

BEFORE THE ILLINOIS TORTURE INQUIRY AND RELIEF COMMISSION

In re:
Claim of Abdul M. Muhammad

TIRC Claim No. 2014.256-M
(Relates to Cook County Circuit
Court Case 00-CR-13572-01)

CASE DISPOSITION

Pursuant to 775 ILCS 40/45(c), and 2 Ill. Admin. Code 3500.385(c), the Illinois Torture Inquiry and Relief Commission (hereinafter, "the Commission") concludes there is sufficient evidence of torture to merit judicial review of Abdul M. Muhammad's claim of torture. This decision is based upon the Findings of Fact, Analysis, and Conclusions set forth below, as well as the supporting record attached hereto.

EXECUTIVE SUMMARY

Abdul Malik Muhammad was convicted of the May 4, 1999, shooting of Damone Mims. Although he did not give a full confession to the shooting, incriminating statements that police testified Muhammad made to them were used to obtain his conviction.

Muhammad submitted his torture claim in a letter dated July 30, 2014, and received August 21, 2014, alleging that he suffered torture at the hands of Area 2 officers during the officers' interrogation of him relating to his conviction for the shooting death of Damone Mims.¹ In the letter, Muhammad claimed:

- He was interrogated for four days at Area 2 in a cell that did not have a bed, food, toilet, or water.
- That Detective McDermott threatened him, boasting that he, "*kn[ew] how to get [Muhammad] to confess without leaving a mark.*"²
- McDermott aggressively slammed a large casefile on the table, closed the interrogation room door and told his colleagues (specifically, Detective David Fidyk, and other officers crowding the door of the interrogation room) that he needed a moment alone with Muhammad.³ Then he showed Muhammad contents of the case file.⁴ McDermott used this private moment to apply racial intimidation by noting a jury would be more likely to believe white witnesses than a black defendant.⁵
- He was forcefully held by the arm during two of four lineups.⁶

¹ See Exhibit 1: July 30, 2014 letter received August 21, 2014, from Muhammad to TIRC. The letter was accepted as a communication providing "substantially the same information requested in the Claim Form" under 2 Ill. Admin. Code 3500.330(a)(4) due to claim deadline issues later alleviated by a statutory revision in 2016.

² *Id.*

³ *Id.*

⁴ *Id.* at 2.

⁵ *Id.*

⁶ *Id.* at 4.

Later, during his interview with TIRC staff, Muhammad's allegations expanded, and he claimed he was actually beaten by McDermott with a case file on the head, denied food, forced to urinate on the floor and to defecate into a shirt in his interrogation room because he was denied bathroom use.⁷

Muhammad's direct appeals and post-conviction petitions do not allege physical abuse, but do allege denial of request for counsel. Like many claimants before this Commission, Muhammad alleges that he told his trial attorney about police mistreatment, and like many claimants, this could not be verified with the claimant's trial attorney.

However, unlike most claimants, there is some objective evidence that any such mention by Muhammad to his attorney could have occurred. First, Muhammad's own attorney noted to TIRC that because there was no "confession" in the traditional sense, Muhammad's statements to police were not the focus of his efforts. Rather, trying to prove Muhammad's alibi defense was. With only partially incriminating statements documented by police, it is plausible that Muhammad's attorney could have elected to focus his attentions elsewhere, not realizing how much weight the prosecution would afford those statements at trial.

Second, Muhammad also has claimed consistently that he informed his attorney about multiple lineups in which witnesses failed to identify Muhammad as the shooter. Again, Muhammad's trial attorney does not remember lineups being a focus of the case. However, Muhammad's claim about the lineups is significantly bolstered by TIRC's independent confirmation that at least one eyewitness was brought to Area Two and failed to identify Muhammad. Additionally, although the state specifically represented in writing to the defense that any lineups in which a witness failed to identify Muhammad were documented in police reports, no police records provided to TIRC by police, the State's Attorney's Office or the Public Defender's Office show that the state ever disclosed lineups in which no identification was made – a possible *Brady v. Maryland* violation.⁸ While this does not prove Muhammad *told his attorney* about such non-identifying lineups, it does show they occurred, and Muhammad's continued memory of such events and fixation with them in appeals and post-conviction filings makes it significantly more likely that he did, in fact, inform his attorney of lineup issues prior to trial. That valid lineup issues were not discovered and litigated by Muhammad's attorney⁹ before trial makes it at least possible that Muhammad informed the attorney about any coercive interrogation tactics that were also not explored before trial.

While the Commission has serious reservations about Muhammad's credibility – the scope of the allegations Muhammad made about coercive tactics has grown in scope and severity over time, and allegations of physical abuse arose only in his recent TIRC interview – we find that the objective evidence supporting Muhammad's contention about withheld lineup evidence makes his claims of coercion and torture more credible. That demonstrated partial credibility, coupled with the long history of allegations and court findings against Detective McDermott regarding torture and perjury, is enough to warrant a hearing by the courts.

⁷ Hear EXHIBIT 2, April 13, 2017 TIRC Interview w Muhammad, Parts 1 & 2.

⁸ See *Brady v. Maryland*, 373 U.S. 83 (1963) (discussing the state's obligation to provide defendants with exculpatory evidence).

⁹ This is not necessarily the fault of Muhammad's trial attorney. The attorney asked for such evidence in discovery and had a reasonable expectation that the state would provide such evidence if it existed.

Although the Commission refers this claim to court for a hearing on the issue of alleged torture, we also note that Muhammad's presence remains supported by his co-defendant, Aubrey Dungey. Dungey has always identified, and continues to identify, Muhammad as Mims' murderer.

I. FINDINGS OF FACT

a. The Crime

On May 4, 1999, at about 9:00 p.m. Damone Mims was shot and killed while in a car stopped in traffic at 1600 E. 76th Street, Chicago, IL.¹⁰ Muhammad and his Co-defendant, Aubrey Dungey, were identified as suspects by anonymous calls, and several eyewitnesses.¹¹

Aubrey Dungey signed a lengthy, written statement implicating Muhammad. Dungey's statement was introduced into evidence via Dungey's testimony at Muhammad's trial and used to convict Muhammad.¹² The statement contends that Aubrey Dungey met Muhammad at approximately 3p.m. on May 4th, 1999, at Grand Crossing Park.¹³ Upon their initial meeting, Muhammad, Dungey, and two additional Vice Lord gang members, discussed a disagreement between the Vice Lords and their rivals, the Black Gangster Disciples. According to Dungey's confession, Muhammad requested a gun from fellow gang member Terry Taylor; Dungey drove Abdul to pick up the gun.¹⁴

When Muhammad and Aubrey Dungey left Terry Taylor's home, Muhammad was armed. Dungey's statement said Muhammad intended to travel from Terry Taylor's home to 7616 S. South Shore Drive where the pair planned to join additional Vice Lord gang members discussing a retaliatory attack on the Black Gangster Disciples. While en route, Muhammad instructed Dungey to pull alongside of a white car near 76th and Stony Island. The victim, Demone Mims, was stopped in the white car at a stoplight when Muhammad exited Dungey's car, walked to Mims' car, and shot into Mims' car. Muhammad escaped the crime scene in Dungey's car and was dropped off at 7616 S. South Shore Drive.¹⁵

b. The Police Investigation

Detectives Ramierez and Foster, joined by Investigators Paulson and Ginnelly, were dispatched to the scene of the crime. Damone Mims was identified at the scene by his sister Kimberly Mims.¹⁶ Detective Ramirez interviewed Kimberly Mims, who shared that Damone was on his way to pick up Adrian Herman at the time of his death. Ms. Mims also noted that she'd heard that "Malik" was involved in the shooting.

¹⁰ See EXHIBIT 3, *People of the State of Illinois v. Abdul Muhammad*, No. 1-02-0053, Illinois Appellate Court, 1st Dist. (March 9, 2004), at 2. See also, EXHIBIT 4, May 4, 1999 CPD Case Report, Officers Bucky & Claxton.

¹¹ See EXHIBIT 5: Area 2 Supplemental Report, May 13, 1999, Det. A. Ramierez reporting, Page 2; see also EXHIBIT 6, Area 2 Supplemental Report, May 5, 1999, Det. Ramirez reporting; see also EXHIBIT 7, Area 2 Supplemental Closing Report, June 16, 1999, Dets. Fidyk and McDermott reporting.

¹² See EXHIBIT 8, Dungey Statement to Police of June 3, 1999; see also ROP of Nov. 14, 2001, H. 101- 150.

¹³ See EXHIBIT 8, Dungey Statement to Police of June 3, 1999; see also ROP of Nov. 14, 2001, H. 101- 150.

¹⁴ See EXHIBIT 8, Dungey Statement to Police of June 3, 1999; see also ROP of Nov. 14, 2001, H. 101- 150.

¹⁵ See EXHIBIT 8, Dungey Statement to Police of June 3, 1999; see also ROP of Nov. 14, 2001, H. 101- 150.

¹⁶ See EXHIBIT 5: Area 2 Supplemental Report, May 13, 1999, Det. A. Ramierez reporting.

Detective Ramirez also interviewed Adrian Herman, who confirmed he was awaiting Damone Mims at the time Damone was shot and killed. Mr. Herman also explained that he'd seen "Malik" and "Ubie" in a white, four door, Grand Prix flashing Vice Lord street gang hand signs at him as they traveled east towards 75th street on Greenwood. Herman explained this was the last time he had seen "Malik" and "Ubie" before finding out that Damone had been shot and killed.¹⁷ Police also reported receiving anonymous phone calls and a letter identifying "Malik" or "Oobie" or both as being involved in the shooting.¹⁸

Detectives Fidyk and McDermott deduced from police records that Abdul Muhammad and Aubrey Dungey were "Malik" and "Ubie" respectively.¹⁹ On June 1, 1999, Sixth District Tactical Officer Garcia and his partner observed Aubrey Dungey sitting in a parked car at a gas station. Officer Garcia informed Dungey that Mims' murder was being investigated. According to Garcia, Dungey agreed to cooperate, noting, "I know about this and I ain't going down for this shit." Officer Garcia transported Dungey to Area 2 for questioning.²⁰

Dungey was formally arrested June 2, 1999 and signed a handwritten confession June 4, 1999, implicating Muhammad, as noted above. Muhammad was arrested months later in Seattle, Washington by members of the FBI fugitive task force. Extradition proceedings were initiated and arrangements were made to bring Muhammad back to Chicago on April 27, 2000. Muhammad was formally placed under arrest and advised of his rights at Area 2 on the same day, police testified.²¹

According to detectives, Muhammad admitted his involvement with the Vice Lords street gang but denied any knowledge of Demone Mims' murder. Police also claimed he admitted knowing a warrant had been issued for his arrest in the Mims murder and that he had left for Seattle to start a new life.²²

c. Line Ups

During Muhammad's interrogation, several lineups were conducted. Witnesses at the scene of the crime included: Bradley Huett, Helen Huett, Glenn Davis, Sharron Davis, Gregory Brewer, Evelyn Wilson, Edward Wilson, and Shamica Wilson.²³ Muhammad claims there were at least four lineups conducted.²⁴ Typed police reports summarizing the investigation note that witnesses Glenn Davis and Edward Wilson both positively identified Muhammad as the offender they'd witnessed shoot Damone Mims.²⁵

The following documents and testimony indicate lineups may have occurred at the following dates and times:

¹⁷ *Id.*

¹⁸ See EXHIBIT 7, at 3. The anonymous letter purportedly received by police was not among police records TIRC received, nor was it ever introduced into evidence at trial.

¹⁹ See ROP of November 15, 2001, I6.

²⁰ EXHIBIT 7, at 3.

²¹ See ROP of November 15, 2001, Testimony of Det. Fidyk, I4-I31.

²² *Id.*

²³ See EXHIBIT 6: Area 2 Supplemental Report, May 5, 1999, Page 3. (where reporting Officer Detective Ramirez lists all witnesses present at the scene of the crime.)

²⁵ EXHIBIT 7

²⁵ EXHIBIT 7

- Det. Fidyk testified that witnesses Glenn Davis and Edward Wilson identified Muhammad in lineups on April 28, 2000.²⁶
- A photograph of a card documenting when photographs were taken lists a handwritten time of either “1345” or “2345” (1:45 p.m. or 11:45 p.m.) on April 28, 2000, and indicates the photograph was taken by McDermott.²⁷
- A handwritten evidence report listing Det. Pesavento as the investigating officer and Det. McDermott as the “reporting technician” indicates a lineup was initiated at 11:30 p.m. on April 28, 2000 and finished at 12:01 a.m. on April 29, 2000.²⁸
- A photograph of a card documenting when photographs were taken lists a time of 8:00 p.m. on April 29, 2000, and indicates the photograph was taken by McDermott.²⁹
- A handwritten General Progress Report by Detectives Karl and Pesavento indicates a lineup was conducted with an unnamed witness on April 29, 2000 at 11:30 p.m.³⁰

After the lineups where witnesses Glen Davis and Edward Wilson had positively identified Muhammad, Assistant States Attorney Tiernan attempted to interview Muhammad; Muhammad refused to speak with ASA Tiernan.³¹ Tiernan approved 1st Degree murder charges against Muhammad.³²

d. Pre-Trial and Trial Proceedings and Developments

Court Documents indicate Muhammad first arrived in court on April 30, 2000.³³ He was subsequently indicted and arraigned before Judge Michael P. Toomin on June 15, 2000, where he was appointed a public defender and represented by Assistant Public Defender Terrance McCarthy.³⁴

On June 30, 2000, Muhammad and his Assistant Public Defender Guy Hoch, appeared before Judge Clayton Crane and filed a motion for substitution of judge. Hoch indicated Muhammad had perceived something in Toomin at the June 15, 2000, appearance indicating Toomin could not be fair. Judge Crane, citing a 10-day deadline for automatic substitution of judge, denied the request but said the motion could be revisited if cause was demonstrated.³⁵

²⁶ See ROP of November 15, 2001, I20-I25.

²⁷ See EXHIBIT 9, Photograph of April 28, 2000 photo card. This photograph was submitted to TIRC by Muhammad’s counsel, who obtained it from the Chicago Police Department through a Freedom of Information lawsuit.

²⁸ See EXHIBIT 10, handwritten evidence report of Detectives Pesavento and McDermott. This document was located both in the state’s attorney’s file and the public defender’s file that TIRC requested and received.

²⁹ See EXHIBIT 11, Photograph of April 29, 2000 photo card. This photograph was submitted to TIRC by Muhammad’s counsel, who obtained it from the Chicago Police Department through a Freedom of Information lawsuit.

³⁰ See EXHIBIT 12, Undated General Progress Report documenting lineup of Frenshon Rogers, Corey Tulley, Keith Seaton, Muhammad and DeLacey Sykes (in that order). This document was located by TIRC only in the State’s Attorney’s file that it requested and received.

³¹ See EXHIBIT 13: Area 2 Supplemental Report, May 18, 2000, Dets Fidyk and McDermott reporting, 2.

³² *Id* at Page 3.

³³ See EXHIBITS 14: Prisoner Data Sheet.

³⁴ See ROP of June 15, 2000, A1-A5.

³⁵ See ROP of June 30, 2000, A1-A9.

Also on June 30, 2000, Muhammad's attorney filed a motion requesting "[t]hat the State provide defense counsel with the names and addresses of the witnesses they intend to call at the time of trial for identification of the defendant as the perpetrator of the crime including: (a) time, date and place of identification; (b) if photographic identification was used, production of any photo used, whether of defendant or of other person; (c) all persons present at such viewing; (d) any pictures taken of line-up, etc; (e) names and addresses of any individuals who confronted accused and made no identification or identified him for other crimes."³⁶

On August 7, 2001, Hoch indicated he was having difficulty getting information from American Airlines to establish Muhammad's alibi that he had left town before the murder.³⁷

On August 21, 2000, the state responded to Muhammad's discovery request in writing, stating, "[t]he dates, times, places, *circumstances, results, and persons present at any* identification confrontations involved in this cause are contained in the police reports tendered to the defense in open court. Any photographs available to the People which were used in connection with any photographic identification will be made available for inspection. Any lineup photographs available to the People will be made available for inspection." (Emphasis added.)³⁸

Muhammad did not present any pretrial motion to suppress statements nor to quash arrest.

Trial began November 14, 2001; Muhammad presented an alibi defense. He did not testify.³⁹ Witnesses Glenn Davis testified Detectives Fidyk and McDermott visited him at his home about a week after the shooting and showed him six or seven pictures, from which he identified a photograph of Muhammad as that of the shooter.⁴⁰ He also testified that he had attended a lineup April 28, 2000 at the police station in which he also identified Muhammad as the shooter.⁴¹ Teenage witness Edward Wilson testified substantially similarly.⁴²

Muhammad's co-defendant, Aubree Dungey, having already testified at his own trial was compelled to testify over his own objections. He also identified Muhammad as Mims' shooter.⁴³ During the jury instructions conference after Dungey's testimony, Muhammad's attorney Guy Hoch engaged in the following exchange with Judge Toomin:

Court: People's 19, the closing instruction, 26.01. That looks okay. * * * Do you envision any besides these?

Hoch: I anticipate that the minute this guy is found guilty, if that happens, that he is going to turn on me.

³⁶ See EXHIBIT 15, June 30, 2000 Motion for Discovery.

³⁷ See ROP of August 7, 2001, 1D-3D.

³⁸ See EXHIBIT 16: August 21, 2000 Answer to Discovery, ¶12.

³⁹ Trial Transcript, I- 66-67. (Ex. 1B)

⁴⁰ See ROP of November 14, 2001, H23-H46. The photographs were entered into evidence at trial via Mr. Davis' testimony.

⁴¹ *Id.*

⁴² See ROP of November 14, 2001, H47-H61.

⁴³ See ROP of November 14, 2001, H101-H151.

Court: Is there an instruction you can do on that?

Hoch: Now he has decided this is a second degree [murder] case. I will ask for a second degree instruction.

Judge Toomin denied the request to instruct the jury that they could find Muhammad guilty of a lesser charge.

The following trial day, November 15, 2001, Detective Fidyk testified that Muhammad made incriminating statements during his interrogation.⁴⁴ Fidyk detailed Muhammad's statements, explaining that Muhammad had relayed,

...that he was a Vice Lord. Member of the Vice Lord street gang from around 79th and Dobson. He denied any knowledge of the aggravated battery case report, which he was the victim, the one that was assigned to myself. He said, he had no actual knowledge of the murder and that he knew that there was an arrest warrant for him regarding this case and he went to Washington.⁴⁵

Fidyk also testified that, in lineups on April 28, 2000, Glenn Davis and Edward Wilson identified Muhammad as the shooter.⁴⁶ Fidyk additionally testified that the photo exhibits of lineups were not, in fact, photographs of the lineups themselves, but had been taken of the lineup participants in the room outside of the rooms where the actual lineups occurred. He was not asked why the lineup photos were recreated, rather than taken in the actual lineup rooms.⁴⁷

Witness Flora Walker, Muhammad's grandmother, then testified for the defense. She testified Muhammad arrived in Seattle, Washington on May 3, 1999 – the day before Mims' shooting occurred.⁴⁸ During a recess after Walker's testimony, Muhammad asked to approach the bench to complain about his attorney, Hoch. The following exchange ensued:

MUHAMMAD: Your Honor, * * * I showed him [Hoch] October 11th, he's not in my favor. And he hasn't been representing me right. I feel that he's not doing his job. * * * I don't feel he's doing his job at all, at all.

COURT: What is he not doing?

MUHAMMAD: He ain't doing anything right. He coming back in the back, bullpen, he was – he wanted me to take some time. He kept telling me, he can't beat this case. Why do you want me to take this case to trial. He called me, foolish, stupid. He said, that Judge despise you.

COURT: Said the Judge what?

⁴⁴ Ex. 1B, Trial Transcript at I-19.

⁴⁵ Ex. 1B, Trial Transcript at I-19.

⁴⁶ See ROP of November 14, 2001, I4-I31.

⁴⁷ *Id.*

⁴⁸ See ROP of November 14, 2001. I39-I53.

MUHAMMAD: He said the Judge despise you. The Judge feel that you are a coldblooded killer. I said – Mr. Hoch, I say, Mr. Hoch, I asked you if you can't win my case, please don't represent me. And – and everybody in the bullpen heard him. ***

COURT: Anything to say, Mr. Hoch?

HOCH: Judge, nothing that he said is inaccurate as far as things I told him with respect to how bad his case was. But I certainly, you know, made a record in open Court that I had vigorously attempted to defend him, as I'm sure the Court has seen. ***

COURT: You tell him that I despise him because he's a coldblooded killer?

HOCH: I told him that, Judge, that –

MUHAMMAD: Ask the bullpen.

HOCH: Yes, I did, because you told – you had told me that you resented the fact that he had caused –

MUHAMMAD: And your words, you say, he despise me.

HOCH: I said that. I said that.

MUHAMMAD: You said that you knew from the beginning that – that I was going to file inefficiency of counsel. * * * I said, so you really think that I'm going to lose, and I didn't do this. You really feel that I should cop out for something that I didn't do? He said, I'm not going to beat it and you's the fool, you's the fool. He kept getting loud at me, your Honor. ***

HOCH: Everything, of course, he said is true. I have been trying to get you to see how bad the case was, and that a plea of guilty for what amounts to a generous sentence won't –

* * *

COURT: I'll set the record straight. I never said, I despise you. I never said that at all.

HOCH: That was my characterization, Judge, of the fact that we did have some discussion about if he plead guilty, he would get a certain sentence. That he couldn't expect such a generous sentence, if he was found guilty after a jury trial.

* * *

MUHAMMAD: You feel, I'm a coldblooded killer?

COURT: I didn't say that.

MUHAMMAD: Because he said that you said that.

* * *

HOCH: I said that's how the Judge feels. That's the –

MUHAMMAD: He said the exact words.⁴⁹

Judge Toomin ultimately ruled that he found no indication that Hoch could not and had not been representing Muhammad, and refused to remove Hoch from the case. Muhammad then waived his right to testify and presented no more witnesses, although Muhammad's mother had stood up and announced her presence in court, possibly to indicate she could also serve as an alibi witness.⁵⁰ The prosecution in closing arguments highlighted Muhammad's alleged statements to police as an indication of acknowledgement of guilt.⁵¹ The same day, Muhammad was found guilty of first degree murder in violation of Section 9-1(a)(1) of the Illinois Criminal Code. The trial court sentenced Muhammad to 50 years imprisonment.

e. Appeals and Post-Conviction Proceedings

Muhammad's trial Counsel, Guy Hoch, filed a Motion for New Trial on Muhammad's behalf on December 12, 2001.⁵² The motion presented four arguments: (1) the state failed to meet its burden where the evidence offered was inconsistent, (2) the court erred in denying Muhammad's motion for directed verdict of not guilty, (3) the court erred in denying Muhammad's request for a second degree murder instruction to the jury, and (4) the court erred by allowing graphic photos of the victim to be considered by the jury.⁵³ There is no mention of police torture or prosecutorial misconduct of any kind in the motion for new trial.

Muhammad appealed the trial court's decision in *People v. Muhammad*, No. 1-02-0053, on or around February 7, 2003.⁵⁴ In his direct appeal, Muhammad argued ineffective assistance of counsel, trial court err in denying his requests for new counsel, and excessive sentencing on the part of the trial court.⁵⁵ Notably, Muhammad did not allege torture, coercion, or police misconduct in his appeal. Assistant Appellate Defender Ann C. McCallister also argued the trial court had failed to properly investigate Muhammad's claim of ineffective assistance of counsel. She argued the judge was more focused on clearing his name than investigating how Hoch had been ineffective. Although no abuse or torture was specifically alleged, McCallister argued in her reply brief that the failure to thoroughly question Muhammad about alleged ineffective counsel may have masked further deficiencies by counsel.⁵⁶

On March 9, 2004, the First District appellate court denied Muhammad's appeal, affirming the lower court's decision.⁵⁷ The Supreme Court of the United States then denied Muhammad's petition for writ of certiorari.⁵⁸

⁴⁹ See ROP of November 14, 2001. I53-I66.

⁵⁰ *Id.*

⁵¹ See ROP of November 15, 2001, I84-I86.

⁵² See EXHIBIT 17: Muhammad Motion for New Trial.

⁵³ *Id.*

⁵⁴ EXHIBIT 3: *People of the State of Illinois v. Abdul Muhammad*, No. 1-02-0053, March 9, 2004, Unpublished Rule 23 Order.

⁵⁵ See EXHIBIT 18: Muhammad Direct Appeal Brief.

⁵⁶ See EXHIBIT 19, May 7, 2003 Muhammad Reply Brief.

⁵⁷ See Exhibit 3.

On June 22, 2006, Muhammad filed a post-conviction petition alleging ineffective assistance of counsel regarding jury instructions, failure to suppress arrest based on extradition challenges and warrant misrepresentations, failure to examine eyewitnesses, failure to suppress Muhammad's identification, counsel's derogatory language toward Muhammad, and other issues.⁵⁹ Notably, Muhammad specifically referenced the existence of eyewitnesses (a white couple) in the car behind the victim's car and alleged that they were brought to the police station for a lineup and failed to identify him, as did a white doctor who was nearby at the time of the shooting.⁶⁰ The brief also alleged relatives of the witnesses who did identify Muhammad were also brought to the station and failed to identify Muhammad in lineups but were also not questioned at trial. Although Muhammad's pro se petition for post-conviction relief did not mention police torture or physical abuse, it did allege that Muhammad "inform[ed] everyone who question him that his lawyer [--] he was told not to speak unless a lawyer [is] present[.]. When homicide officers asked who was this lawyer, the petitioner states, the attorney Karen Stone from the Public Defender's Office in Peirce County in Tacoma, Wa[shington]."⁶¹ The petition also alleged he was held by the arm by officers during a lineup.

In August 30, 2006, Judge Toomin dismissed Muhammad's pro se petition for Post-Conviction relief.⁶² Muhammad appealed and his September 4, 2007, appeal brief by Assistant Appellate Defender Therese Bissell, repeated the allegations that he had invoked his right to counsel with officers, been held by arm during lineup and been ineffectively represented at trial due to his lawyer's failure to call lineup witnesses who hadn't identified him.⁶³ On June 2nd, 2008, the appellate court denied Muhammad's appeal of the circuit court's denial of Muhammad's Post-Conviction petition.⁶⁴ The appellate court reasoned that Muhammad's argument was patently without merit and did not reach the threshold necessary for an ineffective assistance of counsel claim to be considered by the court.

Muhammad's June 14, 2008, petition for leave to appeal to the Illinois Supreme Court largely focused on alleged legal errors of the appellate court and did not mention coercion or abuse issues.⁶⁵ It was denied September 30, 2009.⁶⁶

On March 29, 2010, Muhammad filed a pro-se habeas corpus petition.⁶⁷ In it, Muhammad argued the Circuit Court erred in ignoring his claim that his extradition was unlawful; that the appellate court relied upon matters not included in the record in their review of his appeal; he alleged ineffective assistance of counsel where Guy Hoch failed to submit a more favorable set of jury instructions; and he alleged the Circuit Court failed to adequately investigate his ineffective assistance of counsel claim. Muhammad alleged Chicago police illegally detained him more than 48 hours before taking him before a judge and that detectives should have afforded him an attorney during interrogation because his Sixth

⁵⁸ *Muhammad v. Illinois* 130 S. Ct., 176 L. Ed. 2D 733, 78 USLW 3610.

⁵⁹ See EXHIBIT 20: Muhammad Post-Conviction Petition, No. 00-CR-13572.

⁶⁰ *Id.* at 12-13. The petition states, "Both were called in to view a line-up, and failed to be called to trial."

⁶¹ *Id.* at 27.

⁶² See EXHIBIT 21: *People v. Muhammad*, Post-Conviction 00-CR-13572, Order.

⁶³ See EXHIBIT 22: *People v. Muhammad*, Brief and Argument for Petitioner-Appellant (1-06-2773).

⁶⁴ See EXHIBIT 23: *People v. Muhammad*, No. 1-06-2773, (Ill. App. Ct., 1st Dist).

⁶⁵ See EXHIBIT 24, August 14, 2008 Petition for Leave to Appeal.

⁶⁶ See *People v. Muhammad*, 233 Ill.2d 585 (2009).

⁶⁷ See EXHIBIT 25: *U.S. ex rel. Abdul Muhammad v. Donald Gaetz*, Petition for Writ of Habeas Corpus, 10 – C-1954.

Amendment right to counsel had already attached in Washington.⁶⁸ He repeated his allegations that police ignored his requests for an attorney during interrogation and that the white couple and white doctor viewed him in a lineup but could not identify him.⁶⁹ In his petition, Muhammad describes being held by detectives by the arm in the interrogation room either just prior to, or during two lineups. It is not clear if he was being held by detectives *while* a “family of three” viewed him, but he affirmatively states that in another lineup, a detective released his arm *before* “a young male, a older woman, [and] a younger girl” entered the viewing room.⁷⁰ Muhammad’s filing alleged he did not arrive at Cook County Jail until May 1, 2000, where he attended court via videoconference.⁷¹

On December 15, 2010, the United States District Court of Illinois’ Eastern Division denied Muhammad’s Petition for Writ of Habeas Corpus.⁷²

f. TIRC Claim Form and Correspondence

Muhammad first submitted torture claims in a letter dated July 30, 2014, and received by the Commission August 21, 2014. In that letter⁷³ he alleged that:

- his request for counsel was ignored
- he was held for four days in police custody
- he was threatened:
 - Detective McDermott explained “he knew how to get [Muhammad] to talk without leaving a mark”
 - McDermott instructed that failure to talk would result in identification in a lineup by white witnesses who would be believed over a black defendant
- An assistant state’s attorney pretended to be his attorney
- McDermott kept files on the Mims case in a cabinet labeled “Lost and Found”

In a letter dated August 28, 2014 and received September 5, 2014, Muhammad alleged:

- he did not make the statements police attributed to him
- he made no statements at all
- lineup witnesses could not identify him
- he was forced to sleep on a hard floor while handcuffed
- police used “subtle tactics” to break him, including
 - refusing him use of the washroom
 - handcuffing him to the wall
 - pushing him
 - mocking him
 - threatening him

⁶⁸ Id at Page 10.

⁶⁹ Id at Page 10 – 17.

⁷⁰ Id at 18-19.

⁷¹ Id. at 29.

⁷² *U.S. ex rel. Muhammad v. Gaetz*, 2010 WL 5372730, 10-C-1954 (Dec. 15, 2010), not Reported in F. Supp. 2d.

⁷³ EXHIBIT 1: Letter received August 21, 2014 from Muhammad to TIRC.

- holding his arms during a lineup⁷⁴

After being asked via letter for specifics on alleged torture, Muhammad alleged in a letter dated September 12, 2014, that “I was torture in a manner of such a matter it did not leave a mark, by a different form of military style waterboarding, by handcuffing me to a wall, not feeding me, or allowing me to use the rest room at times, just to break me.”⁷⁵

In an interview with TIRC staff on April 13, 2017, Muhammad alleged even greater coercion, including that

- McDermott hit him over the head 5-6 times with a thick case file⁷⁶
- McDermott struck his ears with his hand when Muhammad would put his head down⁷⁷
- McDermott called him stupid and used a racial epithet⁷⁸
- Muhammad asked for food but was fed only once in four days⁷⁹
- He was refused use of the washroom and urinated defecated on the floor, prompting McDermott to push him in the face with his forearm, cutting the inside of his lip.⁸⁰
- He defecated in his Tshirt and hid the shirt and feces in the ceiling of an interrogation room⁸¹
- A large, unidentified detective kicked Muhammad on the legs during the night to keep him awake⁸²

Asked why he hadn’t reported such serious allegations ever before, Muhammad responded that the defecation detail was embarrassing. As to being hit over the head, Muhammad offered, “I don’t know how I left that out.” He suggested he omitted it in correspondence with TIRC in an effort to quickly reply and show responsiveness.⁸³

Muhammad also noted that prior to his arrest in this case, he had previously filed an unrelated OPS complaint against another officer who had physically abused him.⁸⁴

g. TIRC Interview with Trial Attorney

Former Public Defender Guy Hoch voluntarily participated in two telephone interviews with TIRC staff.⁸⁵ Hoch stated Muhammad had not made any allegations of torture. Hoch noted:

The only way torture would have come up was if there was a confession that I was trying to suppress. His defense was ‘I couldn’t have possibly done it because I was in Seattle at

⁷⁴ See EXHIBIT 26: August 28, 2014 Letter received September 5 2014.

⁷⁵ See EXHIBIT 27: September 12, 2014 Letter from Muhammad.

⁷⁶ Hear EXHIBIT 2: April 13, 2017 TIRC Interview of Muhammad, Part 1, at 31:10.

⁷⁷ Hear EXHIBIT 2: April 13, 2017 TIRC Interview of Muhammad, Part 1, at 52:30.

⁷⁸ Hear EXHIBIT 2: April 13, 2017 TIRC Interview of Muhammad, Part 1, at 31:10-31:40

⁷⁹ Hear EXHIBIT 2: April 13, 2017 TIRC Interview of Muhammad, Part 1

⁸⁰ Hear EXHIBIT 2: April 13, 2017 TIRC Interview of Muhammad, Part 1, at 1:11:10 - 1:13:20.

⁸¹ Hear EXHIBIT 2: April 13, 2017 TIRC Interview of Muhammad, Part 1, at 1:28:20 – 1:29:00.

⁸² Hear EXHIBIT 2: April 13, 2017 TIRC Interview of Muhammad, Part 1, at 1:18:30-1:19:10.

⁸³ Hear EXHIBIT 2: April 13, 2017 interview with Muhammad, part 2, at 2:52-5:40

⁸⁴ Hear EXHIBIT 2: April 13, 2017 TIRC Interview of Muhammad, Part 1, at 40:00-42:30.

⁸⁵ See EXHIBIT 28: Report of Guy Hoch Interview, January 4, 2018, by Michelle Jenkins.

the time.’ As such I didn’t have any basis for inquiring about coercion. But I don’t remember that being an issue. I remember the issue being corroboration of the alibi.

Hoch noted that he would have made notes of Muhammad’s statements to him, and agreed to review them. TIRC arranged for the Public Defender’s office to retrieve the file for Mr. Hoch’s review.

On April 12, TIRC interviewed Hoch again after he had a chance to review Muhammad’s file, including his privileged notes. Hoch said he had a standard checklist he utilized for defending clients, which he used in Muhammad’s case.⁸⁶ It included a section summarizing his client’s statements to Hoch made in an initial interview. Hoch stated his notes in this section stated only “too short.” Hoch’s present-day interpretation of this is that Mr. Muhammad did not say much to him in this interview other than denying guilt. Hoch interpreted this to reflect negatively on Muhammad’s current torture claims.

Hoch said his form also had a section summarizing the state’s case. On Muhammad’s form, his summary reflected no statement that the state was claiming against his client. TIRC staff asked whether Hoch’s notes indicated any allegations of impropriety regarding lineups. Under his form’s “ID” section, Hoch said, was written only, “Ask defendant again.” Hoch was uncertain of the meaning of this notation, but surmised that at the time Hoch was filling his form out, he may not have specifically remembered what had been discussed. TIRC staff asked Hoch if he remembered why he had specifically asked for any *lineups* where his client had not been identified; Hoch believed that was just the boilerplate language he routinely used.

h. TIRC Interviews with Bradley and Helen Huett

Helen and Bradley Huett’s statements in their interviews with TIRC reflect that there was at least one lineup conducted during Muhammad’s interrogation where Muhammad was not positively identified by the witness.⁸⁷

The Area 2 Supplemental Report from May 4, 1999 reflects that Bradley and Helen Huett witnessed the crime while waiting at the traffic light on 76th and Stony Island at the time of the shooting.⁸⁸ In relevant part, Bradley Huett stated in a March 23, 2018, interview that a year after witnessing the shooting, he and his wife were contacted by police and asked to view a lineup. Though his wife declined, Mr. Huett accompanied an officer to Area 2 where he viewed a lineup. Mr. Huett was told immediately after participation in the lineup that he’d identified the wrong suspect. Mr. Huett recalled his experience with great detail.⁸⁹ Bradley Huett specifically recalled that he’d been told the shooter had been arrested in Seattle, Washington.⁹⁰ Bradley Huett did not recall seeing police officers forcibly escort any of the prisoners to the lineup room or hold any suspects in place in the lineup.⁹¹

⁸⁶ See EXHIBIT 29: Report of Guy Hoch Interview, April 12, 2018, by Rob Olmstead & Michelle Jenkins.

⁸⁷ See EXHIBITS 30, 31 and 32: Reports of Helen and Bradley Huett interviews.

⁸⁸ See EXHIBIT 6: Area 2 Supplemental Report, May 5, 1999, Det. Ramirez reporting at 4.

⁸⁹ See EXHIBIT 32, Report of Bradley Huett Interview.

⁹⁰ *Id.*

⁹¹ *Id.*

II. PATTERN AND PRACTICE EVIDENCE

Two officers were most notably involved in Dungey's interrogation: Detectives Michael McDermott and David Fidyk.

- i. **Det. Michael McDermott** - A number of courts and investigative bodies have found that Det. McDermott engaged in abuse of suspects and false testimony regarding such abuse.
 - a. Alfonso Pinex: Special Prosecutor Edward J. Egan concluded that there was proof beyond a reasonable doubt that McDermott and Det. Anthony Maslanka committed aggravated battery against Alfonso Pinex by beating him on or about June 28, 1995, at Area 2 to get him to sign a statement admitting to the murder of Eddie McKeever. Pinex accused McDermott of hitting him in the ribs and holding him while Maslanka beat him (including near both his eyes). Among the evidence Egan cited was the finding by the trial judge that McDermott and Maslanka were not credible in their testimony that Pinex had not asked for a lawyer (Pinex, who had an arrest warrant out for him, had already arranged with Area 1 to surrender the following day). Photographs taken of Pinex at Area 2 showed a bloodshot eye and the trial judge suppressed the signed statement on Miranda grounds but did not reach the subject of involuntary confession or beating. Egan noted that a prison doctor on June 30, 1985, documented Pinex's complaints of blurred vision and diagnosed bilateral subconjunctive hemorrhages. Another prison doctor told the special prosecutor these injuries were consistent with blows to the head. McDermott invoked his Fifth Amendment right against self-incrimination when Egan attempted to question him about Pinex. Egan also concluded there was evidence beyond a reasonable doubt of McDermott's perjury and obstruction of justice for testifying falsely at Pinex's suppression hearing.⁹²
 - b. Burge Trial Testimony regarding Shadeed Mu'min: A federal judge has concluded that McDermott committed perjury regarding Pinex and that, at a minimum, he gave testimony at Police Commander Jon Burge's criminal prosecution "that was inconsistent with his grand jury testimony."⁹³ The judge was referring to the June 14, 2010 trial testimony of McDermott about Burge's interactions with Shadeed Mu'min. On that date, McDermott testified Burge had pointed a gun in the direction of Mumin's side of the room, that they had a "scuffle," and that Burge had placed something in front of Mumin's face. Prosecutors impeached McDermott with his grand jury testimony in which he

⁹² *Report of the Special State's Attorney* ("Egan Report"), 275-290

⁹³ *See U.S. v. Burge*, Memorandum Opinion and Order, 5 (N.D. Ill. Jan. 17, 2014) (J. Lefkow) (2014.1.17 Lefkow order.pdf).

stated Burge pointed the gun directly at Mumin and placed a bag over his head in order to restrict Mumin's breathing and elicit a confession.⁹⁴

- c. Danny Smith probable cause testimony: On March 23, 1990, a trial judge rejected McDermott's testimony that he and four other officers went to the house of suspect, Danny Smith, merely to verify Smith's address before seeking a warrant. Instead, the judge found McDermott had arrested Smith without probable cause on a pretext to put him in a lineup.⁹⁵
- d. Eric Caine civil suit testimony: On March 28, 2011, Det. McDermott invoked his right against self-incrimination when called to testify at a deposition in a civil suit filed by Eric Caine against Jon Burge and other officers.⁹⁶ On July 24, 2013, the Chicago City Council voted to settle the lawsuit for \$10 million.⁹⁷ Caine, a co-defendant of Aaron Patterson in the 1986 Vincent and Rafaela Sanchez murders, alleged he was punched and threatened to elicit a confession.⁹⁸ Caine's confession was thrown out in 2011 by Judge William Hooks, and prosecutors declined to re-prosecute. In 2012, a judge granted Caine's innocence request.⁹⁹
- e. Patterson, Orange, Hobley and Howard civil suits: On September 19, 2008, McDermott invoked his Fifth Amendment right against self-incrimination when asked about a number of police investigations during a deposition in civil suits brought against Jon Burge by plaintiffs Aaron Patterson, Leroy Orange, Madison Hobley, Stanley Howard and Darrell Cannon.¹⁰⁰
- f. Interrogation of Keith Mitchell: In *People v. Mitchell*, the Illinois Appellate Court described McDermott as "an admitted perjurer," and cited the unreliability of his trial testimony that contended a 15-year-old boy initiated a confession when his mother stepped out of the interrogation room. The mother had made detectives promise not to question him in her absence.¹⁰¹ The court found that the special prosecutor's report on McDermott and Pinex was highly relevant, in that, "the evidence of McDermott's perjury in similar cases involving alleged confessions significantly shifts the balance of credibility in the contest between McDermott's

⁹⁴ Report of Proceedings, *U.S. v. Burge*, 08-CR-846, June 14, 2010.

⁹⁵ *People v. Smith*, 232 Ill. App.3d 121, 125 (1st Dist. March 23, 1990).

⁹⁶ *Caine v. Burge, et al*, Deposition of Michael McDermott, March 28, 2011.

⁹⁷ City of Chicago Settlement Order No. 2013-485.

⁹⁸ Jason Meisner, "Another Burge case, another \$10 million" Chicago Tribune July 19, 2013, available at http://articles.chicagotribune.com/2013-07-19/news/ct-met-burge-million-dollar-settlement-20130719_1_eric-caine-burge-case-police-torture.

⁹⁹ *Id.*

¹⁰⁰ Deposition of Michael McDermott, Sept. 19, 2008, Case Nos. 03-C-4433, 04-C-168, 03-C-3678, 03-C-8481, 05-C-2192, at, e.g., 20-22.

¹⁰¹ *People v. Mitchell*, 2012 IL App (1st) 100907. p. 9 (May 16, 2012).

testimony and [Mitchell's and his mother's].”¹⁰² The court then remanded the case for a new suppression hearing.

- ii. **Det. David Fidyk** - Detective Fidyk, at the time of the charge in question, worked in Area 2. Det. Fidyk is named in ten complaints to the police.¹⁰³ Only two complaints allege participating in torture in an attempt to secure a confession.

In the first complaint alleging torture, CR (Complaint Register) 298499, made three years after the alleged incident, complainant Clinton Dixon alleged that Dets. Fidyk, Scott Rotkovich and Brendan Deenihan drove him on September 22, 2002, to a vacant lot where Rotkovich physically abused him, placed a gun to his head and threatened to kill him if he did not confess to a murder. He also claimed Fidyk rewarded him with heroin after he made his confession. OPS reports indicate the complainant's medical records, created two weeks before the arrest, document injuries similar to those the defendant alleged were inflicted by officers. The complaint was not sustained, and complainant's motion in his criminal case to suppress his confession was also denied.

In the second torture-confession allegation (Log 1073442), claimant Lavell Cotton alleged he had been beaten and denied use of the washroom until he defecated upon himself. IPRA administratively dismissed the complaint because it was made 12 years after the alleged torture.

Another CR alleged excessive force during an arrest. Officers told investigators that the suspect had fled and resisted arrest, and one officer documented his own injuries. Other CRs mainly concerned property allegedly going missing during searches, or searches allegedly performed without a warrant or consent.¹⁰⁴

III. STANDARD OF DECISION

Section 40(d) of the Illinois Torture Inquiry and Relief Act permits the Commission to conduct inquiries into claims of torture. 775 ILCS 40/40(d). “‘Claim of torture’ means a claim on behalf of a living person convicted of a felony in Illinois asserting that he was tortured into confessing to the crime for which the person was convicted and the tortured confession was used to obtain the conviction and for which there is some credible evidence related to allegations of torture. 775 ILCS 40/5. 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 shall be referred to the Chief Judge of the Circuit Court of Cook County. If fewer than five

¹⁰² *Id.* at ¶62.

¹⁰³ See Exhibits 33 and 34, Complaint Register Index for Det. David Fidyk and Summary of Complaints against Det. Fidyk.

¹⁰⁴ A 2013 lawsuit by Alprentiss Nash alleged Fidyk testified falsely in his trial, but the bulk of the allegations in the lawsuit concerned other officers and did not allege any torture. See *Nash v. Baker et al.*, 13-CV-5866, Complaint.

Commissioners conclude by a preponderance of evidence that there is sufficient evidence of torture to merit judicial review, the Commission shall conclude there is insufficient evidence of torture to merit judicial review.¹⁰⁵

The Commission is not tasked 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.¹⁰⁶

IV. ANALYSIS

a. JURISDICTIONAL ANALYSIS

Under the Illinois Torture Inquiry and Relief Act, “ ‘claim of torture’ means a claim on behalf of a living person convicted of a felony in Illinois asserting that he was tortured into confessing to the crime for which the person was convicted and the tortured confession was used to obtain the conviction, and for which there is some credible evidence related to allegations of torture occurring within a county of 3,000,000 or more inhabitants.”¹⁰⁷

Under the Commission’s Administrative Rules a “tortured confession includes any incriminating statement, vocalization or gesture alleged by police or prosecutors to have been made by a convicted person that the convicted person alleges were a result of (or, if the convicted person denies making the statements, occurred shortly after) interrogation that the convicted person claims included torture.”¹⁰⁸

¹⁰⁵ Although this claim involves a former Burge supervisee (McDermott), in 2016, the legislature expanded the Commission’s jurisdiction to all Cook County convictions and beyond only those cases connected to Burge. *See* P.A. 99-688.

¹⁰⁶ 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/>. The Illinois Appellate Court has noted that “the Commission is asked to determine whether there is enough evidence of torture to merit judicial review, the circuit court is asked to determine whether defendant has been tortured. These are two different issues determined by two different entities.” *See People v. Christian*, 2016 IL App (1st) 140030, ¶95. The court compared the Commission to a court deciding whether a postconviction petition can advance to the third stage. *Id.* at ¶99.

Although Section 55(a) of the TIRC Act (775 ILCS 40/55(a)) makes Commission decisions subject to the Administrative Review Law, Commission decisions do not concern “contested cases” as defined in the Illinois Administrative Procedure Act (5 ILCS 100/1-30) because TIRC proceedings do not require an opportunity for a hearing. *See* 775 ILCS 40/45(a): “The determination as to whether to conduct hearings is solely in the discretion of the Commission.”

¹⁰⁷ 775ILCS 40/5(1).

¹⁰⁸ 20 Ill. Adm. 2000.10

The trial testimony offered by Detective Fidyk recalling statements made by Muhammad during interrogation bring Muhammad's claim squarely within this definition. Muhammad's alleged statements were used in closing arguments as proof of his consciousness of guilt, thereby using them to obtain Muhammad's conviction. In addition, Muhammad has alleged denial of food, bathroom use, threats of beatings, and actual beatings in pursuit of a statement, adequately alleging torture.

That Muhammad has denied making such statements is not disqualifying under 20 Ill. Adm. 2000.10.¹⁰⁹

b. ANALYSIS OF THE EVIDENCE

i. Factors Supporting Muhammad's Torture Allegations

1. Muhammad's credibility is significantly bolstered by TIRC's confirmation that at least one eyewitness, Bradley Huett, did view a lineup and failed to identify Muhammad, and that this failed lineup was apparently not reported by the state to defense counsel. While this does not prove that Muhammad *told his attorney* of this fact, it makes it significantly more likely that he did, particularly when Muhammad's attorney's notes indicate a need to follow up on identification issues and Muhammad has consistently claimed this issue in appellate and post-conviction briefs. Similarly, while the identification issues do not prove that Muhammad alleged torture to his attorney, the fact that identification issues were likely reported to his attorney and not addressed makes the likelihood that that coercion issues were reported and not addressed a greater possibility. Like the failed lineups, Muhammad did allege in multiple post-conviction filings that coercive elements existed (i.e.: his request for counsel was ignored). Defense counsel's focus on alibi, and the fact that a full confession was not obtained in this case, may have meant counsel did not key in on coercion or torture issues that may have been mentioned by Muhammad.
2. Detective Fidyk testified at Muhammad's trial that he flew to Seattle on April 27, 2000, and returned to Area 2, with Muhammad, on that same day at 9:30pm.¹¹⁰ A prisoner data sheet reflects he first appeared in court April 30, 2000. This supports an inference that Muhammad was in police custody for at least two days, and possibly more. The lengthy detention could certainly be viewed as coercive.

¹⁰⁹ The courts, too, allow an allegation of a coerced confession to be considered when a defendant has also alleged he did not make such statements. "The law is settled that a defendant's assertion that he did not confess does not preclude the alternative argument that any confession should be suppressed." *People v. Wrice*, 2012 IL 111860, ¶53, citing *Ashcraft v. Tennessee*, 322 U.S. 143, 152 n.7 (1944) ("The use in evidence of a defendant's coerced confession cannot be justified on the ground that the defendant has denied he ever gave the confession."). *But see People v. Hobley*, 182 Ill.2d 404 (1998) (rejecting postconviction claim of new evidence of police brutality at Area 2 would have aided defendant where, at trial, he alleged the statements were fabricated. *Wrice* subsequently narrowed *Hobley* significantly, however. *See also People v. Norfleet*, 29 Ill.2d 287, 290, citing *Lee v. Mississippi*, 332 U.S. 742 (1948) (noting the U.S. Supreme Court's reversal of a conviction where a defendant at trial alleged no confession had been made, and then on appeal alleged that it was coerced. The *Lee* court wrote, "A conviction resulting from such use of a coerced confession, however, is no less void because the accused testified at some point in the proceeding that he had never in fact confessed, voluntarily or involuntarily. Testimony of that nature can hardly legalize a procedure which conflicts with the accepted principles of due process."

¹¹⁰ Ex.1B, Trial Transcript, I-15, 16.

3. The state's apparent failure to turn over favorable material is an inadvertent oversight at best, and a deliberate *Brady* violation¹¹¹ at worst, reflecting negatively on the state's conduct in regards to sharing favorable information about lineups and inviting skepticism in regards to its conduct in other areas like coercion and torture. Moreover, the typed police summary, and Detective Fidyk's testimony, mentioning only the two positive identifications suggest that police were actively trying to downplay or suppress exculpatory evidence.¹¹² Again, this raises the question of what other evidence or conduct police reports failed to document.
4. Muhammad's credibility is somewhat bolstered by at least the possibility that suggestive lineups occurred in which his arm was held by detectives. Fidyk affirmed during his cross-examination that he was "in with participants of the lineup"¹¹³ This testimony at least corroborates that a detective was present in the room to do so. Moreover, the lack of an explanation as to why photos of the lineups were recreated outside the actual lineup room allows for the possibility that detectives did not want to photograph a lineup in which the chief suspect was being held by the arm.
5. The involvement of Detective McDermott also weighs in favor of Muhammad's claim. . McDermott's extensive history of abuse and perjury allegations and court findings bolsters Muhammad's allegations.

ii. Factors Detracting from Muhammad's Torture Allegations

1. Muhammad's credibility is severely challenged by the fact that he never raised any allegation of physical abuse prior to his interview with Commission staff. He did not make any motions to suppress statements nor quash arrest prior to trial. Muhammad's allegations of torture are not mentioned in Muhammad's appeal or his post-conviction petitions. New allegations at his TIRC interview include (1) being hit over the head with a file (2) being forced to urinate on the floor and defecate into a shirt, and (3) having

¹¹¹ See *People v. Elston*, 360 N.E.2d 518 (Ill. App. Ct. 1977) (reversing guilty verdict where prosecution revealed to defense counsel only two days before trial that live and photo lineups had occurred in which the defendant was not identified as the culprit. The court ruled the late turnover was an inadvertent violation of the ruling in *Brady v. Maryland*, 373 U.S. 83 (1963) which requires prosecutors to share evidence favorable to the defense. The court also ruled the failure to turn over the materials a violation of Illinois Supreme Court Rule 412, which was designed to facilitate the sharing of *Brady information*. Although the violation was inadvertent, the court nonetheless mandated a new trial for the defendant.

¹¹² We note that the wording of Muhammad's counsel's request could be interpreted to seek only information on lineups involving "witnesses they intend to call," as stated in the motion. However, that Hoch's attorney requested information on witnesses who did *not* identify Muhammad would have made it apparent to prosecutors, we believe, that Muhammad was seeking even those witnesses the state did not intend to call at trial but who failed to identify Muhammad. Moreover, the prosecution's response went further than what was requested, affirmatively stating that the "*circumstances, results, and persons present at any identification confrontations*" were in police reports tendered to the defense. (Emphasis added.) Given the lack of any report documenting Bradley Huett's failure to identify Muhammad, this does not appear to have been the case. Moreover, many cases can be read to mandate such disclosure whether or not it was requested. See *People v. Elston* in above footnote.

¹¹³ Ex. 1B, Trial Transcript, I-27. (Where, Fidyk testifies that he was "in with the persons being viewed".)

other detectives kick him to keep him awake (when previously he had indicated he was able to sleep; albeit on the floor). When asked by TIRC staff to explain this and other significant omissions, Muhammad's explanation that he was rushing his replies was unconvincing. In addition, it is unlikely that if Muhammad thought to mention Miranda violations in multiple appellate and post-conviction filings he would forget to also mention physical abuse. We also note that Muhammad represented that he had previous experience on how to report abuse to OPS, and did not do so in this instance.

2. Muhammad's Habeas Corpus Petition filed in 2010, just four years prior to his TIRC Claim, states affirmatively that a detective in one lineup released his arm *before* witnesses were let into the viewing room, and the wording of his brief at least allows that same inference of release of the arm before viewing in regards to the other lineup . This allows for the possibility that he is now exaggerating or fabricating claims of suggestive lineups.
3. Muhammad's claims of innocence are severely confronted by his co-defendant Aubree Dungey's past and continuing statements. This not only damages Muhammad's credibility in regards to claims of innocence, but claims of torture as well. Additionally, if Dungey's testimony is true, it suggests that Muhammad conspired to fabricate evidence with witnesses who testified he was out of town at the time of the murder.

c. WEIGHING THE EVIDENCE-

Despite the Commission's severe reservations about Muhammad's credibility in regards to his claims of physical abuse, there is enough evidence of misconduct (deliberate or inadvertent) on the part of the state in this case to warrant further review of torture allegations by a court. As noted above, the question before the Commission at this point is not whether torture more likely than not occurred, but whether there is sufficient credible evidence of torture meriting judicial review.

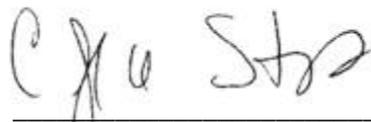
Moreover, several allegations Muhammad makes regarding coercion, such as Miranda violations in regards to his request for an attorney, were consistently and repeatedly lodged by him. Another oft-repeated allegation by Muhammad that he was subjected to multiple unsuccessful lineups has been at least partially confirmed by this Commission, bolstering Muhammad's credibility in some respects. The fact that legitimate trial issues in regard to negative lineups existed and may have been passed along to his attorney but not addressed at least keeps open the possibility that similar allegations regarding coercion or torture were raised with, but not addressed by, his attorney.

The apparent *Brady* violation in regards to negative lineups also discredits the state in general and warrants judicial examination of police and prosecutorial conduct regarding alleged coercion and torture. Documented findings by judges against McDermott's credibility only reinforce the conclusion that a hearing on Muhammad's allegations is warranted.

CONCLUSION

The Commission therefore finds that there is sufficient credible evidence of torture to merit judicial review. Accordingly, the Commission refers Mr. Muhammad's claim to the Circuit Court of Cook County. This determination shall be considered a final decision of an administrative agency for purposes of administrative review under the Administrative Review Law (735 ILCS 5/3-101).¹¹⁴

DATE: July 18, 2018



Cheryl Starks, Chair

¹¹⁴ See 775 ILCS 40/55(a) of the TIRC Act.

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 (*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.