BEFORE THE ILLINOIS TORTURE INQUIRY AND RELIEF COMMISSION

In RE:
Claim of Willie Johnson

TIRC No. 2014.196-J
(relates to Circuit Court
Case No. 79-CR-2527)

CASE DISPOSTION

Pursuant to section 40/45(c) of the Illinois Torture Inquiry and Relief Act (TIRC Act, 775 ILCS 40/40(a)) *et seq.*), the Commission concludes that, by a preponderance of the evidence, there is sufficient evidence of torture to merit judicial review. The decision is based upon the Findings of Fact and Analysis set forth below, as well as the supporting record provided.

PROCEDURAL HISTORY

1. Johnson filed a claim of torture in November, 2013. (*See* EXHIBIT A.) His claim form alleges Det. David Dioguardi and Det. Robert Cornfield tightened his handcuffs and told him if he didn't confess they would "kick my ass." He claimed that his statement was a result of the fear induced by these threats.

2. On July 27, 2016, the Commission reviewed the claim and voted to initiate a formal inquiry into Johnson's claim.

FINDINGS OF FACT

I. Underlying Crime and Arrest.

1. On April 22, 1979, at approximately 6:10 a.m., Jacob B. Miller, a resident of the 8400 block of South Constance in Chicago, discovered the body of Alfred Joyner lying in the alley.[1]

2. Joyner's friend, Kenneth Crisp, testified he and Joyner had been drinking the night before and that Joyner had dropped him off at 75th Street.[2]

3. Medical Examiner Edmond Donoghue concluded that Joyner had died from choking on his stomach contents after vomiting due to blunt head trauma. Joyner's skull had been depressed in two places from being struck.[3]

4. Detective Robert Cornfield located Joyner's car at 1 p.m. on April 22, 1979, in the 7200 block of South Kimbark and placed it under surveillance.[4] Detectives John Solecki and

[1] *People v. Anthony Bland*, 79-2527, ROP of April 7, 1981, 15-33, testimony of Jacob Miller. Bland was a co-defendant of Willie Johnson.
[2] *Id.*, 44-58.
[3] *People v. Bland*, 79-2527, ROP of April 8, 1981, 154-185, Testimony of Edmond Donoghue. On cross examination, however, Donoghue conceded as possible, but unlikely, that Joyner had vomited due to intoxication rather than blunt trauma.

Roy Martin took over surveillance at 5 p.m. and at approximately 8 p.m. they saw two juveniles get into the car and attempted to arrest them. The two juveniles, Lawrence Hardin and Rodney Eason, ran from Joyner's car and were chased to the second floor of a two-flat in the 7300 block of South Kenwood, where they were arrested.[5] Hardin and Eason led police to another juvenile, Anthony Bland, who police testified confessed to having taken Joyner's car from him by force along with two co-defendants, Willie Johnson and Frank Vaughn.[6] Bland was arrested shortly after midnight. Det. David Dioguardi testified that Bland told police Willie Johnson had hit Joyner on the head.[7]

5. At approximately 3 a.m. on April 23, 1979, Detectives Dioguardi and Robert Cornfield of Area 2 arrested Johnson at his home.[8] They recovered a battery charger that had been in Joyner's car and later identified a fingerprint on the charger as belonging to Johnson.[9] At 6:55 a.m., Assistant State's Attorney William Pileggi and Dioguardi secured a court-reported confession from Johnson, who admitted to stealing Joyner's car and striking Joyner in the head with a hammer.[10] (*See* EXHIBIT B.)

6. At the time of Johnson's interrogation, Jon Burge was a sergeant at Area 2. (*See* EXHIBIT C.)[11]

II. Motion to Suppress.

7. Johnson's attorneys filed a motion to suppress his confession on December 11, 1980, and supplemented it on December 19, 1980.[12]

8. Johnson's Motion to Suppress Hearing took place February 11, 1981. He was represented by E. Duke McNeil and Patricia Eggleston. Johnson's attorneys argued that his statement should be considered involuntary due to coercion and to his level of intoxication.[13]

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[4] ROP of April 7, 1981 58-68, testimony of Det. Robert Cornfield.
[5] ROP of April 7, 1981 58-68, testimony of Det. Solecki.
[6] *People v. Bland*, 79-2527, ROP of April 7, 1981, 194-200, testimony of Det. Daniel Swick; *see also* ROP of April 7, 1981, testimony of Det. David Dioguardi. 69-126.
[7] *People v. Bland*, 79-2527 ROP of April 7, 1981, 58-68, 69-126, testimony of Dets. Robert Conrnfield and David Dioguardi,
[8] *People v. Johnson*, ROP, Suppression Hearing Testimony of Willie Johnson, Feb. 11, 1981, 63-113 (Johnson W A002-p.1-229-missing 61,89.pdf); *see also* Trial Testimony of Willie Johnson, April 8, 1981, 448-479 (Johnson W A002-p.230-514-missing 299,300,403-405,441,451,463.pdf).
[9] *People v. Johnson,* 83-2457, 3 (1 Dist., June 28, 1985) (Rule 23 Order).
[10] *People v. Johnson*, ROP, Suppression testimony of Det. Dioguardi, Feb. 11, 1981, 34-35.
[11] *U.S. v. Burge*, 08-CR-846, Trial Exhibit 6d (Summary exhibit with timeline of Burge assignments and rank).
[12] *See* Memorandum of Orders, entries of Dec. 11 and 19, 1980; *see also People v. Johnson*, ROP of February 11, 1981, 10-12 (discussing written motions to suppress). Neither the original motion nor the supplemental motion were in the court documents provided by the Court clerk's office.
[13] *See People v. Johnson*, ROP of February 11, 1981, 221-224 (Eggleston motion-to-suppress argument).

A. Willie Johnson's Suppression Hearing Testimony (*See* EXHIBIT D)

9. At the suppression hearing, Johnson testified that he was arrested in the early morning hours of April 23, 1979, at his mother's house. Johnson claimed that, in the two hours preceding his arrest, he and four others had collectively smoked ten to thirteen joints and drank a fifth of rum. Johnson claimed that he drank half the bottle of rum, popped six Valium, and injected some "P's and Blues."[14]

10. Johnson testified that when Detectives Dioguardi and Cornfield arrived at his mother's house sometime after 2 or 2:30 a.m. on April 23, 1979, Johnson was in her basement, where he lived, lying down. She called to him and said that the police were there, and he came upstairs. He spoke briefly with the two detectives before going downstairs to get dressed. A few moments later, one of the officers came downstairs. Outside, near the police car, he was handcuffed. The officers then drove him to Area 2. There was no conversation during the ride, nor did detectives advise him of his rights, Johnson testified.[15]

11. Johnson testified that, at Area 2, he was taken upstairs to an interrogation room. Dioguardi placed Johnson in a chair, handcuffed his right wrist to a ring on the wall and sat "right next to me." Only Johnson and Dioguardi were present. Dioguardi told Johnson that Johnson's two "wrappies" had given statements against him. Dioguardi then left the room after about five minutes.

12. Johnson testified that Dioguardi returned about three or four minutes later, and Johnson told him that the handcuffs were too tight. Dioguardi did nothing in response to the complaint. Dioguardi asked Johnson if he was going to give a statement, and then jumped up out of his chair, which was about five feet away and said, "You going to give me a statement. I'm tired of this shit."[16] Johnson also testified that Dioguardi threatened to "kick [his] ass."[17] This behavior scared Johnson, and so he agreed to talk. This interaction took about ten or fifteen minutes before Dioguardi left the room.[18]

13. Johnson testified that after another 30-60 minutes elapsed, Dioguardi returned with an Assistant State's Attorney. Johnson testified that he was not given any food or drink or allowed to use the restroom during the thirty minutes to an hour he was in the interview room before he gave a statement but that he felt "alright" physically.[19] Johnson testified

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[14] *See People v. Johnson*, ROP of February 11, 1981, 63-113 (Willie Johnson testimony) (Johnson W A002-p.1-229-missing 61,89.pdf).
[15] *See People v. Johnson*, ROP of February 11, 1981, 63-113 (Willie Johnson testimony) (Johnson W A002-p.1-229-missing 61,89.pdf).
[16] *See People v. Johnson*, ROP of February 11, 1981, 76-77(Willie Johnson testimony) (Johnson W A002-p.1-229-missing 61,89.pdf).
[17] *Id.*, at 80.
[18] *Id.* at 77-80.
[19] *Id.*

that during the 15-20 minutes the statement was taken, the Assistant State's Attorney said nothing and Dioguardi asked all the questions. Johnson acknowledged reading the statement before signing it.[20] After signing it, he was taken to another room for a picture.[21]

14. On cross-examination, Johnson testified that he ingested that amount of drugs "[j]ust about every day" and was used to it.[22] He continued to maintain that the Assistant State's Attorney never asked him questions, and that Dioguardi had done all the talking. Johnson testified that on the ride to the police station, the handcuffs were not too tight, and he didn't remember if anyone adjusted the cuff on his right wrist when his left handcuff was removed and attached to the wall at the police station.[23] He acknowledged that a court reporter was present for his statement.[24] He also acknowledged that he "looked over" a transcript of his court-reported statement and signed each page.[25] He testified he did not really see the Miranda rights printed on page 2 of the transcript of his statement that he signed.[26] On re-direct, he clarified that he had "just glanced" at the statement transcript.[27]

B. Detective David Dioguardi's testimony

15. According to Dioguardi's testimony at the hearing, he informed Johnson of Johnson's rights in the car on the way to Area 2 in the presence of Detective Robert Cornfield, but no other conversation with Johnson occurred in the car.[28] After Dioguardi handcuffed Johnson to the wall in an Area 2 interrogation room in Cornfield's presence, Dioguardi and Cornfield left the room for five to ten minutes. When Dioguardi returned, Dioguardi again informed Johnson of his rights, which Johnson agreed to waive.[29] The two men then talked, alone, for about five minutes before Dioguardi left the room. He returned about 4:30 a.m. with Assistant State's Attorney William Peliggi.[30] Johnson asked to use the washroom, and Dioguardi took him to the washroom and returned him, not handcuffing him.[31] For about 20 minutes, both Pileggi and Dioguardi asked questions and Johnson answered them. Dioguardi left and returned alone around 5:15 or 5:30 a.m. to take Johnson for a picture in another room, returning him to the interrogation room,

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[20] *Id.*at 77-81.
[21] *Id.* at 82.
[22] *Id.*at 91.
[23] *See People v. Johnson*, ROP of February 11, 1981, 97-99 (Willie Johnson testimony) (Johnson W A002-p.1-229-missing 61,89.pdf).
[24] *Id.* at 105-106.
[25] *Id.* at 107.
[26] *Id.* at 112.
[27] *Id.* at 113.
[28] *See People v. Johnson*, ROP of February 11, 1981, 13-60 (David G. Dioguardi testimony) (Johnson W A002-p.1-229-missing 61,89.pdf).
[29] *See People v. Johnson*, ROP of February 11, 1981, 21-22 (David G. Dioguardi testimony) (Johnson W A002-p.1-229-missing 61,89.pdf).
[30] *Id.* at 22.
[31] *Id.* at 22-23.

handcuffing him and leaving. At 6:15 a.m., Dioguardi again escorted Johnson to the washroom and returned him to the interrogation room, handcuffed him and left.

16. Dioguardi testified that at 6:55 a.m., he returned with Pileggi and court reporter Michael Hartnett, at which point Pileggi gave Johnson his rights again, asked questions and Johnson answered them while Hartnett recorded the conversation.[32] At 8:55 a.m., Pileggi and Dioguardi returned with the typed, 9-page statement and reviewed it. Dioguardi testified Johnson looked over each page, his eyes moving as if he were reading, and all three initialed each page and signed the last.[33] Hartnett then took a picture of Johnson.[34] The process took about 15-20 minutes. Dioguardi testified Johnson never complained about the handcuffs, nor did he notice any injury. The handcuffs were "double-locking," meaning they could not be tightened or loosened without a key.[35]

17. Dioguardi acknowledged telling Johnson about statements co-defendants had made, but denied telling Johnson he had no choice but to confess, denied jumping up in a threatening manner, and denied threatening him and insisting he confess. Dioguardi testified he saw no signs of intoxication or the influence of drugs in Johnson.[36]

18. On cross-examination, Dioguardi maintained he had asked Johnson, during their first interaction in the interrogation room, in the presence of Cornfield, whether he could read or write, even though there was nothing for him to read or write at that time.[37] Dioguardi also said his second conversation with Johnson was at 4:30 a.m. He said Johnson had cigarettes, but could not remember if they were Johnson's own cigarettes or Dioguardi's. He acknowledged he did not provide food, but said he gave him coffee. He said he didn't "know that I can answer" whether he encouraged Johnson to confess, but said he never suggested to Johnson he should be cooperative, nor told him to confess. He acknowledged that, other than during the first interaction of putting Johnson into the interrogation room, he was the only police interviewer ever present with Johnson.

19. On rebuttal testimony given 9 days later, Dioguardi testified that he took Johnson to be photographed at 3:30 a.m.[38] He was not cross-examined as to the discrepancy in times as compared to his prior testimony about when he photographed Johnson.

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[32] *Id.* at 23-28.
[33] *Id.* at 26-34.
[34] *Id.* at 33-34.
[35] *Id.* at 33-35.
[36] *Id* at 33-41.
[37] *Id.* at 43.
[38] *See People v. Johnson*, ROP of February 20, 1981, 175-184 (David G. Dioguardi testimony) (Johnson W A002-p.1-229-missing 61,89.pdf)

C. Det. Robert Cornfield's Testimony

20. Detective Cornfield testified he assisted Dioguardi in placing Johnson in the interrogation room after arrest, and that he assisted Dioguardi in taking Johnson to be photographed about a half hour after arriving at the station.[39] Conrnfield also testified that Johnson did not appear intoxicated or high.

D. ASA William Pileggi's Testimony

21. Assistant State's Attorney William Pileggi testified he first saw Johnson, handcuffed, around 4:30 a.m. in the presence of Dioguardi, and that both of them asked Johnson questions. Johnson did not appear high or drunk then, nor at the subsequent court-reported statement around 6:55 a.m. Pileggi said the photograph of Johnson was taken immediately after the statement was given; that it took Johnson 30 minutes to read over his statement.[40]

E. Other Suppression Testimony

22. Johnson's friends and relatives, Leslie Hubbard, Theresa Johnson, and Andre Sales generally corroborated Johnson's account of drug and alcohol intake before his arrest, and his inebriation, although their stories differed on where they were positioned when Johnson took his Valium.[41] Johnson's mother, Ethel Lee Johnson, also corroborated that Johnson was inebriated, and said after they left, she went to his room and found a needle and pills that she called "T's and Blues."[42]

F. Motion to Suppress Argument & Ruling

23. Johnson's attorney argued that, even if no drugs had been used, authorities' testimony that Johnson was alert was unbelievable, as he had not yet slept that night. She argued he was incapacitated with drugs. She did not mention the threatened beating at all.[43] When ASA William Hibbler insinuated she had waived the coercion issue by her omission, she disagreed.[44] Judge Phillip J. Carey acknowledged she had not waived the issue before denying Johnson's suppression motion without elaborating.[45] He granted a motion to sever Johnson's trial from Bland's. The parties set April 6, 1981 as the trial date.

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[39] *See People v. Johnson*, ROP of February 20, 1981, 185-198 (Robert Cornfield testimony) (Johnson W A002-p.1-229-missing 61,89.pdf)
[40] *See People v. Johnson*, ROP of February 26, 1981, 202-220 (William Pillegi testimony) (Johnson W A002-p.1-229-missing 61,89.pdf)
[41] *See People v. Johnson*, ROP of February 11, 1981, 114-149 (Johnson W A002-p.1-229-missing 61,89.pdf).
[42] *See People v. Johnson*, ROP of February 11, 1981, 149-170 (Johnson W A002-p.1-229-missing 61,89.pdf).
[43] *See People v. Johnson*, ROP of February 26, 1981, 221-225 (Eggleston argument) (Johnson W A002-p.1-229-missing 61,89.pdf)
[44] *See People v. Johnson*, ROP of February 26, 1981, 225-229 (Hibbler argument) (Johnson W A002-p.1-229-missing 61,89.pdf)
[45] *See People v. Johnson*, ROP of February 26, 1981, 225-229 (J. Carey ruling) (Johnson W A002-p.230-514-missing 299,300,403-405,441,451,463.pdf).

III. Trial

A. Trial Preliminaries

24. On April 6, 1981, Johnson's attorney, E. Duke McNeil, indicated Johnson would take a bench trial rather than a jury trial, and submitted a signed waiver.[46] The following day, McNeil asked the state to declare whether it was seeking the death penalty. Assistant State's Attorney Hibbler said it was. An unsuccessful plea conference then followed. When the parties returned to the record, McNeil asked the judge if Johnson could have a jury trial. Judge Carey denied the request, citing Johnson's jury waiver the day before.[47]

B. Dioguardi's Trial Testimony

25. Dioguardi testimony was largely consistent with his suppression hearing testimony. He said his first "in-depth" question-and-answer session with Johnson took place at 4 a.m. on April 23, 1979 with ASA Pileggi, and that he, Dioguardi, had asked the questions in that session. [48] This was slightly different from the 4:30 a.m. time he had mentioned at the suppression hearing. He noted that Hartnett took a picture of Johnson at approximately 9 a.m. [49]

C. Johnson's Trial Testimony (*See* EXHIBIT E.)

26. At trial, Johnson admitted to forcing his way into Joyner's car and taking him for a ride with his co-defendants, but claimed he then stopped, got Joyner out and left him standing on the street (not an alley) at 76th and Cornell and never struck him – with or without a weapon. He said they never went to 84th and Constance, where Joyner's body was found the next day. He admitted taking various items from the car to sell.[50]

27. Johnson's testimony regarding the alleged police coercion was largely consistent with his suppression testimony He admitted he signed the court-reported confession but only because Dioguardi threatened to hit him if he didn't.[51] He believed Dioguardi because "You see, I been jumped on by police."[52]

28. On cross-examination, Johnson expanded on his testimony somewhat. He not only disavowed the truthfulness of the confession, but denied that much of it was an accurate recording of what was said. Johnson denied that he had told Dioguardi that there had been

[46] *See People v. Johnson*, ROP of April 6, 1981, 234-236 (Johnson W A002-p.230-514-missing 299,300,403-405,441,451,463.pdf).
[47] *Id.* at 239-240.
[48] *See People v. Johnson*, ROP of April 7, 1981, 327-328 (Dioguardi trial testimony) (Johnson W A002-p.230-514-missing 299,300,403-405,441,451,463.pdf).
[49] *Id.* at 302-358.
[50] *See People v. Johnson*, ROP of April 8, 1981, 447-457, 468 (Johnson trial testimony) (Johnson W A002-p.230-514-missing 299,300,403-405,441,451,463.pdf)
[51] *Id.* at 457-461.
[52] *Id.* at 461.

a tussle with Joyner. He admitted checking all of Joyner's pockets and testified Joyner had no wallet on him. (Joyner's wallet was found near his body.) Johnson explained that the threat from Dioguardi had come before the court-reported statement was taken (as opposed to when it came time to sign). Johnson again denied that the state's attorney had asked him any questions – either during the unreported interview or during the court-reported interview – and insisted that Detective Dioguardi was the only person who spoke to him. He also denied that he was asked whether he was treated fairly by police or that he had answered that he had been. He testified no one ever actually hit him. He denied that he ever told Dioguardi he got Joyner out of the car in an alley, or that he had "tapped" Joyner with a hammer.[53]

29. The state and Johnson stipulated that Dioguardi, if called in rebuttal, would deny threatening Johnson, and that a wallet had been found and returned to Joyner's relative.

IV. Appeals and Post-Conviction Petitions.

30. Johnson raised three issues in his direct appeal: 1) That the trial court erred in admitting his inculpatory statements because they were the fruit of an illegal, warrantless arrest at his mother's home; 2) that his guilt was not proved beyond a reasonable doubt; and 3) that the circuit court erred by denying his request to withdraw his jury waiver. He did not raise any arguments related to torture or threats in his direct appeal. On June 28, 1985, the Appellate Court of Illinois, First District, affirmed the circuit court's finding of guilt.

31. Johnson has since filed at least four post-conviction petitions and one federal habeas petition. As at trial, Johnson has consistently maintained in his post-conviction filings that he did not kill Alfred Joyner and that he did not provide the statement used against him at trial.

32. He filed his first post-conviction petition *pro se* in 1992, alleging that his multiple convictions were based on a single act and that his appellate counsel was ineffective for failure to raise this issue. Johnson apparently did not raise the issue of coercion by police. This petition was denied in June 1997 and the appellate court denied his appeal.

33. Johnson filed a federal writ of habeas corpus in the United States District Court for the Northern District of Illinois in May 1998. The focus of the filing was ineffective assistance of counsel, both at the trial and appellate levels.

34. Johnson filed a successive *pro se* post-conviction petition in December 2000. In that petition, he argued that his extended-term sentence was unconstitutional under the U.S. Supreme Court's *Apprendi* decision and that his extended term sentences for armed violence and armed robbery were unconstitutional because they arose from the same facts

[53] *See People v. Johnson*, ROP of April 8, 1981, 464-479 (Johnson trial testimony) (Johnson W A002-p.230-514-missing 299,300,403-405,441,451,463.pdf)

as his murder conviction. This petition also did not raise the issue of police coercion and was subsequently denied in February 2001. The denial was affirmed on appeal.

35. In February 2004, Johnson filed another successive *pro se* post-conviction petition. In that petition, he again made arguments that his sentence was invalid but did not raise issues about police coercion. The court granted the state's motion to dismiss Johnson's petition in November 2005. In 2007, the appellate court reversed in part, holding that the extended term sentence for Johnson's armed violence conviction was invalid and correcting the *mittimus* to reflect only one murder conviction, though Johnson's life sentence for murder remained intact.

36. Johnson's subsequent attempts at relief focused on DNA testing. He filed three motions for DNA testing of the hammer to determine whether it was in fact used to murder Alfred Joyner. All three motions were unsuccessful. In his third motion, filed in October of 2012, Johnson stated that he gave the inculpatory statement to police under "duress and pressure."

V. TIRC Interview.

37. TIRC spoke with Willie Johnson on May 24, 2016. Johnson's testimony was largely consistent with what he had alleged in the past.[54]

38. Johnson told TIRC interviewers that he believed Dioguardi's threat, in part because he had been beaten by police after a previous arrest. He stated that he had been arrested on drug charges, possibly in November 1974. He reported having been in a room with a group of other arrestees. He made a comment that officers did not like and was moved to another room. The other room had two other arrestees in it who Johnson believed had been beaten. There was an officer, who Johnson alternatively referred to as "Big Red" and "Big Gene," in that room. This officer started hitting Johnson. There was another officer in the room who had placed his pistol on the table, causing Johnson to think they would kill him if he resisted. He reported that the prosecutor dropped his charges from this arrest in exchange for his promise not to testify against the police officer.

39. In Johnson's statement to TIRC, he said he only remembered one conversation in which Pillegi was present, at which the court reporter may have also been present.

VI. Pattern and Practice Evidence

40. Dioguardi has been accused several times of misconduct, including threatening or abusing suspects in order to obtain a confession. Dioguardi died in 2016. (*See* EXHIBIT F.)

[54] *Hear* 2016.5.24 Johnson Waiver Part I.WMA; 2016.5.24 Johnson Waiver Part II.WMA; 2016.5.24 Johnson Waiver Part III.WMA;

a) Dioguardi invoked his Fifth Amendment rights in 2004 when questioned in a civil lawsuit brought by plaintiffs Aaron Patterson, Leroy Orange, Madison Hobley and Stanley Howard.[55] The City of Chicago settled the lawsuits for $20 million.[56]

b) According to the Report of the Special Prosecutor, Office of Professional Standards investigator Veronica Tillman recommended that charges of brutality be sustained against Detectives Peter Dignan and Dioguardi for mistreatment of suspects Stanley Wrice, Lee Holmes and Rodney Benson in 1982.[57] Tillman's recommendation regarding Dignan was overturned by an OPS supervisor. The report of the Special Prosecutor does not make clear whether Tillman's recommendation regarding Dioguardi was also overturned. Benson and Wrice had initially and consistently indentified Dignan and Det. Byrne as administering the beatings, although in his interview with the special prosecutor, Benson said Dioguardi may have been present some of the time. The report does identify Dioguardi as being present with Dignan and Benton when Benton made a statement to the Assistant State's Attorney in the case.

c) Ronnie Bullock, Jr. sued Dioguardi and Detective John O'Hara in 1986, alleging Dioguardi used racial epithets and threatened him while interrogating him for a rape.[58] No physical abuse was apparently alleged.[59] A judge dismissed the lawsuit. Later, DNA tests excluded Bullock as the donor of sperm found on the rape victim, and in 1994, prosecutors conceded he was innocent of the rape.[60]

d) In 1994, the appellate court affirmed the suppression of Virgil Bass's confession despite Dioguardi's testimony that Bass had been at the police station voluntarily during his questioning. Judge Leo Holt called the police's assertion that Bass was there voluntarily "absurd," noting Bass had recently been shot in the foot and was without any pain medication at the time he was at the police station.[61]

e) Murder defendant Earl Wilson claimed his interrogators, who included Dioguardi and seven other officers, induced his confession to the murder of gang kingpin Willie "Flukey" Stokes at Area 2 in 1986 by ignoring his requests for an attorney, depriving him of sleep, and threatening to tell Stokes' gang associates that Wilson had set up the hit on Stokes. The allegations were denied by police and a motion to suppress was

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[55] Deposition of David Dioguardi, November 8, 2004. Case Nos. 03-C-4433; 04-C-168; 03-C-8481; 03-C-3678.
[56] Monica Davey and Katrin Einhorn, *Settlement for Torture of 4 Men by Police*, New York Times, December 8, 2007, available at http://www.nytimes.com/2007/12/08/us/08chicago.html?_r=0
[57] Edward Egan and Robert Boyle, *Report of the Special State's Attorney.*
[58] *Bullock v. Dioguardi*, 86-CV-3819
[59] *Bullock v. Dioguardi*, 847 F.Supp 553 (N.D. Ill 1993).
[60] Jeffrey Bils, *Accusers Finally Agree – He's Innocent*, Chicago Tribune, November 24, 1994, 1994 WLNR 4293233.
[61] *People v. Bass*, 247 Ill. App. 3d 893 (1 Dist. 1994).

denied before Wilson's trial by the judge, who found officers more credible than Wilson. The appellate court affirmed that decision.[62]

f) After police received an anonymous call in 1982 that a Nick Owens had information relating to the murder of police officers William Fahey and Richard O'Brien, Detectives Dioguardi and John Gallagher took Owens into custody for questioning. Owens' mother complained to the Office of Professional standards that Owens was arrested without a warrant, against his will and initially refused to get into a police car, so police struck him about the body until he got in the car. Nick Owens further reported that he became frightened in the squad car when police threatened him, so he jumped out and ran, and received further beatings while being retaken into custody. Dioguardi denied any abuse. The anonymous call was later determined to be from the sister of Owens' girlfriend who was mad at him over an argument, and Owens was released without charges. Owens and his mother later withdrew their complaint, refusing to explain why to OPS investigators.[63]

g) Dioguardi testified on November 10, 1982, that Andrew Wilson, who had killed two police officers, had an eye injury upon being brought into Area 2 the morning of February 14, 1982.[64] This testimony, while consistent with several other arresting officers' testimony that Wilson injured his eye during his arrest, was contradicted by a deputy superintendent's testimony that Wilson suffered no injury during his arrest. The Chicago Police Board rejected the testimony of Dioguardi and other officers about the origin of the injury, concluding from the deputy superintendent's testimony and other evidence that "the totality of these circumstances supports a reasonable inference that Wilson did not incur his eye injury during the course of his arrest."[65]

VII. Johnson Arrest History

41) Johnson's arrest history shows he was arrested in July, 1974 for possession of a stolen automobile; in September, 1974 for the same charge; and in January, 1975, for armed robbery. His arrest history shows one arrest in October, 1975, in the Sixth District (located within Area 2) for possession of drugs and that he was found guilty and fined $25. (*See* Exhibit G.)

ANALYSIS

As a threshold matter, before assessing the credibility of Johnson's claims, the Commission must determine whether Johnson's allegations, if assumed to be true, constitute torture under the TIRC Act or "mere" coercion.

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[62] *People v. Earl Wilson*, 196 Ill. App.3d 997 (1 Dist. 1990).
[63] CR No. 1233320
[64] ROP *People v. Wilson*, Testimony of Dioguardi, Nov. 10, 1982, before Judge John J. Crowley, 1030-1038.
[65] *In the Matter of the Charges Filed Against Commander Jon Burge, et al.*, Nos. 91-1856-1858, 33.

VII. Definitions of Coercion and Involuntary Confesssion

The test to determine whether a confession is voluntary is whether the accused's will was overborn at the time he confessed. (citations omitted) if so, the confession cannot be deemed the product of a rational intellect and a free will. *People v. Kincaid*, 87 Ill. 2d 107, 117 (1981).

Although threats of physical violence may have at one time been considered *per se* coercive (*See* , *Holland v. McGinnis,* 963 F.2d 1044, 1050 (7th Cir. 1992) ("It is axiomatic that a confession extracted with violence or the threat of violence is involuntary"), the current standard seems to consider it as one factor in a host of issues to be considered.

Courts now counsel that, in determining whether a statement is voluntary, the totality of the circumstances are paramount, and 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, 253-254 (2009).

Coercion need not be physical, but can be strictly mentally debilitating. *See Weidner v. Thieret*, 866 F.2d 958, 959 (7th Cir. 1989) (remanding case for further investigation of involuntariness where defendant claimed he had been interrogated by an officer playing with a gun and threatening him with the death penalty while the suspect was intoxicated by drugs).

For a confession to be involuntary, there must be a causal connection between the threats and the decision to confess. *Id.* at 963. In some unique circumstances, threats or violence by police need not have occurred immediately at the time of the confession in order to be coercive, nor even be related to the charge at hand. *See People v. Santucci*, 374 Ill. 395 (1940) (ruling that a gratuitous, unrelated beating by police given to suspect three days prior to his interrogation for a robbery charge was highly relevant to the issue of coercion: "After such abuse by policemen when they had no charge against him, it is obvious defendant would in all probability be afraid to invite the hostility and wrath of the officers by insisting he was innocent when arrested on the robbery charge.")

VIII. Definitions of Torture

Section 5(1) of the TIRC Act defines "[c]laim of torture" as a claim by a convicted person "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."

"Torture" is further defined as "any act by which *severe* pain or suffering, whether physical *or mental*, is intentionally inflicted on a person for the purpose of obtaining from that person a confession to a crime." 20 Ill. Adm. Code 2000.10 (emphasis added).

Webster's Third New International Dictionary defines "severe" in many ways including: 1 a: strict or uncompromising in judgment, discipline or government * * * b: of a strict or stern bearing or demeanor * * * 6 a : inflicting physical discomfort or hardship.[66]

The Commission's statutory and regulatory definition of torture is a largely verbatim replica of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[67] It also mirrors 18 U.S.C. § 2340, (the criminal statute by which the United States adopted the Convention) which defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."

> 18 U.S.C. § 2340 defines "severe mental pain or suffering" as:
> (A) the intentional infliction *or threatened infliction* of severe physical pain or suffering
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) *the threat* that another person will imminently be subjected to death, *severe physical pain* or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality[.](Emphasis added)

The Torture Victim Protection Act (TVPA) of 1991, which allows U.S. citizens tortured abroad to file civil suits, defines torture similarly as:

> [A]ny act, directed against an individual in the offender's custody or physical control, by which ***severe*** pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

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[66] Webster's Third New International Dictionary, Unabridged, 1981, ISBN 0-87779-201-1, page 2081.
[67] UN General Assembly, *Convention Against Tortuer and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://www.refworld.org/docid/3ae6b3a94.html.

28 U.S.C. § 1350 § 3(b)(1) (2016) (emphasis added).

Under the TVPA "[t]he severity requirement is crucial to ensuring that the conduct proscribed by the (U.N.) Convention and the TVPA is sufficiently extreme and outrageous to warrant the universal condemnation that the term 'torture' both connotes and invokes." *Doe v. Qi*, 349 F.Supp.2d 1258, 1314-1315 (N.D. Calif., Dec. 8, 2004) (*quoting Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 29 (D.C. Cir. 2002). "Only acts of a certain gravity shall be considered to constitute torture." *Id.* Accordingly, "[n]ot all police brutality, not every instance of excessive force used against prisoners, is torture under the TVPA." *Id.* and *Price*, at 93. The term is "usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain." *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 236 F.3d 230, 234 (D.C. Cir. 2003) "The crucial issues is the degree of pain and suffering the torturer intended to and actually did inflict – '[t]he more intense, lasting, or heinous the agony, the more likely it is to be torture.' " *Doe*, at 1314-1315, quoting *Price*, 294 F.3d at 92.

"In cases of mental (as opposed to physical) torture, the TVPA requires a showing of 'prolonged' mental harm that is caused by the threat that either the victim or another will be imminently subjected to death or severe physical pain or suffering." *Doe*, at 1317 (*citing* 28 U.S.C. § 1350 § 3(b)(2).

IX. Analysis of Torture Allegations under the TIRC Act

While instructive, none of the above definitions is wholly satisfactory – nor are they binding on this Commission or the State of Illinois, because the TIRC Act is a unique act created for a purpose specific to Illinois. We hesitate to so stringently define torture as to require electroshock or similarly extreme conduct – and indeed, we have previously found less egregious behavior to constitute torture in many cases.[68] Nor do we necessarily think that one must suffer from post-traumatic stress disorder or similarly long-lasting mental impairments in order for mental torture to qualify as torture under the Act.

Yet the sentiment the federal TVPA cases express – that torture must somehow be distinguished from other coercive conduct that does not rise to the level of torture – has merit. Indeed, this Commission has previously found certain alleged conduct to not rise to the level of torture.[69]

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[68] *See In re: Claim of Arnold Day* (Jan. 18, 2017) (referring claim to court in which choking and a threat of being thrown from a window were alleged); *see also In re: Claim of Javan Deloney*, (Jan. 18, 2017) (referring claim to court in which repeated slaps, chest and leg punches, and elbows to the side were alleged; *see also In re: Claim of James Gibson* (July 22, 2015) (referring claim to court in which repeated punching, kicking and slapping were alleged).

[69] *See In re: Claim of Carnalla-Ruiz,* TIRC No. 2014.216-G (denial of bathroom for one hour does not constitute a claim of torture); *See also In re: Lindsay Anderson*, TIRC Claim No.: 2011.002-A (several open-hand chest slaps did

While *Doe v. Qi*'s emphasis on "severity" mirrors the use of the word "severe" in 20 Ill. Adm. Code 2000.10, *Doe* is fundamentally more restrictive than what is required by the TIRC Act. Administrative Rule 20 Ill. Adm. Code 2000.10 explicitly acknowledges that severe mental pain or suffering, by itself, can constitute torture. Likewise, 18 U.S.C. § 2340 acknowledges that severe mental suffering may come from the threat alone of severe physical pain.

We do not contend that threats, without more, automatically constitute torture. Here, Johnson alleges a number of additional factors beyond a threat. He alleges that not only was he subject to threats, but at the same time was subjected to actual physical pain of a handcuff that was too tight, and which the threatening officer knew was too tight and refused to loosen. Johnson additionally alleges that he was highly intoxicated and under the effect of multiple drugs, not the least of which was marijuana, which can induce paranoia and may have made the threat of violence all the more terrifying. He alleged that he had not slept for some time at the time of his interrogation. Although police did not cause the sleep deprivation in this instance, it nonetheless was a factor in Johnson's physical condition at the time of his interrogation. He alleged that he had previously been beaten in the very same police station for nothing more than mouthing off to police, and that the previous abuse is why he believed Dioguardi would carry out his threat. He has alleged that the threat came from an officer who, in an unrelated case, previously secured a confession to a rape where subsequent DNA testing later eliminated the confessor as the sperm donor and prosecutors conceded the confessor was innocent. In that rape case, the confessor alleged not physical abuse, but only threats of physical abuse.

If Dioguardi's past alleged threats were severe enough to convince an apparently innocent man to confess to rape, it is not unreasonable here to conclude that his threats, coupled with the myriad additional coercive factors listed above, could constitute torture.

We think that defining torture, like defining coercion, is a fact-specific, unique inquiry taking into account the totality of the circumstances of each individual case. It is the totality of the allegations of this case, and this case alone, that lead us to conclude torture has been adequately alleged. Nothing precedential should be read into this determination as instituting a blanket rule when it comes to verbal threats and whether they constitute torture. As we noted before, there was much more than just verbal threats at issue in these allegations

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not constitute torture); *In re: Andre Griffin*, TIRC Claim No. 2011.245-G (being hit once on neck and shown statements of co-defenders did not rise to severe pain or suffering); *In re: Claim of James Hinton*, TIRC Claim No. 2011.031-H (being shown pictures of deceased not torture) – all available at www.illinois.gov/tirc/Pages/TIRCDecision.aspx

X. Credibility of the Allegations

Having determined that the allegations sufficiently allege torture, we must determine whether there is sufficient evidence of torture meriting judicial review. The Commission was not asked by the General Assembly to conduct full, adversarial, evidentiary hearings concerning the likelihood of torture, or even to make a final finding of fact that torture likely occurred. That remains the role of the courts. Instead, the Commission has interpreted Section 45(c), through its administrative rules, as not requiring that it be more likely than not that any particular fact occurred, but rather that there is sufficient evidence of torture to merit judicial review.[70] We conclude there is.

Johnson's allegations of abuse, while not 100 percent identical at all stages of his proceedings, have been largely consistent. This commission has seen, time and time again, claimants "gild the lily" and expand upon the allegations they made in their initial suppression hearings. Here, it would have been all too easy for Johnson to throw in an allegation of a gratuitous slap, a punch, a bagging by Dioguardi, but he did not.

We also find persuasive the multiple witnesses who testified to Johnson's heavy drug and alcohol use immediately prior to his interrogation, police denials notwithstanding. This weighs in favor of referral in that drug and alcohol influence would have exacerbated any mistreatment. So too would his lack of sleep at the time. These elements weigh in favor of referral.

Johnson's allegation that his handcuff was too tight was made in his written motion to suppress. He testified at the motion to suppress that they were not too tight in the car ride, but too tight upon one hand being hooked to the wall into the interrogation room, at which point he asked that they be loosened. The state cast doubt on this testimony by contending the cuffs were not adjustable ones, but that is a question of fact.

While the details of the alleged prior, unrelated police beating were heard in detail for the first time only at his TIRC interview, outlines of this contention were alleged at trial, when he stated, "You see, I been jumped on by police," when asked to explain why he believed the threats. Johnson had multiple previous arrests, and possible abuse at one of them is at least plausible.

[70] *See* 2 Ill. Adm. Code 3500.385(b)(1). In general, the approach the Commission has taken is akin to the concept of "probable cause." That is, there must be enough evidence that the claim should get a hearing in court. *See* FAQ No. 8, https://www.illinois.gov/tirc/Pages/FAQs.aspx/. Note that the Commission is free under its rules, where it chooses, to find that any fact occurred, more likely than not. 2 Ill. Adm. Code 3500.385(b)(2). The Illinois Appellate Court has similarly framed the Commission's duties: "[T]he 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. These are two different issues determined by two different entities. * * * What the Commission did was analogous to finding that a postconviction petition could advance to the third stage." *People v. Christian*, 2016 IL App (1st) 140030, ¶95, 98.

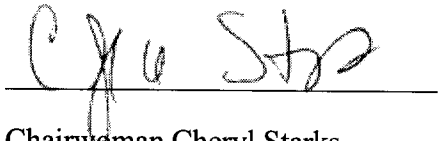
Although we note his suggested dates of occurrence cannot be exactly matched to a specific arrest on his criminal history report, we would not expect perfect recall of the date or charge. Overall, the consistency of the abuse allegations weigh in favor of referral.

So too, does Dioguardi's history. We will not belabor the point by repeating the entirety of his history, but strongly relevant to our decision was Dioguardi's ability in another case to secure an apparently false confession from a rape suspect with nothing more than alleged threats. The pattern and practice evidence weighs in favor of referral.

The consistency of abuse allegations is not to say that Johnson does not have credibility problems. His testimony that the state's attorney did not ask him certain questions, nor that Johnson gave the answers a court reporter transcribed, seem unlikely. It would require the collusion of not only the police, but the state's attorney and court reporter as well, which, while possible, is far less likely.. We also note that his testimony denying that he struck the victim with the hammer, but left him upright and unharmed, is also suspect, particularly given the opposite testimony from his co-defendants. His criminal history also warrants skepticism of his honesty. Johnson's general credibility, therefore, weighs against referral.

Nonetheless, our inquiry is whether there is *sufficient* evidence of torture to merit judicial review; not whether it more likely than not occurred. Here, the strength of the consistent allegations and the pattern and practice history merit judicial review. The Commission instructs its executive director to refer the claim to the Chief Judge of Cook County for further review in accordance with Section 45(c) of the TIRC Act.

Date: May 17, 2017



Chairwoman Cheryl Starks