BEFORE THE TORTURE INQUIRY AND RELIEF COMMISSION

In re:
Claim of Tony Anderson

TIRC Claim No. 2011.014-A

ORDER FOLLOWING REFERRAL TO
THE COMMISSION BY CHIEF JUDGE EVANS

Tony Anderson was arrested on April 18, 1990 for auto theft. Taken to the police station at 11th and State, he invoked his right to silence, and may have invoked his right to counsel. Anderson was then taken to Area 2 detective headquarters by Detective Michael McDermott.

McDermott testified he was told by the police at 11th and State that Anderson was "eager to talk" – despite Anderson's invocation of the right to silence. At Area 2, Anderson signed a confession to a murder and confessed to other crimes under questioning by detectives from Areas 2 and 3. He was also identified in lineups by victims and witnesses from several of the crimes.

Anderson filed a motion to suppress, claiming that his confessions were procured by torture. Anderson claimed McDermott held a gun to his head, and that Detective Anthony Maslanka jabbed him with a nightstick in his thighs and back until Anderson agreed to confess. Anderson's motion was denied, with the judge finding the police officers more credible than Anderson.

Anderson was convicted of attempted murder and armed robbery in one trial, and a separate armed robbery in another. A third trial was scheduled for Monday, August 5, 1991, but Anderson's lawyer failed to appear. The lawyer was found in his apartment two days later, intoxicated, injured, and immobile, and sent to a hospital. The judge cautioned Anderson that he had severe reservations about the capacity of the lawyer to represent Anderson. Nevertheless, two days later, on Friday, August 7, the lawyer arrived in court. That day, apparently without further consultation with his attorney, Anderson pled guilty to a murder and ten additional crimes, in a negotiated plea. He was sentenced to 50 years in prison.

Anderson filed a claim of torture with the Illinois Torture Inquiry and Relief Commission (the "Commission" or "TIRC"), raising facts consistent with his testimony in his motion to suppress. On May 20, 2013, the Commission filed a Case Disposition, referring Anderson's claim to the Circuit Court of Cook County for judicial review. *See* 775 ILCS 40/1 *et seq.* (the "TIRC Act").

After the case was referred to the Circuit Court, counsel for Anderson and for the Special State's Attorney[1/] did not agree as to which of Anderson's thirteen convictions had been referred to Court by the Commission. The Chief Judge of the Circuit Court, Hon. Timothy C. Evans, entered an Agreed Order on July 15, 2014, asking the Commission to clarify the Case Disposition.

The Special State's Attorney and counsel for Anderson have now agreed on the referral of seven of the 13 cases, and continue to disagree about six others. The Commission decides today that

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1/ Hon. Stuart Nudelman has been appointed the Special State's Attorney for this case.

12 of the 13 cases – all of the cases except for an attempted escape charge as to which there was no confession – are referred to the Circuit Court.

I. STATUS OF AGREEMENT AND DISAGREEMENT BETWEEN THE STATE AND THE CLAIMANT AS TO THE CASES.

In each of the seven cases that the Special State's Attorney and Anderson agree should be referred to court, the confession was either introduced at trial or mentioned in the plea colloquy:

Case Number	Offense	Trial/Plea	Incident/Date
90 CR 11979	1st-degree murder	Plea	Cox shooting—3/30/90
90 CR 11984	Attempt murder, armed robbery	Bench Trial	11613 S. Halsted Trak Auto — 4/15/90
90 CR 11987	Armed robbery	Plea	L. Chheda — 4/8/90
90 CR 11989	Armed robbery	Plea	Honnecker — 3/8/90
90 CR 11990	Armed robbery	Plea	Halsted liquor — 4/13/90
90 CR 11991	Armed robbery	Plea	Beauty shop: Ford Gilliam/Carter— 4/4/90
90 CR 660648	Armed robbery	Plea	Stefani, Suranski @ gas station-4/17/90

In the remaining six cases, there is either uncertainty about whether a confession occurred, or whether a confession was used to obtain the conviction. In these cases, there remains a disagreement between the State and Anderson:

Case No.	Offense	Trial /Plea	Incident/Date	Statement Made?	Statement Used?
11980	Armed robbery	Plea	Brand/Cephus/ Mattie 3/30/90	Anderson contends oral statement	No document reflects introduction in proceeding
11982	Atmpd. escape	Plea	4/20/90	NO	No statement alleged.
11983	Atmpd. first –degree murder	Plea	Lazzarotto shooting 4/7/90	YES	Included in Official Statement of Facts.
11985	Armed robbery	Jury Trial	7354 S. Stony Island Trak Auto 4/15/90	YES	ASA said would be introduced if Anderson testified
11986	Atmptd. 1st-degree murder	Plea	Jerome Wright shooting 3/17/90	Anderson contends oral statement	No document reflects introduction in proceeding
11988	Armed Robbery	Plea	Marva Hall/Huerta 3/23/90	Anderson contends oral statement	No document reflects introduction in proceeding

II. SUMMARY OF THE COMMISSION'S DETERMINATION.

The determination of which cases should be referred to court turns on the application of the TIRC Act's requirements that the claimant was "tortured into confessing to the crime for which the person was convicted and the tortured confession was used to obtain the conviction." 775 ILCS

40/5(1). The six matters that are still disputed, identified in the last chart, can be divided into fact patterns raising three questions. These questions, and the Commission's answers, are:

CASE	FACT PATTERN	QUESTION	TIRC ANSWER
11985	ASA told the court the State would not seek to introduce the confession at trial unless the defendant took the stand.	Was a confession "used to obtain the conviction" when the defendant was discouraged from testifying at trial because of the prospect that it would be used to cross-examine him?	Yes, on the facts of this case.
11980 11983 11986 11988	Defendant confessed and pled guilty, but there was no reference in the plea colloquy to the confession.	Was a confession "used to obtain the conviction" when the defendant has pled guilty, if the prosecutor did *not* refer to the confession in the plea colloquy?	Yes, on the facts of this case.
11982	Defendant did not confess to the crime, but guilty pleas to cases where defendant had confessed were negotiated and entered at the same time.	Was a person "tortured into confessing to the crime for which . . . [he] was convicted and the tortured confession . . . used to obtain the conviction" if a confession in another case could have affected the defendant's decision to plead guilty?	No, because he wasn't "tortured into confessing to the crime for which . . . [he] was convicted.

III. FACTUAL BACKGROUND PRIOR TO THE CLAIM OF TORTURE BEFORE TIRC.

A. Anderson's Arrest and Interrogation.

On April 18, 1990, two police officers followed a car in Chicago. The officers testified that they checked the car's registration, and found it to be stolen. The officers stopped the car and questioned Tony Anderson, his wife, and Robert Allen (a/k/a Reginald Bragg). The officers found a gun in a coat in the back seat, at Allen's feet.[2/]

Anderson and Allen were arrested for auto theft and taken to the police station at 11th and State. Anderson was read his rights. Anderson claimed he invoked his right to silence and repeatedly asked to call family to contact a lawyer. One of the arresting officers, Patrick Brosnan, testified that Anderson did invoke his right to silence. Brosnan did not recall if Anderson asked for a phone call, but conceded that "he may have."

All questioning did not stop. Instead, Anderson was taken to Area 2 detective headquarters, where he was questioned about a number of crimes *other* than the allegedly stolen auto. Detectives from both Areas 2 and 3 questioned Anderson. Anderson claims he was threatened by Det.

2/ *See People v. Allen*, 268 Ill. App. 3d 279, 282, 645 N.E.2d 263 (1st Dist. 1994)(discussing the arrest). Anderson has claimed that the car was not stolen, and that the auto theft charge was dropped.

McDermott and beaten by Det. Maslanka, and was coerced into making incriminating statements. He also claims he repeatedly asked to make a phone call to obtain counsel.

At Area 2, Anderson made one or more statements implicating himself in many offenses committed in March and April 1990. Files reviewed by the Commission show that Anderson signed a written confession to the murder of Leonard Cox, and confessed to at least eight other crimes. In addition, Robert Allen signed a written statement implicating Anderson in the murder. At least 16 witnesses identified Anderson. Anderson was indicted on over 100 charges in 13 separate cases.

B. The Motion to Suppress.

On behalf of Anderson, the public defender filed a written motion to suppress. The motion claimed that Anderson had (a) invoked his right to silence and counsel, (b) been struck in the ribs by a stick, and (c) been threatened with a gun to his head, but (d) had not been advised of his rights.

Judge Karnezis held a suppression hearing beginning on March 19, 1991, and concluding on May 1, 1991.[3] In the hearing, Detective Brosnan testified that Anderson invoked his right to silence at the police station at 11th and State, where he was questioned on the auto theft charge.[4] Dets. McDermott and Gallagher testified that they took Anderson to Area 2, where detectives from Areas 2 and 3 questioned him about other crimes.[5] Det. McDermott testified that officers at the State Street police station did *not* tell him that Anderson had invoked the right to remain silent. Rather, they said Anderson was "eager to talk." *See* Exhibit 2. All officers denied Anderson was abused.[6]

Anderson testified that he repeatedly asked to make a call to his family to obtain counsel. He said that he was not threatened or hit at 11th and State, but was coerced into making incriminating statements at Area 2, where he was questioned throughout the night. He testified that McDermott placed a gun to his head and threatened to "blow [his] damn brains out" if he did not confess. Anderson also said that Maslanka jabbed him in the chest, rib, and back with his night stick, estimating he was hit "over 12 times," because he was crying in pain.[7]

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[3] The suppression hearing was described in an appeal of a post-conviction proceeding. *People v. Anderson*, 2006 WL 3833003 (1st Dist. Dec. 22, 2006), *op. withd'n on denial of reh'g and substituted*, 375 Ill. App. 3d 121, 872 N.E.2d 581 (1st Dist.), *leave to appeal denied,* 226 Ill.2d 589, 879 N.E.2d 932 (2007).

[4] *See* Exhibit 1 for Brosnan's testimony about the right to silence (5/1/91 Tr. at 123).

[5] Detective McDermott said the transfer was around 9 p.m.; Det. Gallagher said around midnight.

[6] McDermott's testimony is at 4/29/91 Tr. at 53; Gallagher's testimony at 4/30/91 Tr. at 103.

[7] All of the details of Anderson's testimony may not be credible. (5/1/91 Tr. at 3 *et seq.*) For example, Anderson said that he was not permitted to use the bathroom until he was transferred to the County Jail. He also testified that no one advised him of his *Miranda* rights. Further, Anderson was given a physical examination prior to his admission to the county jail, but no bruises were present at that time.

At the close of the hearing, Judge Karnezis denied Anderson's motion to suppress, finding that his statements were given "freely and voluntarily without coercion or threat or compulsion of any kind." The Court found that based on the totality of evidence, defendant "was advised of his rights numerous times" and was "not in anyway threatened or abused." The Court also noted that "the evidence we choose to accept * * * [is] the testimony of the police officers indicating that he was at no time abused or physically threatened." 375 Ill. App. 3d at 127.

C. The Trials.

Anderson went to trial in two of the cases. In 90 CR 11984, Anderson was found guilty of attempted murder, armed violence, and armed robbery at a Trak Auto store three days before his arrest. Anderson's oral confession was used against him.[8/] Anderson was sentenced to three concurrent terms of 25 years imprisonment.[9/]

At the beginning of the trial in 90 CR 11985, Anderson's lawyer said he had just been informed an oral statement was made by Anderson and asked if it would be introduced. The Asst. State's Attorney said that it would not, unless Anderson testified. (*See* Ex. 3.) Anderson did not testify, so the confession was not introduced. Anderson was convicted and sentenced to 25 years, concurrent to the sentence imposed in 11984.

D. The Conduct of Retained Counsel Prior to Entry of the Guilty Pleas.

Trial was set for Monday, August 5, 1991, before Judge Karnezis in the first degree murder case, No. 11979. Thomas Hoffa, who had been retained as counsel by Anderson's family, did not appear. After Hoffa did not appear on Tuesday, August 6, Judge Karnezis issued a bench warrant.[10/]

On Wednesday, an Asst. State's Attorney and the Judge reported that they had spoken with Hoffa's neighbor, who said that Hoffa was injured, his face was swollen, and he appeared to be sedated and unable to go to court. An investigator from the State's Attorney's office was in Hoffa's

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[8/] McDermott testified that Anderson said that he and Allen drove to the store armed with a gun, that a scuffle broke out between Allen and Scott Volk, and that Allen placed the gun to the back of Volk's head and fired once. McDermott also testified that Anderson told him that shooting Volk "wasn't necessary."

Anderson's confession was corroborated. Volk testified Anderson grabbed Volk by the arm and led him to the back of the store while Allen held a gun to the back of Volk's head. Volk said Anderson punched him in the face at least five times. Allen shot Volk; Anderson then took the keys to the cash drawer from Volk. The gun in the car was identified as the gun used in the robbery. Two employees of the store also identified Anderson. *See People v. Anderson*, slip op. at 3, 6-7 No. 91-1867 (1st Dist. July 12, 1994).

[9/] Allen was also convicted in 11984, *see People v. Allen*, 260 Ill. App. 3d 1113, 675 N.E.2d 659 (Table)(1st Dist. 1994), as well as in other robberies. *See People v. Allen*, 268 Ill. App. 3d 279, 645 N.E.2d 263 (1st Dist. 1994); *People v. Allen*, 268 Ill. App. 3d 947, 645 N.E.2d 270 (1st Dist. 1994).

[10/] Excerpts of the transcript from August 5, 6, and 7 are attached as Exhibit 4.

apartment, and said that Hoffa had a gash on the side of his head. Hoffa was described as bruised, disoriented, intoxicated, and unable to move. The investigator called an ambulance, and reported that the paramedics thought Hoffa would be hospitalized for a while. *Id.* at 9.

Judge Karnezis addressed Anderson:

> I don't know what to tell you, Mr. Anderson.
>
> It would be this Court's opinions, and it is just my opinion, that Mr. Hoffa is not now nor will he be in the near future in a position to represent you in this case.
>
> I am– So you know, I am very hesitant to, you know, to get between, as it were, an attorney and his client. I don't know that that is really my function. But, I wanted you to be aware of a lot more facts than we were aware of yesterday. [8/7/90 Tr. at 6-7 (emphasis added).]

Judge Karnezis then commented on the consequences of an absent lawyer, and asked if Anderson wanted Hoffa to continue to represent him. Anderson said that he did.

Judge Karnezis and the ASA said they had last spoken with Hoffa on Friday, August 2. The ASA said that Hoffa had not heard if Anderson would plead guilty, and that Hoffa assumed the case would be tried. *Id.* at 7. Judge Karnezis continued the case to August 9 for an update. *Id.* at 11.[11/]

E. The Guilty Pleas.

On Friday, August 9, 1991, Hoffa appeared in Court. The transcript reflects no on-the-record inquiry into Hoffa's condition. Hoffa said he had conferred with the prosecutor on July 26, and with Anderson on July 30, but there was no statement concerning any consultation after August 2.

Anderson then pled guilty to charges in the eleven remaining cases.[12/] The ASA said there were witnesses who would identify Anderson in each case. In addition, there was evidence that Anderson possessed the gun used in the murder.[13/] The prosecutor also mentioned Anderson's

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[11/] Anderson's sister, Diane Collins, approached the bench to say that the family didn't realize Hoffa was unreliable. Judge Karnezis said he understood, adding "you would have to be a little goofy to retain somebody and for him not to come to court." Judge Karnezis said that if Hoffa didn't come on Friday, Anderson could ask for time to retain his own attorney, or request the Public Defender. He noted however, that the State and he had been ready for trial, and expressed impatience with the wasted time. *Id.* at 11.

[12/] The cases included one count of first degree murder (90 CR 11979), two counts of attempted first degree murder (Nos. 11983 and 11986), eight counts of armed robbery (Nos. 11780, 11987, 11988, 11989, 11990, 11991, and 660648), and one count of attempted escape (No. 11982). *See* Exhibit 5.

[13/] In the trial of Robert Allen in 11987, the "drug store robbery," a victim testified Anderson pointed a gun at him and removed cash from the register. *See People v. Allen*, 377 Ill. App. 3d 938, 940, 880 N.E.2d 223 (1st Dist. 2007). In a 2003 post-conviction petition, Allen admitted to participating in a series of robberies with Anderson, but claimed that Anderson instigated the robberies. 377 Ill. App. 3d at 944-45.

confession to six of the charges.[14] In exchange for Anderson's guilty plea, the State recommended a 50–year sentence for the murder; 30–year sentences for attempted murder; 30–year sentences for armed robbery; and a 5–year sentence for attempted escape, all to run concurrently (but consecutively to the sentences in 11984 and 11985).

Judge Karnezis explained the nature of the charges and the sentences, and said that there had been extensive negotiations about the plea. He also said that the first degree murder case was not a death penalty case. Anderson said that he understood, and he voluntarily pled guilty.

F. The Appeal.

Anderson appealed his conviction for attempted first degree murder in 11984, but he did not appeal the denial of his motion to suppress. The conviction for attempted murder was affirmed, though another count was vacated. *People v. Anderson*, No. 91-1867 (1st Dist. July 12, 1994). Anderson did not appeal his conviction for armed robbery in 11985.

G. The Post-Conviction Petitions.

Anderson filed four post-conviction petitions. They were all denied without a full hearing.[15]

- In 1991, Anderson moved to vacate his guilty pleas, claiming (1) they were "coerced," (2) he didn't understand he couldn't receive the death penalty, and (3) he didn't know he could receive consecutive sentences. Judge Karnezis treated the motion as a post-conviction petition and denied it as frivolous, noting that Anderson pled guilty after a full explanation and had not filed an appeal from his sentence. Anderson did not appeal the dismissal.[16]
- In 2000, Anderson alleged that he had been deprived of effective assistance of counsel when counsel "coerced" him to plead guilty by saying that if he proceeded to trial, he would receive the death penalty. Anderson also argued that counsel was ineffective for failing to file any motions, and for appearing drunk in court on the day of his guilty pleas. Judge James B. Linn dismissed the petition as frivolous, noting that Anderson had "intelligently waived his chance to have a different lawyer represent him." The Appellate Court affirmed.[17]

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[14] The prosecutor mentioned confessions in Nos. 11979, 11989, 11991, 11987, 11990, and 60648. In a case summary written for IDOC, the prosecutor also referred to a confession in No. 11983.

[15] A convicted person is usually limited to one post-conviction petition. *See People v. Anderson*, 402 Ill. App. 3d 1017, 931 N.E.2d 715 (1st Dist.), *leave to appeal denied*, 238 Ill.2d 655, 942 N.E.2d 455 (2010).

[16] Judge Karnezis initially dismissed the motion. The dismissal was reversed for procedural flaws. *See Anderson*, 375 Ill. App. 3d at 128-29. Judge Karnezis then dismissed the petition on remand. No appeal was filed from the second dismissal.

[17] *People v. Anderson*, No. 1–00–2338, 328 Ill. App. 3d 1084, 817 N.E.2d 217 (1st Dist. 2002)(unpublished order)(claims of ineffective assistance of counsel were barred because they were identical to claims rejected in Anderson's original petition), *leave to appeal denied*, 201 Ill. 2d 576 786 N.E.2d 187 (2002).

- In 2004, Anderson sought leave to file a post-conviction petition for his guilty plea to first degree murder in 11979. Anderson alleged his confession was coerced, and that there was newly-discovered evidence that coerced confessions (including by Detectives McDermott and Maslanka) were routine at Areas 2 and 3. Judge Linn denied the motion, noting that the voluntariness of Anderson's confession had been adjudicated, all issues had been waived, and the plea had been negotiated. The Appellate Court affirmed, ruling that Anderson had waived the claim that the confession was coerced by failing to raise it in an appeal or in his prior post-conviction petitions. 375 Ill. App. 3d at 142-43.[18/]

- Anderson filed a motion in 2008, covering all of his guilty pleas. For the first time, he claimed actual innocence; he alleged again that his guilty pleas were made as a result of police coercion and ineffective assistance of counsel. Judge Linn denied leave to file the petition. The Appellate Court affirmed, ruling that Anderson's claim that he had been coerced by his lawyer to plead guilty had already been decided.[19/] The court found the new allegations of police torture – including findings by Special Prosecutor Egan against McDermott in the Pinex case[20/] – were insufficiently similar to Anderson's claim to justify a successive petition. The court also held that since Anderson had pled guilty and there was at least one eyewitness to each crime, Anderson would not have been found innocent at a trial. *Id.* at 1038-39.

IV. THE CLAIM OF TORTURE BEFORE THE COMMISSION.

In May 2011, Anderson submitted a claim of torture to this Commission, claiming that Det. McDermott put a gun to his head and threatened to kill him if he did not confess, and that Det. Maslanka had jabbed him in his back and ribs with a police night stick until he confessed "to a crime he didn't commit . . . ." In the claim, Anderson listed convictions in case numbers 11984 and 11985.

On May 20, 2013, the Commission issued a Case Disposition finding there was "sufficient evidence of torture to conclude the Claim is credible and merits judicial review for appropriate relief." In the Case Disposition, the Commission referred to the fact that Anderson had been convicted in 13 cases. The Commission noted that Anderson's claim had been consistent since his motion to suppress; there were many claims of misconduct against Dets. McDermott and Maslanka;

[18/] The Appellate Court noted that Anderson pled guilty, and there was corroborating evidence. 375 Ill. App. 3d at 141. It rejected a claim that there was newly discovered evidence of Burge-related torture. *Id.* at 136. It also rejected a claim that Anderson's counsel was ineffective for failing to investigate torture under Burge, saying the pattern of torture was not widely known at the time of the plea. The Court also said Anderson waived a claim that the State failed to disclose information about other torture. *Id.* at 145-47.

[19/] *Anderson*, 402 Ill. App. 3d at 1029. The Appellate Court also noted that the (allegedly tortured) confession was only mentioned by the prosecutor as supporting 6 of the 11 guilty pleas.

[20/] The July 2006 Report of Special Prosecutor Egan found that there was evidence to find Dets. Maslanka and McDermott guilty beyond a reasonable doubt for aggravated battery, perjury, and obstruction of justice in the interrogation of Alphonso Pinex at Area 2 on June 28, 1985. The Report also found, however, that Anderson's claims could not be supported due to a lack of physical and medical corroboration, his failure to raise his claims in all of his post-conviction proceedings, and his failure to cooperate.

Special Prosecutor Egan's 2006 Report had found sufficient evidence to indict Detectives McDermott and Maslanka in the Pinex matter; and both detectives had taken the Fifth Amendment when asked about abusing detainees.[20] The claim of torture was referred to Chief Judge Evans of the Circuit Court of Cook County for assignment to a trial judge for further proceedings.

V. REFERRAL OF THE CLAIM BACK TO TIRC BY THE AGREED ORDER.

On July 30, 2013, Chief Judge Evans ordered that Petitioner's Claim be referred to the Circuit Court for "all proceedings consistent with the Illinois Torture Inquiry and Relief Commission Act." Chief Judge Evans' referral order listed case numbers 90 CR 11984 and 11985.

Anderson's counsel filed a motion in the Circuit Court concerning the scope of the referral. Following briefing, Chief Judge Evans entered an Agreed Order referring the claim back to TIRC "for the purpose of determining whether the issues raised in the Motion, a copy of which is attached to and made a part of this order, require clarification of the TIRC's Disposition of the Claim."[21]

VI. CURRENT POSITIONS OF THE PARTIES BEFORE THE COMMISSION.

After the matter was referred by the Chief Judge, TIRC staff requested that the parties submit supplemental filings. Anderson's counsel appeared before the Commission on Sept. 17, 2014, and filed additional papers. The Commission also subpoenaed records from the Chicago Police Dept.

As noted above, the Special State's Attorney and counsel for Anderson have now agreed that case numbers 90 CR 11979, 11984, 11987, 11989, 11990, 11991, and 660648 should be referred to

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[20] The Case Disposition noted that there was some credible evidence Anderson was tortured, and that the claim merited judicial review. In addition to the evidence noted in May 2013, the fact that Det. McDermott testified that he was told that Anderson was "eager to talk," when Det. Brosnan testified that Anderson had asserted his right to silence, raises a question as to whether police testimony about the interrogation at Area 2 may not have been truthful. While officers are free under many circumstances to resume interrogation about a different crime after the invocation of the right to silence, *see Michigan v. Mosley*, 423 U.S. 96 (1975), they are not generally free to resume interrogation after the invocation of the right to counsel, *see, e.g., People v. Schuning*, 399 Ill. App. 3d 1073, 928 N.E.2d 128 (2d Dist. 2010)(analyzing cases). The varying testimony about Anderson's invocation of his rights makes more credible his claims that he (1) repeatedly requested a phone call to family to contact a lawyer, and (2) was threatened and coerced.

The Commission makes no judgment that Anderson was innocent of any of the crimes, or that he is in general a credible witness. Nevertheless, the circumstances support the conclusion that, under the standard provided by the TIRC Act, Anderson's claim of torture merits judicial review.

[21] Anderson asked C.J. Evans to amend the July 30 referral Order to include all 13 cases. Special Prosecutor Nudelman's argued that the referral should be limited to 11984, 11979, 11987, 11989, 11990, 11991, and 660648. Anderson's Reply asked that 11985 also be referred. Before C.J. Evans, Anderson agreed that cases where a confession was not mentioned in the plea colloquy could be deemed as not referred. Counsel for Anderson have advised TIRC they did not intend to waive the referral of those cases, but were willing to accept a partial referral as a compromise. They argue here that all should be referred.

the Circuit Court by the Commission. Counsel still disagree on cases 11980, 11982, 119893, 11985, 11986, and 11988 (shown in the chart on the bottom of p.2).

A. Anderson's Position.

Counsel for Anderson argue that all 13 cases should be referred to Court. They say:[22]

- Anderson did confess in 11985, and was deterred from taking the stand because of the State's assertion that it would introduce the confession. *See* Exhibit 3. Further, there is no procedure for TIRC to un-refer 11985, which has been referred to Court.
- A confession is "used to obtain" a conviction whenever that confession could have been admitted in any proceeding — whether or not the confession was to the crime of conviction.
- As a factual matter, Anderson was charged in all 13 cases because of his coerced statement. The confession could have been used against him in any of the cases.
- Anderson is serving sentences for all 13 cases, so a determination of torture would affect his release in each case – even cases where the confession was not used.
- There was a single negotiation leading to a single agreement covering all 11 guilty pleas.
- The Commission should in any event refer all of the cases to Court so the Court can determine whether a claim is torture-related, under 775 ILCS 40/50(a).

B. Special State's Attorney's Position.

Counsel for the Special State's Attorney argue that the only cases that should be referred are those in which (1) Anderson actually confessed to the crime for which he was convicted; and (2) the State used that confession in that case, either by submitting it as evidence at trial or submitting it as part of the factual basis of a guilty plea. In an Aug. 10, 2014 Position Statement, they argue:

- Any confession made by Anderson to the armed robbery in case 11985, was not introduced,[23] so no confession was used to obtain the conviction.
- By referring the claim of torture back to TIRC for clarification, the Agreed Order created a procedure to "unrefer" 11985.
- The 5 cases in which Anderson pled guilty but no confession was mentioned in the factual basis should not be referred to court, because a confession was not "used to obtain the conviction." Also, it is not clear from the record that Anderson confessed to those crimes.

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[22] Anderson filed a Brief with the Commission on Aug. 1, 2014, and supplemented it with filings on Sept. 17, 2014, and Dec. 3, 2014.

[23] While *People v. Anderson*, 375 Ill. App. 3d at 991 n.1, suggests "that in the present case no inculpatory statements were made by defendant with regard to the Halsted store robbery," it appears from Exhibit 3 that Anderson made a statement that was not introduced as evidence.

- There wasn't a global plea. The plea colloquy shows that the parties and the court "discussed each and every one of these cases. We discussed the facts in each case." See Ex. 5 at A17. Since the factual basis and sentence were separate, all cases need not be referred.

- Courts view guilty pleas as final. A defendant gives up his right to challenge a coerced confession by pleading guilty. Since Anderson's convictions for the eleven guilty pleas rest on his admission of guilt in open court, the claims should not be referred to court.[24/]

VII. COMMISSION'S ANALYSIS OF THE QUESTIONS PRESENTED.

A. The Statutory Background.

1. The TIRC Act is an Extraordinary Remedy.

The Commission starts from the premise that the TIRC Act is a special remedy designed to address claims of torture related to Jon Burge and officers who had been under his supervision:

> Sec. 10. Purpose of Act. This Act establishes an extraordinary procedure to investigate and determine factual claims of torture . . . . [775 ILCS 40/10.]

The Commission was created to address these claims even if they had not succeeded in prior appeals or post-conviction proceedings. *See* 775 ILCS 40/50 (relief in TIRC proceeding is separate from any other post-conviction proceeding).[25/]

2. Any Claim Must Fall within the Definition of a Claim of Torture.

Under the TIRC Act, the Commission has jurisdiction to investigate claims of torture. The statute contains the following definition of a "claim of torture:"

> (1) "Claim of torture" means a claim on behalf of a living person convicted of a felony in Illinois asserting that he was tortured into confessing to the crime for which the person was convicted and the tortured confession was used to obtain the conviction and for which there is some credible evidence related to allegations of torture committed by Commander Jon Burge or any officer under the supervision of Jon Burge. [775 ILCS 40/5(1) (emphasis added).]

[24/] The Special State's Attorney cites *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *United States v. Johnson*, 878 F. Supp. 1135, 1138 (N.D. Ill. 1995), and *People v. Bowman*, 335 Ill. App. 3d 1142, 1151 (5th Dist. 2002). *See also Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Although the State noted an argument that none of the guilty plea cases present a "claim of torture" because the defendant's in-court admissions (and not his confession) were used to obtain his convictions, the State agreed that the 6 guilty pleas in which the confession was part of the factual basis for the plea could be referred to court in this case.

[25/] The fact that Anderson did not list all 13 claim numbers is not dispositive. The Commission does not believe that a claim is limited to the information placed on the initial claim form, which did not ask for all relevant data. Also, claim forms were usually filled out by convicted persons, and not lawyers.

Anderson clearly meets several of these requirements. He is a living person, convicted of a felony in Illinois, who asserts he was tortured. The questions presented as to each count are:

- Was Anderson tortured into confessing *to the crime for which he was convicted?*
- Was the *tortured confession used to obtain the conviction*?

3. Referral Provisions and Court Remedies.

Under the TIRC Act, the Commission can refer cases to the Circuit Court of Cook County:

> If the Commission concludes there is sufficient evidence of torture to merit judicial review, the Chair of the Commission shall request the Chief Judge of the Circuit Court of Cook County for assignment to a trial judge for consideration. [. . .] *Notwithstanding the status of any other postconviction proceedings relating to the petitioner*, if the court finds in favor of the petitioner, *it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to rearraignment, retrial, custody, bail or discharge, or for such relief as may be granted under a petition for a certificate of innocence, as may be necessary and proper.* [775 ILCS 40/50(a) (emphasis added).]

B. Principles of Statutory Construction.

To interpret the TIRC Act, the Commission looks to the rules of statutory construction articulated by the Illinois Supreme Court:

> When construing a statute, our primary objective is to ascertain and give effect to the intent of the legislature. [. . .] The most reliable indicator of legislative intent is the statutory language, given its plain and ordinary meaning. [. . .] In determining the statute's plain meaning, we consider the subject it addresses and the legislature's purpose in enacting it. [Citations omitted.]

BAC Home Loans Serv., LP v. Mitchell, 2014 IL 116311, ¶38, 6 N.E.3d 162 (Ill. 2014).[26/]

C. What Does the Definition of Claim of Torture Mean as Applied to These Questions?

Looking at the plain language of the statute, the Commission believes that a convicted person has claimed he was "tortured into confessing to the crime for which the person was convicted and the tortured confession was used to obtain the conviction" when:

- a person has been found guilty of a crime, either by a verdict or a guilty plea;

[26/] "The best indication of legislative intent is the statutory language, given its plain and ordinary meaning. . . . Where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction." *Krohe v. City of Bloomington*, 2013 IL 94112, ¶3, 789 N.E.2d 1211 (2003). Only when a statute is ambiguous will the court "look to aids of statutory construction, including legislative history and established rules of construction." *BAC Home Loans*, 2014 IL 116311, ¶38.

- the person has made an incriminating statement (or been said to have made an incriminating statement) relating to that crime; and
- the tortured confession was a significant element that led to the verdict or plea.

The last element is a question that must be resolved on the facts of each case.

1. The Meaning of "Conviction."

The Commission believes that the word "conviction" in the statute includes either a verdict or a guilty plea. Illinois law defines "conviction" as including a guilty plea: "'Conviction' means a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense . . . ." 720 ILCS 5/2-5. *Accord*, 730 ILCS 5/5-1-5.

2. The meaning of being "tortured into confessing to the crime for which the person was convicted."

A claim of torture cannot, under the plain language of the TIRC Act, be within the Commission's jurisdiction if it does not involve a tortured confession "to the crime for which the person was convicted."[27] A claim of torture to some other crime – even if it is used as part of the state's case against a defendant – is not within the plain language of the statute.

3. The meaning of "the tortured confession was used to obtain the conviction."

The Commission believes that the phrase "the tortured confession was used to obtain the conviction" must turn on the facts of each case. In any particular case, the tortured confession must have been used, that is, it must have had some role in, obtaining the conviction.[28] If a tortured confession is mentioned as the only evidence supporting a guilty plea, the Commission will view it presumptively as being "used to obtain the conviction." The failure of a prosecutor to mention a tortured confession as part of the evidence supporting a plea may mean that it was not "used to obtain the conviction," but other facts in a particular case may lead to a different conclusion.

D. The Application of the Commission's Analysis to the Disputed Cases.

1. The Trial for Armed Robbery in No. 11985.

Anderson and the Special State's Attorney have disagreed over whether Case No. 11985, the trial for armed robbery where the confession was not introduced, should be referred to Court. The Commission agrees with Anderson that the confession was "used to obtain the conviction."

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[27] The Commission has defined the meaning of "tortured confession" by regulation. 20 IAC §2000.10.

[28] *See People v. Wrice*, 2012 IL 111860, *43, 962 N.E.2d 934, 945 (2012)(introduction of tortured confession at trial is not harmless error).

Exhibit 3 shows that the State's Attorney advised Anderson's lawyer and the Judge that Anderson had made an oral statement (which was apparently a confession), and that it would be introduced if Anderson took the witness stand. The Commission believes that an express statement that a confession would be used for impeachment would deter a defendant from testifying at trial,[29] and that the deterrence would be of significant benefit to the prosecution. The Commission therefore finds that this case falls within the language "used to obtain the conviction."

2. The Guilty Pleas in the Cases where the Confession Was Not Mentioned in the Plea Colloquy.

(a) Anderson likely confessed to all of the cases, except for the attempted escape case.

The Commission concludes that Anderson likely confessed to all of the cases (except for the attempted escape). It reaches this conclusion for several reasons:

- Anderson has told the Commission that he did.
- The Chicago Police Department has failed to locate and produce complete records showing the scope of all of Anderson's confessions. The Department says the records of most of the non-murder cases were likely destroyed under routine procedures. Nevertheless, the absence of the records – at best – is neutral, and could be construed against the position of the State.[30]
- The existence of a document confirming a confession in a case where a confession was not mentioned in the plea colloquy, Exhibit 3, shows that Anderson's confessions were not limited to those mentioned in the plea colloquy.
- Since the charges were brought following the same interrogation, the Commission presumes that there was a confession leading to all the charges (except for the attempted escape, which occurred after the interrogation).

(b) On the facts of this case, the confessions were used to obtain the guilty pleas in every case except the attempted escape.

The Commission agrees with the Special State's Attorney that guilty pleas are normally not subject to collateral attack in post-conviction proceedings, since the plea waives a claim that a confession was coerced. That rule does not, however, apply to TIRC proceedings, for two reasons. First, as discussed at pp. 12-13 above, the TIRC Act provides an extraordinary remedy, separate from a post-conviction remedy. Second, the plain language of the Act allows the referral to Court of a claim of torture arising from any "conviction" within the definition of claim of torture that merits

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[29] There is nothing improper, in the Commission's view, with an Assistant State's Attorney acting within the law and noting that a (non-coerced) confession that is not being introduced could be used to impeach the defendant if the defendant takes the stand. The question here is one of the meaning of statutory language.

[30] The Commission does *not* believe that City officials are acting in bad faith in failing to locate these records. (The Department has produced some records from non-murder cases that were of similar age.)

judicial review. Since the word "conviction" is defined by Illinois statutes as including guilty pleas, *see* p. 14 above, TIRC's jurisdiction is not limited to claims of torture arising from trials.

Referral is particularly appropriate here, since the circumstances surrounding Anderson's guilty pleas, *see* pp. 5-7 above, suggest that Anderson was not represented by competent counsel at the time of his plea.[31/] Given the unusual facts, it is a fair inference that Hoffa was not prepared for trial of the murder case on August 5th or 9th, and may have had an incentive to advise Anderson to plead guilty to all outstanding charges that was not based solely on Anderson's best interests.

It is also clear that the plea agreement for all charges was interrelated. They all arose from the same conference, and were entered at the same time. *See* Exhibit 4. The fact that each charge was reviewed separately does not change the relationship. The Commission therefore finds that all of the guilty pleas in cases where Anderson confessed should be referred to Court.

CONCLUSION

For the reasons stated above, the Commission clarifies its Case Disposition and refers Case Numbers 90 CR 11979, 11980, 11983, 11984, 11985, 11986, 11987, 11988, 11989, 11990, 11991, and 660648 to the Circuit Court.[32/] Case 11982 is not within the Commission's referral.

DATE: May 20, 2015

Cheryl Starks, Chair
Illinois Torture Inquiry and Relief Commission

31/ *See McMann*, 397 U.S. at 767-73 (holding that a guilty plea waived a claim of a coerced confession depended on the effectiveness of competent counsel). This is not to say that Anderson was "coerced" into pleading guilty. As the Appellate Court noted, Anderson's claim that he believed he would get the death penalty if he didn't plead guilty is inconsistent with the record of the plea. Further, the State's offer benefitted Anderson by limiting his total sentence.

32/ The Commission does not express any opinion as to the scope of the remedy that the Circuit Court may grant should it find in favor of Anderson. Each party is free to argue whether the Court should vacate any judgment based on a conviction arising from the same arrest. *See* 775 ILCS 40/50(a).