

BEFORE THE ILLINOIS TORTURE INQUIRY AND RELIEF COMMISSION

In re:
Claim of John Hersey

TIRC Claim No. 2014.245-H
(Relates to Cook County Circuit Court
Case *People v. Hersey*, 92-CR-4156)

I. CASE DISPOSITION

Pursuant to Section 40/45(c) of the Illinois Torture Inquiry and Relief Act (TIRC Act, 775 ILCS 40/1 *et seq.*) and 2 Ill. Adm. Code 3500.385(b), the Commission concludes that there is insufficient credible evidence of torture to merit judicial review of John Hersey's claim of torture.

II. EXECUTIVE SUMMARY

On July 19, 2014, John Hersey filed a TIRC Claim Form alleging that he confessed the crimes of murder, armed robbery, and armed violence after being beaten and tortured by Chicago Police Department Area Two Detective James Boylan on December 23-24, 1991.¹ Hersey alleges that during the drive from the police station at 61st Street and Racine to 111th Street, Detective Boylan pulled over the vehicle and beat and choked him while he was handcuffed in the back seat. Boylan allegedly continued beating and choking him during the next 24 hours at Area Two. According to Hersey, the physical abuse occurred because Hersey refused to sign a confessional statement that was to be pre-written by Boylan. Hersey alleges that because of the prolonged abuse, he eventually signed "a false statement against [him]self."²

Factors supporting Hersey's claim include accounts from his family and friends that Hersey told them about the alleged abuse approximately two or three weeks after his arrest. Those individuals' accounts of what Hersey told them were largely consistent with Hersey's description of the events provided during his interview with TIRC investigators. Further supporting Hersey's claim is the fact that on at least one other occasion Boylan was accused of physically coercing a witness to change his statement.

Factors weighing against Hersey's claim include the lack of any physical evidence (including photographs) or any claim by Hersey of torture in the pre-trial and trial record. Allegations of torture do not appear in the record until December 2009 – eighteen years after Hersey was arrested. Further weighing against Hersey's claim is the lack of any notes regarding

¹ See TIRC Claim Form of John Hersey, attached hereto as Exhibit 1. The Claim Form also includes an allegation that Chicago Police Department Area Two Detective Michael McDermott tortured and coerced the State's witness, Melinda Graham, by, among other things, threatening to take away her unborn child if Graham did not agree to testify. However, because those allegations do not relate to Hersey, they are outside TIRC's jurisdiction (see 775 ILCS 40/5(1)).

² *Id.*

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torture in his trial counsel's file. Although Hersey's trial counsel did draft (but never filed) a motion to suppress Hersey's confessional statement in the early stages of the case, the draft does not contain any mention of physical abuse of Hersey by the Chicago Police Department. The attorney (then law student) who drafted the motion has a strong memory of Hersey and her various conversations with him but does not recall Hersey ever telling her he had been abused by Detective Boylan. Hersey's other trial counsel also had no recollection of these allegations being raised before or during Hersey's trial.

Further weighing against Hersey's claim are his statements at the time of the confession denying any coercion or wrongdoing by Detective Boylan and other officers whom Hersey encountered during his initial detention. Further weighing against Hersey's claim is the inherent bias of the family and friends who spoke with TIRC investigators on Hersey's behalf, some of whom had met with Hersey in prison in advance of their TIRC interview, suggesting that their accounts could have been influenced by Hersey. More importantly, some of the individuals' statements to TIRC investigators were inconsistent with their earlier affidavits filed in support of Hersey's petition for post-conviction relief.

III. FINDINGS OF FACT

This section presents the facts and circumstances concerning Hersey's offense and subsequent investigation, his confession, his trial, and subsequent appeals.³

John Hersey was arrested and charged with various offenses stemming from the July 31, 1991 armed robbery and shooting deaths of two convenience store clerks. Co-defendants Lindsey Crittle, Raymond Brown, and James Sardin also allegedly participated in the offense, and later were convicted. The police investigation led to the arrests of Crittle, Brown, and Sardin, who gave statements about the robbery and shootings and implicated Hersey. Hersey surrendered himself to the police on December 23, 1991, and later that evening gave a detailed statement to the police and Assistant State's Attorney ("ASA") John Murphy about the robbery and shootings.

At Hersey's bench trial in March 1996, the State presented the testimony of Detective Boylan, the testimony of co-defendant Crittle's then-girlfriend, Melinda Graham, and Hersey's signed handwritten statement.⁴ Boylan testified that he was informed at about 4:30 p.m. on December 23, 1991, that Hersey was in custody at the Seventh District police station, so Boylan

³ Portions of the facts set forth in this section were first compiled and published by the Illinois Appellate Court in its written opinion affirming the second-stage dismissal of Hersey's supplemental petition for post-conviction relief, which was the vehicle Hersey used to raise these allegations of torture for the first time. *See People v. Hersey*, 2015 IL App (1st) 122261-U (Mar. 31, 2015). That opinion is discussed at length below in this section and attached as Exhibit 2.

⁴ The case records do not include a copy of Hersey's written, signed confessional statement. Instead, the statement is part of the record on account of Detective Boylan reading it into the record as part of his oral testimony during Hersey's 1996 bench trial. Detective Boylan's testimony, including the signed confessional statement, are attached as Exhibit 3. Boylan's reading of the statement begins at page B-140 of the transcript.

drove there, signed Hersey out, and brought him to Area Two for questioning.⁵ According to Boylan, they did not have any conversation on the way back to Area Two.⁶ At Area Two, Boylan read Hersey his rights, Hersey stated that he understood his rights, and they talked about the convenience store robbery and double murder.⁷ Boylan contacted the State's Attorney's office, and ASA Murphy arrived at Area Two at about 9 p.m. and reviewed information regarding the case.⁸ After Murphy explained his role and advised Hersey of his rights, Hersey waived those rights and gave a second verbal statement, which Boylan testified was substantially the same as his first verbal statement to Boylan aside from a few discrepancies.⁹ The various procedures for memorializing verbal statements were explained to Hersey, and he chose to have ASA Murphy handwrite a summary of Hersey's verbal statement.¹⁰ Boylan and Murphy left the interview room, and Murphy wrote a summary of Hersey's verbal statement.¹¹ Thereafter, Boylan and Murphy reentered the room, and Murphy explained the form to Hersey and had him read the preprinted explanation of rights portion of the form aloud.¹² After Hersey signed the rights portion, he read aloud a few lines of the statement handwritten by Murphy.¹³ Then Murphy read the statement aloud while Hersey sat beside him and read along.¹⁴ Hersey made some corrections to the statement, which was taken at about 11:30 p.m. on December 23, 1991, initialed the corrections, and signed the statement.¹⁵ This process was not videotaped.

Hersey's trial counsel, Richard Kling, never moved to suppress the statement, and Detective Boylan published it to the court.¹⁶ According to Hersey's written statement, he was treated well by the police and ASA, and had been allowed to eat, drink, and use the bathroom.¹⁷ He stated that he was not made any promises in return for his statement, nor was he threatened in any way.¹⁸

Melinda Graham, the girlfriend of co-defendant Lindsey Crittle and mother to his child, testified that she was in a car with Crittle, Hersey, Raymond Vincent Brown, and Keith Sardin when Sardin, Hersey and Brown got out to rob the store while she and Crittle remained in the car. She heard three shots and saw the three men run back to the car. Graham was specifically asked

⁵ See Ex. 3, Trial Testimony of Detective James Boylan, at B130-31.

⁶ *Id.* at B131.

⁷ *Id.* at B131-33.

⁸ *Id.* at B134.

⁹ *Id.* at B136

¹⁰ *Id.* at B136-37.

¹¹ *Id.* at B137.

¹² *Id.* at B138.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at B138-39.

¹⁶ *Id.* at B140.

¹⁷ *Id.* at B151.

¹⁸ *Id.* at B151-52.

by Hersey's attorney, Richard Kling, whether police or the State's Attorney had threatened to take away her baby if she didn't cooperate with the state. She denied it.¹⁹

Following the bench trial, Hersey was convicted under a theory of accountability of the first degree murder of one of the store clerks and the armed robbery of both clerks, but acquitted of the murder of the second clerk. Hersey was sentenced to sixty years in prison for the murder count and thirty years in prison for each of the two armed robbery counts. On direct appeal, the Appellate Court of Illinois affirmed the convictions and corrected the *mittimus* to provide that the two armed robbery sentences should run concurrent to one another and to the murder sentence.²⁰ Hersey's direct appeal did not contain any allegations of torture.²¹

Hersey filed a *pro se* post-conviction petition in May 1999, alleging that his trial and appellate counsel rendered ineffective assistance by (1) failing to argue that Hersey's two armed robbery convictions violated the one-act, one-crime rule; (2) failing to establish through witnesses that the police and ASA coerced Graham's testimony by threatening to take away her unborn child; and (3) conceding Hersey's guilt without discussing that trial strategy with him.²² Affidavits of Hersey, co-defendant Brown, and Hersey's mother, Iola Shelton, were attached as exhibits. Neither the *pro se* petition nor any of the affidavits included any allegation that Hersey was tortured into providing his written confession. During his interview with TIRC investigators, Hersey stated that he did not include any allegations of torture in the *pro se* petition because he was rushed and had been told by law library staff that it was "basically a dead issue."

The *pro se* petition was summarily dismissed at the first stage based on the circuit court's determination that it was not timely filed. However, in 2004, the Illinois Supreme Court remanded it for reinstatement, and the petition later advanced to the second stage. In September 2010, Hersey supplemented the petition through his post-conviction counsel. Counsel adopted Hersey's *pro se* claims of ineffective assistance of counsel and raised two additional issues:

- (1) trial counsel rendered ineffective assistance when he did not allow Hersey to testify about the police beating and threatening him during the interrogation that resulted in his statement; and
- (2) newly discovered evidence, in the form of [Melinda] Graham's affidavit, established that her trial testimony was false and the result of coercion and

¹⁹ See *People v. Hersey*, Record of Proceedings of March 12, 1996, B-39. See also related fn. 1 and fn. 24.

²⁰ *People v. Hersey*, No. 1-96-2866 (Ill App. Ct. Dec. 23, 1998), modified on denial of rehearing (June 7, 2000), attached as Exhibit 4.

²¹ It should be noted that because Hersey's allegations of torture were not raised before the trial court, they would very likely have been deemed waived if raised for the first time on appeal. Hersey stated during his interview with TIRC investigators on January 24, 2018 that he was aware of that at the time and that that was the reason the direct appeal was silent on this issue.

²² Petition for Post-Conviction Relief, filed June 10, 1999, attached as Exhibit 5.

intimidation by the police, who isolated her from her mother for two days during the interrogation and threatened to have an agency take away her unborn child.²³

Attached as exhibits to the Supplemental Petition were affidavits of: 1) Hersey; 2) Shelton (Hersey's mother); 3) Jeene Hersey (Hersey's sister); 4) Melinda Graham; 5) Patricia Ann Graham (Ms. Graham's mother); and 6) Casanova LaMon (Melinda Graham's friend).²⁴

This paragraph and the next one describe Hersey's allegations of abuse. The September 2010 Supplemental Petition—filed almost 19 years after the date of Hersey's arrest and confession—was the first time his allegations of torture appeared in the written record.²⁵ According to Hersey's affidavit that was attached to the Supplemental Petition (dated December 4, 2009), Hersey—who was seventeen years old at the time—first encountered Detective Boylan at the Seventh District police station at about 5 p.m. on December 23, 1991.²⁶ Hersey's hands were already handcuffed behind his back when Boylan arrived.²⁷ Detective Boylan allegedly grabbed Hersey's wrists and squeezed the handcuffs tighter, which caused Hersey intense pain.²⁸ Hersey begged him to loosen the handcuffs, but Boylan refused and said that things would get much worse if Hersey did not cooperate.²⁹ Boylan allegedly also told Hersey that he would go home if he just cooperated.³⁰ Thereafter, while Boylan drove Hersey to Area Two, Boylan told him the substance of the statement Hersey would write and sign.³¹ According to Hersey, when Hersey responded that he would not comply, Boylan stopped the unmarked police car in an alley, opened the back door and grabbed Hersey, and struck him several times in the chest with a closed fist.³² Then Boylan struck the back of Hersey's head several times.³³ Boylan allegedly also

²³ See Amendment in the Nature of a Supplemental Petition for Post Conviction Relief, filed Sept. 20, 2010 (the "Supplemental Petition"), attached as Exhibit 6.

²⁴ *Id.* The affidavits of Melinda Graham, Patricia Ann Graham, and Casanova LaMon are not directly at issue in considering Hersey's allegations of torture. Specifically, the assertions contained in those affidavits directly address the issue of whether Melinda Graham was improperly coerced into testifying against Hersey, rather than any physical abuse allegedly suffered by Hersey. Graham, despite testifying against Hersey and his co-defendants at trial, later swore by affidavit that her statement and later testimony had been coerced by Det. Michael McDermott, namely by detaining Graham as a minor for two days, without permission; by refusing to allow her mother to see or speak with Graham during that time; and by threatening to take Graham's unborn child away from her if she refused to testify against Hersey and others.

²⁵ Prior to filing the Supplemental Petition, in 2008, Hersey's post-conviction counsel, Thomas Herres, indicated at a status hearing that he intended to subpoena "the bruise sheets from [Hersey's] intake at Cook County Jail." See Hrg. Tr. at Y-2 (92-CR-04156) (Mar. 6, 2008), attached as Exhibit 7. TIRC investigators interviewed Herres (see IV.B.2 below), but he was unable to recall whether he subpoenaed and/or received said bruise sheets, and was unable to provide his file from the representation as he is now retired.

²⁶ See Ex. 6 at C00105-06, ¶ 3 (Dec. 4, 2009 Affidavit of John Hersey).

²⁷ *Id.* at C00106, ¶ 4.

²⁸ *Id.* at ¶¶ 4-5.

²⁹ *Id.* at ¶ 5.

³⁰ *Id.* at ¶ 6.

³¹ *Id.* at ¶ 8.

³² *Id.* at ¶ 9.

³³ *Id.*

placed his hands on Hersey's throat and choked him until he almost lost consciousness.³⁴ According to Hersey, Boylan threatened Hersey that he had better be able to say what Boylan would tell him to say when they arrived at Area Two.³⁵

Hersey's affidavit further asserted that Boylan left him alone in a room at Area Two for ten minutes and then brought him to Boylan's desk and told him to sign a prewritten statement.³⁶ Hersey refused, and Boylan shouted and cursed at him, returned him to the room in which he had previously been held, and left.³⁷ Shortly thereafter, Boylan allegedly entered the room, struck Hersey several times and choked him, and kept repeating, "What did I tell you in the car?"³⁸ After several minutes, Boylan told Hersey he would not be hit anymore and could go home if he signed the prewritten statement.³⁹ Boylan said that the ASA was coming, and if Hersey did not sign the prewritten statement, Boylan would beat him again and throw him in a cell with some older inmates and let them beat him.⁴⁰ Hersey allegedly signed the prewritten, false statement due to fear of further beatings and based upon Boylan's promise that Hersey could go home if he signed the statement.⁴¹ Hersey's affidavit also asserted that he told his trial attorney, Richard Kling, at their first meeting and on many other occasions about Boylan's threats and beatings during the interrogation.⁴² Hersey also asserted that he told his family about the threats and beatings.⁴³

On January 10, 2011 Hersey withdrew his December 2009 affidavit and substituted his December 2010 affidavit, which contained the same information but added that he wanted to testify at the trial to refute Melinda Graham's account of the events and explain that he had signed the false, prewritten statement as a result of physical coercion by Boylan during interrogation.⁴⁴ Hersey also added that he had told Mr. Kling and Kling's staff on several occasions of his desire to testify, that Kling informed him on the date of trial that he would not be called as a witness because Kling did not think the judge would believe his testimony, and that Kling never informed him that the decision to testify belonged to Hersey alone.⁴⁵

In her October 2009 affidavit (attached to the Supplemental Petition), Hersey's mother, Iola Shelton, asserted that she had spoken to Mr. Kling on several occasions prior to trial and

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at C00106-07, ¶¶ 10-11.

³⁷ *Id.* at ¶ 12.

³⁸ *Id.* at ¶ 13.

³⁹ *Id.* at ¶ 14.

⁴⁰ *Id.*

⁴¹ *Id.* at ¶ 15.

⁴² *Id.* at C00108, ¶ 16.

⁴³ *Id.*

⁴⁴ See Dec. 21, 2010 Affidavit of John Hersey, attached as Exhibit 8, at C00124-25.

⁴⁵ *Id.* at C00125-26, ¶¶ 22-25. Notably, the trial transcript does not contain any indication that the court or Mr. Kling advised Hersey of his right to testify.

informed him that her son had signed the statement because the police had beaten him during interrogation and promised to release him.⁴⁶ According to Shelton, after the trial Kling told Shelton and her daughter, Jeene Hersey, that Hersey had wanted to testify but Kling did not allow him to do so because he did not think the judge would believe him.⁴⁷ Jeene Hersey's October 2009 affidavit (also attached to the Supplemental Petition) reiterated the information contained in her mother's affidavit concerning Kling's knowledge that Hersey's statement was coerced and he had not been allowed to testify.⁴⁸

The State moved to dismiss the Supplemental Petition, arguing, among other things, that Mr. Kling provided effective assistance because his decisions were matters of reasonable legal strategy and Hersey suffered no prejudice from Kling's performance. In July 2012, the trial court granted the State's motion and dismissed Hersey's petition at the second stage.

Hersey appealed the dismissal. As relevant to Hersey's TIRC claim, he argued that his petition should have advanced to a stage-three evidentiary hearing because he made a substantial showing that: 1) his right to due process was violated by the introduction of a physically coerced confession at his trial; and 2) Mr. Kling rendered ineffective assistance when he usurped Hersey's right to testify.⁴⁹ Hersey also argued that he was denied reasonable assistance of counsel when his post-conviction counsel failed to raise the issue as a freestanding due process claim in the Supplemental Petition.⁵⁰ On March 31, 2015, the Illinois Appellate Court affirmed the dismissal. Most relevant to Hersey's TIRC claim, the court reasoned as follows:

While we acknowledge that the court may not engage in any fact-finding or credibility determinations during the second stage of postconviction proceedings, we do not believe that we are required to assess the reasonableness of postconviction counsel's assistance in a vacuum that ignores defendant's failure to exercise his right to timely object to the use of his alleged involuntary confession and to have a fair hearing and a reliable determination on the issue of voluntariness. *See Jackson*, 378 U.S. at 376–77 (emphasizing that the defendant's right to object to the use of a confession and have a fair hearing and reliable determination on the issue of voluntariness is as equally clear as his due process right protecting him from a conviction based on an involuntary confession). The record indicates that Detective Boylan testified concerning the

⁴⁶ See Ex. 6 at C00112-13, ¶¶ 2-3 (Dec. 14, 2009 Affidavit of Iola Shelton). Ms. Shelton's assertion is noteworthy in that it contradicts an assertion she made in her prior affidavit that other than general conversation, Melinda Graham was the only topic she and Mr. Kling ever talked about. See April 28, 1999 Affidavit of Iola Shelton, attached as Exhibit 9.

⁴⁷ Ex. 6 at C00113, ¶ 4.

⁴⁸ See *id.* at C00109-10, ¶¶ 2-4 (Dec. 14, 2009 Affidavit of Jeene Hersey). As discussed below in Section IV.B.4, Jeene Hersey's 2009 affidavit is inconsistent with her statement to TIRC investigators that she never met with any of Hersey's attorneys.

⁴⁹ See Ex. 2, *People v. Hersey*, 2015 IL App (1st) 122261-U, at 1, ¶ 2 (Mar. 31, 2015).

⁵⁰ *Id.*

voluntary nature of defendant's confession, the procedures taken by ASA Murphy to memorialize defendant's verbal statement in a handwritten statement, and defendant's acknowledgment that he was treated well by the police and ASA and was not made any promises in return for his statement nor threatened in any way. In addition, trial counsel neither moved to suppress defendant's statement as involuntary nor challenged the voluntariness of the statement during the 1996 trial. Moreover, defendant's original *pro se* petition and affidavit did not include any allegations that the police beat and threatened him during his interrogation. The facts that defendant alleges to support his coerced confession claim in his amended petition are so detailed and shocking that any reasonable person would have thought to include such facts in the original *pro se* petition, particularly here where defendant was already alleging that the police and ASA had coerced Graham's statement. Based on the record and defendant's failure to raise the allegation of his physically coerced confession until his second affidavit—dated December of 2009—in support of his amended postconviction petition, we cannot conclude that defendant has rebutted the presumption of reasonable assistance from postconviction counsel. Consequently, we conclude that defendant has failed to make a substantial showing of a constitutional violation concerning this claim.⁵¹

The court also held that Hersey failed to prove ineffective assistance of counsel based on his not testifying at trial. As relevant to Hersey's TIRC claim, the court reasoned as follows:

The record supports the decision that defendant not testify as reasonable trial strategy because . . . the theory of the defense was that defendant was not accountable for the armed robbery and murders and his version of the events, which emphasized his lack of participation, was admitted into evidence through Detective Boylan's publication of defendant's handwritten statement without exposing him to cross-examination. On cross-examination, defendant would have been impeached by the fact that he did not raise any allegations of abuse and coercion to ASA Murphy, who interviewed him at Area Two. Furthermore, defendant would have been impeached for not documenting any of the injuries he undoubtedly would have sustained based on his allegations that Detective Boylan punched defendant's head and chest, severely beat him, and choked him almost to the point of losing consciousness.⁵²

⁵¹ *Id.* at ¶ 43.

⁵² *Id.* at ¶ 49.

IV. TIRC INVESTIGATION

TIRC conducted a thorough fact investigation regarding Hersey's allegations. The investigation involved in-person and telephone interviews with Hersey, his various trial and appellate counsel, and several other individuals identified by Hersey as being able to support his claim. In addition, more than 8,000 pages of documents from Hersey's and his co-defendants' proceedings were reviewed as part of the investigation.

A. Hersey Interview

On January 24, 2018, TIRC investigators conducted an in-person interview with Hersey at the Joliet Treatment Center in Joliet, Illinois. Hersey was represented by counsel. Hersey's account of the events was largely consistent with the assertions first made in his December 2009 affidavit, restated in his December 2010 affidavit, and also included in his TIRC Claim Form. Hersey stated that Boylan choked him and punched him repeatedly in the head, chest, and upper body while Hersey was handcuffed in the back of the police vehicle on the way to Area Two.⁵³ Hersey further stated that after arriving at Area Two, Boylan again punched him repeatedly in the head and chest while Hersey was handcuffed to a wall in an interview room.⁵⁴ Hersey added that this second attack allegedly continued for approximately five to ten minutes.⁵⁵

Hersey stated that when he arrived at Cook County Jail he had bruises on his chest and his stomach.⁵⁶ According to Hersey, Jail examining staff asked him about the bruises and Hersey responded, "Man, you know what that is."⁵⁷ Hersey stated that the examining staff did not take any photographs of his bruises, but Hersey did not know if any notes regarding the bruises were included in his intake paperwork.⁵⁸ TIRC investigators searched for the bruise sheets by issuing subpoenas to the Cook County Public Defender's Office and the State Attorney's Office, and requesting them from Cermak Hospital, but were unable to locate them.⁵⁹

Hersey stated that the first people he told about the abuse were his mother and sister, whom he told during their visit at Cook County Jail approximately two or three weeks after his arrest.⁶⁰ Hersey stated that he did not provide specific details of the abuse at the time.⁶¹ Hersey stated that he also told his first public defender about the alleged abuse shortly after he was

⁵³ *Hear*, Jan. 24, 2018 Audio-Recorded Interview of John Hersey, at time marker 20:22.

⁵⁴ *Id.* at 23:10.

⁵⁵ *Id.* at 28:07.

⁵⁶ *Id.* at 36:22.

⁵⁷ *Id.* at 36:34.

⁵⁸ *Id.* at 36:45.

⁵⁹ Personnel at Cermak Hospital searched for Hersey's medical records, including the intake form or "bruise sheet" and could not locate any records and believe they have been destroyed.

⁶⁰ *Id.* at 45:55.

⁶¹ *Id.* at 47:38.

appointed but the public defender felt that the lack of physical evidence was a problem.⁶² Hersey could not recall the attorney's name and TIRC investigators were unable to identify him or her to corroborate Hersey's assertion.

Hersey stated that he then told his trial counsel, Richard Kling, about the abuse during their first meeting and several times after that.⁶³ Hersey stated that he remembered Kling prepared a motion to suppress the statement based on the abuse but it was either not filed or was withdrawn.⁶⁴ Hersey stated that this was because Kling "felt that by there not being any physical evidence that we didn't have any chance of us winning the motion."⁶⁵ Hersey continued,

[A]fter we went spoke about it, and he just felt that by me not having any physical injuries recorded that at that time it was pointless. And since then, I had an attorney speak to Mr. Kling, I can't remember if it was Thomas Herres or which one, but Kling's position was . . . in hindsight if we had known what we know now it would've been different. But his decision to withdraw was based on the fact that I didn't have any physical proof to back up my claim.

That was the issue with Kling, you know, that there weren't any hospital injuries or anything like that. Now, remember this was in '91 when this happened, so Kling felt like coming in there trying to say that this Detective did this, c'mon this judge is--you know--and that was the reason why when I wanted to testify Kling made the decision basically "the judge is not going to believe you." So, that's why I didn't testify--it wasn't that I didn't want to. It was just he felt it was a losing battle.⁶⁶

Hersey further stated that Mr. Kling and three of Kling's student interns worked on the motion over a period of months to try to overcome the lack of physical evidence.⁶⁷ Hersey stated that Kling decided to withdraw the motion close to trial and told him "I honestly don't believe we can win this motion because there was no physical evidence. And we're trying to go in front of this judge and convince him that this officer, who's decorated and all of this—did this to you."⁶⁸

The trial record does not contain a motion to suppress Hersey's statement. TIRC investigators determined subsequent to Hersey's interview that a motion to suppress was drafted

⁶² *Id.* at 48:00.

⁶³ *Id.* at 71:16.

⁶⁴ *Id.* at 37:40.

⁶⁵ *Id.* at 38:30.

⁶⁶ *Id.* at 39:00.

⁶⁷ *Id.* at 72:30.

⁶⁸ *Id.* at 79:16.

by Mr. Kling's office but never filed. Significantly, the draft motion did not contain any allegations of physical abuse. The draft motion is further discussed below in Section IV.B.1.

Hersey stated that he also told his co-defendants Raymond Brown and James Sardin that he was abused by Detective Boylan, and that they too had been tortured into confessing to these crimes (which, according to Hersey, none of them committed).⁶⁹ Finally, Hersey stated that he also told several other individuals about the alleged abuse. TIRC interviewed all of the individuals that could be located.⁷⁰ A summary of those individuals' accounts is provided in the following sections.

B. Supplemental Interviews

1. Richard Kling and Student Interns (Trial Counsel)

TIRC investigators spoke with Richard Kling multiple times by telephone. During the first conversation, Mr. Kling stated that the name John Hersey sounded familiar but Kling did not have any independent recollection of the matter, including the approximate time period or the crimes that resulted in Hersey's incarceration. Notably, when informed of the nature of TIRC's investigation, Kling asked, "Did I file a motion to suppress? I would have filed one if he had told me anything like that."⁷¹

Mr. Kling later had his file retrieved from storage and reviewed it during a subsequent conversation with TIRC investigators. The file contained a draft motion to suppress Hersey's statement, prepared by Kling with the assistance of then-law student Gina L. Terrano (now Gina T. Panepinto).⁷² As previously stated, the draft motion did not contain any allegations of

⁶⁹ *Id.* at 57:21. Specifically, Hersey stated to TIRC investigators that Sardin told him he was "hit over the head" by police and tortured into confessing, and that Sardin had moved to suppress his statement based on that abuse. TIRC investigators confirmed that Sardin moved to suppress his own statement. However, Sardin's motion argued that he had sustained a head injury earlier in the day on which his statement was given, and he was "unable to appreciate and waive his [M]iranda rights" due to his injuries. *See People v. Sardin*, No. 62-4156, Transcript of Motion Proceedings on April 22, 1996, at M30, attached as Exhibit 10. Sardin's counsel specifically stated during argument that Sardin's alleged diminished capacity had "nothing [to] do [with] the police officers, and *we are not alleging any improprieties on the part of the police officers in inflicting that injury.*" *Id.* (emphasis added). Additionally, on June 22, 2011 Sardin filed a TIRC Claim Form that was based solely on allegations that Melinda Graham was coerced into testifying against him. On July 6, 2011, Sardin's TIRC claim was summarily dismissed for lack of jurisdiction. In subsequent correspondence with TIRC regarding the dismissal of his claim, Sardin requested that TIRC broaden its investigative scope to include claims of abuse to persons other than the convicted individual; however, he did not ever allege that he was personally the victim of physical abuse.

With respect to co-defendant Brown, Hersey stated only that Brown told him the police had given Brown beer earlier in the day on which he provided his statement. *Hear*, Jan. 24, 2018 Audio-Recorded Interview of John Hersey, at time marker 115:36.

⁷⁰ In addition to the individuals discussed in this section, Hersey stated that he also told Reverend Jeffrey Haynes and Casanova LaMon about the abuse. TIRC investigators conducted a search for those individuals but could not locate them.

⁷¹ *See* Record of Interview with Richard Kling, attached as Exhibit 11.

⁷² *See* Draft Motion to Suppress Statements, attached as Exhibit 12.

physical abuse or coercion. Instead, the motion argued that Hersey's statement should be suppressed because:

4. [Hersey] was not informed of his rights under *Miranda v. Arizona* . . . and was led to believe that it was in his best interest to make a statement to the State's Attorney.
5. The statements sought to be suppressed were obtained as a result of an improper interrogation which took place prior to the Defendant admonishment of his rights.
6. The Defendant was admonished and told he was under arrest after he had made a statement to the State's Attorney. The State's Attorney led him to believe that the Defendant would be a witness for the state and his statement was to be used to charge the Co-Defendants, after showing the Defendant his Co-Defendant's statements.⁷³

Because Mr. Kling did not have a stamped copy in his file, he assumed that the motion had never been filed. The trial court docket supports this conclusion. Mr. Kling's file did not contain any notes or memoranda on why that decision was made, and Kling had no recollection of that. Kling stated that he did not recall ever being told by Hersey or anyone else that the statement had been obtained through physical abuse.⁷⁴ Kling further stated that he would expect such allegations to have been included in the draft motion if he had knowledge of them at the time.⁷⁵

On July 31, 2018, TIRC investigators interviewed Gina Panepinto regarding her role in drafting the motion and her recollection of Hersey's allegations of torture. Ms. Panepinto stated that she remembered Hersey very well as he was one of the first people she ever represented.⁷⁶ Panepinto represented Hersey for two years while she was a student in Mr. Kling's law school clinic. Panepinto stated that she remembers meeting with Hersey multiple times and talking to him about grounds for a motion to suppress his statement.⁷⁷ Panepinto stated that she remembers the basis of that motion being that Hersey did not understand at the time he went to the Seventh District police station that he was actually under arrest and could not leave.⁷⁸ Panepinto stated that while she would "love to be able to help John," she has no recollection of Hersey ever telling her that he was physically abused by the Chicago Police Department.⁷⁹ Panepinto stated that had such an allegation been made, it would "definitely" have been included in the draft motion to

⁷³ *Id.* at 1-2.

⁷⁴ Ex. 11.

⁷⁵ *Id.*

⁷⁶ See Record of Interview with Gina Panepinto, attached as Exhibit 13.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

suppress.⁸⁰ Notably, Panepinto was able to recall several specific details from her conversations with Hersey, including one where he referred to the unsanitary conditions in his Cook County Jail cell as “torture.”⁸¹

TIRC investigators also interviewed Karen Levi (Touchi), another former student of Mr. Kling who assisted at Hersey’s trial. Hersey stated during his interview that Levi should be able to corroborate that he told his trial counsel about the abuse. However, Levi stated that she does not have any recollection of John Hersey or the representation. She further stated that any files relating to that matter would have since been destroyed.

2. *Thomas Herres (Post-Conviction Counsel)*

TIRC investigators also interviewed Thomas Herres, Hersey’s former counsel who represented Hersey in connection with drafting and arguing against dismissal of his Supplemental Petition. Mr. Herres represented Hersey from approximately March 2008 through filing the notice of appeal in July 2012. He has since retired from the Cook County Public Defender’s Office. During his interview with TIRC investigators, Herres stated that did not have any recollection of Hersey or the representation, but thought that reviewing the Supplemental Petition might refresh his recollection. Investigators provided Herres with a copy of the Supplemental Petition following the interview. Herres subsequently responded by e-mail that he remembered speculating during his representation as to trial counsel’s strategy regarding the written statement confession. Herres was not able to provide any additional detail regarding the substance of Hersey’s allegations but suggested TIRC investigators review his file from the matter.

3. *Benjamin Wolowski (Appellate Counsel)*

TIRC investigators also interviewed Hersey’s former appellate counsel, Benjamin Wolowski, who represented Hersey in connection with appealing the second-stage dismissal of the Supplemental Petition. Hersey listed Wolowski on the Claim Form as someone who could support the claim. Wolowski stated to TIRC investigators that he remembers Hersey saying he had been telling his attorneys and others about the alleged abuse since immediately after it occurred, but acknowledged that he did not have anything other than Hersey’s word for that. Wolowski stated that while he would like to assist, he has no firsthand knowledge to support Hersey’s allegations and did not perform any sort of investigation of that issue as part of his representation.

4. *Iola Shelton and Jeene Hersey*

TIRC investigators also interviewed Iola Shelton and Jeene Hersey regarding Hersey’s claim. Though the interviews were conducted separately, both women corroborated Hersey’s

⁸⁰ *Id.*

⁸¹ *Id.*

statement that he told them about the alleged abuse approximately two or three weeks after he was taken to Cook County Jail. Shelton maintained that she spoke with Mr. Kling regarding her son's written confession and that he should be allowed to testify about "Burge and them beating him." As previously noted, this is consistent with Shelton's 2009 affidavit but contradicts her 1999 affidavit, wherein she asserted that other than general conversation, Melinda Graham was the only topic she and Kling ever talked about. When asked about this, Shelton could not recall the contents of either affidavit or whether she drafted or merely signed them at the request of someone else. Shelton is currently 73 years old and noted several times to TIRC investigators that her memory is "not what it used to be."

Jeene Hersey stated that she remembers Hersey telling her about the alleged abuse during a visit with her mother to Cook County Jail. Jeene was 14 years old at the time. She recalled that she and Shelton were confused as to why Hersey would confess to a crime that he did not commit, and that Hersey was "begging [Shelton] to help him because he was saying they were doing things to him." Jeene recalled Shelton telling her that Kling did not want to put Hersey on the stand because the judge would not believe him and it would do more harm than good; however, Jeene stated that she was not personally involved in any conversations with Hersey's attorneys so could not corroborate that fact.⁸²

5. *Roma Holmes (Hersey's Ex-Wife)*

TIRC investigators also interviewed Hersey's ex-wife, Roma Holmes. Hersey and Holmes were dating at the time Hersey was taken into custody. They were both 17 years old. Holmes stated that Hersey told her within a day or two of his arrest that "when they took him in for questioning they were threatening him and being abusive with him." Holmes was unable to recall exactly what Hersey said but stated that "the gist was that they were hitting him." According to Holmes, Hersey did not provide very much information as he had to get off the phone. Holmes learned more the following day when she spoke with Jeene Hersey, who related what her brother had said.⁸³ Holmes stated that she could not speak to any other aspect of the allegations as she never had any contact with Mr. Kling or any of Hersey's various attorneys and did not personally see any evidence of torture.

Holmes further stated that she and Hersey are still close and she generally visits him once per week now that he has been moved to Joliet, which is closer to her home. Holmes stated that she visited Hersey both prior to his TIRC interview and several times since—most recently two or three weeks prior to Holmes being interviewed by TIRC investigators. Holmes stated that she

⁸² Jeene Hersey's statement to TIRC investigators contradicts her 2009 affidavit, in which she asserted that she spoke with Kling at least twice prior to trial regarding Hersey's allegations of abuse. *See Ex. 6 at C00109-10.*

⁸³ There appears to be a minor discrepancy in the timeline. Holmes stated that she learned of the abuse within a day or two of Hersey's arrest but Hersey, his mother, and his sister all stated that he did not tell them until he had been at Cook County Jail for two to three weeks. This minor discrepancy is understandable given that almost twenty years have passed and appears to be immaterial in any event.

and Hersey had talked generally about Hersey's TIRC interview and the kinds of questions that were asked, but "didn't go back over what actually happened to him." Holmes denied that Hersey told her what she should say when contacted by TIRC investigators.

C. Detective Boylan's Complaint Record

TIRC investigators also reviewed Detective Boylan's complaint file. On at least one other occasion, Boylan was accused of physically harming an individual to obtain a statement that was helpful to his investigation.⁸⁴ While the allegations were ultimately determined to be "unfounded" and "not sustained" by the Chicago Police Department investigator, in relevant part the complaint alleged as follows:

[Complainant] told [Detective Boylan and the two accompanying officers] that he had not seen [the suspect] in the store but had seen him outside the store immediately after the shooting. Upon hearing this, Det. Boyle's⁸⁵ face turned red. He jumped out of his seat and slapped [Complainant] first on the right side of his head with his open hand and then on the left side of his head. The slap to the left side of his head caused [Complainant]'s head to strike the wall he was sitting next to and bounce off. Det. Boyle then punched him in the stomach. He then took his thumb and two fingers and grabbed his adam's apple and pinched and squeezed it for approximately thirty [seconds].⁸⁶ This was very painful because he did it very hard for approximately thirty seconds. As he did this, he repeatedly told [Complainant] that he was lying and that he would beat his "ass" all night.⁸⁷

In September 1991, several allegations were sustained against Boylan following an altercation with another police officer and that officer's son in which Boylan discharged his weapon while intoxicated.⁸⁸ The sustained allegations were: 1) unlawful or unnecessary use or display of a weapon; 2) disrespect to or maltreatment of any person, while on or off duty; and 3) intoxication on or off duty. The investigator recommended as follows:

It is recommended by the reporting investigator that the allegations made against Police Officer Boylan in regards to his actions of firing at Mr. Griffin and Mr. Chatman and chasing Mr. Griffin with his vehicle, while he was intoxicated, be sustained because the available evidence is sufficient to warrant the recommended findings. The alcohol blood test administered at the hospital showed that Police Officer Boylan was legally intoxicated and Police Officer Boylan admitted to

⁸⁴ See Exhibit 14, Complaint Register No. 206496 Summary Report and Attachment 4, at page 2 of attachment 4.

⁸⁵ The transcript of the Complainant interview incorrectly refers to Detective Boylan as Detective Boyle.

⁸⁶ *Id.* The transcript of the Complainant interview indicates that Detective Boylan squeezed the Complainant's adam's *[sic]* apple for approximately thirty *minutes*. However, given the sentence that immediately follows, and the implausibility of that scenario, TIRC investigators concluded this is most likely a typographical error.

⁸⁷ *Id.*

⁸⁸ See Exhibit 15, Complaint Register No. 186154 Summary Report, at 9.

have been drinking alcoholic beverages prior to the incident. Police Officer Boylan stated he fired three shots at the front of Mr. Griffin's vehicle after he observed Mr. Griffin fire two shots at him from a gun in which he observed muzzle fire, and after Mr. Griffin attempted to veer his car into him. The evidence shows that a B-B gun was recovered from Mr. Griffin's car which makes the observance of muzzle fire an impossibility. The evidence further shows that two holes were found on the passenger side of Mr. Griffin's vehicle and in the taillight section and none were found in the front of the vehicle. The evidence further shows that Police Officer Boylan chased Mr. Griffin and Mr. Chatman to the exit ramp at 9848 South Wabash where he continued to chase Mr. Griffin, who was on foot, in his vehicle.⁸⁹

Detective Boylan's administrative file contained a total of twenty-five complaints filed against him for various alleged conduct ranging from the use of excessive force, assault, battery, and numerous warrantless searches.⁹⁰ While most were found not sustained or unfounded, the volume of complaints and the common thread of physical violence provide some evidence in support of Hersey's claim.⁹¹

V. STANDARD OF PROOF

Section 40(d) of the Illinois Torture Inquiry and Relief Act permits the Commission to conduct inquiries into claims of torture.⁹²

'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 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.⁹³

If five or more Commissioners conclude by a preponderance of the evidence that there is sufficient evidence of torture to merit judicial review, the case will be referred to the Chief Judge of the Circuit Court of Cook County.⁹⁴ If fewer than five Commissioners come to the same conclusion, the Commission will conclude there is insufficient evidence of torture to merit judicial review.⁹⁵

⁸⁹ *Id.*

⁹⁰ See Exhibit 16, TIRC Summary of Complaints Made Against Det. James Boylan.

⁹¹ Notably, many of the complaints included corresponding allegations against Area Two Detective Michael McDermott, who was also present during much of the alleged misconduct.

⁹² See 775 ILCS 40/40(d).

⁹³ 775 ILCS 40/5 (emphasis added).

⁹⁴ See 775 ILCS 40/45(c).

⁹⁵ *Id.*

The Commission was not asked by the General Assembly to conduct a full, adversarial, evidentiary hearing concerning the likelihood of torture, or even to make a final finding of fact that torture likely occurred, as that is the role of the courts. Rather, the Commission has interpreted Section 45(c) 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.⁹⁶

VI. ANALYSIS OF THE EVIDENCE

There are reasons to believe Hersey's allegations of torture. Specifically, Detective Boylan's administrative file reflects a pattern of alleged physical violence during his time with the Chicago Police Department. In addition, Hersey's family and friends' statements that he told them about the abuse shortly after his arrest, and his allegations have (according to them) remained consistent since then, provides some evidence in support of Hersey's allegations.

There are substantial reasons to doubt Hersey's allegations of torture. First, Hersey's claim is only supported by his own words and the statements of his family and friends. There is a complete absence of physical evidence and no mention of abuse in the record until eighteen years after the alleged abuse. Further, none of Hersey's trial counsel has any recollection of him telling them that he had been tortured into providing a written statement. Hersey's former attorney, Gina Panepinto, represented Hersey for two years and has a strong memory of her discussions with him. Ms. Panepinto was able to recount to TIRC investigators several very specific conversations she had with Hersey during her representation. It seems highly unlikely that she would forget Hersey's detailed allegations of torture had she been told them while drafting the motion to suppress Hersey's statement, as he alleges.

Additionally, in his original *pro se* petition for post conviction relief, Hersey challenged several aspects of trial counsel's performance, including the alleged failure to properly impeach Melinda Graham's testimony, but did not argue that his trial counsel should have impeached Detective Boylan or filed a motion to suppress the statement. Given the arguments that were included in the petition, Hersey's justification that he didn't mention torture because he was rushed and had been told it was a "dead issue," does not appear credible.⁹⁷

⁹⁶ See 2 Ill. Adm. Code 3500.385(b)(1). In general, the approach taken by the Commission is similar to "probable cause." 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/>.

⁹⁷ In July 2015, Hersey submitted a claim form for Reparations for Burge Torture Victims to the City of Chicago, pursuant to city ordinance. See Matter No. 28405.52. In that claim, Hersey alleged the substantively same allegations of torture he made to the Commission. An independent third party was called upon to determine the eligibility of the claimants seeking reparations—eligibility that required a "credible claim of physical abuse or torture by Jon Burge or one of his officers at Area 2 or 3 police headquarters between May 1, 1972 and November 3, 1991." In October 2015, the independent third party found that Hersey was not eligible for reparations under the city ordinance (1) because the at-issue events took place on December 23, 1991, after the qualifying time period; (2) because the claim involved Detective Boylan, who had not been indicted as under the command of Burge; and (3) because there had been "no outcry of coercion . . . until 2009," as noted by the Illinois Appellate court in *People v. Hersey*, 2015 IL App (1st) 122261-U (see Ex. 8).

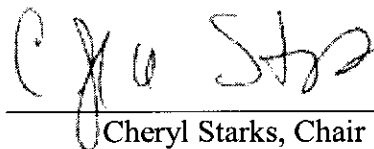
Hersey's credibility is also impacted by his assertion that his co-defendants suffered similar abuse at the hands of the Chicago Police Department and were forced to falsely confess to this crime that none of them committed. To date, none of Hersey's co-defendants have made similar allegations.

Finally, as noted above, there is reason to doubt aspects of statements made by Hersey's family and friends in support of his claim. Both Iola Shelton and Jeene Hersey have made inconsistent statements regarding their conversations with Hersey's trial counsel and whether torture was discussed. Further, given that Jeene Hersey was only 14 years old at the time of these events, and the fact that the assertions in her 2009 affidavit mirror those contained in her mother's corresponding affidavit (*compare* Ex. 6, at C00109-10 *with* C00112-13), TIRC investigators concluded that the assertions in Jeene Hersey's 2009 affidavit regarding her discussions with Hersey's trial counsel are not reliable. Additionally, Roma Holmes spoke with Hersey regarding TIRC's investigation between the time he was interviewed and the time she was interviewed. While Ms. Holmes denied that they discussed specific aspects of the interviews or his allegations, those conversations cast some degree of doubt over her statements.

VII. CONCLUSION

The Commission finds that while there is evidence that Hersey told family, friends, and post-conviction counsel that he had been tortured, there is insufficient credible evidence that torture actually occurred to refer this matter to the Circuit Court. The Commission dismisses the claim and instructs its Executive Director to notify Mr. Hersey of the dismissal and of his right to judicial review under the Illinois Administrative Review Law, as set forth in 775 ILCS 40/55.⁹⁸

DATE: Sept. 11, 2018



Cheryl Starks, Chair

⁹⁸ See 775 ILCS 40/55(a). Although this determination does not concern a "contested case" as defined in Section 1-30 of the Illinois Administrative Procedures Act (5 ILCS 100/1-30) because no opportunity for a hearing is required under the TIRC Act (*See* 775 ILCS 40/45(a)), the Commission notes that the rules of the Commission do not require any motion or request for reconsideration before appeal under the Administrative Review Law, and notes that the service address of interested parties is listed in the Notice of Filing certificate that accompanies the filing of this determination with the Court.