128373

DOCKET NO. 128373
IN THE
SUPREME COURT OF ILLINOIS

DARRELL FAIR,	)	Appeal from the Appellate
	)	Court, First District,
	)	No. 1-20-2072
Petitioner-Appellant,	)	
	)	
v.	)	There on appeal from the Circuit
	)	Court of Cook County,
	)	No. 98 CR 25742-01,
PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Hon. Peggy Chiampas,
Defendants-Appellees.	)	Judge Presiding

BRIEF OF APPELLANT

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NATURE OF THE CASE

Darrell Fair was convicted of a 1998 murder based on an accountability theory, supported exclusively by a false oral statement made after a thirty-hour custodial interrogation marked by physical abuse and deprivations of medication, food, and counsel. The Torture Inquiry and Relief Commission ("the Commission") found a credible claim of torture and referred Mr. Fair's case to the circuit court. After the appellate court mandated that it do so, the circuit court conducted an evidentiary hearing. The court denied relief, and Mr. Fair appealed the decision.

On appeal, the appellate court determined that former Chicago Police Detective Michael McDermott had indeed tortured Mr. Fair, and that the violence was consistent with the detective's extensive history of prior abuses. App. 28-29, ¶¶ 104, 106.[1] But the court construed the TIRC Act to be limited solely to the question whether Mr. Fair's confession was the product of physical torture and found that the incident triggering the Commission's referral was too attenuated from the confession thirty hours later. App.34, ¶ 113. The court recognized that Mr. Fair proved that during that thirty-hour interlude, he suffered: other physical abuses; threats; deprivations of food and needed medication; and a violation of his repeatedly invoked right to counsel. App.33-36, 38-39, ¶¶ 112, 116-17, 123. But the court nevertheless denied relief by holding that its authority was "restricted to consideration of the allegedly torturous conduct triggering the [Commission's] referral

[1] Citations in this brief are as follows: "App." refers to this brief's appendix; "C." refers to the common law record; "Sec. C" refers to the secured common law record; "SUP C." refers to the supplemental common law record; "DA R." refers to the direct appeal report of proceedings; and "R." refers to the report of proceedings from the hearing after the Torture Inquiry and Relief Commission's referral to the circuit court.

to the circuit court." App. 35-36, ¶ 117. This Court granted leave to appeal. *People v. Fair*, 2022 WL 5028465 (Table).

ISSUES PRESENTED

1. This case involves the undisputed (a) denial of Mr. Fair's right to counsel, (b) violence and threats of violence against him, and (c) deprivations of food and acutely needed medications over a span of thirty hours. The resulting oral statement Mr. Fair gave comprised the only inculpatory evidence in this case. When considering Fair's suppression claim upon referral from the Torture Inquiry and Relief Commission, did the lower courts err by construing the Torture Act to limit their consideration to only the torture that triggered the referral and omitting from the suppression analysis the additional undisputed constitutional violations that took place?
2. Where Mr. Fair's allegations of torture, abuse, and constitutional deprivations all stand unrebutted, was Mr. Fair's subsequent oral statement to a prosecutor sanitized of the constitutional violations because the prosecutor himself was not coercive?

JURISDICTIONAL STATEMENT

The Torture Commission found "significant indicators" that the statement attributed to Darrell Fair was involuntary, and it referred his claims for an evidentiary hearing. C.256-57. The circuit court initially refused to conduct the hearing, but the referral was affirmed on appeal and the case was remanded before the same court for the mandated hearing. C.344. The circuit court then conducted a suppression hearing at which the State presented none of the accused officers to deny any of the evidence, witnesses, or allegations against them accusing them of violating Mr. Fair's rights. After the hearing, the court denied Mr. Fair's claims for relief, and he appealed.

The appellate court affirmed the circuit court ruling and issued a modified ruling upon denial of rehearing on March 8, 2022. App.1. On April 11, 2022, Mr. Fair brought a timely petition for leave to appeal under Supreme Court Rule 315. This Court granted leave to appeal on September 28, 2022. The Court has jurisdiction under Illinois Supreme Court Rule 315(a).

STATUTE INVOLVED

This case concerns the construction of the Illinois Torture Inquiry and Relief Commission Act ("the Torture Act"), 775 ILCS § 40/45 (West 2012), which is reproduced in the appendix.

INTRODUCTORY SUMMARY

Darrell Fair was accused of being an accessory to an armed robbery and murder based on an unsigned false statement attributed to him. As detailed below, the crime occurred in front of a large crowd, yet not a single eyewitness inculpated Mr. Fair. In fact, the witness accounts of the crime presented at trial refute the custodial statement.

The court below was tasked with conducting an evidentiary hearing on Mr. Fair's claim for suppression of his statement, which was taken after he spent over thirty hours in custody. At the hearing, Mr. Fair presented evidence that he was: deprived of his necessary asthma medications, food, and sleep; endured threats and physical abuse; and repeatedly invoked his right to counsel, only to be ignored. In support, Mr. Fair presented his own testimony, his mother's testimony, witnesses and medical evidence proving his asthma condition, and extensive evidence of former Detective Michael McDermott's *modus operandi* of similarly trampling the rights of others.

Although the State bore the burden of proof to show that the statement was voluntary, the State's only effort to rebut the allegations at the hearing was its presentation of testimony from the felony review prosecutor, who stated that at hour thirty of Mr. Fair's interrogation, he saw no substantiation for Mr. Fair's claims. That limited testimony was insufficient to meet the State's burden of proof. Moreover, the prosecutor's highly unusual written statement in this case—unsigned by Mr. Fair or the detective who was allegedly present for it and containing striking tells that contradicted the prosecutor's testimony—undermined this tenuous claim.

In this appeal, Mr. Fair contends that the State failed to meet its burden of proof, and the circuit court's denial of the suppression motion was erroneous. He also argues

that the Appellate Court's refusal to consider any of the evidence of what he suffered during the thirty hours between the triggering abuse and the statement was an erroneous reading of the Illinois Torture Inquiry and Relief Commission Act ("the Torture Act") and that the Appellate Court's attenuation ruling needs correction by the Court.

STATEMENT OF FACTS

A. The Evidence Presented at the Original Criminal Trial

1. None of the Eyewitnesses to the Crime Inculpated Darrell Fair

On July 21, 1998, shortly before midnight, at least twenty people were standing outside socializing in the parking lot of a Southside Chicago bar. DA R.409. In front of this crowd, the offender, Lamont Reeves, robbed two young men at gunpoint, William Jones and Christopher Stubblefield. DA R.415-17, 378-80. When Stubblefield tried to edge away from the robbery, Reeves shot him in the back, killing him. DA R.381-83, 418, 535. By all witness accounts, Reeves acted alone when he shot and killed Christopher Stubblefield. No witness accuses Mr. Fair of participating in the crime.

Jones testified that the robbery and shooting occurred when he and Stubblefield walked past a car with its hood up. DA R.376. Reeves had been bent over the hood of the car, and when Jones and Stubblefield walked past, Reeves began his crime. DA R.376-77. Immediately after the shooting, Reeves got into the front passenger seat of the car, and it drove away. DA R.383-84. According to Jones, Reeves acted alone in attempting to rob the victims and shooting Stubblefield.

In addition to Jones, two bystanders from the scene testified at trial, one for the prosecution and one for the defense. First, Christopher Hill testified that when the car arrived near the parking lot, there were three Black men in it. DA R.411-12. Hill only

saw Reeves exit the car, but Hill was busy socializing and was not watching the car intently. DA R.412, 430. According to Hill, Reeves was outside for about a half hour before he committed the offense. DA R.429. Hill described the robbery and shooting and testified that he identified Reeves for the police. DA R.418-23. Hill observed Reeves commit the attempted robbery and murder alone. *Id.*

Second, Nicole Murray testified for the defense. Murray met Mr. Fair for the first and only time on the night of the shooting. DA R.549, 553, 555, 562. She was among the crowd outside socializing before the shooting took place. DA R.548-49. The bar parking lot was on the corner of Michigan Avenue and 104th Street. DA R.549. The shooting took place on the Michigan Avenue side, and Murray did not see the shooting because she was standing on the 104th Street side of the parking lot. DA R.559-61. Murray and her friend Renee had been talking and joking around with Mr. Fair for about a half hour immediately before the shooting. DA R.550-52, 555-56. Mr. Fair was trying to sell the women a bottle of alcohol, and they were teasing him about the futility of his effort. DA R.550-52. Mr. Fair was near Murray talking with Renee when they all heard the shooting and ran. DA R.552-53.

Although there were dozens of eyewitnesses to the shooting, none ever implicated Mr. Fair. The State did not present any witness in rebuttal to refute Murray's testimony that Mr. Fair had been standing around with her and her friend for about a half hour leading up to the shooting and during the shooting. After the shooting, everyone scattered. DA R.553.

2. A Confession Was the Only Evidence Implicating Mr. Fair

The detectives learned the shooter's car was registered to Mr. Fair, and he was arrested on September 1, 1998, at 1:30 p.m. DA R.542, 1062.[2] The trial testimony indicated that after thirty hours in custody, Mr. Fair made a statement to Detective Porter stating that: Mr. Fair had supplied the gun used in the crime; he was in the car's backseat while Reeves committed the crime; his friend Chris Thomas had popped the car's hood for Reeves; and Reeves had put the gun under the hood of the car. DA R.464-65.

Immediately thereafter, Mr. Fair was presented to the felony prosecutor, who took an unsigned statement on September 2nd at 7:30 p.m. DA R.337-44, 1062, 1057, 1065. According to that statement, Mr. Fair, Thomas, and Reeves got together and discussed committing a robbery, Mr. Fair gave Reeves a gun, and Reeves put it under the car hood. DA R.340. According to the statement, Thomas drove the trio around Harvey for four or five hours, looking for someone to rob. DA R.341. Eventually, they stopped at Michigan and 104th Street in Chicago, and all three got out of the car. DA R.341-42. The statement included Mr. Fair's purported description of the robbery and shooting—committed solely by Reeves—and then stated that Thomas, Mr. Fair, and Reeves all got back into the car and drove away, this time with Mr. Fair driving. DA R.342-43. According to the statement, after the shooting, Mr. Fair hid the gun and then returned it to its original owner. DA R.343. Based on this evidence alone, Mr. Fair was convicted of first-degree murder and sentenced to fifty years' incarceration, a sentence he is still serving. C.64.

[2] The undisputed evidence establishes that because Mr. Fair's driver's license was suspended, his friend Chris Thomas had been using his car. DA R.339.

B. The Evidence Presented at the Post-Trial Suppression Hearing

As delineated below, the evidence Mr. Fair presented at the post-trial suppression hearing at issue in this appeal included: (1) Mr. Fair's testimony describing his repeated requests for counsel and the officers' threats, physical abuse, and deprivation of food, sleep, and necessary medications, inducing his statement, which he contends is false; (2) Mr. Fair's mother's testimony, to corroborate his description of his arrest; (3) testimony from Mr. Fair's mother, medical records, and affidavits from fellow prisoners, to substantiate Mr. Fair's testimony about his asthma and need for his medications during his interrogation; (4) every written statement ever drafted by Adriane Mebane as a felony review prosecutor, to show that Mr. Fair's was the only statement Attorney Mebane had ever written that did not state that the suspect claimed he was treated well by the police and the only statement Mebane had ever written where the detective who was listed as present while the statement was taken did not sign the document; (5) Detective McDermott's testimony in the criminal trial against former police commander Jon Burge admitting to committing perjury and covering up Burge's abuses; (6) documentation of extensive allegations against McDermott, accusing him of abusive treatment to coerce statements in numerous other cases; (7) documentation that McDermott was fired for perjuring himself and lying to the Office of Professional Standards; and (8) testimony about another allegedly anomalous statement taken by prosecutor Mebane.

In the face of this evidence supporting suppression, the State did not present any officer to refute Mr. Fair's allegations. Instead, the State presented only felony review prosecutor Mebane's testimony about taking Mr. Fair's statement after he had been in custody for thirty-plus hours.

1. The Evidence Presented in Support of Suppression

a) Darrell Fair's Testimony

Mr. Fair testified that when the police officers arrived to arrest him on September 1, 1998, at about 11:30 a.m., he had not yet eaten breakfast—his last meal prior to his arrest was dinner on August 31st. R.969-70. When the officers pounded on his door, he asked to see a search warrant, and the officers threatened to shoot him through the door if he did not open it. R.970-71. Mr. Fair looked out a window near the door and saw guns drawn and pointed at him. R.971. The officers began kicking down the front door. R.972-74. Mr. Fair opened the door and was immediately handcuffed and arrested. R.974.

Mr. Fair told the officers he had chronic asthma and an allergic skin condition and asked them to let him bring his asthma inhaler with him to the police station, but the officers refused. R.974-77. When Detective Przepiora brought Mr. Fair to an interrogation room and handcuffed him to a ring, Mr. Fair asked the detective for his asthma medication and requested a lawyer, but Przepiora ignored both requests. R.978-79. Mr. Fair explained that stress exacerbates his asthma and that he was struggling to breathe. R.981. He was also having an allergic reaction to the handcuffs and breaking out in hives and blistering welts. R.1227, 1231.

While Mr. Fair was handcuffed in the interrogation room, a detective entered. Mr. Fair learned years later, from the names listed on his police reports, that this detective was Detective McDermott. R.983, 1160, 1197-98. McDermott was in a loud rage, and he kicked Mr. Fair squarely in the kneecap so hard that it felt like an explosion. R.983-84. McDermott wore boots, and Mr. Fair described that it felt like getting hit in the knee with a bat. R.984-85. McDermott stepped back, put his hand on his gun, and threatened Mr.

Fair: "Go for it. Give me a fucking reason, go for it, make a move, go for it. I'll shoot your ass right here." R.985-86. McDermott kicked Mr. Fair repeatedly in the legs, but after the first solid kick, Mr. Fair deflected the beating, covering his legs and dodging direct blows. R.985. McDermott swore and called Mr. Fair names during the attack. R.983-85, 990. McDermott has never denied committing this abuse.

A couple of hours after McDermott's assault Detective Przepiora returned. R.991. Mr. Fair told Przepiora about the abuse and again asked for his medications and a lawyer. R.991. Prezepiora uncuffed Mr. Fair from the wall, but otherwise provided no assistance. R.991. Przepiora returned several more times to question Mr. Fair, and Mr. Fair asked again for a lawyer. R.991-92. Przepiora has never denied that Mr. Fair made an immediate outcry about McDermott's assault and repeatedly invoked his right to counsel.

Mr. Fair saw through the window in the door that Detective Przepiora was right outside the interrogation room speaking to Officer Martin Smith, whom Mr. Fair knew from attending Catholic school together. R.993. Mr. Fair kicked on the door to get Officer Smith's attention and yelled that he wanted a lawyer. R.993. In response, Przepiora returned and cuffed Mr. Fair to the ring on the wall again. R.994.

Over the next day, McDermott returned and told Mr. Fair the details of Mr. Fair's supposed role in the crime. R.995-96. Mr. Fair testified that Detective Porter also returned several times and tried to befriend him. R.997. Mr. Fair told Porter about McDermott's abuse and asked again for his asthma medications and for an attorney. R.998-99. Detective Porter has never denied that Mr. Fair made an outcry, begged for his medications, and invoked his right to counsel.

At this point, breathing was hard for Mr. Fair, he had not eaten since August 31st, and he had not been able to sleep cuffed to the wall. R.969, 999-1001. Porter told Mr. Fair that he had to "deal with" the murder first. R.999. Porter returned with Detective Brown and a Black female prosecutor, and Mr. Fair asked for an attorney and said he did not want to make a statement. R.1002-04. Mr. Fair testified that the prosecutor saw he was having difficulty breathing and was covered in welts and asked what was wrong with him. R.1004-05. Neither Detective Brown nor the prosecutor have denied this account.

The next time Detective Porter returned, Mr. Fair asked for his asthma medications and for food, and Porter told Mr. Fair that he had to give something to get something. R.1006. Mr. Fair then told Porter that he had been in the parking lot of the bar at the time of the shooting, trying to sell some bottles of alcohol. R.1007-08. Porter said he would get Mr. Fair some food and provided a burger, fries, and a drink. R.1009. That was the first and only food Mr. Fair had received after more than twenty-four hours in custody. R.1010, 969.

According to Mr. Fair, the detectives then started telling him very specifically what he needed to say: that Mr. Fair went with Reeves to rob someone; that Reeves had a gun; and that Mr. Fair saw Reeves shoot the decedent. R.1012.

Detective Porter explained that the officers needed Mr. Fair's help to inculpate Reeves, but they knew Mr. Fair had not done anything wrong. R.1013-14. They promised that if he said what they told him to say, Mr. Fair could go home. R.1014.

Mr. Fair testified that he finally just agreed to do what the detectives asked because he was in "survival mode." R.1015-16. Mr. Fair could not breathe without his asthma medications, he had been threatened, kicked, and deprived of food, the officers

were refusing his requests for an attorney, he was scared, and he simply did not know how much longer he could continue to go on like that. R.1016. The fact that the police were not following the rules (by physically abusing him, threatening him, and denying him an attorney) made him believe that he had no option other than to do what the police were asking. R.1015-16.

Mr. Fair spoke to the felony review prosecutor, Cook County Assistant State's Attorney Adriane Mebane, and said what the detectives had told him to say. R.1017. However, when Mebane presented Mr. Fair with the statement that he had written, Mr. Fair saw that it appeared Mebane was trying to implicate Mr. Fair as being involved in the murder and he refused to sign the statement. R.1019-20. After Mr. Fair refused to sign the statement, he was charged with murder. R.1024. After an unsuccessful direct appeal and post-conviction petition, Mr. Fair filed a claim with TIRC about his treatment leading up to the statement that caused his conviction. R.1192-96; Sec. C.337.

b) Evidence Presented to Corroborate Mr. Fair's Allegations

Mr. Fair's mother, Atsia Fair, testified that she was a CTA employee for over thirty years and owned her own home. R.1267. Mr. Fair had lived with her his entire life, except for when he served in the military. R.1277.

When Mr. Fair's mother came home from work on September 1, 1998, the day Mr. Fair was arrested, she saw that the door had been knocked off its hinges and could no longer lock. R.1270-71.

Mr. Fair's mother also testified about his adult-onset asthma condition in 1998. R.1275-78, 1285-87. At that time, Mr. Fair had acute asthma attacks that required an inhaler. R.1275-78, 1287. Sometimes even an inhaler was insufficient, and he went to the

emergency room several times for breathing treatments. R.1276-78, 1287. Mr. Fair also had severe allergic reactions at that time that resulted in hives on his body. R.1278, 1286.

Additionally, Mr. Fair submitted medical records from his emergency room visits shortly before his arrest, discussing his asthma and severe allergies and ordering him to use his inhaler when he had trouble breathing. SUP C. vol. 1, ex. 3. He also submitted affidavits from four fellow inmates who had seen him suffer severe asthma attacks and attested to how dependent Mr. Fair was on his inhaler upon his admission to the Illinois Department of Corrections. SUP C. vol. 3, ex. 107.

c) Systemic Evidence Presented to Support Mr. Fair's Allegations

The evidence presented at the post-TIRC referral suppression hearing included Detective McDermott's immunized testimony in *United States v. Burge*. SUP C. vol. 2, ex. 21, p. 4. During his testimony in the *Burge* trial, McDermott admitted that he had repeatedly lied to the Office of Professional Standards, falsely denying that he saw Burge threaten a suspect with a gun and put a plastic bag over the suspect's head to coerce a confession. SUP C. vol. 2, ex. 21, pp. 17, 24-25, 29-31, 112, 117, 149.

McDermott also admitted that he struck a witness, Alfonso Pinex, and then lied under oath at a suppression hearing, falsely denying it. SUP C. vol. 2, ex. 21, pp. 107, 110. McDermott justified himself to the Burge grand jury, testifying that he had lied because "[the suspect] was a murderer, and [McDermott] didn't want him to get off." SUP C. vol. 2, ex. 21, p. 11. The special prosecutor investigating this incident found that McDermott beat Pinex and that there was sufficient evidence to support indicting him for aggravated battery, perjury, and obstruction of justice. SUP C. vol. 2, ex. 104, pp. 6, 13, 17. The report also found that McDermott provided false testimony when he claimed that

Pinex did not tell them he had a lawyer or that he wanted his lawyer present. SUP C. vol. 2, ex. 104, p. 15.

At the hearing below, Mr. Fair presented additional evidence of McDermott's *modus operandi* including:

(1) Tony Anderson's testimony that McDermott refused his repeated requests for a telephone call, put a gun to his head, and threatened to blow his brains out. SUP C. vol. 3, ex. 105, pp. 7-8. The TIRC found Anderson's claims credible, meriting judicial review and appropriate relief. *See People v. Harris*, 2021 IL App (1st) 182172, ¶ 36.

(2) Robert Allen's averment that he heard McDermott threaten Tony Anderson and that McDermott threatened Allen that he would receive similar treatment if he did not cooperate. SUP C. vol. 3, ex. 110.

(3) Testimony from Keith Mitchell, who has since been exonerated, about McDermott forcing him to waive his invoked right to counsel and barring his mother from the room even though Mitchell was only fifteen. SUP C. vol. 3, ex. 106, pp. 45, 52; SUP C. vol. 3, ex. 117.

(4) An affidavit from Jermaine Bates, who was also a minor, describing how McDermott smacked him hard in the head, refused his requests for an adult and for an attorney, and threatened to pin the murder on him if he did not cooperate to inculpate Mitchell. SUP C. vol. 3, ex. 109.

(5) Lanell Townsend's affidavit describing how McDermott smacked him, choked him, banged his head against the wall, threatened to pin a murder on him, fed him information to inculpate suspects, and fabricated statements for him. SUP C. vol. 3, ex. 111.

(6) Franklin Burchette's testimony about being threatened with a metal object and being told that he was not allowed to have an attorney. SUP C. vol. 3, ex. 112.

(7) A chart created by TIRC enumerating fourteen different allegations of abuse against McDermott. SUP C. vol. 3, ex. 113.

(8) Marvin Scott's COPA complaint describing how he was framed by McDermott, beaten, and denied his right to counsel and how a witness against him was beaten and threatened, as documented in photographs, to make him falsely implicate Scott. SUP C. vol. 3, ex. 114.

(9) Michael Thomas' COPA complaint describing how Detectives McDermott, Przepiora, Boudreau, and Kill framed him and how McDermott punched him

in the stomach and deprived him of food, water, and the use of a bathroom for several days. SUP C. vol. 3, ex. 115.

(10) John Knight's affidavit describing how McDermott slapped him, choked him, and threatened him with a gun to the head, forcing him to make and sign a statement. SUP C. vol. 3, ex. 116.

(11) Reports about allegations by Joseph Carroll that McDermott slapped him and pushed his head against the radiator. SUP C. vol. 3, ex. 108, p.14.

Mr. Fair also presented a court order, issued after an evidentiary hearing in *People v. Alfonso Pinex*, holding, "The Court further finds that the police officers of the City of Chicago, specifically Officer[ ] McDermott, notwithstanding the defendant's assertion of his *Miranda* rights, questioned the defendant and this questioning was in violation of the defendant's constitutional rights." SUP C. vol. 2, ex. 25, p. 30. *See also See People v. Harris*, 2021 IL App (1st) 182172, ¶¶ 1, 6, 36 (reversing denial of post-conviction relief based, *inter alia*, on allegations that McDermott hit the suspect, threatened him with a gun, and ignored requests for counsel).

Additionally, McDermott invoked the Fifth Amendment, admitting that his answers would criminally incriminate himself, during his deposition when asked about: being in the room when Burge put a plastic bag over Aaron Patterson's head and assisting in this abuse; witnessing a variety of other abusive incidents; striking and kicking Andrew Maxwell; hitting Jerry Thompson in the knee with a flashlight two times; and using force on suspects to extract a confession. SUP C. vol. 2, ex. 100, pp. 12-13, 18-20, 21, 23, 28. Before a special grand jury in October 2004, McDermott again invoked the Fifth Amendment and refused to answer any questions. SUP C. vol. 3, ex. 118.

Based on McDermott's perjury and covering up police misconduct, the Cook County State's Attorney's Office suspended McDermott without pay and moved to

terminate him from its employ. SUP C. vol. 2, ex. 101. Rather than request a hearing at which he could defend himself against the charges, McDermott quit his employment. *Id.*

Below in this case, the State informed the court that McDermott would not cooperate or attend the hearing. R.1299-1300. The circuit court expressly found that: McDermott was uncooperative with the State's attempt to serve him with a subpoena to testify; Mr. Fair made nine unsuccessful attempts to serve McDermott at his home; and Mr. Fair attempted to serve McDermott's counsel in another matter, but counsel refused to accept service on McDermott's behalf. C.656. McDermott did not testify in this case.

Finally, Victor Way testified that he had committed an armed robbery in 1998 and was interrogated about his offense by Detective Porter. R.1306, 1308. When prosecutor Mebane wrote the statement of Way's admissions, however, he included false additions trying to implicate him in ways beyond Way's admitted role in the offense. R.1309-27. Way ultimately pled guilty, but he refused to sign the statement Mebane had drafted because of the false statements in it attributed to him. R.1325, 1327.

2. The Testimony Presented in Opposition to Suppression

Felony review prosecutor Adriane Mebane was the only witness to testify for the State at the post-conviction hearing, and he testified that he did not observe the detectives' interrogation of Mr. Fair. R.1039. Mr. Fair was arrested on September 1, 1998, at 1:30 p.m., and Mebane did not see or speak with Mr. Fair until September 2nd at about 7:30 p.m. R.1062, 1057, 1065.

Mebane testified that his regular practice was to *Mirandize* suspects before taking their statement and then to immediately have the suspects sign the waiver form before proceeding with the statement. R.1050, 1053. Mebane's routine practice was also to read

aloud what he was writing as he wrote and to have the suspects initial any necessary changes or additions contemporaneously as they were made, before proceeding on with the remainder of the statement. R.1055, 1092.

Mebane testified that Mr. Fair did not assert his refusal to sign the statement until it was halfway completed, but he had no explanation for why Mr. Fair had not signed the *Miranda* statement at the beginning of the document when it was read to him, nor for why Mr. Fair did not initial the document's early changes in the first half of the document. R.1049-50, 1053, 1094-95, 1141-44. Mebane claimed that Mr. Fair opted instead to verbally waive his *Miranda* rights, although the written statement did not document that distinction, and Mebane admitted he had no independent memory of the exchange. R.1144, 1098; Sec. C.138. Instead, Mebane wrote Mr. Fair's name on the form's *Miranda* waiver signature line. Sec.C.138; R.1053; DA R.329, 360.

Mebane was clear that he had no independent recollection of this case, aside from what was written on the statement. R.1098. Mebane did not remember whether he explored Mr. Fair's treatment by the police or the reason for Mr. Fair's lengthy detention. R.1064. The written statement indicated that Mr. Fair had been given a burger, fries, and a drink, but Mebane was not concerned about that being the only food Mr. Fair received over a thirty-two-hour confinement, nor did Mebane ask when Mr. Fair had received the food. R.1068-70. Mebane admitted that in all thirty-three of the other custodial statements he had drafted as a felony review prosecutor, the statements documented that the suspect had been treated well by the police. R.1081. In the statement Mebane wrote for Mr. Fair, however, he wrote that Mr. Fair was treated well by the prosecutor but omitted his standard confirmation that the suspect was treated well by police. R.1081-83.

In every other statement Mebane had written as a felony prosecutor, the detective present signed every page of the document and initialed any changes. SUP C. vol. 1, ex. 8. Mebane offered no explanation for why, although present, Detective Porter did not sign or initial the statement in this case. Although he failed to document it, Mebane testified that Mr. Fair told him he was treated well by everyone, did not complain about his treatment, and did not appear to have any ailments. R.1106-07, 1124-26, 1130.

Mebane admitted that the statement he wrote in this case indicated that when they were speaking, Mr. Fair initially claimed that he popped the hood on the car immediately before the shooting, but that Mr. Fair had then corrected himself to say that, actually, it was Chris Thomas who popped the hood. R.1087. Oddly, his was not the first time that Mr. Fair had allegedly made this exact same "misstatement." Detective Porter had testified at trial that when he and his colleagues were interrogating Mr. Fair before Mebane's arrival, Mr. Fair first claimed that it was he who popped the hood, but then he corrected himself to say that it was Chris Thomas who did it. DA R.462, 465. When asked about Mr. Fair supposedly making that same exact misstatement and alleged correction with the detectives earlier in the afternoon, Mebane claimed to be unaware of the coincidence. R.1087-88, 1090.

C. The Lower Courts' Rulings

The circuit court found that Mebane was a credible witness who established that Mr. Fair's statement was voluntary. C.674-75, 681. The court drew a distinction between any coercion inducing Mr. Fair's initial inculpatory oral statement to the detectives and the voluntariness of the unsigned written statement taken by Mebane, finding that the statement to the prosecutor could be redeemed if Mr. Fair was not in any physical distress

during the moment of that exchange. C.679-80. Finding Mr. Fair's statement to Mebane voluntary regardless of what had preceded it, the circuit court denied relief.

The appellate court affirmed. First, the appellate court held that the only evidence it would consider in support of the suppression claim was McDermott's initial assault on Mr. Fair's knee—the unrebutted evidence of the detectives' gun threats, repeated deprivation of the right to counsel, refusal to provide food or allow sleep, and refusal to provide asthma medication while Mr. Fair suffered attacks and struggled to breath throughout his ordeal were all irrelevant to the suppression analysis according to the court because they were not the torture that triggered the referral. App.33, 35-36, ¶ 112, 116-17, 123. Then, the court held that because of its limitation on the scope of the hearing, it was unnecessary to adjudicate whether the statement to prosecutor Mebane was sufficiently attenuated from Mr. Fair's coerced statement to the detectives to render it admissible. App. 35, ¶ 116 ("we never had to reach the question of whether defendant's written statement was sufficiently attenuated from the oral statement that was allegedly the product of torture"). Instead, because the court found the statement to the prosecutor sufficiently attenuated from McDermott's initial torture, the appellate court affirmed the circuit court. App. 38-39.

ARGUMENT

The appellate court held that a suppression hearing arising via the Torture Act may only consider the act of torture that triggered the referral and must affirmatively ignore other misconduct (even fully proven additional constitutional violations committed to coerce the contested statement), if those additional violations or abuses do not, in and of themselves, comprise the torture that triggered the referral. This artificial limitation means that to adjudicate torture-based suppression claims under the TIRC Act, courts must ignore the totality of the circumstances, which would be an essential part of the inquiry if the suppression claim arose via a post-conviction petition, Section 2-1401 petition, or pre-trial motion. In this case that meant that the *undisputed* denial of Mr. Fair's right to counsel and the officers' *undisputed* gun threats, deprivations of food and needed medicine, and violence short of torture committed to induce the statement were all irrelevant to Mr. Fair's suppression claim.

This anomalous and contorted interpretation of the Torture Act must be rejected. It runs contrary to the intent of the Torture Act, as expressed in its plain language, which was designed as a remedial statute to make it easier, not harder, for any remaining victims of former Commander Jon Burge and his protégés seeking relief for the abuses committed during that shameful era. It also violates the settled law of this Court and is plainly contrary to the interests of justice, causing the continued conviction and incarceration of an innocent man.

I. The Applicable Law Relevant to This Appeal

A. Adjudication of a Torture Act Referral

Under the Torture Act, 775 ILCS § 40/45 (West 2012), when the Commission finds that "there is sufficient evidence of torture to merit judicial review," it refers the case for assignment to a trial judge for consideration of the petitioner's claims. 775 ILCS § 40/50(a). After the referral, the circuit court is required to conduct an evidentiary hearing and, if the court finds in favor of the petitioner, to "enter an appropriate order with respect to the judgment or sentence in the former proceedings … as may be necessary and proper." 775 ILCS § 40/50(a). At the required evidentiary court hearing, the lower courts have either conducted a suppression hearing or adjudicated the question of whether newly discovered evidence would likely have altered the result of a suppression hearing, and if so, order a suppression hearing. *See, e.g., People v. Wilson*, 2019 IL App (1st) 181486, ¶¶ 48, 52; *People v. Whirl*, 2015 IL App (1st) 111483, ¶ 80; *People v. Galvan*, 2019 IL App (1st) 170150, ¶ 74.

In this case, the Commission issued a referral, and that referral was affirmed by the appellate court. *See People v. Mitchell*, 2016 IL App (1st) 141109 ("*Fair I*"), SUP C.300 (the appellate court affirming that there was sufficient and credible evidence to warrant judicial review of Mr. Fair's claims). That holding became the law of the case. *See City of Chicago v. Eychaner*, 2020 IL App (1st) 191053, ¶ 33. Upon receiving the case after appellate court remand, the court opted to conduct a suppression hearing.

Illinois law is resolute: at a suppression hearing, "the State bears the burden of proving the confession was voluntary by a preponderance of the evidence." *Wilson*, 2019 IL App (1st) 181486, at ¶ 53 (quoting *People v. Slater*, 228 Ill.2d 137, 149 (2008)). *See*

also People v. Richardson, 234 Ill.2d 233, 254 (2009) ("Where a defendant challenges the admissibility of an inculpatory statement through a motion to suppress, the State bears the burden of proving, by a preponderance of the evidence, that the statement was voluntary.") (citing 725 ILCS § 5/114-11(d) (West 2000) and collecting cases); App.26-27, ¶ 98. If the State establishes a *prima facie* case that the statement was voluntary, then the burden would shift to the movant to show that the statement was involuntary. *Wilson*, 2019 IL App (1st) 181486, at ¶ 53, citing *Richardson*, 234 Ill.2d at 254. Finally, if the petitioner satisfies that burden, the burden returns to the State to refute the claim. *Id*.

The suppression hearing conducted below also presented Mr. Fair's claim that the detectives refused to honor his clear invocation of his right to counsel, in violation of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). *See also In re Christopher K*., 217 Ill.2d 348, 376 (2005). If a petitioner expresses his desire to speak with the police only through an attorney, the law requires interrogators to cease questioning until counsel is present. *Edwards*, 451 U.S. at 485 (citing *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)). The *Edwards* prohibition is a rigid "bright-line rule that *all* questioning must cease after an accused requests counsel." *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (citation omitted; emphasis in original).

B. The Standard of Review for Adjudicating This Claim

This Court ordinarily employs a two-part standard of review in adjudicating whether a statement should have been suppressed: the trial court's factual findings are reversed only if they are against the manifest weight of the evidence; but the Court reviews *de novo* the ultimate question of whether the confession was voluntary. *In re G.O.*, 191 Ill.2d 37, 50 (2000). However, when the lower courts commit an error of law

that frustrates its exercise of discretion, the reviewing court should apply a *de novo* standard to the issue. *See People v. Williams*, 188 Ill.2d 365, 369 (1999). In addition, the lower court's construction of a statute is reviewed *de novo*. *People ex rel. Birkett v. City of Chicago*, 202 Ill.2d 36, 46 (2002). Both because the lower courts erroneously excluded the relevant evidence from the suppression analysis and because the facts are essentially undisputed, this Court is presented with legal questions to review *de novo*. *Williams*, 188 Ill.2d at 369; *City of Champaign v. Torres*, 214 Ill.2d 234, 241 (2005).

II. Applying the Correct Legal Standards to the Evidence, Darrell Fair is Entitled to Suppress His Statements

A suppression hearing after a Commission referral is identical to a third-stage post-conviction evidentiary hearing on whether the evidence presented would likely have altered the result of a pre-trial suppression hearing. *See Wilson*, 2019 IL App (1st) 181486, at ¶ 52. Accordingly, at the hearing, the State bore "the burden of proving the confession was voluntary by a preponderance of the evidence." *Wilson*, 2019 IL App (1st) 181486, ¶ 53, citing *Slater*, 228 Ill.2d at 149; *Richardson*, 234 Ill.2d at 254. The State plainly failed to meet its burden.

A. Torture Commission Referrals Are Not Restricted to Only the Triggering Torture Allegation

The lower courts justified denying relief on these egregious, proven suppression claims by artificially restricting consideration of any facts beyond the triggering act of torture. But the lower courts' view is unsupported by the Torture Act's intent as expressed by its plain language, this Court's guidance on how courts should adjudicate suppression motions, and the interests of justice. Reversal is required.

In construing statutes, courts first strive to "determine the legislative intent from the plain language of the statute," and then "give that intent effect without resorting to other interpretive aids." *People v. Roberts*, 214 Ill.2d 106, 116 (2005) (citation omitted). The Court "will not depart from the plain statutory language by reading into it exceptions, limitations, or conditions that are in conflict with the express legislative intent, nor may the Court "inject provisions that are not found in a statute." *Id.* (citations omitted). Only when a statute's plain language is ambiguous do the courts turn to other means of interpretation. *People v. Young*, 2011 IL 111886, ¶ 11.

1. The Lower Courts' Restriction of the Suppression Hearing is Contrary to the Torture Act and the Cases Applying it

The Torture Act provides an extraordinary remedy. 775 ILCS § 40/10 (West 2016). The Act exists to allow credible claims of torture to be referred by the Commission to the courts for adjudication. Once referred, the circuit court has broad discretion to fashion relief if it decides in favor of the petitioner. 775 ILCS § 40/50.

The plain language of the Act does not limit the courts' review to only determine if torture caused a confession. To begin, the Act defines torture: "'[c]laim 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." 775 ILCS § 40/5(1). And then the Act provides that if the Commission determines "by a preponderance of the evidence that there is sufficient evidence of torture to merit judicial review, the case shall be referred to the Chief Judge of the Circuit Court of Cook County." *Id.* at § 45(c).

Once referred to the circuit court, the Act instructs, "if the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to rearraignment, retrial, custody, bail or discharge, or for such relief as may be granted under a petition for a certificate of innocence, as may be necessary and proper." *Id.* at § 50.

The Act is straightforward: it limits the potential recipients of relief to petitioners who have credible evidence that torture was used to obtain a confession and, thereafter, his or her conviction. *Id.* at § 5(1). The Commission's review is not to conduct a suppression hearing or other judicial hearing; rather, the Commission's only concern is whether the petitioner's claim of torture is supported by credible evidence. *Id.* at § 45. Upon such a finding, the entire case is then referred to the circuit court to determine if the court should find in petitioner's favor. *Id.* at § 50. But the Act does not limit or circumscribe the ensuing hearing.

Nothing in the Act limits review to the sole question of whether torture, and torture only, deprived a petitioner of his or her Constitutional rights. Rather, under the Act's plain language, once the Commission refers the case, the circuit court is empowered to determine whether Petitioner is entitled to relief. This Court must give effect to the statute's plain language. *See People v. Martin*, 2011 IL 109102, ¶ 21 ("The cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent, and the plain language of the statute is the best indication of that intent."); *People v. Ellis*, 199 Ill.2d 28, 39 (2002) (courts "must not depart from the statute's plain language by reading into it exceptions, limitations, or conditions the legislature did not express."); *Roberts*, 214 Ill.2d at 116.

Indeed, until this case, courts had universally interpreted the Act consistent with its plain language. In keeping with the Legislature's intention in creating such a remedy, Illinois courts have found "no good reason" why the evidence admissible at a post-trial evidentiary hearing on a suppression claim should depend on which vehicle for a remedy the petitioner invoked to seek relief, the Torture Act or the Post-Conviction Hearing Act. *People v. Gibson*, 2018 IL App (1st) 162177, ¶ 136.

In *Gibson*, the court explained: "It seems arbitrary and unfair to limit the evidence that a [Torture Inquiry and Relief Commission ("TIRC")] petitioner may present, relative to the evidence that a petitioner may present when pursuing relief under the Post-Conviction Hearing Act. Counterproductive, too: the General Assembly did not establish the TIRC because victims of police torture needed a remedy that was harder to secure than what they already had." *Id.* Similarly, in *Wilson*, the appellate court held, "The legislature clearly did not create a new form of postconviction relief with the intent that a petitioner satisfy a heavier burden than that imposed by the Post-Conviction Act. *See* 775 ILCS 40/50(a) (West 2010) (allowing a court to award relief '[n]otwithstanding the status of any other postconviction proceedings')." 2019 IL App (1st) 181486, at ¶ 52.

There is simply no authority or precedent for the lower courts' outlier approach here: considering only one tactic of the detectives' coercion—the initial torture—while excluding from the analysis all the other unrebutted allegations.[3] Had this claim come

[3] The appellate court baldly claimed: "under the Torture Act, the circuit court is tasked with determining whether a confession or statement was the product of torture." App. at 33, ¶ 112. The appellate court provided no citation for this novel approach. The only support the appellate court could muster is its quotation from *People v. Christian*, stating "the circuit court is asked to determine whether defendant has been *tortured*." *Id*. at ¶ 119 (emphasis in original), quoting *Christian*, 2016 IL App (1st) 140030, at ¶ 95. But *Christian* concerned an attempt to bind the circuit court with the Commission's finding that credible evidence of torture existed; a far cry from the question presented here, which is whether a

before the courts via a post-conviction petition, there is no question that all aspects of the coercive circumstances would have been before the courts, including Detective McDermott's extensive history of perjury and abuse, which completely destroy any credibility he otherwise may have had. *See, e.g., People v. Tyler*, 2015 IL App (1st) 123470, ¶ 189 ("Illinois courts have consistently held that a 'pervasive pattern of criminal conduct by police officers' is enough for courts to reconsider the voluntariness of a defendant's confession.") (citing *People v. Mitchell*, 2012 IL App (1st) 100907, ¶ 63; *People v. Patterson*, 192 Ill.2d 93, 139-45 (2000); *People v. King*, 192 Ill.2d 189, 193-99 (2000); and *People v. Cannon*, 293 Ill. App. 3d 634, 640 (1st Dist. 1997)); *Mitchell*, 2012 IL App (1st) 100907, at ¶ 62 ("We find that the new evidence of McDermott's perjury probably would change the result of the motion to suppress [petitioner]'s statements."). Similarly, the courts here were tasked with evaluating a full-bodied suppression claim, not ignoring the totality of the circumstances outside of only the physical abuse triggering the referral.

Quite simply, nothing in the text of the Torture Act permits the limitation the courts below imposed. Even if the statute were ambiguous, which it is not, the Act's legislative history contradicts the courts' refusal to consider the totality of the circumstances at a post-referral hearing. Rather, the Act's history suggests that it was intended as the courts had interpreted it until this case, as a vehicle for reopening a class of cases where the defendant suffered egregiously at the hands of certain notorious police abusers and offering those victims a more generous avenue to obtaining relief than

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court reviewing a claim under the Torture Act must consider the totality of the circumstances. *See Christian*, 2016 IL App (1st) 140030 at ¶¶ 63-97. And *Christian* cites nothing to support the language quoted by the appellate court. *Id*. at ¶95.

heretofore available. *See Wilson*, 2019 IL App (1st) 181486, at ¶ 52; *Gibson*, 2018 IL App (1st) 162177, at ¶ 136; 96th General Assembly, Senate, 3/25/09, p. 26 (comments of Senator Kwame Raoul) ("there are people who may currently be incarcerated who may not be – need to be there. And there are people who may have served time who may want to clear their name. And this torture commission would allow them a vehicle to do so.").

It would be a profound inefficiency—not to mention the *res judicata* problems it would create—to allow petitioners to only litigate the act of torture as a basis for suppression and then to force them to return to the Post-Conviction Hearing Act, and all the procedural hurdles they might face there, for consideration of the other contributing factors supporting the suppression claim based on misconduct by the same exact officers who physically abused the defendant. This Court should not propound such an absurd, inefficient result.

2. The Lower Courts' Interpretation Ignores the Totality of the Circumstances that Must Be Considered at a Suppression Hearing

Vehicle aside, Illinois courts are clear that when suppression claims are heard by the courts, the bases should not be viewed in a vacuum, but rather collectively, with all coercive elements and rights deprivations included. *See, e.g., People v. Gilliam*, 172 Ill.2d 484, 500 (1996) ("Whether a statement is voluntarily given depends upon the totality of the circumstances….no single fact is dispositive."); *People v. Prude*, 66 Ill.2d 470, 475 (1977) ("this court has long looked to the 'totality of the circumstances' to determine the voluntariness of any confession."); *People v. Sykes*, 341 Ill. App. 3d 950, 975 (1st Dist. 2003) (the voluntariness of a confession depends on the totality of the circumstances, including consideration of "compulsion or inducement of any sort," "any physical or mental abuse by police," and "the existence of threats or promises"); *People*

v. Diercks, 88 Ill. App. 3d 1073, 1075 (5th Dist. 1980) ("we must look at the above factors cited by the defendant collectively to see whether the contested statement was made freely and voluntarily or whether the defendant's will was overcome at the time he confessed.") (citation and internal quotation marks omitted).

Considering only one sliver of what occurred over thirty hours of abuse, deprivations, and violations of Mr. Fair's rights is not only contrary to the Torture Act, but it also violates well established law by forcing the courts to disregard profound errors. Mr. Fair has unequivocally proven that his right to counsel was violated. That is a bright-line basis for suppression of his statement that cannot be disregarded. *See Edwards v. Arizona*, 451 U.S. 477, 485 (1981); *People v. Woolley*, 178 Ill.2d 175, 198 (1997); *People v. Olivera*, 164 Ill.2d 382, 389 (1995); *Miranda v. Arizona*, 384 U.S. 436, 474 (1966). Quite simply, where a defendant's request for counsel is not honored, and he does not reinitiate the interrogation, suppression is required. *See, e.g., People v. Coleman*, 2021 IL App (1st) 172416, ¶ 91 ("Defendant invoked his right to counsel while in custody, and his request was not scrupulously honored. His statement should have been suppressed."). The lower courts' interpretation forces the courts to overlook this egregious violation.

Importantly, the violation of the right to counsel was a central part of Mr. Fair's will being overborne, and the abuse and denial of counsel analyses cannot be artificially separated. Mr. Fair testified that he invoked his right to counsel. The detectives' refusal to honor that right signaled to Mr. Fair that they were not playing by the rules and that anything could happen. In that context, and after having been violently assaulted, twice threatened with a gun, and starved, Mr. Fair genuinely believed that the detectives might just let him die from an asthma attack or kill him if he did not cooperate. The detectives'

refusal to allow Mr. Fair to talk to an attorney played an inextricable role in the "totality of the circumstances" and Mr. Fair's calculation of whether to speak to detectives.[4]

Additionally, none of the officers has ever denied that Detective McDermott's gun threat and physical abuse occurred or that they heard Mr. Fair's outcry about it. This too requires relief as a matter of law. *See, e.g., People v. Wrice*, 2012 IL 111860, ¶ 84 ("use of a defendant's physically coerced confession as substantive evidence of his guilt is never harmless error."). These are violations of basic rights that the courts are not permitted to ignore. Finally, the deprivation of Petitioner's needed medical care supports suppression. *See, e.g., People v. Strickland*, 129 Ill.2d 550, 557-59 (1989). Yet, the lower courts' rulings make these proven violations of Mr. Fair's constitutional rights irrelevant to the suppression analysis. This is inconsistent with the Act's plain language and contrary to the legislative intent.

3. The Lower Courts' Interpretation Produces Absurd Results

The lower courts' interpretation that a Commission referral requires the courts to only consider the act of torture that triggered the referral would yields absurd results. For instance, petitioners would face a higher burden of proof by pursuing their claims under the Torture Act than they would under the Post-Conviction Hearing Act because the courts adjudicating the Torture Act claims would be required to turn a blind eye to all non-physical abuses that occurred during the interrogation. This more challenging avenue for relief would defeat the remedial intention of the Torture Act. 775 ILCS § 40/10.

[4] It does not matter whether Mr. Fair waived his right to counsel for prosecutor Mebane, though the evidence supports that he likely did not. Regardless, the law requires suppression of everything occurring after the detectives failed to honor Mr. Fair's rights. *See, e.g., People v. Winsett*, 153 Ill.2d 335, 350 (1992).

The lower courts' limit would also leave no remedy for proven abuses even where, like here, the lower court agreed that the abuses that occurred are the sort that should never be tolerated during any police interrogation. And the restriction of what is a permissible part of the post-referral court inquiry would depend on what the *pro se* petitioner was able to recognize and articulate as constituting torture.

Moreover, this interpretation would require courts to parse out an exact meaning of torture, trying to answer questions like: at what point does beating or physically abusing a suspect become torturous? Drawing a line—wherever the courts choose to draw it—that certain physical abuses of custodial suspects fall short of torture would be a troubling precedent. The Legislature designed the Act so that the Commission could make that initial determination of whether torture occurred and then the courts could conduct a more fulsome review. This Court should honor that delineation.

Statutes should not be interpreted in ways that yield absurd results. *See, e.g., People v. Swift*, 202 Ill.2d 378, 385 (2002) ("In interpreting statutes, we must avoid constructions which would produce absurd results."). The plain language of the statute avoids the absurd results presented by the State's interpretation. Post-referral suppression hearings should not be artificially limited to offer torture claimants less chance of relief than every other litigant.

B. Properly Interpreting the Torture Act, the State Failed to Meet Its Burden of Proof at the Hearing

The Commission's referral, affirmed by the appellate court, informed that "there was sufficient and credible evidence" to warrant consideration of "Fair's claim of a forced confession while being held in police custody." SUP C.333. Confronted with this, the State failed to meet its burden to establish a *prima facie* case that the statement

attributed to Mr. Fair was voluntary. Instead, in the face of well-supported claims that the officers induced Mr. Fair's statement with threats to shoot him, McDermott's physical assault, depriving Mr. Fair of his right to counsel, and a lengthy deprivation of food, sleep, and necessary asthma medications, the State presented only felony review prosecutor Mebane's testimony about what transpired thirty hours into the interrogation. Not one of the accused officers testified to rebut the allegations against them.

And the officers' former testimony at trial fails to establish a *prima facie* case of voluntariness when the totality of the circumstances is considered. Detective McDermott did not testify at trial, so he has never refuted the claims of his gun threat and violent assault. And neither Detectives Przepiora's nor Porter's original trial testimony addressed the present allegations against them, including their denial of Mr. Fair's right to counsel, contemporaneously hearing outcries about the abuse, denying food, and withholding medication, among others.

As for prosecutor Mebane, he admitted that he did not see what transpired during the first thirty hours of Mr. Fair's confinement. R.1039. Mebane therefore could not and did not deny any of the accusations of the earlier violence and threats. Also, he admitted that he learned Mr. Fair had only been fed a burger, fries, and a drink over a thirty-hour span, but he did not inquire further about food deprivation. R.1068-70. In sum, the State presented no evidence that met its burden to establish voluntariness, and the inquiry should end there—Mr. Fair's statement should be suppressed.

Moreover, the limited evidence the State did present from Mebane was problematic, as his role in this case undermines, rather than supports, the State's *prima facie* establishment of voluntariness. Mebane admitted that in every other custodial

statement he has ever taken as a felony review prosecutor, he documented that the suspect was treated well by the police, but in the statement in this case, there is no such confirmation. R.1081-83.

Mebane also admitted that for a murder charge based on an accountability theory, who popped the hood so the offender could access the gun was a key fact. R.1087-88. Mebane could not explain how his written statement, supposedly drafted contemporaneously as Mr. Fair talked, incorporated the exact same misstatement about this key fact that Mr. Fair supposedly made to the detectives hours earlier. To believe Mebane would mean that twice in the span of a few hours, Mr. Fair stated that he popped the hood, then corrected himself to say that actually, Chris Thomas did. This improbable "coincidence" undermines Mebane's credibility—it is highly suggestive that Mebane was instead using the detectives' words to craft the inculpatory statement, rather than contemporaneously writing what Mr. Fair said.

Likewise, Mebane's inability to explain why Mr. Fair did not sign the *Miranda* waiver and the changes to the statement from the beginning of the document—before Mr. Fair told Mebane that he was unwilling to sign the statement—further undermines Mebane's credibility. If the statement was truly an incorporation of a back-and-forth discussion, Mr. Fair's signature and initials should have appeared on the first three pages in accordance with Mebane's practice, and Detective Porter's should have appeared throughout. The absence of Mr. Fair's signature or initials anywhere on the document from during the time when Mr. Fair was supposedly still willing to sign a statement speaks volumes. *Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923) ("silence is often evidence of the most persuasive character"). But even if Mebane had been a stellar

witness with no troubling anomalies in his written statement, he still could not establish the *prima facie* case that Mr. Fair's statement was voluntary because he was not present when the abuses were alleged to have occurred.

The circuit court erroneously concluded that so long as the interactions between the prosecutor and Mr. Fair were not coercive, the written statement drafted during that noncoercive encounter was voluntary, regardless of any police misconduct preceding the statement. That, of course, is contrary to law. *See, e.g., People v. Thomlison*, 400 Ill. 555, 568 (1948) ("Certainly it is decided that a confession unlawfully obtained renders one made later, while under the same constraint, and which is apparently voluntary, inadmissible. The effect of abuse, brutality, constant and continued questioning, or third-degree methods in obtaining a confession are held to affect a later one when made in the same place of confinement."); *People v. Plummer*, 2021 IL App (1st) 200299, ¶ 113 ("The effects of abuse committed by law enforcement does not walk away with the offending officers, it very well may linger."); *Harris*, 2021 IL App (1st) 182172 (post-conviction relief suppressing statement required where the prosecutor testified that the statement was voluntary and the abuse allegations against McDermott all related to misconduct that preceded the taking of the statement); *Whirl*, 2015 IL App (1st) 111483, at ¶ 110 (same, but with different abusive officers); *Galvan*, 2019 IL App (1st) 170150 (same); *Gibson*, 2018 IL App (1st) 162177, at ¶ 97 (statement to prosecutor in front of detective that defendant was treated well does not "rebut" his abuse allegations).

Indeed, for the lower court's interpretation to be true, the only viable suppression claims would necessarily have to relate to physical abuse occurring in front of (or committed by) the prosecutor, and any statements following egregiously abusive

interrogations would still be admissible if the immediate threat was not present at the moment the prosecutor took the statement. No authority supports this frightening interpretation of the law, which would invite abuse and coercion so long as it is kept out of sight of the prosecutor. *See, e.g., People v. White*, 117 Ill.2d 194, 225-26 (1987) (rejecting the argument that a statement need not be suppressed if the person taking confession is not the illegal actor: "Acceptance of the State's position would enable the police to violate the fourth amendment with impunity, simply by dividing the police into two units—one composed of officers who would make illegal arrests but who would not interrogate, and the other composed of officers who would interrogate but not arrest. With the addition of a Chinese wall of silence between the two units, the police could ensure that a confession derived from an illegal arrest need never be suppressed.").

Finally, although it was not Mr. Fair's burden of proof to show that his statement was coerced (because the State failed to present a *prima facie* case), he nevertheless compellingly proved the abuse and coercion he suffered. The evidence supporting suppression was entirely unrebutted and included: Mr. Fair's detailed testimony recounting what occurred; corroboration about his acute asthma from his mother, medical records, and four fellow inmates; corroboration of the violence that occurred at the time of his arrest from his mother; anomalies in Mebane's written statement suggesting that the statement was not a contemporaneous description of Mr. Fair's oral statements; and evidence of McDermott's violent *modus operandi*, deceptions under oath, and denials of suspects' right to counsel. Even in the absence of the State's proof of its *prima facie* case, Mr. Fair resoundingly proved that he is entitled to suppression of the only inculpatory evidence against him.

In addition to the physical abuse, threats, and deprivations of food and medication suffered by Mr. Fair, he also was repeatedly denied his right to counsel. This unrebutted allegation, combined with the allegation of physical abuse, is enough to justify suppressing his confession. Mr. Fair testified about invoking his right to counsel repeatedly, to Detectives Przepiora, Brown, and Porter; to Officer Martin Smith; and to a female prosecutor. That testimony stands unrebutted—none of those five witnesses has ever refuted that Mr. Fair pleaded for an attorney. And Mr. Fair's testimony that he did not wish to waive his right to counsel is corroborated by the absence of his signature on the *Miranda* waiver on the written statement attributed to him, even though it was the prosecutor's practice to seek a signature waiver from suspects at the outset of taking a statement.

There is no question that the unrefuted testimony of an accused's repeated invocation of his right to counsel is a coercive action that suffices to require suppression of his statement. *Wilson*, 2019 IL App (1st) 181486, at ¶ 53; *Richardson*, 234 Ill.2d at 254; *Edwards*, 451 U.S. at 484-85; *Christopher K.*, 217 Ill.2d at 376. No witness rebutted Mr. Fair's allegations, and no witness has ever suggested that Mr. Fair reinitiated the conversation of his own volition after he unequivocally asserted his right to counsel.

Here, too, the State failed to meet its *prima facie* burden to prove the statement was voluntary. No prosecution witness testified about whether Mr. Fair's right to counsel was honored during the first thirty hours of his incarceration. This silence demonstrates a patent failure to meet the State's burden of proof.

C. Justice Demands Full Consideration of Fair's Suppression Claims

There is no dispute in this case that the only evidence of guilt is the inculpatory statement at issue in this appeal—not one of the dozens of eyewitnesses to the crime ever implicated Mr. Fair, nor did the surviving victim, and the eyewitnesses all *contradicted* the custodial statement.

The absence of any other inculpatory evidence, despite dozens of witnesses to the crime, supports what Mr. Fair has been saying for decades—his coerced inculpatory statement was false. *See* Richard A. Leo, *Police Interrogation, False Confessions, and Alleged Child Abuse Cases*, 50 U. Mich. J.L. Reform 693, 709 (2017) ("False confessions and false statements, of course, will occur in response to traditionally-coercive methods of interrogation such as the use of physical violence, threats of immediate physical harm, excessively long or incommunicado interrogation, or deprivation of essential necessities such as food, water, and/or sleep."); Rob Warden & John Seasly, *Unrequited Innocence in U.S. Capital Cases: Unintended Consequences of the Fourth Kind*, 14 Nw. J. L. & Soc. Pol'y 375, 467 n.325 (2019) ("In 122 capital cases in which exonerations have occurred since the dawning of the DNA forensic age in 1989, false confessions occurred in twenty-three cases, or 18.9 percent.") (citing the National Registry of Exonerations).

Mr. Fair has been making his abuse and coercion allegations regarding that statement since the 1990's. And he has always explained the collective impact of the misconduct—it put him in "survival mode." R.1016. The gun threats, denial of counsel, kicking, indifference to his outcries, denial of food, and refusal to give him necessary asthma medicine during severe attacks together led Mr. Fair to believe that the officers

were not abiding by any rules and that his life was therefore in danger if he did not cooperate and repeat the statement fed to him.

Darrell Fair has been incarcerated for almost twenty-five years exclusively based on an inculpatory statement elicited after abuse, coercion, and deprivation of his rights. Both the law and justice demand consideration of his full suppression claim, not just one aspect of his claim, in a vacuum.

E. The Lower Courts' Attenuation Ruling Requires Correction

In upholding the lower court's denial of suppression, the appellate court adopted the lower court's distinction between the first oral statement to Detective Porter and the unsigned written one to the prosecutor, finding that Mr. Fair "specifically testified that he was tortured into giving the *oral* statement, not the *written* statement." App. ¶ 109 (emphasis in original). The appellate court found that since the lower court found prosecutor Mebane credible, and Mebane's testimony established that "the State met its burden to show the statements given to an assistant state's attorney were voluntary and not the product of torture," no suppression was warranted. *Id.* at ¶¶ 109, 113. However, this ruling overlooks decades of Illinois law about attenuation and when a subsequent statement requires suppression after coercion. The appellate court justified skipping the required attenuation analysis by circumscribing the scope of the Torture Act and thus disregarding all the abuse and constitutional violations that occurred except for the initial incident of torture. App. ¶¶ 116-17.

But Illinois law is clear that, even fully crediting prosecutor Mebane's testimony, however "fine" Mr. Fair seemed to the prosecutor after hour thirty, this does not cure the rights violations that occurred during hours one through thirty. This Court has delineated attenuation factors for use when there is initial coercion, to determine whether subsequent

statements are voluntary or instead must be suppressed as a product of that coercion. *See People v. Strickland*, 129 Ill.2d 550 (1989). Specifically, when an earlier statement is coerced, in evaluating the admissibility of a subsequent statement courts must consider: (1) the time that passes between statements; (2) the change in place of interrogations; and (3) the change in identity of the interrogators to determine whether coercion has carried over into the second confession. *Id.*, 129 Ill.2d at 557 (citing *Oregon v. Elstad*, 470 U.S. 298, 310 (1985)).

The *Strickland* Court applied these factors to determine whether the interrogators' withholding of medical treatment, which had been provided by the time of the confession at issue, was sufficiently attenuated to render the confession voluntary. Although Strickland's final statement was taken 3½ hours after the last coercive encounter and after medical care had been given, the Court still found the taint of coercion present, and suppression of the statement was warranted. *Id.* at 558-59.

Applying the attenuation factors here, the taint of the detectives' coercion remained when Mr. Fair spoke to prosecutor Mebane. First, there was no time lag between when Mr. Fair's will was overborne with the detectives and he made the first inculpatory statement and when he made the inculpatory statement to prosecutor Mebane. *See* R.478-79; R.1059. Mr. Fair's immediate presentation to the prosecutor was far less than the 3½ hours found insufficient to obviate the taint of coercion in *Strickland*. Second, both interrogations happened in the same interrogation room at Area 2, so there was no change of location. And third, even the interrogator remained unchanged: Detective Porter was present for both statements. App. ¶¶ 9, 49; R.1088.

None of the factors provides any daylight for attenuation between the original statement to the detectives after Mr. Fair's will was overborne and the statement immediately thereafter in front of Mebane and Detective Porter. Without attenuation, both statements require suppression. *Strickland*, 129 Ill.2d at 557-59; *Thomlison*, 400 Ill. at 569 (confession made on December 4 cannot be attenuated from confession made on the preceding day that was the product of abuse).

The appellate court, however, justified skipping the attenuation analysis by limiting the hearing to only include the torture allegations and omitting Mr. Fair's unrebutted and substantiated testimony about spending the thirty hours before either statement being unable to breath clearly, unable to eat, deprived of his medications, and unable to sleep, all while terrified by McDermott's gun threat, earlier violence, and the detectives' disregard for the rules. App. ¶ 113, 116-17, 123. For Mr. Fair, this was not just a torturous assault on his knee the day before his inculpatory statement; it was an extended harrowing experience which, between the gun threat, the withholding of lifesaving medication, the detectives' indifference to his outcries, and their disregard for the rules, Mr. Fair worried he would not survive. A noncoercive experience with the prosecutor and Mr. Fair's relief that his ordeal seemed to be coming to an end is no substitute for attenuation.

Burge era abuses should not be sanitized through prosecutors and thus disregarded by the courts. *See, e.g., Plummer*, 2021 IL App (1st) 20029, at ¶ 111 (the accused telling the prosecutor that he was treated well by the abusive detectives did not defeat his coercion claim); *Whirl*, 2015 IL App (1st) 111483 (Whirl telling prosecutor he was treated "fine" did not defeat his suppression claim). That Mr. Fair purportedly told

prosecutor Mebane he was "fine" did not obviate the need for the court to conduct an attenuation hearing to determine whether the statement was attenuated from the abuse and rights violations. Circumscribing the scope of the Torture Act referral hearing to artificially eliminate the need for an attenuation hearing was not only reversible error, but it also underscores that the appellate court's scope limitation is an incorrect interpretation of the statute.

CONCLUSION

There was never any evidence inculpating Darrell Fair for this crime except for the custodial statements made after Detective McDermott physically abused Mr. Fair and threatened him with a gun and McDermott and his cohorts deprived Mr. Fair of his asthma medication, food, sleep, and his repeatedly invoked right to counsel for thirty-plus hours. At the suppression hearing below, the State presented no evidence refuting any of these allegations. Mr. Fair has been wrongfully incarcerated for decades, and he respectfully asks this Court to vacate and reverse the judgment below, reverse his conviction, and suppress the statement used against him. Any other interpretation of the Torture Act would render the remedial statute meaningless.

Respectfully Submitted,

/s/ Debra Loevy

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Appendix

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SECOND DIVISION
Rule 23 Order Filed December 21, 2021
Modified Upon Denial of Rehearing March 8, 2022

1-20-1072

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 98 CR 25742
	)	
DARRELL FAIR,	)	Honorable
	)	Peggy Chiampas,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the trial court's order denying petitioner relief; petitioner was kicked in the leg by a police officer shortly after his arrest; however, the officer who kicked petitioner was not present when petitioner made inculpatory statements a day later; therefore, petitioner failed to establish that his statements were the product of torture, and he is not entitled to relief.

¶ 2 William Jones and Chris Stubblefield were robbed at gunpoint in the early morning hours of July 22, 1998. The gunman fatally shot Stubblefield when he tried to walk away. Over a month later, police arrested petitioner Darrell Fair. After his arrest, Fair made inculpatory statements that were admitted at the 2003 trial which resulted in his conviction for murder.

¶ 3 Years later, petitioner filed a claim before the Illinois Torture Inquiry and Relief Commission alleging his inculpatory statement was the product of physical abuse by detectives at Area 2. In his claim, petitioner alleged a detective kicked his leg and threatened to shoot him during questioning. He also alleged he was denied sleep, food, asthma medication, and access to a lawyer. The Commission interviewed petitioner about his claim and determined there was sufficient evidence of torture to merit judicial review. The Commission referred petitioner's claim to the circuit court for an evidentiary hearing under the Illinois Torture Inquiry and Relief Commission Act (775 ILCS 40/1 *et seq.* (West 2018)). Following a hearing, the circuit court determined petitioner was not entitled to the suppression of his inculpatory statement to authorities and dismissed his claim. Petitioner appealed.

¶ 4 On appeal, petitioner contends the State failed to carry its burden "to show that the statements attributed to [him] were not the result of coercion and misconduct, necessitating suppression" and, further, "the unrebutted evidence of the interrogating detectives' refusal to honor [his] clear, repeated invocation of his right to counsel further support suppression of the statements attributed to [him]." Petitioner argues the circuit court misapplied the burden of proof and failed to recognize the State's burden to prove the voluntariness of his statement by a preponderance of the evidence, which it failed to meet.

¶ 5 For the following reasons, we affirm.

¶ 6 BACKGROUND

¶ 7 We recount only those facts relevant to the issues raised in this appeal because the underlying facts are detailed in our judgment affirming petitioner's conviction and sentence on direct appeal. *People v. Fair*, No. 1-03-0983 (2004) (unpublished order under Illinois Supreme Court Rule 23).

¶ 8 Around midnight on July 22, 1998, a gunman robbed William Jones and Chris Stubblefield outside the Anywhere But Out lounge. The gunman grabbed a chain from Jones's neck, and as Stubblefield tried to walk away, the gunman walked up behind him and fatally shot him in the back.

¶ 9 More than a month later, police arrested petitioner and questioned him about the incident. Petitioner gave an oral inculpatory statement to detectives. An assistant state's attorney reduced petitioner's oral statement to writing but petitioner refused to sign the prepared statement.

¶ 10 Before trial, defense counsel filed a motion to suppress petitioner's statements to detectives and Assistant State's Attorney Adrian Mebane. According to the State, petitioner's initial motion was a "Boilerplate" motion alleging that his inculpatory statements were the product of physical and mental coercion by the authorities during interrogation. Defense counsel subsequently amended the motion with specific allegations that petitioner was kicked in the shins by a police officer wearing cowboy boots and that he was denied his asthma medication and food. However, defense counsel withdrew the motion to suppress after consulting petitioner.

¶ 11 At trial, Detective Przepiora testified he and Detective Ayers arrested petitioner at a residence on September 1, 1998. Petitioner's white Camaro was parked outside. Two tactical officers assisted in the arrest. Petitioner was advised of his *Miranda* rights and transported to Area 2 police station. After turning petitioner over to Detectives Porter and Brown, Przepiora had no further contact with petitioner.

¶ 12 Detective Porter testified that he and Detective Brown investigated the murder of Stubblefield and learned of petitioner's involvement through the gunman, Lamont Reaves. They interviewed petitioner, who agreed to answer their questions. During the interview, petitioner stated he popped the hood of his Camaro for Reaves to retrieve a handgun, but he changed his

story and said Thomas popped the hood. Afterwards, Assistant State's Attorney Mebane spoke with petitioner and memorialized his statement.

¶ 13 Assistant State's Attorney Mebane testified he asked petitioner if he wanted his oral statement reduced to a handwritten statement or transcribed by a court reporter, and petitioner stated a handwritten statement was fine.

¶ 14 Defense counsel declined to cross-examine Mebane about the statement he prepared before it was published to the jury. Defense counsel instead used petitioner's handwritten statement to challenge Mebane's credibility and argue that neither petitioner nor the detective who initially questioned petitioner signed the statement.

¶ 15 According to the handwritten statement, petitioner was a senior at Roosevelt University. His friend Jack gave him a loaded .38 caliber revolver on July 21, 1998. The next day, he asked his friend Chris Thomas, who was borrowing his Camaro, to pick him up because his driver's license was suspended. They drove around for a couple of hours and drank beers outside a friend's house. There, Lamont Reaves, whom petitioner knew as "King," mentioned knowing someone easy to rob in Harvey, Illinois. The three of them went back to petitioner's house to retrieve the revolver. Reaves hid the revolver under the hood and by the battery of petitioner's Camaro. They drove around Harvey for several hours and did not find the person Reaves mentioned. On their way back to Chicago, they stopped around 104th Street and Michigan Avenue because petitioner wanted to sell some liquor and Reaves knew people there. When William Jones and Chris Stubblefield pulled up in a car across the street and got out, Reaves told him to pop the hood of the Camaro, but Thomas popped the hood. Then, Reaves retrieved the revolver and confronted them. Reaves pointed the revolver at Jones's forehead and grabbed a chain from his neck. Stubblefield tried to walk away, and Reaves shot him in the back. Petitioner

drove away in his Camaro with Reaves and Thomas. The next day, petitioner gave the revolver back to his friend Jack.

¶ 16 Petitioner did not testify. Ultimately, the jury found him guilty of murder during the commission of armed robbery.

¶ 17 On direct appeal, this court affirmed petitioner's conviction and sentence. *People v. Fair*, No. 1-03-0983 (2004) (unpublished order under Illinois Supreme Court Rule 23). Petitioner argued the trial court erred in admitting his handwritten statement because it lacked a proper foundation, and defense counsel was ineffective for failing to object to its admission and for withdrawing the pretrial motion to suppress. However, petitioner failed to raise the issue at trial or in a posttrial motion. We declined to consider the issue under the doctrine of plain error because defense counsel relied on the handwritten statement to challenge the credibility of the assistant state's attorney who prepared it and therefore defense counsel's decision not to seek suppression of the handwritten statement before trial or object to its admission at trial was a matter of trial strategy that petitioner agreed with.

¶ 18 In 2005, petitioner filed a *pro se* postconviction petition alleging, in part, defense counsel was ineffective for failing to file a motion to suppress his statement and failing to challenge the validity of his arrest. The circuit court summarily dismissed the petition as frivolous and patently without merit. In doing so, the court found these claims were barred by *res judicata* because petitioner raised them on direct appeal.

¶ 19 Petitioner appealed the summary dismissal of his petition, and this court affirmed the judgment of the circuit court. *People v. Fair*, No. 1-05-3259 (2007) (unpublished order under Illinois Supreme Court Rule 23). Then pursuant to a supervisory order from our supreme court, we reconsidered the matter under *People v. Hodges*, 234 Ill. 2d 1 (2009), and determined a

different result was unwarranted. *People v. Fair*, No. 1-05-3259 (2010) (unpublished order under Illinois Supreme Court Rule 23).

¶ 20 Petitioner filed a petition for a writ of *habeas corpus* in federal district court alleging, in part, that police questioned him notwithstanding his request for a lawyer and denied him food, sleep, and medical treatment for more than 30 hours before he gave his statement. The district court denied the petition. *United States ex rel. Fair v. Hardy*, No. 10 C 7710 (N.D. Ill. April 18, 2011) (memorandum opinion and order).

¶ 21 Illinois Torture Inquiry and Relief Commission Proceedings

¶ 22 In May 2011, petitioner filed a claim of torture with the Illinois Torture Inquiry and Relief Commission. Petitioner named Detective Przepiora, Detective Porter, and Assistant State's Attorney Mebane; he also described an unknown detective 5'5"-5'6" and 140-150 pounds. Petitioner alleged he was "kicked in the lower leg and threatened to be shot while Detective McDermott rested his hand on service weapon" and "kept awake, chained to metal ring on wall, denied asthma medication + food – for period over 30 hours, [and] was also denied access to lawyer."

¶ 23 Petitioner's Interview with the Commission

¶ 24 The Commission interviewed petitioner regarding his claim in June 2012. Petitioner stated he has asthma and severe skin allergies. He went to the emergency room in 1995 after he broke out in hives and could not breathe. The emergency room doctor treated his symptoms and prescribed albuterol and steroid inhalers. He needs to use his inhalers every 10 to 12 minutes.

¶ 25 According to petitioner, police officers arrested him at his mother's house and took him in handcuffs to Area 2 for questioning. The officers did not allow him to take his inhalers, and the handcuffs gave him hives. At Area 2, his asthma flared up and he felt like he was breathing

through a straw. His symptoms would have been apparent to the detectives and a female assistant state's attorney who were in the interrogation room. When he asked for his medication, Detective Przepiora explained they would have "to start the whole process over again" if he went to the hospital for treatment. After he gave his statement, he was processed at the jail and examined at Cermak Health Services. There, he received an asthma inhaler and Benadryl.

¶ 26 As to his allegations of physical coercion, petitioner stated Detective Przepiora threatened him with a gun and a short white officer wearing cowboy boots kicked him in the shins once and called him a murderer. That officer then "rested his hand on [his] revolver" and dared him to "make a move." Petitioner recalled that officer had testified in one of his cases in Markham, but he did not know his name. Meanwhile, Detective Brown was professional and did not coerce him.

¶ 27 Petitioner stated he was deprived of sleep and questioned persistently at Area 2. The cold room and his asthma kept him awake. About 30 hours later, Detective Porter entered the room and accused him of being involved in Stubblefield's murder, but Petitioner denied the detective's accusations. Detective Porter gave him a sandwich and fries, and while he ate, he agreed to give a statement repeating what the detective told him to say. Then, Assistant State's Attorney Mebane entered the room and prepared a handwritten statement for his signature and initials. He refused and told Mebane he wanted a lawyer and would say nothing more.

¶ 28 Mebane and Porter then told petitioner that his codefendant, Reaves, claimed petitioner owned the car and the gun, and that petitioner popped the hood to give Reaves access to the weapon. They also told him the surviving victim, Chris Jones, gave a statement. They suggested he sign the prepared statement so they could help him out and "make things easier;" otherwise,

he would go to jail. He refused and neither of them tried to physically coerce a signature from him.

¶ 29 Petitioner conceded his defense counsel drafted, but did not file, a motion to suppress raising these allegations and he did not testify at trial. Petitioner also admitted he was with Reaves before, during, and after the shooting.

¶ 30 At the end of petitioner's interview, the executive director of the Commission advised petitioner to find the name of "the detective with the cowboy boots."

¶ 31 The Commission's Recommendation

¶ 32 The Commission issued a case disposition in May 2013. The Commission found there was sufficient evidence of torture to conclude petitioner's claim was credible and to merit judicial review for appropriate relief. In doing so, the Commission acknowledged petitioner's claim was "not corroborated by physical evidence, or by a pattern of such conduct by the police officers involved." However, the Commission stated it was troubled by the handwritten statement and the prosecutor's "dubious testimony" about the circumstances surrounding the preparation of the statement, which were "significant indicators of the fact that it was not voluntarily made." The Commission noted the case against petitioner "was practically non-existent without the statement, creating a powerful incentive to obtain the statement."

¶ 33 After the Commission referred petitioner's claim to the circuit court for judicial review, the State moved to dismiss the matter and claimed the Commission's recommendation failed to state a valid cause of action under the Illinois Torture Inquiry and Relief Commission Act because the alleged torture happened years after John Burge was fired from the Chicago Police Department. Although the circuit court granted the State's motion, this court found petitioner's

claim fell within the scope of the Act, and we reversed and remanded the cause to the circuit court for consideration on the merits. *Mitchell v. People*, 2016 IL App (1st) 141109.

¶ 34 Evidentiary Hearing in the Circuit Court

¶ 35 The evidentiary hearing commenced on April 29, 2019, and the parties delivered opening statements. Petitioner's attorney stated that authorities coerced his client to give an inculpatory statement, and they would show, by a preponderance of the evidence, his statement was "the product of severe physical or emotional coercion." Petitioner's attorney asked the circuit court to vacate his client's murder conviction and grant a new trial or dismiss all charges outright. The State asserted petitioner voluntarily gave his statement and thus it should not be suppressed. The State cited the Commission's observation that there was no physical evidence to support petitioner's claim of physical abuse.

¶ 36 Direct Examination of Petitioner

¶ 37 Petitioner testified that on September 1, 1998, two plainclothes officers knocked on the front door of his mother's house and asked to talk to him. When he asked whether they had any warrants, the officers threatened to shoot through the door if he did not open it. He retreated into the TV room when he heard them kick the door. Then one of the officers called the house and asked him again to open the door. Moments later, the cable went out and the kicking resumed. Petitioner opened the door because he did not want the officers kicking it in. The officers told him he was under arrest for murder and handcuffed him. When he asked to bring his asthma medication to the police station, the officers ignored him.

¶ 38 At Area 2 police station, Detective Przepiora seated petitioner on a metal bench in an interview room and handcuffed his left arm to a ring on the wall. Petitioner asked again for his asthma medication and a lawyer, but the detective ignored him and left the room.

¶ 39 After Detective Przepiora left, a short white detective wearing cowboy boots entered the interview room. Petitioner identified a photograph of Detective Michael McDermott as that person. Petitioner testified McDermott appeared angry and called him names. As petitioner stared at McDermott's angry face, he felt "something just exploded against my lower left leg under the – under the kneecap." The pain in his left shin was excruciating, and he reached down to shield his knee in case McDermott kicked him again. At that moment, McDermott "took another two steps back with his right leg, or his right foot rather, and his arm immediately went down to his service weapon." McDermott threatened to shoot petitioner, called him names, and tried to kick him again. Petitioner moved his left leg back and forth to avoid being kicked and only suffered glancing contact. Afterwards, McDermott left the interview room.

¶ 40 When Detective Przepiora returned two hours later, petitioner told him what happened. He also asked for his asthma medication and a lawyer, but Przepiora ignored his request, uncuffed his arm, and left the room. At that time, petitioner noticed his shin was bleeding from McDermott's kick, which scraped the skin off. Subsequently, Przepiora returned three or four times and probed him for details about the shooting. He denied knowing anything and asked for a lawyer. As Przepiora left the room, petitioner saw an officer that he recognized from preparatory school. Hoping that his former classmate would hear him, he kicked the door and yelled for a lawyer. That prompted Przepiora to return and handcuff him to the wall.

¶ 41 Hours later, McDermott returned to the room with a handful of files and photographs. McDermott told petitioner he knew about his involvement in the murder of Stubblefield as well as two unrelated armed robberies. McDermott explained there were witnesses who gave statements about him and would view a lineup that included him. McDermott also showed him photographs that included the deceased victim Stubblefield. This time, McDermott was

aggressive but not physical in his questioning. Petitioner denied his involvement and McDermott left the room.

¶ 42 Detective Porter entered the room later that night; he was not aggressive and treated petitioner like a friend. Petitioner told Porter that McDermott kicked him earlier, and he asked for his asthma medication and a lawyer. Porter replied he wanted to talk about the case first. When petitioner repeated his request for a lawyer, Porter left the room. Petitioner did not sleep that night. The lights were on, his left arm was handcuffed to the wall, and he had not eaten since the night before.

¶ 43 Detective Porter returned to the room with Detective Brown. When they asked him again about the murder, petitioner asked for a lawyer and explained he had nothing to say.

¶ 44 The next morning, Detectives Porter and Brown returned to the room with a female assistant state's attorney. At the time, petitioner was developing welts all over his body from the handcuffs and having difficulty breathing. The assistant state's attorney asked the detectives what was wrong with petitioner, and they ushered her out.

¶ 45 Petitioner's Oral Statement

¶ 46 When Detective Porter returned to the room, petitioner asked for something to eat. Porter responded, "If you want to eat, you got to give us something." So, petitioner agreed and admitted, "yeah, I was there at the lounge that night. I was selling alcohol." He explained to Porter that it was dollar drink night at the Anywhere But Out lounge and he was trying to sell three small bottles of Hennessey. Then Porter brought him two cheeseburgers with fries and left the room. After he ate, Detective Brown entered the room and made small talk until Porter returned.

¶ 47 Detective Porter told petitioner he was not the target of their investigation, but they needed his help by giving a statement against Reaves, the gunman. Porter explained they needed him to say he went to the lounge with Reaves and Thomas to commit a robbery and Reaves shot the victim; if he cooperated, they would let him go home. That sounded good to petitioner, so he agreed to say whatever they wanted him to say. Petitioner explained he was in "survival mode" and was not sure what would happen if he kept denying involvement.

¶ 48 Petitioner's Handwritten Statement

¶ 49 Assistant State's Attorney Mebane entered the room and introduced himself to petitioner. Then, while Detective Porter asked petitioner questions about what happened during the robbery, Mebane wrote down his responses, which he made up according to what Porter told him to say earlier. When Mebane asked him to sign the prepared statement, he worried that some of his responses might also get him charged with murder. So, he told Mebane he preferred to speak to a lawyer before signing anything.

¶ 50 Petitioner explained, "saying stuff is one thing" but "if I commit my signature to this stuff that I know is not accurate, I mean, that's a little more – it's kind of like signing my name to it. I'm kind of verifying something. I didn't feel comfortable doing that."

¶ 51 Mebane was visibly upset by petitioner's refusal to sign the prepared statement. Mebane asked petitioner for his signature several more times and petitioner refused. Then Mebane and Porter left the room. Shortly thereafter, petitioner was transported to Cook County jail and processed. He was unable to call his mother until several days later.

¶ 52 Additionally, petitioner testified defense counsel filed a pretrial motion to suppress statements that included an allegation that a short white officer wearing cowboy boots kicked him in the shins. Defense counsel withdrew the motion after consulting with petitioner. Defense

counsel explained to petitioner the judge might suppress the handwritten statement but not his oral statement; they could use the handwritten statement to show the jury he did not sign it and that Mebane wrote petitioner's name on it. Petitioner testified he agreed with defense counsel's advice.

¶ 53 Due to a scheduling issue at that time, the parties agreed for petitioner's attorney to call former Assistant State's Attorney Mebane as a witness and then for the State cross-examine petitioner afterwards.

¶ 54 Assistant State's Attorney Mebane

¶ 55 Mebane testified about his procedure for interviewing suspects during his assignment to the felony review unit. Typically, he would ask suspects preliminary questions about how they were being treated by police, whether they were under the influence of any substances, and whether they had eaten. He would also explain to suspects the available methods of memorializing a statement; they could give an oral statement, a handwritten statement, or a court reported statement.

¶ 56 For handwritten statements, Mebane testified, "my process was usually to sit right down next to the suspect and have a give-and-take, a back-and-forth almost verbatim as to what [he] or she would talk with – he or she witnessed or what actions that he or she engaged in." Before doing so, he would read aloud from the preprinted *Miranda* warnings on the statement form. Then, he would print the suspect's name below the warnings and ask for the suspect's signature. He would also mention they would be asked to sign the statement after it was prepared. If the suspect suggested any changes to the prepared statement, he and the suspect would initial next to them at that time.

¶ 57 Around 6:00 p.m. on September 2, 1998, Mebane arrived at Area 2 police station where petitioner was being held for questioning. Given the passage of time since then, Mebane did not independently recall the details surrounding his preparation of petitioner's written statement. For instance, he did not recall reviewing petitioner's arrest report or being concerned about how long petitioner had been in custody.

¶ 58 Mebane identified the handwritten statement that he prepared for petitioner. Although the statement reflected that it was taken at 9:32 p.m., Mebane testified he would have also met with petitioner earlier to introduce himself and get a general statement from petitioner about what happened. He noted the statement reflected that Detective Porter was present when it was taken, but he did not recall whether the detective was present for the duration. Mebane also noted petitioner initially claimed he, not Thomas, popped the hood of his Camaro so Reaves could retrieve the revolver. Nonetheless, he did not suspect that petitioner's statement was "staged." Mebane recalled that petitioner would not sign anything without a lawyer but agreed to continue discussing what happened.

¶ 59 On cross-examination, Mebane denied fabricating the handwritten statement or conspiring with Detective Porter to attribute a false statement to petitioner; he drafted the statement while interviewing petitioner and petitioner did not ask him for a lawyer. While Detective Porter was gone, Mebane asked petitioner how he was being treated in custody and petitioner said he was being treated well. Petitioner did not complain about being unable to sleep. Rather, he was alert during questioning. He did not appear to be under the influence of any substances. Nor did he appear to have hives or difficulty breathing. Mebane testified that petitioner never mentioned that an officer kicked him in the leg or threatened him with a gun. Mebane saw no injuries on petitioner, who was wearing shorts.

¶ 60 On further cross-examination, Mebane denied trying to force petitioner to sign the prepared statement; rather, he wrote on the last page that petitioner refused to provide his signature without a lawyer. Also, no one from the Commission contacted him about this case.

¶ 61 On redirect examination, Mebane testified he did not remember exactly when petitioner refused to initial any changes to the statement or to sign the completed statement, but it happened during the process and again at the end. He also did not remember whether he asked petitioner to sign the *Miranda* warnings before drafting the statement with petitioner. On recross examination, Mebane testified that petitioner orally confirmed his understanding of the *Miranda* warnings before they proceeded.

¶ 62 Petitioner's Testimony on Cross-Examination

¶ 63 After Mebane's testimony, the State cross-examined petitioner. Petitioner identified the papers he submitted to the Commission in support of his torture claim, which included documentation about his asthma. Petitioner acknowledged that "Exhibit E, Documentation of Asthma Condition" stated he claimed to take asthma medication but declined any treatment at the time. He conceded he did not mention to the Commission that officers refused to take him to the hospital but maintained he still needed his asthma medication. Petitioner also identified a photograph of his head with no hives that was taken when he was processed at the jail.

¶ 64 Additionally, petitioner identified the pretrial motion to suppress statements that defense counsel filed on August 24, 1999. He acknowledged the motion did not allege that a detective at Area 2 kicked him; the motion only raised a general allegation of physical coercion. Petitioner identified the amended motion that defense counsel filed on March 31, 2000, and again the motion only raised a general allegation of physical coercion. Then petitioner identified an amended motion that defense counsel filed on October 25, 2000; this time, the motion alleged

that a white officer wearing cowboy boots kicked petitioner's shins. Petitioner acknowledged he agreed with defense counsel's advice to withdraw the motion.

¶ 65 Petitioner further testified he did not learn the name of the detective who kicked him until after his interview with the Commission. He saw McDermott's name in police reports from his other robbery cases, which he obtained pursuant to a Freedom of Information Act request sometime after 2004 when his direct appeal in this case was affirmed. He also identified a police report in this case, which was dated September 2, 1998, signed by McDermott, and stated that petitioner made a statement at 7:15 p.m. regarding several armed robberies. Petitioner also recognized McDermott from a photograph in a newspaper article about Detective Jon Burge at Area 2, which he obtained from fellow inmates with similar claims against officers at Area 2. Previously, those inmates helped draft his postconviction petition.

¶ 66 On further cross-examination, petitioner stated he agreed to give an oral statement about Stubblefield's murder because of the abuse by McDermott but then refused to sign the handwritten statement. Petitioner explained on redirect examination that he agreed to give an oral statement because Detective Porter told him he was not the target of their investigation, and he refused to sign the handwritten statement after seeing Assistant State's Attorney Mebane writing down what he was saying. According to petitioner, "this writing stuff down, it stood like [Mebane's] trying to, like, you know, get me in trouble, too, you know, charge me with something now." Petitioner added, "saying stuff is one thing" but "if I commit my signature to this stuff that I know is not accurate, I mean, that's a little more."

¶ 67 Atsia Fair

¶ 68 Petitioner's mother Atsia Fair testified that petitioner was not home when she returned from work on the evening of September 1, 1998. The front door was unlocked, and the latch was

misaligned with the strike plate. Inside, things were in a disarray and the television was disconnected.

¶ 69 Ms. Fair further testified that petitioner had asthma and required medication. Petitioner used an inhaler and went to the hospital for breathing treatments when symptoms were severe. Petitioner was also allergic to grass and shrubs, which gave him hives. However, she never saw petitioner have trouble breathing and hives at the same time.

¶ 70 Victor Way

¶ 71 Victor Way testified about his encounter with Detective Porter and Assistant State's Attorney Mebane in February 1998, several months before petitioner's arrest in this case. Way was arrested while robbing a Kentucky Fried Chicken with a handgun. The arresting officers took him to Area 2 police station, where Porter questioned him. Way asked for a lawyer, but Porter continued to question him. Eventually, the detective and Assistant State's Attorney Mebane asked him to sign a handwritten statement. Way identified the handwritten statement, which he refused to sign because it was not consistent with what he told Porter. He admitted trying to rob the KFC with a handgun, but he never told Porter he bought the handgun for $25, agreed to give some of the money to the person who drove him there, displayed a gun, or took money out of the cash register. Ultimately, he pleaded guilty to the KFC robbery along with several other robberies as part of a plea deal.

¶ 72 On cross-examination, Way stated that Porter and Mebane treated him well. There were inconsistencies in the handwritten statement that Mebane prepared, but Way did not suggest any changes. Although he refused to sign the handwritten statement, he did not seek its suppression; on redirect examination, he explained he did not challenge the handwritten statement because he pleaded guilty.

¶ 73 Detective McDermott

¶ 74 Petitioner's next witness, Detective McDermott, did not testify. The State tried to subpoena McDermott as a courtesy to petitioner but was unsuccessful, and the circuit court continued the hearing to allow petitioner the opportunity to subpoena McDermott. Petitioner made numerous attempts to serve McDermott with a subpoena but was unsuccessful.

¶ 75 Documentary Evidence of McDermott's Misconduct

¶ 76 In addition to live testimony, petitioner introduced into evidence exhibits about prior allegations of misconduct by Detective McDermott including:

1. A deposition transcript where McDermott asserted his fifth amendment rights in response to allegations that he and other detectives physically abused suspects in several cases.
2. Investigative documents from the Cook County State's Attorney's office finding McDermott lied to the Office of Professional Standards and at a suppression hearing.
3. A petition and order granting McDermott immunity to testify in Jon Burge's federal court trial.
4. A suppression hearing transcript concerning McDermott's involvement in a 1991 murder investigation, where a fellow detective allegedly destroyed the defendant's seizure medication during interrogation and squeezed his testicles until he confessed.
5. A Special State's Attorney report regarding allegations McDermott abused Alphonso Pinex in 1985 by hitting his ribs, kneeing him, and holding him down while another detective beat him.
6. A suppression hearing transcript concerning McDermott's involvement in a 1990 armed robbery investigation, where he allegedly denied defendant Tony Anderson a phone call and threatened him with a gun placed against his head.

7. The affidavit of Robert Allen, Tony Anderson's codefendant, who overheard Anderson crying out during interrogation and was then similarly threatened.
8. A transcript concerning McDermott's involvement in a 1992 murder investigation, where he and fellow officers allegedly "started popping their knuckles" while interrogating Keith Mitchell without the presence of his mother and lawyer.
9. Affidavits from two witnesses that McDermott interrogated in the 1992 murder investigation. Jermaine Bates alleged that McDermott hit him in the head to coerce a statement against Mitchell. Lanell Townsend alleged that McDermott smacked him, choked him, banged his head against the wall, and squeezed his handcuffs to coerce a statement against Mitchell.
10. An order vacating Keith Mitchell's conviction.
11. A complaint register file regarding a 1993 murder investigation, where the Office of Professional Standards determined the allegations that McDermott slapped Joseph Carroll and pushed his head against a radiator were unfounded.
12. Marvin Scott's complaint that in 1993, McDermott ignored his request for a lawyer and hit him in the eye and ribs during interrogation.
13. Michael Thomas's complaint that in 2001, McDermott, Przepiora, and another officer slapped, punched, and handcuffed him to a wall without food, water, sleep, or access to the restroom during interrogation.
14. John Knight's affidavit stating that McDermott choked, slapped, and threatened him with a gun against his head during interrogation.
15. A transcript from a 2004 special grand jury proceeding where McDermott invoked his fifth amendment rights.

16. A chart of police abuse cases from 1984 to 1999.

¶ 77 The State's Documentary Evidence

¶ 78 The State did not call any witnesses but presented documentary evidence including:

1. Petitioner's claim of torture that he filed with the Commission.
2. An audio recording of petitioner's interview with the Commission.
3. The handwritten statement attributed to petitioner.
4. The handwritten statement attributed to codefendant Reaves.
5. Excerpt of Mebane's trial testimony about his preparation of petitioner's statement.
6. Petitioner's motion to suppress statements.
7. Petitioner's amended motions to suppress.
8. A photograph of petitioner upon his admission to jail.
9. Documentation about petitioner's asthma.
10. Excerpt from transcript where defense counsel withdrew the suppression motion.

¶ 79 The Circuit Court's Order

¶ 80 The circuit court issued a 53-page order dismissing petitioner's claim of torture. In doing so, the court stated the legal framework of the hearing: a petitioner's initial burden is to show that newly discovered evidence would likely have resulted in the suppression of the statement; if the petitioner satisfies that burden, then the State bears the burden of proving the statement was voluntary by a preponderance of the evidence; and if the State establishes the voluntariness of the statement, the burden shifts back to the petitioner to present evidence to the contrary.

¶ 81 The circuit court ultimately found that petitioner failed to meet his initial burden. In so finding, the court first considered whether petitioner's evidence of prior alleged police abuse at Area 2 was relevant to his torture claim. The court examined the factors identified by our

supreme court in *People v. Patterson*, 192 Ill. 2d 93, 145 (2019), as relevant in determining if new evidence of a pattern of abuse is relevant and would have changed the outcome at a pretrial suppression hearing.

¶ 82 Applying those factors, the court stated the prior allegations of misconduct by McDermott from 1984 to 2002 showed a pattern and practice of abuse. Then the court stated those prior allegations "technically" met another factor – they involved the same officer as in this case, McDermott.

¶ 83 However, the court stated petitioner's allegations against McDermott were not "strikingly similar" to the abuse described in his new evidence; the specific methods of abuse described in those prior allegations were "quite different" from petitioner's allegations. Although petitioner alleged that McDermott threatened to shoot him while resting a hand on his service weapon, Tony Anderson and John Knight alleged that McDermott placed a gun to their heads and threatened to shoot them. Although petitioner alleged that McDermott kicked him with cowboy boots, other suspects alleged they were kicked and struck in various ways including by multiple officers, but they made no mention of cowboy boots. Despite these differences, the court acknowledged petitioner consistently alleged he was kicked by a white officer wearing cowboy boots since before trial.

¶ 84 The court noted, however, petitioner did not mention being threatened with a gun until long after trial and his allegations of abuse changed over time. For instance, at his interview with the Commission in 2012, petitioner claimed he was kicked once. Then during this evidentiary hearing, petitioner testified that McDermott repeatedly kicked him in the shins.

¶ 85 The court questioned petitioner's inability to name the detective who kicked him with cowboy boots until after his interview with the Commission. The court noted petitioner admitted

possessing police reports from his other robbery cases that listed McDermott's name, but he claimed he did not associate McDermott's name with the officer who kicked him until he obtained McDermott's police report from this case, which stated that petitioner made a statement at 7:15 p.m. on September 2, 1998, regarding several armed robberies. However, the court noted petitioner never told the Commission that the detective who kicked him returned later and questioned him about any of his cases, and McDermott's September 2 police report does not corroborate petitioner's testimony that McDermott questioned him on September 1.

¶ 86 The court added the circumstances surrounding petitioner's identification were troubling. The court noted although petitioner testified his first sight of McDermott was from a photograph in an article that he obtained from inmates who had previously helped him with his postconviction petition, he did not see the photograph before filing his claim with the Commission. Rather, petitioner only identified McDermott as the officer who abused him after his interview with the Commission, when the executive director strongly advised petitioner to learn the name of the detective.

¶ 87 Consequently, the court found petitioner's ignorance about the identity of his alleged abuser and his eventual identification of McDermott not credible. The court stated the evidence supported the inference that petitioner fabricated the allegations against an unnamed detective and the advice to find the detective's name motivated petitioner to fabricate a name. The court also stated the evidence supported the inference that petitioner altered his story to account for McDermott's police report by testifying that McDermott interviewed him a second time after kicking him. The court noted petitioner's allegations of abuse were inconsistent and the only reason the prior allegations of McDermott's misconduct were relevant was because petitioner

named McDermott as his abuser. The court determined the evidence of prior allegations of abuse by McDermott was of little relevance to his claim of abuse by McDermott.

¶ 88 Next, the court considered the new evidence concerning McDermott's prior allegations of abuse together with the circumstances surrounding petitioner's interrogation at Area 2. In doing so, the court declined petitioner's request to draw an adverse inference from McDermott's failure to testify at the evidentiary hearing. The court found no authority supporting petitioner's proposition requiring an adverse inference to be drawn from a witness who allegedly avoided service of process.

¶ 89 The court further noted petitioner's testimony about his treatment by other people at Area 2 was inconsistent with the responses he gave during his interview with the Commission. Petitioner told the Commission he was questioned persistently at Area 2 and thus deprived of sleep, but he testified at the evidentiary hearing that he could not lie down because his arm was handcuffed to the wall. He told the Commission that when he asked for his asthma medication, Detective Przepiora stated they would have "to start the whole process over again" if he went to the hospital for treatment. However, petitioner testified at the hearing that it was McDermott, not Przepiora, who said that during a second encounter in the interview room. Also, petitioner told the Commission he gave a statement to Detective Porter while eating food the detective brought him, but he testified at the hearing that Porter offered him food only if he agreed to give a statement.

¶ 90 The court also noted that petitioner's testimony about his alleged abuse by McDermott was not corroborated by physical evidence. Petitioner testified the kick from McDermott scraped the skin off his shin, he developed skin welts over his body from the handcuffs and had difficulty breathing. However, documentation of petitioner's asthma condition indicated he declined any

medical treatment when he was processed at the jail and a photograph of petitioner did not show he had any hives at that time. Also, Assistant State's Attorney Mebane's testimony at trial and at the evidentiary hearing contradicted petitioner's claim that he was in distress during questioning. The court questioned the severity of petitioner's asthma and skin allergies when he was questioned at Area 2.

¶ 91 The court found petitioner to be "wholly incredible" after observing his demeanor as he testified at the evidentiary hearing and listening to the audio recording of petitioner's interview with the Commission. The court gave little to no weight to petitioner's allegations of abuse because his testimony at the hearing was repeatedly contradicted by other evidence including his interview with the Commission. The court determined the new evidence of prior allegations of misconduct by McDermott would not have arguably changed the outcome at a suppression hearing, and thus petitioner failed to meet his initial burden.

¶ 92 Moreover, even if petitioner had met his initial burden, the court determined the totality of the circumstances showed the State met its burden of establishing that petitioner's statement was voluntary. The court found Mebane to be an "extremely" credible witness in comparison to petitioner and noted the Commission made no attempt to interview Mebane about his trial testimony or the handwritten statement. The court credited Mebane's testimony that it was partway through his preparation of petitioner's handwritten statement when he asked petitioner to initial a correction and petitioner refused to sign anything without a lawyer present. The court noted although Mebane did not independently recall much of his interview with petitioner at the hearing, his prior testimony about drafting petitioner's statement largely comported with his procedure for memorializing a suspect's statement. The court stated Mebane consistently testified that petitioner acknowledged his *Miranda* rights orally, agreed to give a handwritten

statement, and continued to cooperate despite refusing to sign the statement. By contrast, the court noted petitioner's testimony "about what 'went wrong' at the time of his statement was that he had been previously coerced by McDermott's physical abuse, Porter's promises of food, his denial of counsel, sleep, and medication," but petitioner "specifically testified that he was tortured into giving the *oral* statement, not the *written* statement." The court added that petitioner never testified he told Mebane that he was mistreated by police. The court also noted the other handwritten statements that Mebane prepared while in the felony review unit were substantially similar to petitioner's statement and comported with Mebane's testimony about his general procedure. The court stated Mebane's testimony supported the conclusion that petitioner gave a voluntary oral statement, then agreed to give a handwritten statement, but later decided not to sign the statement. On the other hand, the court noted petitioner's testimony that signing an inaccurate statement was "a little more" than "saying stuff" and stated that explanation did not reflect the thoughts of a person whose will was overborne. Accordingly, the court dismissed petitioner's claim of police abuse. This appeal follows.

¶ 93 ANALYSIS

¶ 94 Petitioner claims he presented compelling evidence at the evidentiary hearing of an involuntary statement and the State failed to establish a *prima facie* case that the statement was voluntarily made.

¶ 95 An evidentiary hearing under the Torture Inquiry and Relief Commission Act (775 ILCS 40/1 *et seq.* (West 2018)) is like a third-stage evidentiary hearing under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)), where the claimant has the chance to show by a preponderance of the evidence that a confession was coerced. *People v. Christian*, 2016 IL App (1st) 140030, ¶ 78.

¶ 96 At an evidentiary hearing, the circuit court acts as the factfinder and resolves any conflicts in the evidence and determines the credibility of witnesses and the weight to give their testimony. *People v. Harris*, 2021 IL App (1st) 182172, ¶ 49. Where, as here, new evidence was presented at the evidentiary hearing and the circuit court made findings of fact and credibility determinations, our standard of review is the manifest error standard. *People v. Carter*, 2017 IL App (1st) 151297, ¶ 132. "The term 'manifest error' means error that is 'clearly evident, plain, and indisputable.' " *People v. Coleman*, 206 Ill. 2d 261, 277 (2002) (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997)). On the other hand, if there were no fact-finding or credibility determinations and the issues were purely questions of law, we apply a *de novo* standard of review. *Carter*, 2017 IL App (1st) 151297, ¶ 132.

¶ 97 Similarly, we apply a bifurcated standard of review to a circuit court's decision regarding the voluntariness of a defendant's statement. *People v. Brown*, 2012 IL App (1st) 091940, ¶ 26. Although we review *de novo* the ultimate question of whether the statement was voluntary, we review the factual question of whether a *Miranda* waiver was knowing and intelligent under the manifest weight of the evidence standard. *Id.* Under the manifest weight standard, we give great deference to the circuit court's findings of fact and credibility determinations. *People v. Guerrero*, 2012 IL 112020, ¶ 19. The court's findings of fact and credibility determinations are against the manifest weight of the evidence if they are arbitrary, unreasonable, and not based on the evidence. *Wilson*, 2019 IL App (1st) 181486, ¶ 62.

¶ 98 A petitioner's initial burden is the same under the Post-Conviction Hearing Act and the Torture Act. *People v. Wilson*, 2019 IL App (1st) 181486, ¶ 52. A petitioner must show that new evidence would likely have resulted in the suppression of his confession. *Id.* ¶ 54. If the petitioner satisfies this initial burden, then the State must show the petitioner's statement was

voluntary. *Id.* After the State establishes its *prima facie* case that the statement was voluntary, the burden shifts to the petitioner to present evidence that it was involuntary. *Id.* ¶¶ 53-54; see *People v. Kochevar*, 2020 IL App (3d) 140660-B, ¶ 21 (the State always bears the burden of *proof* during a hearing on a motion to suppress an inculpatory statement, but there is a shifting burden of *production*). However, a hearing under the Torture Act may provide relief beyond the relief available under the Post-Conviction Act. Specifically, a petitioner may obtain the suppression of his statement and dismissal of the charges if appropriate.

¶ 99 Petitioner's Evidence of Torture by McDermott

¶ 100 Within the context of this legal framework, the State asserts the circuit court properly dismissed petitioner's torture claim because he failed to meet his initial burden of showing that new evidence of prior allegations of misconduct by McDermott would likely have led to the suppression of his inculpatory statements. The State argues that petitioner's testimony at the evidentiary hearing, coupled with his evidence about prior allegations of misconduct by Detective McDermott failed to satisfy the factors for admissibility or relevancy under *People v. Patterson*, 192 Ill. 2d 93 (2000). It bears noting the circuit court found the new evidence of prior allegations of McDermott's misconduct was of little relevance to petitioner's claim of abuse by McDermott.

¶ 101 However, we find that petitioner presented consistent, unrebutted allegations and testimony that he was kicked by Detective McDermott.

¶ 102 The court noted although the prior allegations of McDermott's misconduct from 1984 to 2002 revealed a pattern and practice of abuse, petitioner's allegations of abuse in this case were inconsistent, and the prior allegations of McDermott's misconduct were only relevant to the extent petitioner named McDermott as his abuser. The court reasoned petitioner's allegations

were not "strikingly similar" to the methods of abuse described in the prior allegations of McDermott's misconduct; rather, they were "quite different." The court noted that two individuals had alleged McDermott placed a gun to their heads and threatened to shoot them whereas petitioner testified McDermott threatened to shoot him while resting a hand on his service weapon. The court also noted that petitioner consistently alleged he was kicked by a white officer wearing cowboy boots even though other suspects alleged they were kicked and struck in other ways with no mention of cowboy boots.

¶ 103 Although similarity is an important factor to consider in determining whether new evidence of police misconduct in other cases shows a pattern and practice of certain behavior, the question is "not one of exact or perfect identity." *Jackson*, 2021 IL 124818, ¶ 34. Instead, the question is "simply whether there is *sufficient* similarity between the misconduct at issue in the present case and the misconduct shown in the other cases, such that it may fairly be said the officers were acting in conformity with a pattern and practice of behavior." (Emphasis added.) *Id.* That determination depends on the unique circumstances of each case. *Id.* (citing *Patterson*, 192 Ill. 2d at 144-45). Moreover, our supreme court has clarified its use of "strikingly similar" in *Patterson* when comparing the misconduct there to the misconduct shown in other cases. *Id.* ¶ 33 (citing *Patterson*, 192 Ill. 2d at 145). The court explained "it was merely descriptive of the allegations in that case and not a legal test for admissibility." *Id.* Here, the circuit court erred in testing whether petitioner's allegations of police misconduct were "strikingly similar" to the misconduct shown in other cases. See *id.* (the appellate court erred in relying on this descriptive language as a test).

¶ 104 We believe that petitioner's allegations of misconduct in this case were sufficiently similar to the misconduct shown in other cases to show a pattern or practice of behavior. See

Jackson, 2021 IL 124818, ¶ 34. Petitioner has consistently alleged he was kicked and his resulting statements were coerced. He raised those allegations in a pretrial motion to suppress, which was ultimately withdrawn after consultation with defense counsel. He raised them again in his petition for a writ of *habeas corpus* in federal district court, albeit unsuccessfully. Then he raised those allegations in his claim of torture that he filed with the Illinois Torture Inquiry and Relief Commission. During his interview with the Commission, petitioner stated his asthma flared up when he arrived at Area 2 for questioning and when he asked for his medication, Detective Przepiora replied they would have "to start the whole process over again" if he went to the hospital for treatment. Petitioner told the Commission that Przepiora threatened him with a gun and a short white officer wearing cowboy boots kicked him in the shins and called him a murderer. That officer "rested his hand on [his] revolver" and baited him to "make a move."

¶ 105 As early as the year 2000, petitioner has consistently alleged that McDermott kicked him in his leg. McDermott did not testify at his trial or at the evidentiary hearing, and the trial testimony of Detectives Przepiora and Porter did not rebut petitioner's allegations he was kicked by McDermott. Although we accord deference to the circuit court's resolution of conflicts in evidence and its determination on witness credibility, " 'the manifest weight standard is not a rubber stamp. It does not require mindless acceptance in the reviewing court.' " *Harris*, 2021 IL App (1st) 182172, ¶ 56 (quoting *People v. Anderson*, 303 Ill. App. 3d 1050, 1057 (1999)).

¶ 106 Contrary to the trial court, we accept petitioner's unrebutted and consistent claims of being kicked by McDermott as true. However, we still come to the same conclusion as the circuit court that the State sustained its burden to show petitioner's statements were voluntary and not the product of torture.

¶ 107 Petitioner was arrested on September 1 and taken to the police station. He was kicked in the leg by McDermott at the police station that day. However, it was not until the afternoon on the following day that petitioner made a statement to Detective Porter. Petitioner testified that Porter treated him like a friend. Porter wanted to ask about the incident and, according to petitioner, petitioner told Porter he was present the night of the shooting. After admitting he was present during the shooting Porter brought him two cheeseburgers and fries. Petitioner then gave a more extensive statement to Porter and subsequently to an assistant state's attorney. Petitioner contends the State failed to carry its burden of proof to show the statements attributed to him were voluntary. He argues the State presented only Assistant State's Attorney Mebane's testimony to establish the voluntariness of that statement. He points out Detective McDermott did not testify at trial, and the trial testimonies of Detectives Przepiora and Porter do not rebut the allegations against them regarding promises of food, denial of counsel, sleep, and medication.

¶ 108 In determining the voluntariness of a suspect's statement, courts consider the totality of the circumstances, which include the presence of *Miranda* warnings, the duration of questioning, and any physical or mental abuse. *Wilson*, 2019 IL App (1st) 181486, ¶ 63. The procedural safeguards set forth in *Miranda v. Arizona* contemplate the possibility of mental and physical coercion during custodial interrogation. *People v. Holloway*, 131 Ill. App. 3d 290, 307 (1985). Accordingly, the test for voluntariness is whether the statement was made freely without compulsion or inducement, or whether the defendant's will was overcome at the time of the confession. *Id.* Relevant factors include the duration of the defendant's detention before making the statement, a disregard for necessities of life, deprivation of counsel, and the defendant's age,

education, and experience in criminal matters. *People v. Dodds*, 190 Ill. App. 3d 1083, 1090 (1989).

¶ 109 Here, the circuit court found the totality of the circumstances showed the State met its burden of establishing that petitioner's handwritten statement was voluntarily given. The circuit court noted petitioner's testimony about what "went wrong" was that he was previously coerced by McDermott's physical abuse, Detective Porter's promises of food, and his denial of counsel, sleep, and medication; but petitioner "specifically testified that he was tortured into giving the *oral* statement, not the *written* statement." Petitioner never told Mebane that he was mistreated by police at the time he agreed to give a handwritten statement. The court stated that Mebane's testimony supported the conclusion that petitioner voluntarily gave an oral statement, then agreed to a handwritten statement, but then decided not to sign it. The court stated petitioner's explanation that signing an inaccurate statement was "a little more" than "saying stuff" and did not reflect the thoughts of a person whose will was overborne. "It is unlikely that a person whose will was overborne would be unable to resist confessing, yet at the same time attempt to mitigate the effect of a confession." *People v. Kincaid*, 87 Ill. 2d 107, 120 (1981), quoted in *Christian*, 2016 IL App (1st) 140030, ¶ 110. Although Mebane did not independently recall much of his interview with petitioner during the hearing his testimony at trial about preparing petitioner's statement largely comported with his procedure for memorializing a suspect's statement. Although petitioner testified about the detectives' alleged failure to honor his request for a lawyer, Mebane consistently testified that petitioner acknowledged his *Miranda* rights orally, agreed to give a handwritten statement, and continued to cooperate despite refusing to sign the prepared statement. That petitioner did not sign the *Miranda* waiver is insufficient by itself to establish that he wished to end the interrogation. *People v. West*, 25 Ill. App. 3d 827, 832 (1975).

The circuit court was in the best position to assess the credibility of the witnesses at the hearing, and the court found Mebane's testimony more credible than the witnesses for the defense. See *Wilson*, 2019 IL App (1st) 181486, ¶ 62 (the trial judge's advantageous position to observe witnesses warrants deference). "Just as a court may not ignore a defendant's uncontroverted testimony that a confession was a product of specific acts of physical or mental coercion, so it may not ignore uncontroverted testimony by the State establishing the voluntariness of a confession." *People v. Lopez*, 114 Ill. App. 3d 1018, 1024 (1983). On the record before us, we cannot find that the circuit court's credibility determination about Mebane was against the manifest weight of the evidence.

¶ 110 Petitioner nevertheless maintains that Mebane's testimony is insufficient as a matter of law to refute his allegations of coercion by police, and he faults the State for failing to produce all material witnesses associated with his confession at the evidentiary hearing, *i.e.*, Detectives Przepiora, Porter, and McDermott. However, our supreme court rejected this material witness rule in *People v. R.D.*, 155 Ill. 2d 122, 139, 144-45 (1993), and stated the prosecution is not required to call all material witnesses to testify at a suppression hearing if it can meet its burden of proving the voluntariness of a confession without such testimony. We find this to be the case here.

¶ 111 Petitioner argues that his statements were the result of being promised food, deprived of sleep and his asthma medication by police for 30 hours, denied his right to counsel, and being kicked by Detective McDermott. He correctly notes there is no testimony from Detective McDermott regarding his allegations of physical abuse, and the assistant state's attorney who prepared his written statement was not present during the initial 30 hours he was in police custody. Even so, confessions made after more than 30 hours have been found voluntary where

there has been no evidence that the defendant's rights were violated. *Dodds*, 190 Ill. App. 3d at 1090-91 (citing *People v. Nicholls*, 42 Ill. 2d 91 (1969), *cert. denied*, 396 U.S. 1016 (1970) (34-hour delay did not invalidate confession); and *People v. Taylor*, 40 Ill. 2d 569 (1968) (50-hour detention did not invalidate confession). An interview room or jail cell "is hardly a paradise for the senses, yet defendants properly processed and charged can be held there for lengthy periods of time." *People v. House*, 141 Ill. 2d 323, 379 (1990). The appellate court has found that any physical discomfort a defendant suffered from his failure to have adequate sleep, medication, or something to eat before giving an inculpatory statement, was insufficient to show his will was overcome. *Holloway*, 131 Ill. App. 3d at 307. Our supreme court has also condemned "the practice of leaving suspects handcuffed in a chair all night" but held the defendant's confession was voluntary. *House*, 141 Ill. 2d at 376 (citing *In re Lamb*, 61 Ill. 2d 383 (1975)).

¶ 112 Finally, petitioner argues that all the statements should be suppressed because the record shows the unrebutted testimony of petitioner that he repeatedly told police he wanted an attorney, but police nevertheless continued to question him. Mebane's testimony does not rebut petitioner's requests for an attorney that he made to officers. Petitioner argues that when a criminal defendant requests an attorney, all questioning should have ceased unless he initiated contact which he did not. See *People v. Coleman*, 2021 IL App (1st) 172416, ¶ 55 (citing *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)). However, under the Torture Act the circuit court is tasked with determining whether a confession or statement was the product of torture. The State proved petitioner's written statement was not the product of torture and petitioner's waiver of his right to counsel was not a consequence of torture. The circuit court was not tasked with determining whether the deprivation of counsel produced a statement or confession.

Therefore, petitioner is not entitled to relief under the Torture Act based on the denial of his repeated requests for counsel.

¶ 113 The record before us shows Detective Przepiora testified at trial that he had no further contact with petitioner after transporting him to Area 2 police station and turning him over to Detectives Porter and Brown, and Detective Porter testified at trial that petitioner agreed to answer his questions. The kicking incident with McDermott occurred the day before petitioner gave a statement to an assistant state's attorney. Under the Torture Act, the court is tasked with considering petitioner's claims and determining what relief, if any is appropriate. In view of all the circumstances surrounding petitioner's inculpatory statements, we affirm the circuit court's finding that the State met its burden to show the statements given to an assistant state's attorney were voluntary and not the product of torture. Therefore, petitioner is not eligible for relief, and we affirm the dismissal of his torture claim.

¶ 114 SUPPLEMENTAL ORDER UPON DENIAL OF REHEARING

¶ 115 Petitioner filed a petition for rehearing pursuant to Illinois Supreme Court Rule 367 (eff. Nov. 1, 2017). "The purpose of a petition for rehearing is to allow parties to call a reviewing court's attention to matters it might have overlooked or misapprehended." *Compass Group v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 121283WC, ¶ 52. Petitioner argues this court overlooked the law of attenuation applicable to claims of a coerced confession and misapprehended the breadth of a post-Torture Commission evidentiary hearing. As we noted before, during the judicial review process a petitioner must show that new evidence would likely have resulted in the suppression of his confession. *Supra*, ¶ 98 (citing *Wilson*, 2019 IL App (1st) 181486, ¶ 54). The petition for rehearing argues this court improperly only considered "the underlying torture allegations triggering the original referral *** from the Torture Commission

to the circuit court" rather than also considering allegedly "unrebutted testimony [petitioner] repeatedly told police he wanted an attorney but the police nevertheless continued to question him" and allegedly "unrebutted claims of gun threats and medical and food deprivations." Specifically, petitioner accuses this court of erroneously determining what constitutes torture in this case and limiting our analysis to "whether the tortuous conduct triggering the referral coerced the inculpatory statement."

¶ 116 Initially we note this court did not overlook this issue. See Ill. S. Ct. R. 367(b) ("The petition shall state briefly the points claimed to have been overlooked or misapprehended by the court.") This court's order in this case addressed defendant's argument that all the statements should be suppressed because the record shows the unrebutted testimony of petitioner that he repeatedly told police he wanted an attorney, but police nevertheless continued to question him. We rejected this argument concluding that the circuit court was not tasked with determining whether the deprivation of counsel produced a statement or confession. Therefore, we never had to reach the question of whether defendant's written statement was sufficiently attenuated from the oral statement that was allegedly the product of torture. See *supra*, ¶¶ 109-112; *People v. Bates*, 267 Ill. App. 3d 503, 504 (1994) (discussing attenuation generally). On the contrary, under the Torture Act, the circuit court is only tasked with determining whether a confession or statement was the product of torture. *Supra*, ¶ 112.

¶ 117 Petitioner's argument that this court misapprehended the breadth of a post-Torture Commission evidentiary hearing raises a question of the trial court's authority to act. This raises a question of law subject to *de novo* review. *People v. Alexander*, 369 Ill. App. 3d 955, 957 (2007) ("We consider questions regarding statutory authority *de novo.*"). We hold that under the

Torture Act this court's authority is restricted to consideration of the allegedly tortuous conduct triggering the referral to the circuit court.

¶ 118 When the Torture Commission refers a claim of torture to the circuit court, the Torture Act directs as follows:

> "Post-commission judicial review.
>
> (a) If the Commission concludes there is sufficient evidence of torture to merit judicial review, the Chair of the Commission shall request the Chief Judge of the Circuit Court of Cook County for assignment to a trial judge for consideration. The court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing. Notwithstanding the status of any other postconviction proceedings relating to the petitioner, if the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to rearraignment, retrial, custody, pretrial release or discharge, or for such relief as may be granted under a petition for a certificate of innocence, as may be necessary and proper." 775 ILCS 40/50 (West 2018).

¶ 119 This court has found that "while the Commission is asked to determine whether there is enough evidence of *torture* to merit judicial review, the circuit court is asked to determine whether defendant has been *tortured*." (Emphases added.) *People v. Christian*, 2016 IL App (1st) 140030, ¶ 95. We noted that "the Commission's decision [does] not relieve [the] defendant of the burden of proving before the circuit court that he had been *tortured*." (Emphasis added.) *Christian*, 2016 IL App (1st) 140030, ¶ 96.

¶ 120 As for this court's ability to go further than the statute's express terms prescribe, as petitioner argues we should, we find as a matter of law, we cannot. Where "a justiciable matter is statutorily derived, the legislature may define it in such a way as to limit or preclude the circuit court's authority." *In re A.H.*, 195 Ill. 2d 408, 416 (2001). In such instances, "[w]hen a court's power to act is controlled by statute, *** the court must proceed within the strictures of the statute." (Internal quotation marks and citations omitted.) *Id*. "The court, therefore, has only the subject matter jurisdiction accorded to it by the statute and [a]ny action taken by the circuit court that exceeds its jurisdiction is void." *Id*. See also 14 Ill. Law and Prac. Courts § 17, citing *In re G.F.H.*, 315 Ill. App. 3d 711, 715-16 (2000) (collectively finding that fact "that a court acts beyond its statutory authority in a particular case does not mean that the court lacks jurisdiction over the type of proceeding involved" but authority of court to act may be limited by the statute). Pursuant to the terms of the Torture Act we adhere to our prior holding that the circuit court was not tasked with determining whether the deprivation of counsel produced a statement or confession. *Supra*, ¶ 112. The authorities cited in the Petition for Rehearing are insufficient to give us reason to find that our construction of the Torture Act is erroneous.

¶ 121 In *People v. Wilson*, 2019 IL App (1st) 181486, this court found that an evidentiary hearing under the Torture Act has been "likened" to a third-stage evidentiary hearing under the Post-Conviction Hearing Act "at which the claimant has the opportunity to demonstrate by a preponderance of the evidence that his confession *resulted from coercion*." (Emphasis added.) *Wilson*, 2019 IL App (1st) 181486, ¶ 51 (citing *Christian*, 2016 IL App (1st) 140030, ¶ 78). This court found that "[g]iven the similarities between evidentiary hearings under the Post-Conviction Act and the Torture Act, *** a petitioner's initial burden under the Torture Act is the same as under the Post-Conviction Hearing Act; that is, that evidence his confession resulted from

coercion would likely have altered the result of a suppression hearing." *Id*. ¶¶ 51-52. Consequently, "after a petitioner satisfies his initial burden of showing that new evidence would likely have resulted in the suppression of his confession," *i.e.*, that the confession resulted from torture, "the State has the burden of proving petitioner's statement was voluntary, just as it would at a motion to suppress hearing. The burden shifting provisions involved in a motion to suppress likewise apply." *Id*. ¶ 54. However, the threshold question under the Torture Act remains whether the petitioner has demonstrated by a preponderance of the evidence that his confession resulted from torture. *Id*. ¶ 50 ("the Torture Act was intended to definitively and expeditiously decide whether a petitioner was tortured and provide appropriate relief"). Petitioner has cited nothing in *Wilson* to convince us otherwise.

¶ 122 In *People v. Whirl*, 2015 IL App (1st) 111483, ¶ 50, this court had before it a combined petition pursuant to the Post-Conviction Hearing Act and the Torture Act. However, all of the arguments in the appeal related to the denial of the successive postconviction petition following an evidentiary hearing. *Whirl*, 2015 IL App (1st) 111483, ¶ 78. This court specifically held that the defendant in that case was "entitled to a new suppression hearing under the Postconviction Act." *Id*. ¶ 111. This court did not consider the evidence in *Whirl* as it pertained to the defendant's claim under the Torture Act but only as it pertained to the defendant's claim under the Post-Conviction Hearing Act. We find *Whirl* inapposite.

¶ 123 Petitioner's arguments that the voluntariness of a statement should be determined based on the totality of the circumstances bypasses the threshold question of this court's authority to, in petitioner's words, "evaluate[] a full-bodied suppression claim" which we find we do not have. The Torture Act provides a vehicle to determine whether a defendant's statement was the product of torture. The Torture Act does not provide an alternative "vehicle" for convicted

defendants to litigate the voluntariness of their statements—that is what the Post-Conviction Hearing Act is for. We conclude that this court did not overlook or misapprehend the applicable law; therefore, the petition for rehearing is denied.

¶ 124 CONCLUSION

¶ 125 The State established that petitioner's handwritten statement was voluntarily given and, thus, petitioner is not eligible for relief under the Torture Act. Accordingly, we affirm the circuit court's dismissal of petitioner's claim of torture with the Commission.

¶ 126 Affirmed.

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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	98 CR 25742 01
Plaintiff-Respondent,	)	
	)	
v.	)	ILLINOIS TORTURE INQUIRY AND RELIEF COMMISSION
	)	
DARRELL FAIR,	)	
	)	Hon. Peggy Chiampas
Defendant-Petitioner.	)	Judge Presiding

Order

Petitioner, Darrell Fair, seeks relief from the judgment of conviction entered against him on January 13, 2003. Following a jury trial, Fair was convicted of first degree murder and sentenced to 50 years' imprisonment.

As grounds for relief, Fair claims that he was tortured into confessing to the crime for which he was convicted by individuals who previously served under the supervision of Jon Burge.

Background

Fair's conviction arose from the July 22, 1998 murder of Chris Stubblefield. Fair was arrested on September 1, 1998. The following day, Fair gave an inculpatory statement to police detective Maverick Porter and Assistant State's Attorney Adrian Mebane. Fair admitted that he, Chris Thomas, and Lamont Reaves were driving around looking for someone to rob. Fair had obtained a gun from a friend, which they hid under the hood of the car. When they saw the victims, Chris Stubblefield and Williams

Jones, Reaves retrieved the gun, snatched a chain off of Jones' neck, pursued a fleeing Stubblefield, took his money, and shot him in the back. Reaves returned to the car, and they drove away.

Mebane prepared a handwritten account of Fair's statement, which Fair refused to sign. Prior to trial, defense counsel Robert Cavanaugh moved to suppress Fair's statements to police. Counsel's initial motion, filed August 24, 1999, alleged that Fair was interrogated by "law enforcement officials" including "Detective Brown", Porter, and "McBane" [Mebane]. The motion claimed, *inter alia*, that Fair was not properly *Mirandized*, that he was denied his request for an attorney, and that his statements were the product of unspecified acts of physical, psychological, and mental coercion. Counsel amended the motion to suppress on March 31, 2000, adding that Detectives Ayers and Przepiora participated in the interrogation along with Brown, Porter, and Mebane. Counsel amended the motion to suppress a second time on October 25, 2000. This amendment added the first specific allegations of coercion, to wit, that "a short White police officer with cowboy boots kicked defendant on his shins" and "[d]efendant was denied his asthma medication, [and] food". The motion did not identify the officer with cowboy boots. Defense counsel subsequently withdrew the motion to suppress, informing the court that he had consulted Fair about the decision. Fair confirmed on the record that he consented to counsel's decision to withdraw the motion.

At Fair's trial in 2003, Mebane testified that, in September of 1998, he was a Cook County Assistant State's Attorney, assigned to the felony review unit. On the evening of September 2, 1998, Mebane was called to the Area 2 police station to investigate the

murder of Chris Stubblefield. Mebane arrived at Area 2 at around 6 p.m.. After speaking with with Detective Brown and Detective Al Porter, and reviewing some police reports, Mebane learned that the police had Fair in custody as a suspect.

Mebane testified that he interviewed Fair at around 7 p.m., with Brown and Porter present. Fair was not handcuffed. Mebane identified himself as an assistant state's attorney, and stated that he was not Fair's lawyer. Mebane read Fair his *Miranda* rights and Fair responded that he understood those rights. Fair agreed to discuss the Stubblefield murder with Mebane. They then had a 30-40 minute conversation during which Fair made an oral statement about the murder.

Mebane then asked if Fair would agree to have his his oral statement reduced to writing. Mebane explained the process to Fair: Fair would repeat his statement in more detail while Mebane sat next to him and write it down in front of him. Mebane told Fair that he would have an opportunity to make any changes or corrections to the written statement. Fair agreed to a written statement.

Mebane testified that, before preparing the written statement, he asked Fair about his treatment by police. The detectives left the room, and Mebane was alone with Fair for this conversation. Mebane asked Fair how he had been treated since his arrival at the station, if he had anything to eat, and if he had been allowed to use the bathroom. Fair responded that he had been treated "good" by everyone, that he had something to eat, and that he was allowed to use the bathroom when he needed to. Fair denied that he was threatened or promised anything in exchange for his statement. This conversation lasted for around 35 minutes.

Mebane then left the room and interviewed a witness to the murder, William Jones. At about 9:32 p.m., Mebane returned to Fair's interview room to prepare the written statement. Porter was also present in the interview room. Mebane again explained to Fair what a written statement was. He sat down next to Fair and began to prepare the statement. Mebane testified that preparing the statement was "a give and take": he wrote down what Fair had told him in their earlier conversation, but also asked Fair questions about what happened and wrote down Fair's responses. As Mebane wrote the statement, he reviewed it with Fair, and made several corrections at Fair's request. Mebane wrote down his initials next to each of the corrections. He asked Fair to initial next to the corrections as well, but Fair declined. Fair told Mebane that he did not want to sign anything without a lawyer present. Mebane testified that Fair did not say that he was unwilling to sign the statement when they began. Although he declined to initial any corrections, Fair did not say that he wanted to stop talking to Mebane or that he wanted Mebane to stop writing the statement. Mebane continued writing the statement and reviewing it with Fair. Mebane signed the statement and asked Fair to sign it as well. Fair again declined, stating that he did not want to sign anything without legal representation. Mebane testified that the written statement was substantially the same as Fair's oral statement from when they first spoke.

Mebane then identified the statement in court. Mebane testified that Fair's "Constitutional rights" were typewritten on the first page of the statement, and Fair's name was handwritten below. Mebane testified that he was the one who wrote Fair's name there. When the prosecutor asked why, Mebane responded:

> "That would have been his name and after we reviewed the statement if he had wished to sign he probably would have signed there indicating that he understood those rights."

Mebane then read the written statement into the record, which included Fair's account of the July 22 murder. One of the corrections stated that "Chris" popped the hood of the Camaro, after which that "King" retrieved a gun from the hood and shot the victim. Mebane testified that the statement originally stated that Fair popped the hood, and Fair later stated that Chris popped the hood. The written statement also included Fair's statement that he "was treated good by ASA Mebane", that he "had hamburgers and fries to drink and soda and water to drink", that he was allowed to use the bathroom, and that he was not threatened or promised anything in exchange for his statement. The statement also included that Fair "does not want to sign the statement without legal representation."

On cross examination, Mebane testified that the area where he printed Fair's name on the first page was the only signature line on that page. Mebane denied that he attempted to "sign" Fair's name on the Statement.

Several other witnesses testified to the facts of the murder, including the surviving robbery victim. Fair did not testify.

Defense counsel argued that Mebane's testimony and written statement were suspect, in part because the written statement was not signed by Fair. Counsel characterized Mebane's printing Fair's name on the first page as fraud. The jury nevertheless found Fair guilty of first degree murder.

During sentencing, the defense challenged the voluntariness of Fair's statement. The trial judge stated that she believed that Fair's claims of police abuse and being denied an attorney were "an absolute lie." The court then sentenced Fair to 50 years' imprisonment.

On direct appeal, Fair argued that the trial court erred in admitting his written statement, and that defense counsel rendered ineffective assistance when he withdrew the motion to suppress and failed to object to the statement's admission at trial. The appellate court affirmed his conviction. *People v. Fair*, No. 1-03-09B3 (2004) (Unpublished Order Pursuant to Rule 23).

On July 28, 2005, Fair filed a *pro se* petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (LEXIS 2012)), again asserting that his trial counsel was deficient for withdrawing the motion to suppress. The circuit court summarily dismissed the petition at the first stage of post-conviction proceedings, and the appellate court affirmed. *People v. Fair*, 2007 Ill. App. LEXIS 1437 (Ill. App. Ct. 1st Dist., 2007). The Illinois Supreme Court directed the appellate court to vacate its judgment and reconsider in light of *People v. Hodges*, 234 Ill. 2d 1 (2009). *People v. Fair*, 234 Ill. 2d 532 (2009). The appellate court again affirmed Fair's conviction. *People v. Fair*, 2010 Ill. App. LEXIS 2841 (Ill. App. Ct. 1st Dist., 2010) (Unpublished Order Pursuant to Rule 23). Leave to appeal was denied. *People v. Fair*, 237 Ill. 2d 570 (2010).

Fair then filed a petition for *habeas corpus* with the United States District Court for the Northern District of Illinois, Eastern Division. The petition claimed, *inter alia*, that police denied his request for counsel, and coerced him into giving his statement

through physical abuse, deprivation of medical treatment, food, and sleep. It also claimed that his trial, appellate, and post-conviction counsel were ineffective, that the state appellate court erred in the proceedings on his post-conviction petition, and that his sentence was excessive. The district court denied his petition. *United States ex rel. Fair v. Hardy*, 2011 U.S. Dist. LEXIS 42038 (N.D. Ill., Apr. 18, 2011).

On May 25, 2011, Fair filed a claim with the Illinois Torture Inquiry and Relief Commission ("Commission"). The petition claimed that while at Area 2 on September 1-2, 1998, Fair "was kicked in the lower leg, and threatened to be shot while Det. Rested his hand on [his] service weapon." It also alleged that Fair was chained to a metal ring on the wall and denied sleep, food, asthma medication, and access to a lawyer. The petition identifies Przepiora, Porter, and Mebane, along with an "unknown det[ective]" 5'5"-5'6", 140-150lbs. as the persons committing the alleged torture. On June 1, 2012, the Commission interviewed Fair regarding his claim. At the time, Fair had still not yet identified the officer who allegedly kicked him at Area 2.

On May 20, 2013, the Commission issued a "Case Disposition" pursuant to section 45 of the Illinois Torture Inquiry and Relief Commission Act ("Act") (755 ILCS 40/45 (LEXIS 2012)), finding that there was sufficient evidence to warrant judicial review of Fair's claim. The Case Disposition identified four bases for the Commission's determination: 1) the "troublesome nature of the handwritten statement itself" and Mebane's "dubious testimony" about the taking of the statement suggest that it was not voluntarily made; 2) the differences between Fair's statement and his co-defendant Lamont Reaves's written statement suggest that Fair's statement was not voluntary; 3)

the Commission's determination that the prosecution's case was "practically non-existent" without the statement, which "created a powerful incentive to obtain the statement"; and 4) that Fair had been claiming that he was kicked and denied asthma medication since his pre-trial motion to suppress. The Commission acknowledged in its determination that Fair's claims of abuse were not corroborated by any physical evidence, or evidence of a pattern of conduct by the officers involved.

Fair's torture claim was referred to the circuit court to review. The State filed a motion to dismiss, claiming that Case Disposition failed to state a valid cause of action under the Act because the alleged torture occurred years after John Burge was fired from the Chicago Police Department. The circuit court granted the motion, but the appellate court reversed and remanded, finding that Fair's claims fell under the purview of the Act. *Mitchell v. People*, 2016 IL App (1st) 141109.

Upon remand, this Court held an evidentiary hearing pursuant to the Act. The hearing began on April 29, 2019 and concluded on January 2, 2020. This order follows.

Evidence in TIRC Proceedings

I. Darryl Fair's Interview by the Commission

At Fair's June 1, 2012 interview by the Commission, he testified that he suffered from asthma and severe skin allergies. The first time Fair had an asthma attack/severe allergic reaction was in 1995, when he broke out in hives and couldn't breathe after cutting the grass and going jogging. Fair went to the emergency room and the doctor told him that he had allergies. He received shots for the skin reaction, breathing treatments for the asthma, and a prescription for albuterol and steroid inhalers. Fair

testified that, from 1995 until he was arrested in 1998, he had to use his inhalers every 10-20 minutes. When Fair's symptoms got very bad, he would have to go to the emergency room for treatment.

Fair testified that he was arrested at his mother's house, and was then taken to Area 2. He stated that he was at Area 2 for 30 hours until the State's Attorney took his statement. Fair stated that, when he was arrested, the officers handcuffed him immediately and he was unable to bring his inhalers with him. Fair stated that the handcuffs triggered an allergic skin reaction, and he broke into hives around his wrists. He stated that the hives spread across his hands, arms, chest, and neck. Fair stated that his asthma also flared up while at Area 2, and it felt like he was "breathing through a narrow straw". Fair stated that he believed that his symptoms were obvious to the detectives at Area 2. He stated that, at one point, that an unidentified female African American Assistant State's Attorney came into the interrogation room to see him "lying there wheezing" and covered in hives.

Fair testified that, while at Area 2, he asked everyone he came into contact with for his medication, but was denied treatment. Fair stated that Przepiora responded to his request by saying that if Fair went to the hospital and came back, that Fair would have "to start the whole process over again." Fair again asked for his medication, but Przepiora did not provide it. Fair testified that he was not provided with medication until after he gave his statement, was processed through the jail, and examined at Cermak Health Services. Fair stated that he was then given inhalers for his asthma, and

Benadryl for his allergies. Fair did not testify that he received any injections or breathing treatments at that time.

Fair testified that he continued to receive treatment while in jail, and went to Cermak several times. Fair stated that his asthma has gotten better, such that he only has to use an inhaler when the temperature changes. He also no longer suffers from the skin condition, which went away around 2000 or 2001.

As to his allegations of physical coercion, Fair testified that Przepiora threatened him with a gun when Fair was arrested at his mother's house. He also testified that a short, white officer with cowboy boots called him a murderer and kicked him in the shins one time. After kicking Fair, the officer "rested his hand on [his] revolver" and told Fair to "make a move" and give the officer a reason to shoot Fair. As of the June 1, 2012 interview, Fair still did not know the identity of this officer. Fair did recall that the officer testified in one of the other cases that Fair was charged with, in Markham. Fair testified that Brown "was a professional" and did not coerce him.

Fair testified that he was deprived of sleep at Area 2. Whenever he tried to lay down, someone would come in to question him. Fair also had trouble sleeping because of his asthma, and because it was cold where he was being held.

Fair also testified about the written statement. When Fair had been at Area 2 for about 30 hours, Porter came in and spoke to him. Porter accused Fair of being involved in the murder, and told Fair what he allegedly did. Porter told Fair to repeat these allegations "verbatim." Fair initially denied these allegations. Porter then brought him a sandwich and french fries. While Fair was eating, he agreed to say what Porter told him

to say. Fair did not testify that Porter physically abused him, threatened him, or conditioned giving Fair food on Fair giving a statement.

Then Mebane came in. Mebane "started writing something down" and asked Fair to sign it. Fair told Mebane that he wanted a lawyer, that he would not sign something that he did not do, and that he would not say anything. Mebane then printed Fair's name on the statement, near the waiver of rights, and told Fair to initial it. Fair again refused to sign. Mebane and Porter told Fair that the surviving victim, Chris Jones, gave a statement, and Fair's co-defendant had implicated Fair. Specifically, that Fair owned the car and the gun that were used in the shooting, and that Fair "popped the hood" to allow the shooter access to the gun. Mebane and Porter told Fair that he could "make things easier for [himself]" if he signed the statement, that they could help him out if he signed, and that he would go to jail if he did not. Fair did not sign the written statement. Fair stated that neither Porter nor Mebane physically coerced him to sign the written statement.

Fair testified that his trial counsel, Cavanaugh, drafted a motion to suppress with all of the above allegations, but "rushed through it' and never filed the motion. Fair stated that Cavanaugh died three months after trial.

At the conclusion of the interview, the Executive Director of the Commission told Fair to find the "[n]ame of the detective with the cowboy boots."

II. Darryl Fair's Testimony at the Evidentiary Hearing

Fair also testified at the evidentiary hearing before this court.

Fair testified that, on September 1, 1998, he was living at his mother's house. At around 11:30 to 11:45 in the morning, he was on the first floor watching television when two plain clothes detectives knocked on the front door. The detectives asked to talk to Fair. When Fair asked if the detectives had a warrant, they drew their guns and threatened to shoot him if he did not open the door. Fair retreated back to the TV room, and heard the detectives kicking at the front door. One of the detectives then called the house's phone and again told Fair to open the door. Then the television went out. Fair testified that he eventually opened the door because the detectives' kicks were shaking the door frame loose from the wall.

When Fair opened the door, the detectives told him that he was under arrest for murder, and then handcuffed him on the couch. Fair testified that he was only wearing shorts at the time, and asked the detectives to bring a shirt, some shoes and his asthma medication. The detectives got a shirt and shoes, but did not bring his medication.

Fair testified that, at the time, he suffered from chronic asthma and a skin condition. He first started experiencing symptoms in 1995 after he had cut the grass and went jogging. He started having trouble breathing, welts appeared all over his skin, and he went to the emergency room. Fair testified that he was hospitalized six other times between 1995 and the date of his arrest. Fair stated that he was prescribed two different inhalers for the asthma and pills for the skin condition.

Fair testified that the stress from his arrest began to trigger his asthma. He stated that his asthma was usually triggered by stress or overexertion. On cross-examination, Fair testified that his asthma began to flare up around when he was transported from

his mother's house. His skin also started to welt up on his wrists, where he was handcuffed.

After arresting Fair, the detectives transported him to the Area 2 police station. Detective Przepiora took Fair to an interview room on the second floor. Fair stated that it was a windowless room, about 15 by 20 feet wide. The room had only one door, no clock, no carpet, and no bedding. There were metal rings along one of the walls, a steel bench, and a table and chairs in the middle. Przepiora handcuffed Fair's left arm to one of the rings on the wall, and Fair sat down on the steel bench. He asked Przepiora for his asthma medication and to speak with a lawyer. Fair testified that Przepiora was "nonresponsive" like he did not hear Fair, and left the room two to three minutes later.

Next, a short, white detective with cowboy boots came into the interview room. Fair identified a photograph of Detective Michael McDermott as the short white detective. Fair testified that McDermott got in his face and called him an "F'ing gang banger" or an "F'ing killer". While Fair was still handcuffed to the wall, McDermott kicked him in his left shin. When McDermott drew back his foot to kick Fair again, Fair reached down to protect his knee. McDermott then put his hand on his gun and told Fair to give him a reason to shoot Fair. McDermott then kicked Fair several more times. Fair tried to ward off these kicks, but some of them made contact. Fair testified that the flesh was scraped off the bone of his knee, and it was bleeding. McDermott eventually left the room.

Two hours later, Przepiora returned. Fair told Przepiora about being kicked, asked for a lawyer, and asked for his medication. Przepiora uncuffed Fair's hand from

the wall and left the room. Przepiora returned three or four times. Around the third time, Przepiora began asking about the murder in this case. Fair denied any knowledge of the murder, and again asked for a lawyer. Przepiora left the room. Fair began kicking at the door of the interview room and asking for a lawyer. Przepiora returned to the room and recuffed Fair to the metal ring on the wall. Fair stated that he was never provided a lawyer at any time that he was at Area 2.

Several hours later, McDermott returned with a handful of files. Fair was still handcuffed to the Wall. McDermott told Fair that he knew Fair was involved with a murder and two armed robberies. McDermott showed Fair photographs, including one of Stubblefield. McDermott said that the police had a witness and statements against Fair, and that Fair might as well tell them what he knew. Fair did not recall whether or not he told McDermott about his asthma symptoms. Fair did not testify that McDermott kicked or otherwise abused him this second time. McDermott eventually left.

Later that evening, Detective Porter came to interview Fair. Fair was still handcuffed to the wall. Porter said that they had evidence that Fair was involved in the murder and that Fair needed to help himself. Fair testified that Porter was not aggressive, and was acting like he was trying to befriend Fair. Fair told Porter about McDermott kicking him, asked for his asthma medication, and asked for a lawyer. Porter turned the conversation back to the murder. Fair did not answer any questions about the murder, and Porter eventually left.

Fair testified that he could not sleep that night, or at any time while at Area 2. The lights were on all night. His arm was still handcuffed to the wall, two to three feet

above the bench, and he testified that he could not comfortably lay on the bench. He had not eaten since the night before and was hungry.

Detectives Porter and Brown eventually came to talk with Fair about the murders. Fair again asked for a lawyer and did not give a statement. Porter seemed irritated about Fair asking for a lawyer, but Fair did not testify that Porter abused him. Around five to six hours later, sometime between the morning or the evening of September 2nd, Porter and Brown returned with a female state's attorney. This state's attorney allegedly commented "what's wrong with him?" Fair testified that his whole body was covered with welts, which had started where he was handcuffed. Fair's breathing was also getting worse, and he "couldn't say a whole sentence without starting to cough".

Eventually Porter returned alone. This time, Porter eventually told Fair that if he wanted something to eat, Fair had to "give [them] something". Fair then said that he was at the lounge selling alcohol on the night of the murder. Porter then left and brought Fair two cheeseburgers and some fries. At some point, Brown returned to the interview room, and was alone with Fair. Either during or after eating, Fair began talking to Brown about the night of the murder, while Porter was out of the room.

When Porter returned, he told Fair that he was not a target of their investigation, but that they needed Fair to give a statement against Lamont Reaves. Porter said that he needed Fair to say that Fair and "Snake" (Reaves) went to rob someone and Fair saw Snake shoot them. Porter said that he would tell Fair what to say, and that once Fair gave this statement, they would release him. Fair testified that he agreed because he

was in "survival mode", was struggling to breathe, and was not sure what would happen to him if he kept on denying involvement.

After Fair agreed to give a statement, Mebane came into the interview room. Mebane introduced himself and asked Fair some background questions. Mebane did not give Fair any options to have his statement memorialized, such as having a court reporter come and transcribe it. Then Fair and Porter discussed what happened the night of the murder. Fair testified that Porter did not tell him exactly what to say, rather, Porter gave him an "outline" of what he wanted Fair to say, and Fair added his own details to make it sound believable. On re-cross, Fair testified that he was "discombobulated" during this interview, due to his asthma and skin irritation.

Fair testified that Mebane was "calm and collected" through the interview, and was "writing stuff down" during Fair and Porter's back and forth. Fair stated that he was never alone with Mebane. Mebane eventually asked Fair to sign the statement that he had written. Fair testified that he realized that some of the things that Porter had him say also implicated Fair in the murder. It occurred to Fair that Porter and Mebane were trying to charge Fair with the murder along with his co-defendant. Fair then told Mebane that he wanted to talk to a lawyer before signing anything. Fair testified that he decided to not sign because he reasoned that signing his name to the allegations was "a little more" than just giving an oral statement. When Fair refused to sign, Mebane became anxious and told Fair, "[y]ou already said everything, just sign it". Mebane and Porter asked Fair to sign several more times, and Fair continued to refuse. Mebane and Porter eventually gave up and left.

Fair was then taken to the Area 2 lockup. He was then taken to 26th and California to be processed into the Cook County Jail. Fair was not allowed a phone call until several days later.

Fair testified that Cavanaugh was his trial attorney for the murder. Fair stated that he told Cavanaugh about being kicked at Area 2, and identified those allegations in the October 25, 2000 amended motion to suppress that Cavanaugh filed. Fair testified that Cavanaugh wanted to withdraw the motion to suppress because, even if the judge suppressed the written statement, they would likely not suppress the oral statement. Cavanaugh told Fair that they could use the written statement to show the jury that Fair did not sign it, and that Mebane wrote Fair's name on the statement. Fair testified that he went along with Cavanaugh's advice.

On cross-examination, Fair testified that detectives at Area 2 also talked with him about two armed robberies, one of which was assigned to Markham, and one of which was assigned to the same judge that heard the murder.

Fair testified on cross that when he asked McDermott for medical treatment, McDermott responded that if Fair went to the hospital, then the whole process would start over again. Fair claimed that he responded by asking for his medication, but McDermott did not take him to the hospital.

Fair testified on cross that he learned that the detective who kicked him was McDermott when he saw McDermott's name on his arrest report and on police records from one of his interviews at Area 2. Fair stated that, during his second encounter with McDermott at Area 2, McDermott talked to him about the murder and the two armed

robberies. Fair identified Petitioner's Exhibit 4 as one of the police records that helped him to identify who McDermott was. Exhibit 4 is a "general progress report" dated September 2, 1998, signed by McDermott. It indicates that Fair made a statement at 1915 hours (7:15 p.m.) regarding several armed robberies. At first, Fair did not recall whether McDermott had testified at a hearing in one of Fair's robbery cases in Markham. Fair eventually stated that McDermott did testify at a hearing in Markham. Fair admitted that he had previously received a document listing all of the witnesses expected to testify at Markham. On re-cross, Fair stated that he received Exhibit 4 in response to a FOIA request, sometime after his direct appeal in this case was affirmed. Fair concluded that McDermott must have been the detective who kicked him because he was only interviewed twice: by the detective who kicked him, and by Porter. Fair then admitted that he was interviewed by "numerous other officers", but that McDermott and Porter were the only ones who had paperwork and showed him things. Fair also admitted that several officers were named in the police reports. Fair also testified that McDermott did not write anything down when he interviewed Fair.

Fair testified on cross that he determined that the officer who kicked him was McDermott after he saw a photograph of McDermott. Fair stated that one of the inmates who had helped him with his prior post-conviction petitions had an article from the Sun Times or the Tribune about officers who had worked with Jon Burge at Area 2. Fair testified that some of these inmates had their own encounters with detectives at Area 2, and had their own files on their cases. Fair did not recall any of these other inmates' names or nicknames. The article had photographs of some of the officers, and Fair

recognized McDermott's photograph. This allegedly occurred after his June 1, 2012 interview with the Commission, but before he received the reports with McDermott's name. Fair testified that the photograph from the article was different from the one he testified to on direct examination. Fair acknowledged that Burge was not involved in his case.

Fair testified on cross that he did not receive asthma medication until his admission to Division 1 of the Cook County Jail, which was around four to five days after his arrest on September 1, 1998. Fair stated that he continued to have difficulty breathing until he received medication at Division 1. Fair testified that they made a notation of his condition on his records at Cermak. Fair identified a document entitled "moving arrestee out of & into arrest/detention facility", which he attached to his claim form that he filed with the Commission. This document indicated that Fair was screened on September 3, 1998 at 1:40 a.m.. It indicated that Fair did not "have obvious pain or injury", but that he "claims to take medication for asthma/declines any treatment at this time." Fair also identified a photograph of his head taken on September 4, 1998. Fair testified that the photograph was taken when he was admitted to the Cook County Jail, and that it truly and accurately depicted how he looked on that day. Fair then stated that it was possible that he received medication when he was screened at Cermak, before arriving at Division 1.

Fair admitted on cross that he told the Commission that he was only kicked once.

Fair denied on cross that Mebane told him that Mebane was going to write down the statement and ask Fair to initial it when he was done. Fair also denied that Mebane

asked him to initial any part of the handwritten statement. Fair testified that he agreed to the oral statement because he was abused, but that he still refused to sign the written statement. On redirect, Fair testified that he agreed to give an oral statement because Porter told Fair that he was not the target of the investigation, and decided to not sign the written statement when he realized that he was a target. He admitted on cross that the abuse by McDermott happened hours before he gave a statement, and that nobody else at Area 2 abused him.

Fair testified on cross that his asthma symptoms have improved such that he is now able to run 5Ks. On redirect, Fair testified that he continued to suffer from asthma until around 2015. He still has an inhaler that he uses as-needed.

III. Adrian Mebane's Testimony at the Evidentiary Hearing

Mebane first testified about his general practices for interviewing suspects during his time working in felony review.

Mebane testified that he would ask questions to determine whether suspects were mentally and physically able to have a discussion with him. He would ask whether they had been drinking or under the influence of any other kind of substance. He would ask whether they had an opportunity to go to the bathroom, and had any food. He would ask whether the suspect had been treated well by police, and by him. Mebane did not know whether he had ever asked a suspect how much they had slept. Mebane stated that he would document however the suspects described that they were treated.

Mebane testified that he would explain to a suspect the different methods that the suspect's statement could be memorialized, to wit: an oral statement, a written statement, and a statement documented by a court reporter.

Before taking a suspect's written statement, Mebane would tell them that they would be asked to sign the statement at the end. He would also read a suspect their *Miranda* rights. Mebane testified that it was his practice to print their name on the line below the pre-printed *Miranda* warnings on the statement form, and ask them to sign next to their name.

If any changes were made to the statement, Mebane stated that his general practice was to initial next to the change, and ask the suspect to initial as well.

With respect to Fair, Mebane testified that he did not observe all of Fair's interrogation. He arrived at Area 2 at about 6:00 p.m. on September 2, 1998, near the beginning of his shift. Mebane did not independently recall what he did when he arrived at the police station, but stated that he likely talked to the detectives and read whatever documents were available at the time. He did not recall reviewing Fair's arrest report at that time. Mebane did not recall whether he had investigated how long Fair had been at Area 2. Mebane stated that, if he was concerned that a suspect was in custody for too long, he would have documented it. He did not recall asking Fair whether Fair had an opportunity to sleep. Mebane asked Fair whether he had been fed. He recalled only that Fair responded that he had hamburgers, fries, and a drink. Mebane did not recall observing anything that would have given him a reason to be concerned that Fair did not understand what they were discussing.

Mebane did not recall whether he investigated Fair's treatment by police. Mebane testified that he asked Fair whether Fair had been treated well by Mebane, and by police. After refreshing his recollection with the written statement, Mebane acknowledged that he only documented how Fair said that he had been treated by Mebane, but not his treatment by police. Mebane did not recall what Fair told him about how Fair was treated by police. Mebane reviewed 33 other written statements that he prepared while he was in felony review, and acknowledged that in each of those statements he documented the suspect's statement about how they were treated by both Mebane and the police.

Mebane recalled speaking to Fair twice: first to introduce himself to Fair and get a general statement about what took place, and the second time to actually draft the written statement. Mebane then testified about the substance of the written statement. He did not independently recall much of what Fair told him about the murder. Nor did he independently recall his conversations with Brown or Porter, or how Fair looked on September 2. Mebane recalled that Porter was present during the handwritten statement, but did not recall whether Porter was present for the entire statement. Mebane did not recall whether Porter was in the room when Fair said that he popped the hood, and then that it was Chris who popped the hood. Mebane testified that it did not appear to him that Fair's statement was staged in any way. Mebane recalled that Fair said that he would not sign anything without a lawyer. Mebane did not recall asking Fair why he would not sign anything without an attorney. Mebane recalled that

Fair agreed to continue discussing the murder, even though he did not want to sign the statement.

On cross-examination, Mebane denied fabricating the written statement, conspiring with Porter to attribute a false statement to Fair, or trying to frame Fair for a crime that he did not commit. He testified that he wrote the statement contemporaneously with his interview of Fair. He also testified that Fair never asked Mebane to get a lawyer for him. Mebane recalled that he was alone with Fair when he asked Fair how he had been treated. Mebane stated that, at trial, he testified that Fair told him that he had been treated good by "everyone". Mebane stated that Fair never complained that he had not been able to sleep, and that Fair was responsive during the interview. Fair did not appear to have any breathing difficulties, hives, markings, or be in any sort of distress. Fair did not complain of any injuries, state that he was having an asthma attack, or ask Mebane for medical attention. Fair did not complain of being abused by police.

Mebane testified that, in other cases, he had interviewed suspects who refused to sign after Mebane had prepared a written statement. Mebane stated that, just as with Fair's statement, he documented that the person did not want to sign. Mebane denied forcing Fair to sign the statement. Mebane testified that he spoke with Fair while preparing the written statement, and wrote down what Fair said. He denied getting the details of the statement from Porter. He denied telling Fair that he could "make things easier" for himself. He denied threatening to put Fair in jail if he did not sign the

statement. He denied getting angry when Fair refused to sign the statement. Mebane testified that no-one from the Commission contacted him about this case.

On redirect, Mebane testified that, at Fair's murder trial, he originally testified that he did not ask Fair to initial anything in the written statement until about halfway through the interview. Mebane stated that Fair told him that he would not sign anything at some point during the statement, as well as at the end. Mebane acknowledged that it was his practice to ask suspects to sign the *Miranda* warning before getting into the substance of a written statement, but he did not recall whether he asked Fair to sign the *Miranda* warning before starting the written statement in this case. On recross, Mebane stated that he did read Fair his *Miranda* rights at the beginning, and that Fair orally confirmed that he understood them.

IV. Atsia Fair's Testimony at the Evidentiary Hearing

Atsia Fair testified that she is Fair's mother. Atsia lives in Chicago, and is retired from the Chicago Transit Authority. Fair lived with Atsia his entire life up until his arrest, aside from the time that he was in the military.

Atsia testified that, in September of 1998, Fair had asthma and required medication. She took Fair to the hospital several times as an adult for his breathing problems, where he would receive breathing treatments and prescriptions for inhalers. When Fair's breathing was labored, sometimes his inhaler was enough to relieve his symptoms, but other times he would have to go back to the hospital for breathing treatments. On cross-examination, Atsia testified that she was not aware that Fair is now running 5Ks.

Atsia also testified that Fair would break out in hives when he cut the grass or was around greenery. On cross-examination, Atsia testified that she did not observe anything else that triggered Fair's hives. She also never observed Fair break out in hives at the same time that he was having trouble breathing. Atsia did not recall exactly when Fair developed asthma and his skin condition, but he did not have them as a teenager.

On September 1, 1998, she was at work when Fair was arrested at her home. She arrived home from work in the late evening. When Atsia got home, she noticed that the front door frame was damaged, and the locks on the front door did not line up with the frame. The inside of her house was in a state of upheaval, things had been moved around and the television was disconnected. Fair was not home.

V. Victor Way's Testimony at the Evidentiarty Hearing

Victor Way testified that he was arrested in February of 1998 for an armed robbery at a Kentucky Fried Chicken ("KFC") in Chicago. He was transported to Area 2, where Detective Porter questioned him about the robbery. He was eventually asked to sign a handwritten statement by Porter and an Assistant State's Attorney, who was also present for the interrogation. Way identified Petitioner's Exhibit 35 as a copy of the handwritten statement in open court. Exhibit 35 indicates that it was taken by Porter and Mebane. It is a copy of one of the statements included in Exhibit 8, which Mebane testified was one of the written statements that he took while working at felony review. Way testified that he refused to sign the statement because it was inconsistent with what he told Porter and the State's Attorney about the robbery. Way testified that some of the allegations of the statement were true, namely that he entered the KFC and

attempted robbed it with a gun. But some of the allegations were false: Way never told Porter that he bought the gun for $25; he never said that he agreed to split the proceeds of the robbery with the person who drove him to the KFC; and he did not take money out of the register, because he was detained by the police mid-robbery. Way testified that he was not allowed to have an attorney present during his interrogation. When he refused to sign the statement, he was taken to the holding cells in Area 2. Way eventually pled guilty to the KFC robbery, in addition to several other robberies, and was sentenced to 30 years' imprisonment.

On cross-examination, Way admitted that he did not ask to stop the questioning during the taking of his statement. He stated that he was treated well by Porter and the State's attorney. Way stated that he was never asked by Porter or the State's attorney to make changes to the statement, and that he did not offer to make any changes to the statement after he read it. He acknowledged that the last sentence of the written statement read, "after reading the statement, Victor states that he wants an attorney before signing anything." Way also admitted that he was represented by counsel in the armed robbery case and never challenged the written statement in court. Way testified that Fair's attorney in these TIRC proceedings was the first person to ask Way why he did not sign the statement.

On redirect, Way stated that he did not challenge the written statement because he admitted to his guilt in the robbery.

VI. McDermott

The State represented that they were initially in communication with McDermott, and that he was available to testify early on in these proceedings. However, the State indicated that McDermott became uncooperative. The State then attempted to serve McDermott at his home with a subpoena to testify, but were unsuccessful. Counsel for Fair then made nine attempts to serve McDermott at his home, and were also unsuccessful. Counsel for Fair reached out to McDermott's attorney in an unrelated post-conviction proceeding, but counsel did not accept service on behalf of McDermott. McDermott was ultimately never served with process, and he did not testify.

VII. Evidence of Misconduct by McDermott

In addition to witness testimony, Fair offered evidence relating to allegations of prior misconduct by McDermott, including:

A deposition transcript in which McDermott was questioned regarding allegations that he and other detectives committed various acts of physical abuse against multiple suspects in several cases. McDermott asserted his Fifth Amendment rights in response to each question.

Documents from a Cook County State's Attorney's Office investigation wherein McDermott was found to have lied to the Office of Professional Standards, and at a suppression hearing.

A petition for, and an order granting, McDermott immunity to testify in the federal court trial of Jon Burge.

A transcript from a suppression hearing regarding a 1991 murder investigation. McDermott was involved in the investigation, and a different detective was alleged to have destroyed defendant David Randall's seizure medication during his interrogation, and squeezed his testicles until he confessed.

A report of the Special State's Attorney regarding allegations that McDermott abused Alphonso Pinex in 1985, to wit: that McDermott hit the suspect in his ribs, kneed him, and held him down so that another detective could beat him.

A transcript from a suppression hearing regarding a 1990 armed robbery investigation. It was alleged that McDermott denied defendant Tony Anderson a phone call, put a gun to his head and threatened to blow his brains out. Fair also provided an affidavit from a co-defendant, Robert Allen, who overhead Anderson crying out during the interrogation. McDermott then threatened Allen with the same treatment.

A transcript regarding a 1992 murder investigation, wherein McDermott and other officers were alleged to have "started popping their knuckles" while interrogating Kieth Mitchell, questioned him outside of the presence of his mother, and while his lawyer was on the way to the police station. Fair also provided an order from Mitchell's post-conviction proceedings, vacating his conviction.

Affidavits from two witnesses interrogated by McDermott in connection with the same 1992 murder investigation. Jermaine Bates alleged that McDermott hit him in the head to get him to give a statement against Mitchell. Lanell Townsend alleged that McDermott smacked him on the face, choked him, banged his head against the wall, and squeezed his handcuffs tighter, to get him to give a statement against Mitchell.

A complaint regarding a 1993 murder investigation, wherein McDermott was alleged to have slapped Joseph Carroll in the face and pushed his head against a radiator. The Office of Professional Standards determined that these allegations were unfounded.

A complaint by Marvin Scott that, in 1993, McDermott ignored his invocation of his right to counsel, and struck him in his eye and ribs during an interrogation.

A complaint by Michael Thomas that, in 2001, McDermott, Przepiora, and another officer slapped him, punched him, cuffed him to a wall, and denied him food, water, sleep, and access to the bathroom during an interrogation.

An affidavit by John Knight stating that, on an unspecified date, McDermott choked him, slapped him in the back of his head, pointed a gun at his head and threatened to kill him during an interrogation.

A transcript from a special grand jury proceeding in 2004 wherein McDermott invoked his Fifth Amendment rights at the outset of questioning.

Fair also provided a chart listing allegations of abuse in cases from 1984 through 1999. Counsel for Fair represented that this chart was compiled by the Commission with respect to allegations of abuse by McDermott. However, McDermott's name appears on the chart indicating that he was granted immunity in the Jon Burge federal trial. The chart does not specifically indicate that the abuse described was committed by McDermott. The chart does list cases for which Fair included documentation, including Frank Bruchette, Jerry Thompson, Jeffrey Howard, Andrew Maxwell, Tony Anderson, David Randall, and John Knight. However, some of that documentation indicates that

the defendant accused a detective other than McDermott of the abuse described in the chart, including Shaded Mumin and David Randall. Thus, it is not evident from the chart that the abuse described in the other listed cases, for which Fair has not provided documentation, was committed by McDermott.

VIII. Other Evidence

Fair provided other documentary evidence, including an affidavit from several inmates stating that they observed Fair having breathing problems in the jail in 2000. Fair provided medical records subpoenaed from Roseland Community Hospital, documenting his hospitalization and treatment for breathing problems and an allergic skin reaction in October and November of 1995.

Fair's arrest report states that he was arrested on September 1, 1998 at 1:30 p.m. McDermott is listed as one of the arresting/assisting officers.

Legal Standard

The Illinois Torture Inquiry and Relief Commission Act ("Act") "establish[ed] an extraordinary procedure to investigate and determine factual claims of torture related to allegations of torture." 755 ILCS 40/10 (LEXIS 2012). Pertinent to this case, the Act defined a claim of torture as "a claim on behalf of a living person convicted of a felony in Illinois asserting that he was tortured into confessing to the crime for which the person was convicted and the tortured confession was used to obtain the conviction and for which there is some credible evidence related to allegations of torture committed by Commander Jon Burge or any officer under the supervision of Jon Burge. " 775 ILCS 40/5(1) (LEXIS 2012).

The Act established the Illinois Torture Inquiry and Relief Commission (Commission), which is an independent commission under the Illinois Human Rights Commission for administrative purposes. 755 ILCS 40/15(a) (LEXIS 2012). The Commission consists of eight voting members, who are appointed by the governor, with the advice and consent of the senate. 775 ILCS 40/20(a) (LEXIS 2012). "If 5 or more of the 8 voting members of the Commission conclude by a preponderance of the evidence that there is sufficient evidence of torture to merit judicial review, the case shall be referred to the Chief Judge of the Circuit Court of Cook County ***." 775 ILCS 40/45 (LEXIS 2012).

When a case is referred to the circuit court for review, "[t]he court may receive proof by affidavits, depositions, oral testimony, or other evidence." 775 ILCS 40/50(a) (LEXIS 2012). The court is not bound by the findings of the Commission. The Commission's disposition of a torture claim is not a final determination that the claimant proved he was tortured. *People v. Christian*, 2016 IL App (1st) 140030, ¶ 79. (Holding that a determination by the Commission is "simply [a] finding that there is sufficient evidence to proceed to the next step, namely, a hearing before the circuit court."). Furthermore, the Commission's determination does not raise collateral estoppel concerns and is not the "law of the case". *Id.* at ¶¶ 84, 104.

The petitioner's initial burden at this stage of proceedings under the Act is the same as a petitioner's burden at third-stage evidentiary hearing under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (LEXIS 2012)). *People v. Wilson*, 2019 IL App (1st) 181486 ¶ 52. The petitioner is not initially required to prove that his confession

actually resulted from coercion; rather, his initial burden is to show that newly-discovered evidence would likely have resulted in the suppression of his statement. *Id.*

If the petitioner satisfies his initial burden, the State has the burden of proving petitioner's statement was voluntary by a preponderance of the evidence, just as it would at a motion to suppress hearing. See *Wilson*, 2019 IL App (1st) 181486 ¶¶ 53-54. If the State establishes a *prima facie* case that the statement was voluntary, the burden shifts back to the petitioner to present evidence that the confession was involuntary. *Id.*

Analysis

Fair argues that his testimony and other evidence establishes that he was coerced into making an oral statement to police, and that had he presented it at a suppression hearing it would have resulted in the suppression of that statement.

Considering the parties' respective burdens of proof in this hearing, the issues before the court are ultimately 1) whether Fair has provided sufficient evidence that he was tortured, and 2) if so, whether or not his statement was voluntary.

I. Allegations of Torture

a. Evidence of abuse by McDermott in other cases

This Court first considers whether Fair's evidence of prior alleged abuse at Area 2 is relevant to his claim. Evidence of prior misconduct may be relevant both to establish a pattern of abuse by police, and to impeach the credibility of testifying officers. *People v. Mahaffey*, 194 Ill. 2d 154, 169 (2000). Prior allegations of police brutality "have been found admissible where they involved the same officer or officers as in the defendant's case, where they involved similar methods of abuse, and where they

occurred at or near the time of the defendant's allegations." *People v. Reyes*, 369 Ill. App. 3d 1, 19 (1st Dist. 2006) (citing *People v. Patterson*, 192 Ill. 2d 93, 140 (2000)).

In *Patterson*, the defendant claimed that his confession was the result of torture at the hands of Lieutenant Jon Burge and other officers at Area 2. *Patterson*, 192 Ill.2d at 107-08. On post-conviction review, the defendant cited to numerous prior allegations of abuse contained in a report prepared by the Office of Professional Standards (OPS), several appellate court decisions, and 60 additional torture cases involving Burge. *Id.* at 139-42. Our supreme court found that these allegations were material because (1) the volume of incidents established a pattern and practice of torture; (2) they involved the same officers that defendant identified as torturing him; (3) they were "strikingly similar" to defendant's specific allegations that he was suffocated with a typewriter cover, threatened with a gun, and beaten in a manner that did not leave physical evidence; and (4) that defendant had "consistently claimed that he was tortured" ever since his first court appearance. *Id.* at 145.

1. First *Patterson* Factor: Pattern and Practice

The prior allegations of misconduct by McDermott from 1984 through 2002 satisfy the first factor of the *Patterson* test. Even if allegations of abuse are remote in time, they may be relevant to establishing a pattern of police misconduct occurring over a long period of time. See *Patterson*, 192 Ill. 2d at 145; *Reyes*, 369 Ill. App 3d at 19 (finding that prior allegations over a course of 10 years were relevant to establishing a pattern and practice of abuse).

2. Second *Patterson* Factor: Same Officer

The prior allegations of misconduct also technically satisfy the second *Patterson* factor because Fair eventually identified McDermott as the detective who allegedly abused him. However, the inconsistencies in these allegations bear on the fourth *Patterson* factor, which is discussed *infra*.

3. Third *Patterson* Factor: Similar Allegations of Abuse

As to the third *Patterson* factor, it is not enough that a defendant provides evidence that the detective at issue abused other suspects. The specific methods of abuse in these other cases must be "strikingly similar" to those described by the defendant. See *Patterson*, 192 Ill.2d at 145; *People v. Upshaw*, 2017 IL App (1st) 151405 ¶ 80 (allegations that defendant was beaten with a stick on the way to the police station not "strikingly similar" to allegations of "repeated beatings by punching, kicking, hitting with a flashlight and a rubber hose, choking, and the use of electric shock and suffocation."). Here, some of the evidence included allegations that McDermott threatened other suspects with a gun. However, the methods of abuse described are quite different from Fair's claim that McDermott rested his hand on his gun and told Fair to give him a reason to shoot: Tony Anderson alleged that McDermott put a gun directly to his head and threatened to blow his brains out; John Knight also alleged that McDermott put a gun to his head and threatened to kill him; and Ricky Robinson alleged that McDermott threatened to drive him to an alley, shoot him, and claim that Robinson provoked him. While some of the reports and transcripts allege that McDermott kicked or kneed other suspects during interrogations, it was during

beatings where the suspects were struck in a variety of ways, often by multiple detectives. And none of the evidence provided describes McDermott as wearing or kicking suspects with cowboy boots. Accordingly, Fair's allegations against McDermott are not "strikingly similar" to the police abuse described in his new evidence.

4. Fourth *Patterson* Factor: Consistent Allegations of Abuse

As to the fourth *Patterson* factor, Fair testified that he informed his trial counsel about his treatment at Area 2. However, counsel did not include any specific allegations of physical abuse in the first two motions to suppress. It was not until more than a year after the initial motion to suppress was filed that the defense alleged that Fair was kicked by an officer with cowboy boots. On one hand, the first two motions to suppress appear to be boilerplate filings with general allegations of physical and mental coercion, which counsel may have intended to amend with more specific allegations at a later date. On the other hand, this Court cannot help but wonder why counsel waited 14 months to add a single sentence stating that Fair was kicked in the leg, in a motion that already alleged physical coercion. Mr. Cavanaugh passed away shortly after trial, and this Court does not have any testimony from him as to what Fair told him, and his thought process in drafting these three motions. Regardless, Fair has consistently alleged that he was kicked by a white officer with cowboy boots since prior to trial. This, however, is where the consistency ends.

Fair did not allege that he was threatened with a gun until well after his trial and conviction. And his allegations of abuse have changed even during the pendency of his torture claim. In 2012, Fair specifically testified that he was only kicked once, but in

2019, Fair testified that McDermott repeatedly kicked him in the shins until it cut his skin and he started to bleed.

Critically, Fair did not allege that McDermott was the one who abused him until after his 2012 interview. Fair listed the names of the other detectives who interviewed him in his first motion to suppress, filed in 1999, but was unable to identify McDermott until 2019. Fair admitted that he was in possession of reports which listed McDermott as one of the individuals involved in his case, but claimed that he did not associate McDermott's name with the person who kicked him until receiving a copy of McDermott's report regarding Fair's statement at Area 2. Fair testified that he did not receive this report until after he filed his claim, and that the report helped him put a name to the detective who kicked him because that detective came back a second time to question him about the armed robberies. However, in 2012, Fair did not tell the Commission that the detective who kicked him questioned him about any of his cases. Nor did Fair tell the Commission that the detective came back into the interview room a second time after abusing him. Furthermore, McDermott's report does not corroborate Fair's testimony about this second interview. While Fair claims that McDermott interviewed him on September 1st, the report is dated September 2nd. And the report indicates that Fair made a statement at 7:15 p.m., which is around when Fair gave his oral statement to Mebane.

Fair did tell the Commission that the detective who kicked him also testified at a hearing in his robbery case at Markham. However, when Fair testified before this Court, he initially did not recall that McDermott testified at Markham. Fair eventually testified

before this Court that he was previously provided with a list of the State's witnesses for the motion to quash arrest hearing at Markham, which would reflect whether McDermott actually testified. Fair has not produced this list, a transcript of the motion to quash hearing, or any other evidence of who testified at this hearing.

Assuming that McDermott did testify at Markham, he would have stated his name for the record at the motion to suppress hearing. Fair testified that he was present at this hearing, and recognized McDermott as the detective who kicked him. So why did Fair not remember McDermott's name from the hearing? Even if Fair had forgotten McDermott's name by the time that he filed his claim in 2011, it does not explain why Fair did not include McDermott's name in his earlier filed direct appeal or 2005 post-conviction petition, which related to his allegedly coerced confession.

The circumstances surrounding Fair's alleged identification of McDermott after 2012 are also troubling. Fair testified that he first saw a photograph of McDermott while working with other inmates who had also been arrested at Area 2, which is why they had the news article about Area 2 detectives with McDermott's photograph. But Fair testified that these inmates also helped him file his earlier post-conviction petition, which directly related to his allegedly coerced confession from Area 2. So why is it only now, that these other inmates are showing him articles about detectives at Area 2? What changed between the filing of his post-conviction petition and now?

Fair only identified the detective who allegedly abused him after his 2012 interview. The Commission repeatedly asked Fair to obtain this detective's name, and impressed upon him the importance of this information.

And when Fair did finally identify the previously unnamed detective, it was from a news article about Jon Burge. Fair testified that "I associated him [McDermott] with the Jon Burge thing."

Considering all of the above, this Court does not find credible Fair's alleged ignorance about the identity of his alleged abuser, or his subsequent identification of McDermott. The above evidence supports the inference that Fair fabricated these allegations against an unnamed detective from the start. That it was the Commission's request for Fair to name the detective that gave Fair a motive to fabricate the name as well. Thereafter, Fair picked McDermott's photograph in an article about Jon Burge and torture at Area 2 after seeing his name in some of the reports in this case. The evidence also supports the inference that Fair changed his story to account for McDermott's report, by adding that McDermott interviewed him a second time after allegedly kicking him.

Therefore, Fair has not been consistent in his allegations of the abuse that he suffered, or who abused him. The latter is significant because the only reason why the allegations of prior misconduct are relevant is because Fair named McDermott. Considering all of the *Patterson* factors, this Court finds that the evidence of prior allegations of abuse by McDermott is of little relevance.

b. Evidence of abuse/torture during Fair's interrogation

Even if the evidence of other abuse at Area 2 were relevant, Fair's initial burden is to establish that his new evidence would have changed the outcome at a pre-trial suppression hearing. *Wilson*, 2019 IL App (1st) 181486 ¶ 52. Thus, this Court must

consider the new evidence of abuse in conjunction with the evidence of what transpired during Fair's interrogation at Area 2.

McDermott did not testify in this case, and Counsel for Fair asks this Court to draw an adverse inference regarding McDermott's failure to testify. Courts have held that, in proceedings pursuant to the Act, the court may draw an adverse inference from a witness's refusal to testify, and in some circumstances, must draw such an inference. See *People v. Gibson*, 2018 IL App (1st) 162177, ¶¶ 86-108; *People v. Whirl*, 2015 IL App (1st) 111483, ¶. However, those cases involve witnesses who appeared in court and asserted their Fifth Amendment rights when asked about the alleged abuse. Here, McDermott was not even served with process, was not in violation of any court order, and did not refuse to answer specific questions about Fair's case. Counsel has not provided any authority to support the proposition that an adverse inference is required to be drawn against a witness who allegedly avoids service of process. This Court has researched the issue, and has found no such authority. This Court acknowledges the representations made by the parties regarding their attempts to secure McDermott's testimony, including the fact that McDermott was apparently available early on in the proceedings, that the State was cooperative in trying to produce McDermott to testify, and the fact that Counsel for Fair's documented attempts to serve McDermott were limited to going to his house on nine occasions. This Court provided Fair with several continuances to serve McDermott. This Court does not find that the extraordinary remedy of an adverse inference is warranted in these circumstances. This is especially true considering the inconsistencies in Fair's own testimony regarding McDermott.

As discussed *supra*, Fair's allegations regarding his physical abuse by the detective with cowboy boots/McDermott have been inconsistent over the years. Fair's testimony about other aspects of his treatment at Area 2 was also inconsistent.

At his 2012 interview, Fair testified that he was denied sleep because detectives would come in to question him whenever he tried to lie down. But before this Court, Fair testified that he could *not* lie down because of how his arm was chained to the wall. Fair also did not testify that detectives kept on interrupting him throughout the night of September 1st. Between when Porter first interviewed Fair in the evening/late day of September 1st, and when Porter, Brown, and the female state's attorney interviewed Fair at around 8:00-10:00 a.m. on September 2nd, Fair testified that he was only interviewed once: by Porter and Brown, sometime five to six hours before they returned with the female state's attorney.

In 2012, Fair testified that Przepiora told him that Fair would have "to start the whole process over again" if he went to the hospital. In 2019, Fair testified that it was McDermott, not Przepiora, who said this. And McDermott allegedly said this during his second encounter with Fair – an interview which Fair did not even mention to the Commission in 2012.

In 2019, Fair testified that Porter offered Fair food and drink only if he agreed to give a statement. However, in 2012, Fair testified only that Porter brought him food and that he gave a statement while he was eating. Before 2019, Fair never alleged that Porter promised him food as a condition of giving a statement.

In 2012, Fair only testified that he was kicked in the leg once. In 2019 he testified that he was kicked repeatedly until it scraped the skin off of the bone, and he was still bleeding by the time that Przepiora spoke to him two hours later.

As the Commission noted in its 2013 Determination, Fair's testimony regarding his alleged abuse is also not corroborated by the other evidence in this case. Fair testified that the flesh was scraped off of his leg, he was covered in hives, and it was obvious that he was having breathing difficulties at the time that he gave his statement to Mebane. However, the "moving arrestee out of & into arrest/detention facility" form states that, when Fair was examined approximately four hours after Mebane prepared the written statement, Fair had no obvious pain or injury and declined any medical treatment for his asthma. And Fair's photograph upon admission to the jail on September 4th did not show that he had any hives at that time. Mebane's testimony at trial and at the hearing in this case also contradicted Fair's claim that he was obviously in distress during his interview. There is no evidence, other than Fair's changing testimony, that he was suffering from an asthma attack, hives outbreak, or any other acute physical injury when he gave his statement to police.

This Court also questions the severity of his asthma and skin condition at the time of his interview, particularly where Fair testified that these symptoms have all but disappeared and he is now able to run 5Ks. This Court gives little weight to the affidavits from Fair's fellow inmates, which were not testified to. Fair testified that his asthma was triggered by the stress of his arrest, and his skin condition was triggered by his handcuffs. However, Fair testified that the first time he experienced these symptoms

was after cutting grass in 1995. Fair's documentation from Roseland Community Hospital in 1995 indicates that he was treated for an allergic reaction. Fair's mother also testified that she only ever observed Fair's skin condition flair up when he was around grass or other vegetation, and never observed him having breathing problems and hives at the same time. Furthermore, Fair and his mother both testified that when his asthma or hives became severe he would have to go to the hospital for treatment. And yet Fair declined medical treatment for his asthma just 4 hours after Mebane's written statement. The testimony and medical documentation in this case does not support Fair's allegations that his skin condition was triggered simply by physical contact with handcuffs, or that he was suffering from a severe asthma attack during his interrogation at Area 2.

Lastly, this Court had the opportunity to hear the audio recording of Fair's voice as he testified before the Commission in 2012, and to observe Fair's demeanor as he testified in person in 2019. This Court found Fair to be a wholly incredible witness. In particular, this Court observed that Fair's demeanor and the manner in which he testified were incredible while testifying about the alleged abuse inflicted upon him by McDermott, and the nature of his alleged injuries. Fair's reenactment of the alleged abuse, including what McDermott allegedly said and how McDermott allegedly kicked Fair, were unconvincing. This Court also found Fair to be incredible while testifying about how he determined that McDermott was the detective who kicked him, including: how he became aware of McDermott's photograph while in the Illinois Department of Corrections; his conversations with other inmates in the law library; and

his newfound recollection that the detective who kicked him also interviewed him a second time, about the information contained in McDermott's report. This Court also observed that Fair's answers regarding these topics were evasive and inconsistent. The incredible nature of Fair's in-court testimony about these critical facts was enhanced by the inconsistencies with his prior testimony before the Commission, his prior allegations of abuse, the testimony of other witnesses, and the other evidence in this case, as outlined *supra*.

Considering the fact that Fair's testimony is repeatedly contradicted by other evidence in this case, as well as by his own prior testimony, this Court gives little to no weight to Fair's allegations of torture. See *Bazydlo v. Volant*, 164 Ill. 2d 207, 214-15 (1995) (finding that the finder of fact is in a superior position "to observe witnesses while testifying, to judge their credibility, and to determine the weight that their testimony should receive" when that testimony conflicts with other evidence).

Had the above evidence of torture been presented at a suppression hearing, this Court finds that Fair would not have likely prevailed, and that the new evidence regarding other allegations of abuse at Area 2 would not have even arguably changed the outcome of that hearing. Therefore, this Court finds that Fair has failed to meet his initial burden in these proceedings, and his claim necessarily fails.

II. Voluntariness of Fair's Statement

Even if Fair had provided sufficient evidence to meet his initial burden, this Court finds that the State has met its burden to show that Fair's statement was nonetheless voluntary.

"In determining whether a statement is voluntary, a court must consider the totality of the circumstances of the particular case; no single factor is dispositive. Factors to consider include the defendant's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning; the legality and duration of the detention; the presence of *Miranda* warnings; the duration of the questioning; and any physical or mental abuse by police, including the existence of threats or promises." *People v. Richardson*, 234 Ill. 2d 233, 253-54 (2009) (citation omitted).

The Supreme Court "has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause." See *Id.* at 252 (citing *Miller v. Fenton*, 474 U.S. 104, 109 (1985). However, most of the relevant cases citing this proposition with reference to allegations of physical abuse present strikingly different facts. See *Brown v. Mississippi*, 297 U.S. 278 (1936) (defendants confessed after being whipped and hanged); *People v. Thomlison*, 400 Ill. 555 (1948) (defendant confessed after being beaten for two hours until his body was bruised and eye swollen shut); *People v. Santucci*, 374 Ill. 395 (1940) (defendant abducted by police, beaten until unconscious, and held in custody until he gave a statement). Fair has not provided, and this Court cannot find, any authority holding that being kicked in the leg and having an officer put his hand on its gun are interrogation techniques so offensive that they automatically violate a defendant's due process rights without any further analysis. Therefore, this Court must consider these allegations in the totality of the circumstances in determining whether Fair's statement was voluntarily given.

Compared to Fair's conflicting testimony, this Court found Mebane to be an extremely credible witness. At trial, Mebane testified that he interviewed Fair twice, and prepared the written statement during the interview based on what Fair told him. Mebane testified that he explained the process of taking a written statement, and that Fair would be able to make corrections. Fair agreed to the written statement. He then interviewed Fair about his treatment outside of the presence of any of the detectives, and that Fair responded that he was treated well. He then prepared the written statement while having a "back and forth" with Fair. It was partway through drafting the statement, when Mebane asked Fair to initial next to a correction, that Fair refused to sign anything without a lawyer present. But Fair did not make a specific request for counsel, and continued to answer Mebane's questions.

Before this Court, Mebane testified that he did not independently recall much of his interview of Fair. Mebane did testify regarding his general practices when he took a suspect's written statement. His prior testimony about the taking of Fair's statement largely comports with these practices. This Court also had an opportunity to review more than 30 handwritten statements that Mebane took from other subjects while he was at Felony Review. These other statements are substantially similar to Fair's statement, and comport with Mebane's testimony about his general practices.

Mebane testified that he would document however a subject described that they were treated. He testified that Fair did not complain about being mistreated. Fair did not appear to be in any sort of distress, and was alert throughout the interview. Mebane testified that he wrote Fair's statement based upon what Fair said, that the statement

was the product of a collaborative discussion between himself and Fair, and that it did not appear that Porter had staged Fair's statement. Importantly, Mebane was forthright about the fact that Fair did not want to sign the statement, and even documented Fair's stated reason for not signing in the body of the written statement itself. His testimony is consistent, credible, and corroborated by other evidence in this case. And Mebane's testimony supports the conclusion that Fair was free from duress, gave a voluntarily oral statement, initially agreed to give a handwritten statement, but subsequently decided that he did not want to go through with signing the statement.

This Court notes that the Commission based its findings in this case largely on perceived irregularities between the written statement and Mebane's trial testimony regarding the taking of said statement. However, this Court is not in any way bound by these findings and is entitled to make its own determinations based on the evidence before it. See *Christian*, 2016 IL App (1st) 140030, ¶¶ 79, 84, 104. This Court notes that the Commission made no attempt to interview Mebane regarding his testimony or the written statement. Counsel does not adopt all of the Commission's complaints with how Mebane took Fair's statement, but for the sake of posterity this Court will address them.

The Commission expressed concern that Mebane printed out Fair's name on the line below the pre-printed *Miranda* warnings. The Commission did not credit Mebane's testimony that he simply printed Fair's name where he would eventually sign. The Commission also expressed concern that Mebane continued to make corrections and sign them without Fair signing them. This Court finds that Mebane's original trial testimony makes sense, and notes that the jury rejected Fair's argument at trial that

Mebane was trying to forge Fair's signature. First, the handwritten statement explicitly states that Fair refused to sign it without counsel present, and Mebane never represented that the printed name was written by Fair. Second, petitioner's Exhibit 8 confirmed that Mebane printed the subject's name below the waiver of rights on *every other written statement that he ever took while at Felony review.* And, just as Mebane previously testified, subjects who agreed to sign would do so above or next to where he printed their name. This included the statements of Victor Way on March 1, 1998 and Tony Davis on September 10, 1998. Both subjects refused to sign their statements. Just as with Fair's statement, the signature line on both statements has the subject's printed name with no signature, and states at the end that the subject did not agree to sign. Way's statement also includes a single correction which is initialed only by Mebane, just as the corrections in Fair's statement are only initialed by Mebane. Mebane testified before this Court that he did not independently recall his questioning of Fair, but he did testify to his general practices in taking a subject's statement. This testimony was substantially consistent with how Mebane took Fair's statement, and was corroborated by each of the other written statements that he took, as shown in petitioner's Exhibit 8.

This Court acknowledges that Way testified about the circumstances of Mebane taking his statement, and claimed that Mebane included facts which Way did not tell Mebane. However, these allegations are substantially different from Fair's. Fair did not testify that Mebane included facts in the written statement that Fair did not say. Fair alleged that the statement was false because Porter told him to say it, not because Mebane took it down incorrectly. Fair stated that he refused to sign the statement

because he read it and realized that it implicated him in the murder. This Court also does not find Way's testimony to be credible, considering that he pled guilty to the offense which was memorialized in his written statement, and never claimed that his statement was false until more than 21 years after it was taken.

The Commission also claimed that discrepancies between Fair's written statement and the statement of his co-defendant Reaves demonstrate that Fair's statement was not voluntarily given. This conclusion does not make sense. Co-defendants routinely give different accounts of a crime, often to shift blame to the other person or put them in a negative light. Here, for example, Fair stated that Reaves put the gun under the hood, while Reaves stated that Fair told him that the gun was under the hood. Fair also stated that Reaves snatched the chain off of the person accompanying the victim before gunning the victim down, while Reaves stated an occupant of the car was showing a necklace to the victim's companion and that he got in a fight with that person before shooting the victim. These subtle discrepancies are no different than the discrepancies between voluntary statements of co-defendants during non-coercive interrogations, and they do not even arguably support the inference that Fair's statement was involuntary.

Counsel for Fair argues that it is suspicious that Mebane did not ask Fair to sign below the pre-printed *Miranda* warnings at the outset, before taking Fair's statement. Mebane testified that it was his standard practice to read a subject their *Miranda* rights and have them sign below the pre-printed rights at the beginning, but did not recall whether he asked Fair to sign at the beginning. He originally testified that Fair did not

refuse to sign or initial the statement until they were partway through. However, Mebane did consistently testify that he read Fair these rights, and that Fair acknowledged them orally before they began. Mebane consistently testified that he explained the entire process of giving a written statement, including that the subject would be asked sign the statement, and Fair agreed to the written statement. Mebane also testified that, regardless of when Fair announced that he would not sign the statement, Fair continued to cooperate with giving the statement. And, finally, the other two handwritten statements taken by Mebane where the subjects refused to sign are substantially similar to Fair's written statement in these regards: the *Miranda* rights at the beginning are unsigned, Mebane completed writing out the statement, and the last page of the statement indicates that the subject refused to sign.

Counsel for Fair also highlights the fact that Fair's is the only one of Mebane's handwritten statements to not include how the subject was treated by police. At trial, Mebane testified that he asked Fair generally how he was treated at Area 2, and that Fair responded that he was treated "good" by everyone. At the hearing before this Court, Mebane acknowledged that it was his practice to ask how a suspect was treated by himself and by police, and did not independently recall what Fair specifically told him about his treatment by police.

Counsel argues that these discrepancies give "the strong impression that something very bad and very wrong went on during Mr. Fair's 32-hour interrogation." However, Fair's testimony about what "went wrong" at the time of his statement was that he had been previously coerced by McDermott's physical abuse, Porter's promises

of food, his denial of counsel, sleep, and medication. Fair specifically testified that he was tortured into giving the *oral* statement, not the *written* statement. The fact that Mebane did not include Fair's response as to his treatment by police does not support Fair's narrative about the written statement because Fair never testified that he told Mebane that he was mistreated by police. Fair also did not testify that Mebane ever asked him what he had to eat, whether he was allowed to use the bathroom, or whether Mebane had treated him well. Fair denied ever speaking to Mebane alone, without Porter present. Fair has also suggested that Mebane pre-wrote some or all of the statement based on what Reaves and another witness had said. So, according to Fair's testimony, the entire portion of the written statement where Fair tells Mebane about his treatment at Area 2 is a fabrication. If Mebane allegedly falsified Fair's responses to every other question about his treatment at Area 2, why would he leave out Fair's treatment by police? Why not falsify that response as well? This alleged omission does not support Fair's allegations about the circumstances of his statement, and does not substantially undermine the rest of Mebane's otherwise credible and corroborated testimony.

In addition to Mebane's testimony, other evidence supports the conclusion that Fair was not under duress at the time that he gave the statement. Fair alleges that his decision to sign the statement was influenced by his difficulties breathing and his skin condition, and that those same symptoms persisted until he received medication at the jail. But as discussed *supra*, his medical evaluation just four hours after the written statement indicates that he was not suffering from any such ailments.

Fair's own testimony also undercuts his allegations that his will was overborne at the time that he gave the statement. He was allegedly abused by one detective, on one occasion, the day before he gave his statement. Neither Mebane nor any of the other detectives were present or assisted during this abuse, and no other personnel at Area 2 threatened him with violence. McDermott was neither present when Fair told Porter that he agreed to give a statement, nor when Mebane took Fair's statement..

What stands out particularly in the Court's mind is the contrast between Fair's testimony about why he agreed to give an oral statement, and his testimony about why he ultimately refused to sign the written statement.

When Fair was asked why he agreed to repeat the allegedly false story that Porter fed to him, he said that whenever he "didn't cooperate", he was physically abused, denied food, and medication. He knew that he was supposed to be provided a lawyer when he asked for one, but that the police were not following the rules. He could not breathe, could barely talk, and did not know how much longer that he could go on without medication. Fair testified that he was "in survival mode", and did not know what would happen if he continued to not cooperate.

But just hours later, when Fair was asked to sign the written statement, he testified that his overriding concern was that it inculpated him as well as Reaves for the murder. Fair said nothing about his alleged fear of reprisal, his fear of what might happen if he refused to cooperate, or his fear of what might happen if he did not receive medication. If Fair did not believe that the police were respecting his right to an

attorney, then why did he tell Mebane that he would not sign the statement without counsel present?

When asked why he agreed to give the oral statement, but did not agree to sign the written statement, Fair did not address any of these discrepancies. He merely stated that signing false allegations was "a little more" than repeating them to a state's attorney. These are not the thoughts and actions of a man in "survival mode", whose will is so overborne that he is willing to do and say anything just to end the interrogation. They are the thoughts and actions of every suspect who has ever agreed to talk to the police, but realized too late that he has said too much.

Considering all of the circumstances of Fair's interrogation, hearing all of the evidence, and giving it the appropriate weight, this Court finds that the State has met its burden of establishing that Fair's statement was voluntarily given.

Conclusion

Based on the foregoing, the Court finds that Fair has failed provide sufficient evidence of torture to meet his burden at this stage of proceedings. The Court also finds that the State has provided sufficient evidence that Fair's statement was voluntarily given. Therefore, Fair's claim is hereby DISMISSED.

ENTERED: _____

Hon. Peggy Chiampas
Circuit Court of Cook County
Criminal Division
#1949

DATED: August 20 2020

ENTERED
Judge Peggy Chiampas-1949
AUG 20 2020
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CRIMINAL DIVISION

DARRELL FAIR	)	
	)	
Petitioner-Defendant	)	Case No. 98 CR 25742-01
	)	
-vs-	)	
	)	
PEOPLE OF THE STATE OF ILLINOIS,	)	The Honorable Peggy Chiampas,
	)	Judge Presiding
Respondent-Plaintiff	)	

NOTICE OF FILING

TO: Cook County State's Attorney's Office
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eserve.criminalappeals@cookcountyil.gov

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PLEASE TAKE NOTICE that on September 15, 2020, the attached Notice of Appeal in the above-captioned case was filed in the Circuit Court of Cook County, 2650 S. California Avenue, Chicago, IL 60608, a copy of which is hereby served upon you.

Russell Ainsworth
Attorney for Petitioner

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CRIMINAL DIVISION

DARRELL FAIR	)	
	)	
Petitioner-Defendant	)	Case No. 98 CR 25742-01
	)	
-vs-	)	
	)	
PEOPLE OF THE STATE OF ILLINOIS,	)	The Honorable Peggy Chiampas,
	)	Judge Presiding
Respondent-Plaintiff	)	

NOTICE OF APPEAL

(1) Court to which appeal is taken: Illinois Appellate Court, First Judicial District

(2) Name of appellant and address to which notices shall be sent:

Mr. Darrell Fair
The Exoneration Project
at the University of Chicago Law School
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Chicago, Illinois 60607

(3) Name and address of appellant's attorneys on appeal:

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(4) Dates of judgment or order: August 20, 2020

(5) Offenses of which convicted: First degree murder

(6) Sentence: 50 years

(7) If appeal is not from conviction, nature of orders appealed from:

Petitioner Darrell Fair appeals from the Court's denial of his post-conviction claims on referral from the Torture Inquiry and Relief Commission in a written order on August 20, 2020.

DATED: September 15, 2020

Respectfully submitted,

Darrell Fair

By: Russel Ainsworth /gm
Attorney for Petitioner

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CERTIFICATE OF SERVICE

I hereby certify that on this September 15, 2020, I caused a copy of the foregoing to be served upon counsel of record by electronic mail.

Russel Ainsworth, Jr.
Attorney for Petitioner

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775 ILCS 40 Illinois Torture Inquiry and Relief Commission Act.

775 ILCS 40/1

Sec. 1. Short title. This Act may be cited as the Illinois Torture Inquiry and Relief Commission Act.

775 ILCS 40/5

Sec. 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.

(2) "Commission" means the Illinois Torture Inquiry and Relief Commission established by this Act.

(3) "Convicted person" means the person making a claim of torture under this Act.

(4) "Director" means the Director of the Illinois Torture Inquiry and Relief Commission.

(5) "Victim" means the victim of the crime, or if the victim of the crime is deceased, the next of kin of the victim, which shall be the parent, spouse, child, or sibling of the deceased victim.

775 ILCS 40/10

Sec. 10. Purpose of Act. This Act establishes an extraordinary procedure to investigate and determine factual claims of torture related to allegations of torture that shall require an individual to voluntarily waive rights and privileges as described in this Act.

775 ILCS 40/15

Sec. 15. Commission established.

(a) There is established the Illinois Torture Inquiry and Relief Commission. The Illinois Torture Inquiry and Relief Commission shall be an independent commission under the Illinois Human Rights Commission for

administrative purposes.

(b) The Illinois Human Rights Commission shall provide administrative support to the Commission as needed. The Executive Director of the Illinois Human Rights Commission shall not reduce or modify the budget of the Commission or use funds appropriated to the Commission without the approval of the Commission.

775 ILCS 40/20

Sec. 20. Membership; chair; meetings; quorum.

(a) The Commission shall consist of 8 voting members as follows:

(1) One shall be a retired Circuit Court Judge.

(2) One shall be a former prosecuting attorney.

(3) One shall be a law school professor.

(4) One shall be engaged in the practice of criminal defense law.

(a-1) The Governor shall also appoint alternate Commission members for the Commission members he or she has appointed to serve in the event of scheduling conflicts, conflicts of interest, disability, or other disqualification arising in a particular case. Where an alternate member is called upon to serve in a particular place, the alternate member shall vote in the place of, and otherwise exercise the same powers as, the member which he or she is replacing. The alternate member shall have the same qualifications for appointment as the original member. In making the appointments, the Governor shall make a good faith effort to appoint members with different perspectives of the justice system. The Governor shall also consider geographical location, gender, and racial diversity in making the appointments.

(b) The retired judge who is appointed as a member under subsection (a) shall serve as Chair of the Commission. The Commission shall have its initial meeting no later than one month after the appointment of a quorum of members of the Commission, at the call of the Chair. The Commission shall meet a minimum of once every 6 months and may also meet more often at the call of the Chair. The Commission shall meet at such time and place as designated by the Chair, in accordance with the provisions of the Open Meetings Act. Notice of the meetings shall be given at such time and manner as provided by the rules of the Commission, in accordance with the provisions of the Open Meetings Act. A majority of the voting members shall constitute a quorum. All Commission votes shall be by majority vote of the voting members appointed.

775 ILCS 40/25

Sec. 25. Terms of members; compensation; expenses.

(a) Of the initial members, the appointments under clauses (a)(3) and (6) of Section 20 shall be for one-year terms, the appointments under clauses (a)(1), (2), and (4) of Section 20 shall be for 2-year terms, and the appointments under clause (a)(5) of Section 20 shall be for 3-year terms. Thereafter, all terms shall be for 3 years. Members of the Commission shall serve no more than 2 consecutive 3-year terms plus any initial term of less than 3 years. Unless provided otherwise by this Act, all terms of members shall begin on January 1 and end on December 31.

Members serving by virtue of elective or appointive office, may serve only so long as the office holders hold those respective offices. The Chief Judge of the Cook County Circuit Court may remove members for good cause shown. Vacancies occurring before the expiration of a term shall be filled in the manner provided for the members first appointed.

(b) The Commission members shall receive no salary for serving, but may be reimbursed for reasonable expenses incurred as a result of their duties as members of the Commission from funds appropriated by the General Assembly for that purpose, or from funds obtained from sources other than the General Assembly.

775 ILCS 40/30

Sec. 30. Director and other staff. The Commission shall employ a Director. The Director shall be an attorney licensed to practice in Illinois at the time of appointment and at all times during service as Director. The Director shall assist the Commission in developing rules and standards for cases accepted for review, coordinate investigation of cases accepted for review, maintain records for all case investigations, prepare reports outlining Commission investigations and recommendations to the trial court, and apply for and accept on behalf of the Commission any funds that may become available from government grants, private gifts, donations, or bequests from any source.

Subject to the approval of the Chair, the Director shall employ such other staff and shall contract for services as is necessary to assist the Commission in the performance of its duties, and as funds permit.

The Commission may meet in an area provided by the Illinois Human Rights Commission, or any other State agency. The Illinois Human Rights

Commission shall provide, directly or through any other State agency, office space for the Commission and the Commission staff.

775 ILCS 40/35

Sec. 35. Duties. The Commission shall have the following duties and powers:

(1) To establish the criteria and screening process to be used to determine which cases shall be accepted for review.

(2) To conduct inquiries into claims of torture.

(3) To coordinate the investigation of cases accepted for review.

(4) To maintain records for all case investigations.

(5) To prepare written reports outlining Commission investigations and recommendations to the trial court at the completion of each inquiry.

(6) To apply for and accept any funds that may become available for the Commission's work from government grants, private gifts, donations, or bequests from any source.

775 ILCS 40/40

Sec. 40. Claims of torture; waiver of convicted person's procedural safeguards and privileges; formal inquiry; notification of the crime victim.

(a) A claim of torture may be referred to the Commission by any court, person, or agency. The Commission shall not consider a claim of torture if the convicted person is deceased. The determination of whether to grant a formal inquiry regarding any other claim of torture is in the discretion of the Commission. The Commission may informally screen and dismiss a case summarily at its discretion.

(b) No formal inquiry into a claim of torture shall be made by the Commission unless the Director or the Director's designee first obtains a signed agreement from the convicted person in which the convicted person waives his or her procedural safeguards and privileges including but not limited to the right against self-incrimination under the United States Constitution and the Constitution of the State of Illinois, agrees to cooperate with the Commission, and agrees to provide full disclosure regarding inquiry requirements of the Commission. The waiver under this subsection does not apply to matters unrelated to a convicted person's claim of torture. The convicted person shall have the right to advice of counsel prior to the

execution of the agreement and, if a formal inquiry is granted, throughout the formal inquiry. If counsel represents the convicted person, then the convicted person's counsel must be present at the signing of the agreement. If counsel does not represent the convicted person, the Commission Chair shall determine the convicted person's indigency status and, if appropriate, enter an order for the appointment of counsel for the purpose of advising on the agreement.

(c) If a formal inquiry regarding a claim of torture is granted, the Director shall use all due diligence to notify the victim in the case and explain the inquiry process. The Commission shall give the victim notice that the victim has the right to present his or her views and concerns throughout the Commission's investigation.

(d) The Commission 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. The Commission may also do any of the following: issue subpoenas or other process to compel the attendance of witnesses and the production of evidence, administer oaths, petition the Circuit Court of Cook County or of the original jurisdiction for enforcement of process or for other relief, and prescribe its own rules of procedure. All challenges with regard to the Commission's authority or the Commission's access to evidence shall be heard by the Circuit Court of Cook County, including any in camera review.

(e) While performing duties for the Commission, the Director or the Director's designee may serve subpoenas or other process issued by the Commission throughout the State in the same manner and with the same effect as an officer authorized to serve process under the laws of this State.

(f) All State discovery and disclosure statutes in effect at the time of formal inquiry shall be enforceable as if the convicted person were currently being tried for the charge for which the convicted person is claiming torture.

(g) If, at any point during an inquiry, the convicted person refuses to comply with requests of the Commission or is otherwise deemed to be uncooperative by the Commission, the Commission shall discontinue the inquiry.

775 ILCS 40/45

Sec. 45. Commission proceedings.

(a) At the completion of a formal inquiry, all relevant evidence shall be presented to the full Commission. As part of its proceedings, the Commission may conduct hearings. The determination as to whether to conduct hearings is

solely in the discretion of the Commission. Any hearing held in accordance with this Section shall be a public hearing and shall be held subject to the Commission's rules of operation, and conducted pursuant to the Open Meetings Act.

(b) The Director shall use all due diligence to notify the victim at least 30 days prior to any proceedings of the full Commission held in regard to the victim's case. The Commission shall notify the victim that the victim is permitted to attend proceedings otherwise closed to the public, subject to any limitations imposed by this Act, and subject to Section 2(c)(14) of the Open Meetings Act. If the victim plans to attend proceedings otherwise closed to the public, the victim shall notify the Commission at least 10 days in advance of the proceedings of his or her intent to attend. The Commission may close any portion of the proceedings to the victim, if the victim is to testify and the Commission determines that the victim's testimony would be materially affected if the victim hears other testimony at the proceeding.

(c) After hearing the evidence, the full Commission shall vote to establish further case disposition as provided by this subsection. All 8 voting members of the Commission shall participate in that vote.

If 5 or more of the 8 voting members of the Commission conclude by a preponderance of the evidence that there is sufficient evidence of torture to merit judicial review, the case shall be referred to the Chief Judge of the Circuit Court of Cook County by filing with the clerk of court the opinion of the Commission with supporting findings of fact, as well as the record in support of such opinion, with service on the State's Attorney in non-capital cases and service on both the State's Attorney and Attorney General in capital cases.

If less than 5 of the 8 voting members of the Commission conclude by a preponderance of the evidence that there is sufficient evidence of torture to merit judicial review, the Commission shall conclude there is insufficient evidence of torture to merit judicial review. The Commission shall document that opinion, along with supporting findings of fact, and file those documents and supporting materials with the court clerk in the circuit of original jurisdiction, with a copy to the State's Attorney and the chief judge.

The Director of the Commission shall use all due diligence to notify immediately the victim of the Commission's conclusion in a case.

(d) Evidence of criminal acts, professional misconduct, or other wrongdoing disclosed through formal inquiry or Commission proceedings shall be referred to the appropriate authority. Evidence favorable to the convicted person disclosed through formal inquiry or Commission proceedings shall be disclosed to the convicted person and the convicted

person's counsel, if the convicted person has counsel. The Commission shall have the discretion to refer its findings together with the supporting record and evidence, to such other parties or entities as the Commission in its discretion shall deem appropriate.

(e) All proceedings of the Commission shall be recorded and transcribed as part of the record. All Commission member votes shall be recorded in the record. All records of the Commission shall be confidential until the proceedings before the Commission are concluded and a final decision has been made by the Commission.

775 ILCS 40/50

(Text of Section before amendment by P.A. 101-652)

Sec. 50. Post-commission judicial review.

(a) If the Commission concludes there is sufficient evidence of torture to merit judicial review, the Chair of the Commission shall request the Chief Judge of the Circuit Court of Cook County for assignment to a trial judge for consideration. The court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing. Notwithstanding the status of any other postconviction proceedings relating to the petitioner, if the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to rearraignment, retrial, custody, bail or discharge, or for such relief as may be granted under a petition for a certificate of innocence, as may be necessary and proper.

(b) The State's Attorney, or the State's Attorney's designee, shall represent the State at the hearing before the assigned judge.

(Text of Section after amendment by P.A. 101-652)

Sec. 50. Post-commission judicial review.

(a) If the Commission concludes there is sufficient evidence of torture to merit judicial review, the Chair of the Commission shall request the Chief Judge of the Circuit Court of Cook County for assignment to a trial judge for consideration. The court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing. Notwithstanding the status of any other postconviction proceedings relating to the petitioner, if the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such

supplementary orders as to rearraignment, retrial, custody, pretrial release or discharge, or for such relief as may be granted under a petition for a certificate of innocence, as may be necessary and proper.

(b) The State's Attorney, or the State's Attorney's designee, shall represent the State at the hearing before the assigned judge.

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 or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 41 pages or words.

DATED: December 2, 2022

/s/ Debra Loevy
Debra Loey

DOCKET NO. 128373
IN THE
SUPREME COURT OF ILLINOIS

DARRELL FAIR Appellant, v. PEOPLE OF THE STATE OF ILLINOIS, Appellee.	)	Appeal from the Appellate Court, First District, No. 1-20-2072 There on Appeal from the Circuit Court of Cook County, No. 98 CR 25742-01 Honorable Peggy Chiampas Judge Presiding

NOTICE OF FILING AND PROOF OF SERVICE

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PLEASE TAKE NOTICE that on December 2, 2022, Appellant Darrell Fair filed via the Odyssey E-File system in the Supreme Court of Illinois the Appellant Brief, Oral Argument Requested, a copy of which is hereby served upon you.

DATED: December 2, 2022

Respectfully submitted,

/s/ Debra Loevy
Attorney for Debra Loevy

Russell Ainsworth

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2022, I caused a copy of the foregoing Proof of Service and accompanying Brief of Appellant, Oral Argument Requested to be served on the following via the Court's Odyssey E-File and Serve system:

TO: Illinois Attorney General
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DATED: December 2, 2022

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VERIFICATION BY CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters I certify as aforesaid that I verily believe the same to be true.

DATED: December 2, 2022

/s/ Debra Loevy
Debra Loevy