BEFORE THE ILLINOIS TORTURE INQUIRY AND RELIEF COMMISSION

In re:
Claim of Aubree Dungey

TIRC Claim No. 2011.060-D
(Relates to Cook County Circuit Court Case No. 99-CR-14721)

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" or "TIRC") concludes that there is insufficient evidence of torture to merit judicial review of Aubree Dungey'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.

FILED
DEC 20 2018
DOROTHY BROWN
CLERK OF CIRCUIT COURT

EXECUTIVE SUMMARY

Aubree Dungey submitted a claim form to the Commission in August, 2011.[1] He wrote that he was arrested at gunpoint, beaten, and dragged to a squad car by arresting officers. He wrote that he was then taken to the Area 2 police station where he contends he was threatened; deprived of sleep, food and water, and continually handcuffed from June 1 through June 3, 1999, as part of the investigation into the murder of Damone Mims.

Dungey's initial claim form additionally indicated he'd signed the statement presented to him by police after being coerced and that he was under the impression that the statement was a complaint, not a confession to a crime. The signed statement[2] was a key piece of evidence used to convict Dungey for the murder of Damone Mims. In his TIRC interview, Dungey further claimed that he was threatened with beatings during his interrogation, and that after he signed the confession on June 3, he was subsequently interviewed again on June 4 and actually beaten to induce statements against a co-defendant.[3]

Before trial, Dungey's attorneys filed a motion to dismiss based on a lack of evidence[4], and a motion to quash Dungey's arrest and subsequent statements based on a lack of probable cause[5], but they did not file a motion to suppress statements due to involuntariness. Dungey's trial attorneys deny that he mentioned any beatings or torture to them.

Prior to his trial, Dungey did complain in open court to his trial judge about his public defenders. He asked for a new attorney who would file a motion to suppress his statement on the grounds that it was involuntary.[6] Although he did not elaborate in court on why the statement

[1] *See* Exhibit 1. Aubrey Dungey Claim Form.
[2] *See* Exhibit 2.
[3] *Hear* Exhibit 3, Audio of September 13, 2016, TIRC interview with Dungey, Parts I and II.
[4] *See* Exhibit 4, Motion to Dismiss.
[5] *See* Exhibit 5, Motion to Quash Arrest and Suppress Evidence
[6] *See People v. Dungey*, ROP, Dungey comments to Judge Michael P. Toomin, B5, excerpted *infra* at page 5.

was involuntary, contemporaneous letters from Dungey cite his alleged beating by arresting officers, unspecified threats by interrogating detectives,[7] and his belief (caused by detectives' and the assistant state's attorney's misrepresentations) that he was signing a complaint against the shooter as the basis for the motion.

Despite Dungey's statements during pre-trial proceedings regarding a desired motion to suppress, the Commission does not find sufficient credible evidence of torture to merit judicial review. Interviews with Dungey's trial attorneys indicate that in their interviews with Dungey prior to filing motions, he indicated he went voluntarily with arresting officers and made no allegations to his attorneys of abuse by either arresting officers or interrogating detectives.

While Dungey's statements and letters at the time of his pre-trial statements allege involuntariness, they focused on a physical confrontation with officers during his arrest that was significantly attenuated from his interrogation. Until very recently, he made nothing more than vague allegations about unspecified threats by detectives. Until recently, Dungey indicated only that the threats consisted of repeated questioning by detectives and an Assistant State's Attorney as to "what really happened."[8]

Only during his recent interview with TIRC, 17 years after his arrest, did Dungey ever raise specific threats of beatings by detectives or the alleged post-confession beating by a detective. Moreover, his claim of having his head smashed against his car during his arrest to the point of unconsciousness[9] is not corroborated by his confession photograph,[10] which shows no obvious marks, or by medical records of examinations performed shortly after his arrest. Additionally, his trial attorney, Ruth McBeth, stated that if Dungey had mentioned beatings, she would have noted it in her defense of him. Lastly, Dungey's demeanor during his TIRC interview and his willingness to talk without inhibition, all while continually evolving his account of his interrogation, lead the Commission to believe that he elected to talk to detectives rather than being forced to do so.

BACKGROUND

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.[11] Dungey identified the shooter in court as Abdul "Malik" Muhammad.[12] Dungey acknowledged driving Muhammad to and from the crime

[7] *See* Dungey's trial testimony, H-94, 95.
[8] *See* ROP of August 24, 2000 at H-94: "Well, I wouldn't say that Assistant State's Attorney Robin Mitchell was really pleasant with me. She was threatening me just as much as the cops were about this incident about what – kept asking me what really happened, for a period of three days."
[9] *Hear Exhibit 3*, TIRC Interview of Aubree Dungey, Sept. 13, 2016, at 23:20 – 23:56.
[10] *See* Supplemental Exhibit 4, Polaroid Photograph of Dungey Taken Contemporaneously with Confession, and enlargements of same.
[11] *See* Exhibit 4, Motion to Dismiss, 1.
[12] *See* ROP of August 24, 2000 at H22, H31-H44.

scene, but denied complicity, participation or knowing Muhammad intended to shoot before he did so.

According to the handwritten statement Dungey signed before police and an Assistant State's Attorney, he met Muhammad at about 3 p.m. on May 4, 1999, at Grand Crossing Park.[13] The statement indicates that Muhammad, Jermaine Bates, and "Marky" discussed a beating Muhammad had recently received from the Black Gangster Disciples (BD's).[14] According to the statement, Dungey and Muhammad later met up with Terry Taylor, from whom Muhammad requested a gun. Dungey and Muhammad followed Taylor to his home in order to pick up the gun. Dungey and Muhammad then traveled toward 7616 S. South Shore Drive, where Muhammad planned to meet "Marky" and Bates so the three could plan a retaliation against the BDs. While en route, near 76th and Stony Island, Muhammad claimed he'd seen Bates and "Marky" in a car and instructed Dungey to turn around on 76th Street. Dungey did. According to Dungey's statement, when Muhammad instructed him to pull alongside a white car, Dungey at that point realized the occupant of the car was likely a retaliation target rather than Bates and "Marky." Dungey refused to pull alongside, so Muhammad opened the door, said he was going to "shoot that fucker; don't leave me," and walked ahead and shot Mims. When Muhammad got out, Dungey turned his car south into an alley and traveled a block southbound; he then turned left (eastbound) on another street and then back north to 76th Street, where Muhammad re-entered the car. According to the statement, Muhammad had the gun in his lap, pointed in Dungey's direction while instructing him to drive faster. After some time passed, Muhammad calmed down and returned the gun to his waist belt. Dungey's statement recalls he dropped Muhammad off at the originally intended destination and waited in his car for about 10 minutes until "Marky" came out and told him to leave.

FINDINGS OF FACT

The Police Investigation

Police reports indicate that after the shooting, the victim's sister, Kimberly Mims, told police in mid-May she heard from "people on the street'" that a man known as "Malik" may have been involved in the shooting. The victim's friend, Adrian Herman, gave police the same information and said he saw Malik and his cousin "Ubie" in a white Gran Prix immediately before the shooting, and the two were flashing Vice Lord gang signs. Herman told police the shooting may have been retaliation for an earlier altercation between the Vice Lords and GD's.[15] Police reports also indicated they received several anonymous phone calls identifying "Malik" and "Oobie" as the offenders. A handwritten letter identified "Malik" and a "Dobson" as being responsible.[16] Police identified "Malik" as Abdul Muhammad and "Oobie" as Aubree Dungey and began looking for them.[17]

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[13] *See* Exhibit 2, June 3, 1999, 2:00 a.m. Statement of Aubree A. Dungey..

[14] Dungey maintained at trial and in his TIRC Interview that he was friends with many Vice Lords, including Abdul Muhammad, but is not himself a Vice Lord. *See, e.g.,* ROP H22-H23

[15] *See* Exhibit 6, Area 2 Supplementary Report, May 13, 1999, Det. A. Ramirez reporting, 2.

[16] No such letter appears in court or police files produced to the Commission.

[17] *See* Area 2 Supplementary Report, June 16, 1999, Det. Fidyk reporting. NOTE: Pages 5 through 7 of this 8-page report were not among materials turned over to TIRC by CPD.

Officers Garcia and Grubbs saw Dungey on June 1 around 1:30 p.m.[18] and, according to their report, he agreed to come to the police station to tell detectives about the murder. [19] At Area 2, Det. David Fidyk testified, Dungey was read his rights around 4:30 p.m.[20] and he described driving Muhammad on 76th when Muhammad supposedly spotted Jermaine and Marky and asked Dungey to turn around, which Dungey did. Muhammad then got out and ran toward the car he had wanted Dungey to catch. Dungey turned south into the alley and heard about 5 shots, drove east on the first street and then turned north, returning to 76th Street where he picked up Muhammad. After dropping Muhammad off, Dungey then told his godmother and his girlfriend what had happened.[21]

Assistant State's Attorney McGuire arrived at the police station, and at 6:54 p.m.,[22] Dungey told him essentially the same story, reports indicate. Detectives and ASA McGuire interviewed the godmother and girlfriend, who mentioned a detail about Dungey going to get a gun before the shooting. Detectives re-interviewed Dungey around 2:00 p.m. on June 2nd,[23] and Dungey acknowledged taking Muhammad to get a gun before the shooting. On June 2, 1999, at about 9 p.m., he talked with ASA Robin Mitchell for about 45 minutes, she testified.[24] Mitchell and detectives left the station to look for more witnesses. At 2:00 a.m. on June 3, 1999, in a larger conference room,[25] Dungey then gave a signed, written statement to ASA Robin Mitchell and Det. Fidyk. Detectives interviewed other witnesses who said Muhammad told them he had shot Mims. ASA Andy Dalkin then approved a charge of First Degree Murder against Dungey.[26]

Pre-Trial and Trial Proceedings and Developments

Dungey's Public Defender David Eppenstein filed a motion on October 22, 1999, to dismiss charges on the premise that there was insufficient evidence for the state to have a good faith basis that Dungey had committed first-degree murder.[27] He also filed a motion to quash arrest, arguing Dungey was arrested without probable cause.[28] Eppenstein did not file a motion to suppress statements as involuntary.

The motion to dismiss was heard and denied on November 5, 1999. The motion to quash arrest was apparently never heard or argued and no ruling was ever issued.

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[18] *See* ROP of August 23, 2000, Garcia trial testimony at G-206.
[19] *See* Exhibit 8, June 1, 1999, Supplemental Report of Grubbs and Garcia
[20] *See* ROP of August 23, 2000, G-217-226, Det. Fidyk Trial Testimony.
[21] *Id.*
[22] *See* Exhibit 9, ASA McGuire notes on interview of Dungey
[23] *See* ROP of August 23, 2000, Det. Fidyk trial testimony, G226.
[24] *See* ROP of August 23, 2000, Mitchell trial testimony, G259-264.
[25] *See* ROP of August 23, 2000, Det. Fidyk trial testimony, G233
[26] *See* Exhibit 7, CPD Area 2 Supplemental Report, June 16, 1999, Det. Fidyk reporting.
[27] *See* Exhibit 4, Motion to Dismiss. At the hearing on the motion, Eppenstein argued that the statement Dungey gave to police offered no evidence that Dungey had any plan or knowledge of Muhammad's intent to shoot Mims before Muhammad did so. *See also* ROP of November 5, 1999, A1-20.
[28] *See* Exhibit 5, Motion to Quash Arrest and Suppress Evidence.

Dungey apparently disagreed with the tack his public defender, Eppenstein, took regarding the motion to dismiss and complained to Eppenstein's supervisors. The office, apparently with Eppenstein's agreement, then assigned Ruth McBeth to the case.[29]

On April 5, 2000, Dungey telephoned the Office of Professional Standards and complained that he had been battered by the arresting officers. Specifically, he complained that he was grabbed by the back of his neck, had had his head slammed against a car, that he was kneed in the back, and that he was dragged on the ground while handcuffed too tightly. The OPS records contain no mention of any allegations against interrogating detectives.[30] On April 7, 2000, McBeth sent Dungey a letter advising him not to speak with OPS investigators because "such a conversation could cause irreparable harm to your case."[31]

In an undated[32] letter written sometime after McBeth was appointed, but before trial, Dungey wrote the Attorney Registration and Disciplinary Commission complaining of McBeth and "police misconduct and flagrancy." Dungey in this letter focused on the conduct of the arresting officers, but additionally complained that he had been locked in an interrogation room and denied a lawyer. He additionally claimed that police and the state's attorney "used threats, deceit, promises to make me sign a[n] inconsistent[,] coerced statement." He claimed police obtained his statement by saying they needed a witness, and then twisted his statement to charge him. He made no allegation of any physical abuse by detectives.[33]

On May 11, 2000, Dungey filed a federal lawsuit against the Public Defender's Office and ASA Mitchell, complaining that his attorneys "foundaled [sic] my case, mishandled motions and set forth a prejudice within the court to a[] disadvantage on my behalf." He additionally claimed malicious prosecution by Mitchell and, in passing, complained that "[t]he police violated my constitutional rights to arrest me[.] I was beaten and fals[e]ly accused of a crime[.]"[34]

On or about June 16, 2000, McBeth filed a motion to withdraw as counsel and permit Dungey to act as his own attorney. At a hearing on the matter on July 13, 2000, she explained that she did so because Dungey stated he didn't want her or any assistant public defender representing him.

> McBETH: Mr. Gleason, who is one of my supervisors, instructed me to file this motion so that Mr. Dungey could make his concerns of record and this could be ironed out as soon as possible.

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[29] *See* Exhibit 10, April 4, 2000, letter from Shelton O. Green to Aubree Dungey. *See also* ROP of July 13, 2000, B1-B16.

[30] *See* Exhibit 11, Office of Professional Standards CR File 261338 (excludes CPD reports on homicide). The file reflects that the office tried to interview Dungey in jail on April 19, 2000, but he declined, noting he was trying to secure private counsel. After trying to call Dungey's father on May 23, 2000, and reaching a disconnected number, OPS closed the case without interviewing any officers or, apparently, attempting to talk to Dungey again.

[31] *See* Exhibit 12, April 7, 2000 letter from Ruth A. McBeth to Aubree Dungey.

[32] *See* Exhibit 13. The letter indicated it was written contemporaneously with his attempts to file with the Office of Professional Standards. *See also* ROP of August 16, 2000, in which the state noted the ASA who took the confession, Robin Mitchell, had been notified by the ARDC of the complaint.

[33] *Id.*

[34] *See* Exhibit 14, Complaint in Dungey v. Cook County Public Defender, et al., 00-CV-2924. Judge Robert Gettleman dismissed the complaint two weeks after it was filed for failure to state a claim.

* * *

THE COURT: All right. Well, Mr. Dungey, what do you have to say about this?

* * *

DUNGEY: [T]his * * * dates back to a motion to dismiss charges for myself, and that I initially did not want him [Eppenstein] to pursue the motion, but the Public Defender[']s Office did it anyway. * * * The reason that I felt that I did not want that motion because I felt that the statement that the defense has was involuntary, and I have not came ...

THE COURT: The statement was what now?

DUNGEY: That the defense has, the evidence against me, the statement was involuntary. I gave it, I did not give it with my consent, and, I wanted, I needed help here and from Miss McBeth on this issue, and I also was a victim in this crime and I felt that I was being railroaded by my attorney and I felt that I can get some help here with Miss McBeth, and I haven't gotten anywhere in it, and I just wanted you, if possible, if you can read this [letter from Public Defender Supervisor Shelton O. Green] and give your decision of it.

McBETH: I would suggest that you not give it to him [the judge] because it has privileged communication and you have to give it to the State and it's my suggestion to you.

THE COURT: Until you're representing yourself, I think you should listen to the advice of your attorney.

DUNGEY: * * * I do not want an attorney that has, is not going to go for the issues and the things that, prior to my case, that I feel that it can help me. * * * I feel Mrs. McBeth can't give me the justice that I deserve, as my counsel, or the Public Defender's Office because they have not, they have not listened to any of my views or even studied the case whatsoever on my behalf.

* * *

DUNGEY: I know that I can't defend myself in a court of law, I do need a lawyer, but, I do want a lawyer that's going to help with the truth of this case.

THE COURT: Well, when it comes to decisions, tactical and strategic decisions as to how your case should be prepared and fought and defended, that is...

DUNGEY: Up to the attorney?

THE COURT: That's up to the attorney, that's right. You have certain basic decisions [but] * * * the drafting and presenting and arguing of motions are not, that is left up to the expertise of your lawyer. * * * [Y]ou've had Miss McBeth for a period of, a number of months, and the matter has now been set down for trial. She's an experienced litigator. * * * The fact that you may disagree with her as to certain tactical decisions that she has made, in my opinion, does not present an issue for me to resolve because this happens all the time where clients disagree with what lawyers say is the best thing they can do for them. You may think you have a motion for this or a motion for that. If you have a valid motion, I'm sure Miss McBeth would be receptive to presenting it. * * * [I]f she felt that a motion to suppress a statement or a lineup or a show up or something like that were, would lie in this case, then she would present it. She didn't and she wouldn't, she's not going to waste

> the Court's time with motions she thinks does not merit merely because you feel they should be presented.[35]

Dungey's jury trial began August 23, 2000. Dungey's attorney argued a defense based heavily on Dungey's ignorance of Abdul Muhammad's intentions on May 4, 1999. Dungey's August 24, 2000, testimony at trial included varying representations regarding the nature of Dungey's relationship with Abdul Muhammad at the time of the crime in question. Most notably, Dungey testified at trial that after the shooting, he had not voluntarily picked up Muhammad, but that he had been stuck in traffic when Muhammad re-entered his car, pointed his gun at Dungey and forced Dungey to drive Muhammad from the crime scene.[36] He also claimed that after they left the scene, Muhammad tried to shoot him but the gun didn't fire. Dungey claimed he then ran from the car with the keys, returning later after Muhammad had left.[37] He claimed to have told these additional details to Assistant State's Attorney Robin Mitchell, but maintained that Mitchell did not put these additional details in the statement.

Dungey also testified he was framed by ASA Mitchell.[38] When Dungey was asked how ASA Mitchell treated him during the interrogation, he responded, "Mrs. Mitchell had me under the impression that I was signing a complaint. And everything that she said to me and Officer Fidyk had me in belief that I was signing a complaint against Malik Muhammad."[39]

Dungey also testified alternately that ASA Mitchell and police officers threatened him[40], that they denied his request for an attorney[41] and that "I didn't think I was being prosecuted whatsoever or someone was trying to arrest me. Actually I believed I was hundred percent that the police were trying to help me."[42] He also testified that, "I was pretty much relieved [to finally talk to the police] but then also I was so fed up, you know, with it, with it eating me up inside that I had to let something out. I just had to. I mean it had to come through the air, the truth had to come to light."[43] Dungey was not asked whether, and did not claim that, he had been physically abused by police.

On August 24, 2000, Dungey was found guilty of first-degree murder under the theory of accountability. He was sentenced on September 27, 2000, to 40 years in prison.[44]

Immediately before his sentencing, Dungey again complained about his attorneys and noted that he had complained to OPS about "police brutality between two of the Chicago police officers who assaulted me on June 1, 1999 at a Amoco gas station."[45] He did not complain of any

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[35] *See* ROP of July 13, 2000, B1-B15.
[36] *See* ROP of Dungey Trial Testimony at Trial Transcript Pg. H18 to H105.
[37] *Id.* at H-46, 47.
[38] Id. at H-61-71.
[39] Id. at H-67.
[40] *Id.* at H-94: "Well, I wouldn't say that Assistant State's Attorney Robin Mitchell was really pleasant with me. She was threatening me just as much as the cops were about this incident about what -- kept asking me what really happened, for a period of three days."
[41] *Id.* at H-98.
[42] *Id.* at H-98.
[43] *Id.* at H- 97.
[44] *See* ROP of September 27, 2000, I-37.
[45] *Id.* at I-10.

mistreatment by interrogating detectives. He also noted that in his federal lawsuit, he had mentioned the police abuse. "This is something that I for a year and a half have complained about very most to the immense of my everlasting being[.] I have complained to * * * every attorney or anybody pretty much I have come in contact with."[46]

Appeals and Post-Conviction Proceedings

Since his conviction, Dungey has unsuccessfully sought appeal as well as petitioned for post-conviction and successive post-conviction relief.

Trial counsel for Dungey, Ruth McBeth, argued a motion for new trial on Dungey's behalf on September 27th, 2000.[47] It reasserted the arguments of the motion to dismiss and other grounds. There was no mention of involuntariness of Dungey's confession or mistreatment while in police custody.[48] The motion was denied.

Another Public Defender, Lindsay Huge, filed an appeal January 31, 2002, with no mention of police misconduct or claims of torture.[49] The appeal reviewed and detailed arguments made in the motion for a new trial. Specifically, the appeal argued: (1) the evidence presented at trial, consisting primarily of the confession, was insufficient to prove Dungey's guilt; and (2) Dungey's sentence was excessive.[50] On November 27, 2002, the First District Appellate Court affirmed the jury's verdict and the judge's sentence.[51]

On September 29, 2003, Dungey submitted a Post-Conviction Petition, alleging, among other things, that "his arrest without warrant was without probable cause, resulting in an illegal search and seizure, violating petitioner/Defendant's Fourth and Fifth Amendment rights, against the use of involuntary confessions spanning from the illegality of the arrest."[52] In his 146-page, pro-se petition, Dungey complained of being fed only once in three days at Area 2, that police and ASA Mitchell had threatened him by asking him over and over again what really happened, had not given him a bed and held him consistently in an interrogation room. He did not make any allegations of physical abuse or torture.[53] On December 4, 2003, the petition was summarily dismissed by the trial court.[54]

Dungey appealed the dismissal, and on September 23, 2005, the appellate court affirmed the dismissal. The ruling does not reflect any discussion of torture or abuse.[55] Dungey then sought leave to appeal his post-conviction petition decision to the Illinois Supreme Court; his petition was denied on March 29, 2006.[56] He further appealed on June 20, 2006 to the U.S.

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[46] *Id.* at I-12
[47] *Id.* at I-3.
[48] Id. at I-3 to I-6.
[49] *See* Exhibit 15, Dungey Direct Appeal Brief.
[50] *Id.*
[51] *See* Exhibit 16, November 27, 2002 Appellate Court Direct Appeal Opinion 1-00-3816.
[52] September 2012 Order Denying PC Appeal, Pg. 4.
[53] *See* Exhibit 17, Sept. 29, 2003, Pro- Se Post Conviction Petition for Relief, 2 and Assignments of Error, 27, 28.
[54] *See* Exhibit 18, December 4, 2003 Order of Judge Michael P. Toomin.
[55] *See* Exhibit 19, *People v. Dungey*, No. 1-04-2003 (1st Dist) (September 23, 2005).
[56] People v. Dungey, 218 Ill. 2d 347 (2006).

Supreme Court, and apparently referenced the just-released Egan/Boyle special prosecutor's report in support of his allegations of an involuntary confession.[57] The petition for a writ of certiorari was denied October 2, 2006.[58]

On May 31, 2012, Dungey filed a successive Post-Conviction petition alleging he was "a victim of systematic torture & psychologically coerced into signing an involuntary statement by Area 2 Violent Crimes Detectives Michael McDermott & David Fidyk."[59] He further alleged that arresting officers Grubbs and Garcia "beat the petitioner very badly, assaulted him & handcuffed him[,] then dragged him to an unmarked detective car."[60] He alleged that McDermott and Fidyk fabricated probable cause for an arrest, and that at the time of his arrest he was recouperating from surgery for a collapsed lung[61], was in pain, was handcuffed continually to a bench, and denied sleep.[62] Supporting his argument of psychological coercion, he repeated his allegations that detectives assured him he was signing the statement as a witness, and once he did so, he could leave.[63] He repeated the allegation that ASA Mitchell and detectives "threatened" him by "asking him what really happened for a period of three days." In a 2003 affidavit accompanying the 2012 petition, Dungey said that detectives removed him from Area 2 on the night of June 1, 1999 and took him to three locations: his home, the murder scene, and the scene where Muhammad tried to shoot him after the murder.[64]

The Successive Post-Conviction Petition was denied in September of 2012.[65] Dungey appealed the 2012 dismissal of the Successive Post Conviction and the Appellate Court affirmed the dismissal in January of 2014.[66]

TIRC Investigation

TIRC Claim form, Correspondence, and Interview

Dungey submitted a TIRC Claim Form in July of 2011.[67] Dungey's claim form alleges he was coerced into signing a statement which he believed to be a complaint. Dungey's claim form indicates:

> "[Dungey was] taken from car at gun point, beaten and assaulted on trunk of car and dragged to detective car, against my will. Taken to Area 2 police station threatened constantly, held against my will, handcuffed to bench for three days no water, no

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[57] The petition to the U.S. Supreme Court is not among the court records TIRC has access to, but is referenced in the Circuit Court's September 6, 2012 order denying leave to file a successive post-conviction petition. *See* Exhibit 20.
[58] Dungey v. Illinois, 549 U.S. 918; 127 S.Ct. 271.
[59] *See* Exhibit 20, May 31, 2012 Successive Post-Conviction Petition, 2.
[60] *Id.* at 3.
[61] The medical records Dungey submitted to the Appellate Court in support of this were from September, 2000 and indicate the surgery for the collaped lung occurred in 1997, at least a year and a half before his arrest.
[62] *Id.* at 12.
[63] *Id.* at 14-15.
[64] *See* Exhibit 21, Dungey Affidavits submitted with 2012 PC petition.
[65] *See* Exhibit 22, September, 2012, "Order Denying Petitioner Leave to File Successive Petition for Post-Conviction Relief," by Judge Nicholas Ford.
[66] *See* Exhibit 23, *People v. Dungey*, 2014 IL App (1st) 123130-U, (January 29, 2014).
[67] *See* Exhibit 1. Aubrey Dungey Claim Form.

> bathroom no sleep, ate once. While being held in various interrogation rooms. Forced to sign statement I thought was a complaint against the person who commit[t]ed the actual crime told me they wouldn't let me go home if I didn't sign it. They told me they needed me as a witness and to sign the complaint against the real person who committed the crime. They said they had spoken with witnesses and knew I was a victim also. They lied and coerced me into signing a statement I thought was a complaint at 2:00 am three days later still chained to a bench." [68]

On September 13, 2016, Dungey was interviewed by TIRC Staff in the presence of his then-attorney, Rebecca Kaiser He repeated his previous OPS claims that arresting officers Grubbs and Garcia had physically abused him at the arrest. For the first time in the record available to TIRC, however, he added details that Grubbs had pistol-whipped him in the stomach.[69] He also alleged for the first time that he fell unconscious from having his head slammed against the car.[70] Dungey also added that Grubbs and Garcia had torn his car apart during the search of it. He stated he had been threatened by interrogating detectives. When pressed as to how he was threatened, Dungey, for the first time, said detectives had used racial slurs: "N[-----] this, you're gonna tell us this or we're going to beat you again. You're going down for murder and all types of things."[71] He estimated that 9 to 10 officers had interviewed him at various times.

Dungey alternately said detectives didn't give him anything to eat[72] and that they offered him a stale McDonalds hamburger.[73] He claimed he was never allowed to go to the bathroom for three days, but never urinated on himself.[74] For the first time, Dungey claimed that he was actually beaten at the police station by an unidentified sandy-haired detective after he had already given his statement to ASA Mitchell.[75] That sandy-haired detective was apparently questioning another witness and needed information from Dungey for his interrogation of the witness, Dungey said. The sandy-haired detective hit him in the face, beat him about the body, and grabbed his neck in a "choke-move."[76]

Dungey told TIRC he had first been interviewed by a male ASA before eventually giving the statement to ASA Mitchell.[77] Dungey claimed that the male ASA had argued with detectives about charging Dungey and that the ASA had refused to do so.[78] Dungey repeated the allegation he made at trial that ASA Mitchell threatened him as much as detectives had. When asked what

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[68] Dungey Claim Form.
[69] *Hear Hear* Exhibit 3, Audio of September 13, 2016, TIRC interview with Dungey. Part I at 23:09.
[70] *Id.*
[71] *Id. at* 31:50.
[72] *Id.* at 34:40
[73] *Hear* TIRC Dungey interview Part II at 10:20.
[74] *Id.* at 11:50.
[75] *Hear* TIRC Dungey interview Part I at 35:18 – 37:00.
[76] *Id.* at 55:02-56:05
[77] This aspect of his story is corroborated by Fidyk's June 16, 1999 report, which notes that an ASA McGuire spoke with Dungey on June 1, 1999. *See* Exhibit 7
[78] *Hear* TIRC Dungey interview Part I at 40:28.

those threats by Mitchell were, Dungey said only that Mitchell just kept asking him what really happened. Asked how that was threatening, he said it was threatening because he was handcuffed and ASA Mitchell and detectives weren't listening to him even though he had been saying the same thing to them for days.[79] Such questions by Mitchell, he said at first, made him start to realize that maybe she was not trying to help him.[80] Then he corrected himself and said that he didn't realize her intentions, because they (police and the ASA) were acting in secret.[81]

Dungey said his eye was black and swollen from the abuse he received[82] and that the black eye was visible in the picture police took of him.[83] Immediately after saying that, however, he qualified the statement by saying that you could see "darkness" under his eye in the photo.[84] The photograph in question does not appear to demonstrate a black eye or any obvious darkness under the eye. [85] Dungey also told TIRC interviewers that he had not been taken out of Area 2 during his confinement there.[86]

Dungey reported that when he was admitted to Cook County Jail, he was asked if he needed medical assistance and he said he did, and was immediately taken to the hospital wing for three days. They "treated for my eye, 'cause my eye was black, and it was swollen, and I was distraught." He received pain medication for the eye, he said, and counseling.[87] Before being taken to the hospital, however, he relayed to the intake medical technician that he had been kidnapped by Muhammad and beaten by the police, and the technician took notes as he relayed his story.[88] Once evaluated at Cermak, Dungey was kept on the medical wing in Division 8 for 6-12 months. He was taken to Cook County Hospital for treatment of internal bleeding from the beating with the gun, and received an operation to stop the bleeding in his stomach.[89]

TIRC Interview with trial attorneys

TIRC Staff Attorney Michelle Jenkins interviewed Dungey's trial attorneys: Retired Assistant Public Defender, Ruth McBeth, and retired Assistant Public Defender, David Eppenstein. Mr. Eppenstein noted in his interview a disbelief in Dungey's torture claim, stating "It's highly unlikely anyone would have to torture Mr. Dungey to get him to talk; if anything, they'd have to beg him to shut up."[90]

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[79] *Id.* at 43:10.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 59:28-1:01:35.
[83] *Hear* TIRC Dungey Interview Part II at 8:22-8:52.
[84] *Id.*
[85] *See* Exhibit 27, Photograph of Aubrey Dungey.
[86] *Hear* TIRC Dungey Interview Part I at 39:17.
[87] *Id.* at 58:20 - 1:00:53
[88] *Id.* at 1:00:53 – 1:01:39
[89] *Id.* at 1:01:39 – 1:02:21
[90] *See* Exhibit 24, October 21, 2016 report of interview with David Eppenstein.

Mr. Eppenstein also recalled his disagreement with Dungey over trial strategy and suggested Commission staff interview McBeth.

In a November 2, 2016 interview, McBeth echoed Mr. Eppenstien's sentiments. She noted Dungey had been challenging to work with, but there had been no indications that Dungey had been beaten by police. Ms. McBeth firmly stated she would have noted such a claim in her defense. However, she did request to review the Public Defender's file in the matter in order to verify her memory.[91]

TIRC subpoenaed the Public Defender's file and on or about December 13, 2017, McBeth reviewed the file. On December 14, 2017, after reviewing the file, she told TIRC that notes in the file[92] reflected that:

- Eppenstein's notes of July 7, 1999, indicate he concluded, after an interview with Dungey, that there was no basis for a motion to suppress the statement because Dungey had voluntarily gone with police and given a statement. Eppenstein left open the issue of whether to file a motion to quash arrest.
- Eppenstein's notes of September 20, 1999, however, indicated that Dungey now said he did not go voluntarily, but was handcuffed and thrown into a squad car.
- Eppenstein's notes of September 27, 1999, indicated that Eppenstein and Dungey talked and agreed not to file a motion based on the arrest but to instead move forward with a bench trial.
- Eppenstein changed his mind on October 18, 1999, and decided to file pre-trial motions.[93]
- Eppenstein's notes of December 17, 1999, reflect that, for the first time, Mr. Dungey represented to him that on Day 2 of the questioning, he only signed the statement because detectives told him he could not go home until he did sign. Mr. Eppenstein told Mr. Dungey that this would require a motion to suppress, which would delay proceedings. Mr. Dungey told Mr. Eppenstein that he did not want that delay.
- McBeth's notes of January 23, 2000, reflect that in her interview of Dungey, he alleged that police would not let him go home because they told him they needed him as a witness to the homicide, that they told him he could not go home until he provided a statement regarding the homicide, that he was held for 36 hours, that the interview room

[91] *See* Exhibit 25, Report of November 2, 2016 interview with McBeth.
[92] Because Dungey's attorney-client waiver extended only to matters regarding coercion and strategy around it (and not conversations about the underlying crime), TIRC did not view the privileged notes, but rather relied on Ms. McBeth's account of them in her interview with TIRC.
[93] These change of heart on pre-trial motions seems to be corroborated by the court file, which indicates that the motion to Quash arrest and the Motion to Dismiss were filed shortly thereafter, on October 22, 1999. *See* Exhibits 4 and 5.

door was locked, that he was denied access to his family, that he was only 25 years old, that he was not allowed any calls, and that he was having nightmares at the police station and police were aware of this.

- McBeth's notes of February 9, 2000, reflect that Dungey told her there were a number of things in his written statement that did not happen but that the State's Attorney added on her own.
- McBeth's notes of April 7, 2000, reflect that Dungey refused to share with her what he had told the Office of Professional Standards when he made a complaint. McBeth advised him not to speak with OPS before he testified at trial.
- A June 28, 2000 letter to McBeth indicated that his statement to police was not voluntary, but cited no specific reasons for that conclusion.[94]

McBeth told TIRC that there was no explanation in the notes about why the motion to quash that Eppenstein filed was never litigated and she had no recollection of why it was not litigated, but speculated that it may have been a strategic decision to try to gain an acquittal through trial testimony, and to bolster that tactic by avoiding giving the state two chances to cross-examine Dungey. McBeth said there was nothing in the notes about arresting officers beating Dungey, slamming his head against a car, or knocking him unconscious. She also said the notes did not reflect any allegations by Dungey that interrogating detectives threatened him with a beating.

Dungey Family Affidavits

Dungey's attorney submitted affidavits from three of Dungey's family members alleging they either witnessed his bruises soon after his interrogations, or spoke soon after the arrest with Dungey, who told them of police abuse.[95]

Cermak Medical Records[96]

TIRC Staff obtained Dungey's medical records from Cermak Hospital, the hospital at Cook County Jail. The records contain:

- A June 4, 1999 "Medical Intake Record"[97] completed upon admission into the jail in which Dungey reported a history of low blood pressure, a collapsed lung suffered in 1996, a skin disorder since age 19, daily use of approximately a pint of alcohol since age 15 and tobacco use since age 18. The medical technician examining Dungey

[94] *Hear* Exhibit 26, Audio of December 14, 2017 McBeth interview.
[95] *See* Supplemental Exhibit 3, Affidavits of Aherene Dungey, Nicolet Johnson and Panisse Johnson.
[96] *See* Supplemental Exhibit 5, Select Cermak Hospital Dungey Medical Records; *see also* complete records produced by Cermak Hospital in Administrative Record in folder marked "Cermak."
[97] *See* Supplemental Exhibit 5, p. 041 of 061.

reported tattoos on his forearm and scars on his left underarm and forehead, but no bruises, cuts, swelling or sores. No complaints of police abuse are noted. (p. 94-95)

- A Cermak Department of Mental Health Services "Brief Primary Phsychological Screening Tool" form dated June 5, 1999[98] indicating Dungey reported feeling suicidal. He was referred for an "Admission/Evaluation Assessment" rather than direct admission to General Population.

- A Cermak Department of Mental Health "Admission/Evaluation Form"[99] dated June 4, 1999 indicating Dungey was depressed, tearful and expressing "vague suicidal ideation due to nature of charge." The evaluator recommended admission for further mental evaluation.

- A Mental Health Services Admissions Assessment[100] dated June 4, 1999 reporting Dungey had "[b]lood in urine," breathing problems, a skin condition and previously suffered a collapsed lung. It diagnosed him with "adjustment disorder" and said he had significant depression. (pp. 190-192)

- A Cermak psychiatry "Secondary Interview" form[101] dated June 5, 1999 reporting that Dungey reported a head injury from 1996 when he was hit with a bat and lost consciousness. There is no indication Dungey complained of having his head hit by police and losing consciousness on June 1, 1999. (p. 203)

- A Cermak Department of Nursing "Admission Assessment" form[102] dated June 5, 1999, reporting that Dungey reported pain in his left chest, but associated it with his collapsed lung of 1997, when he had a tube inserted into the left side of his chest. The form also reported that his hematuria (blood in urine) had existed since 1997. Dungey also reported a history of depression; alcohol, tobacco and marijuana use; wearing glasses; hardness of hearing; diarrhea; difficulty falling asleep; palpitations; and dizziness and headaches from migraines. A bruise diagram on the sheet records no bruises or scars nor any complaints of police abuse.

- Observation "Progress Notes"[103] of Dungey over the next three days reporting that he had not been able to call his family because of a block on their phone, that he expressed concern for his pregnant girlfriend, that he felt confined, that he wanted to go to school and church and use money for commissary, that he was not sleeping well

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[98] *See* Supplemental Exhibit 5, p. 043 of 061. Although the form is dated June 5, 1999, it was likely June 4, 1999, as subsequent psychological evaluations were dated June 4, 1999.
[99] *See* Supplemental Exhibit 5, p. 044 of 061.
[100] *See* Supplemental Exhibit 5, p. 045 of 061.
[101] *See* Supplemental Exhibit 5, p. 048 of 061.
[102] *See* Supplemental Exhibit 5, p. 049 of 061.
[103] *See* Supplemental Exhibit 5, p. 052 of 061.

due to circumstances surrounding his case, and that his urine on June 7, 1999 was bright red. The notes indicated that Dungey reported having bloody urine "for two years on & off." He also reported that he needed to see a doctor due to "an old back injury[;] he fell off a car." There is no complaint of police abuse.

- Various medical records[104] indicating Dungey eventually received some sort of corrective procedure for the blood in his urine.

- Various medical records[105] document Dungey protesting his innocence, expressing displeasure with his public defender, and indicating he was litigating a lawsuit and waiting to speak to an investigator, but there is no notation that he ever complained about abuse by police.

Pattern and Practice Evidence

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

1. **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.

    i. 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

[104] *See* Supplemental Exhibit 5, p. 055-057 of 061.
[105] *See* Supplemental Exhibit 5, p. 058-061 of 061.

and obstruction of justice for testifying falsely at Pinex's suppression hearing. [106]

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ii. 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."[107] 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 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.[108]

iii. 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.[109]

iv. 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.[110] On July 24, 2013, the Chicago City Council voted to settle the lawsuit for $10 million.[111] Caine, a co-defendant of Aaron Patterson in the 1986 Vincent and Rafaela Sanchez murders, alleged he was punched and threatened to elict a confession.[112] Caine's confession was thrown out in 2011 by Judge William Hooks, and prosecutors declined to reprosecute. In 2012, a judge granted Caine's innocence request.[113]

v. 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

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

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

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

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

[110] *Caine v. Burge, et al*, Deposition of Michael McDermott, March 28, 2011.

[111] City of Chicago Settlement Order No. 2013-485.

[112] 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.

[113] *Id.*

brought against Jon Burge by plaintiffs Aaron Patterson, Leroy Orange, Madison Hobley, Stanley Howard and Darrell Cannon.[114]

vi. 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.[115] 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 testimony and [Mitchell's and his mother's]."[116] The court then remanded the case for a new suppression hearing.

2. **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.[117] Only two complaints allege participating in torture in an attempt to secure a confession. In the first complaint, CR 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

[114] 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.
[115] *People v. Mitchell*, 2012 IL App (1st) 100907. p. 9 (May 16, 2012).
[116] *Id.* at ¶62.
[117] *See* Exhibit 26, Complaint Register Index for Det. David Fidyk. Scott Rotkovich and Brendan Deenihan drove him on September 22, 2002 to a vacant lot where Rotkovich physically abused him, threatened to kill him and placed a gun to his head.

CRs mainly concerned property allegedly going missing during searches, or searches allegedly performed without a warrant or consent.[118]

3. **Officer Garcia** - Officer Garcia has 43 complaints to the police department against him. Sixteen of those alleged excessive or unwarranted use-of-force against suspects during or after arrest.[119] Two complainants alleged they were choked as part of Garcia trying to recover drugs from their mouth. Several alleged overly tight handcuffs Garcia refused to loosen. Some alleged Garcia slapped them while they were in custody. One alleged Garcia kicked him when he refused to answer questions. Investigators found a man (whom Garcia had transported) bleeding from the head and found blood in the transport van. The man told investigators the transport officers had done it. Garcia and his partner claimed the man banged his own head against the transport van wall. That investigation is pending.[120] Police in Anaheim, California called Chicago police to complain Garcia was drinking and committed assault and battery against a stadium security guard when she refused to let him move behind the White Sox dugout in 2005. The guard claimed Garcia pushed her on both shoulders, almost sending her tumbling backwards down the steps. Garcia flashed his badge when confronted by officers, and initially refused to be handcuffed, police said. No charges were filed (and the complaint was not sustained) when the guard declined to press charges.[121]

   Garcia's only sustained complaint involved charges of inattention to duty when a fellow officer alleged Garcia wrote false parking tickets against her car as retribution for her involvement in a traffic accident with a friend of Garcia's. Garcia acknowledged being friends with the person in question, but denied the tickets were written as retribution. However, he could not produce the ticket book used to write the tickets and when confronted with pictures was forced to admit that there was no fire hydrant where his ticket said there was. In another case, Garcia also denied ever having any interaction with a pizza delivery man who claimed he was searched without cause and physically abused by Garcia deliberately squeezing his handcuffs. However, the man identified Garcia's partner in a photo array and investigators were able to show that the man's driver's license was checked by a communications unit assigned to Garcia that night, and the man produced medical records corroborating injury to his wrists. Nonetheless, investigators deemed the complaint not sustained.[122]

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[118] 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.
[119] *See* SUPPLEMENTAL EXHIBIT 1, Summary of Complaints against Officer Robert Garcia. Specifically, the following CR or Log numbers allege excessive force: 246683, 256858, 270129, 271791, 271918, 272485, 283209, 284480, 287516, 299550, 304637, 306235, 306501, 306930, 308612, 1082193.
[120] *See id.*, Log 1082193.
[121] *See id.*, CR 309200.
[122] *See id.* CR 297516.

Officer Grubbs - Officer Grubbs has 38 complaints to the police department against him.[123] There are six instances where Grubbs is accused of verbally abusing civilians. Ten complaints allege Grubbs physically abused civilians, witnesses, or suspects. For example, complainant Isaiah Swift claimed Grubbs grabbed his genitals and caused Swift pain. There are four complaints that characterize domestic disputes between Grubbs and his significant other, including a sustained complaint that he held his wife and her friend at gunpoint to prevent them from answering the door when police responded to their 911 call. In a final incident, Grubbs broke his ex-wife's nose, ribs and gave her several bruises and then shot and killed himself when police arrived. ***Conduct Regarding Co-Defendant:***

In the course of investigating the torture claim of Dungey's co-defendant, Abdul Muhammad, the Commission discovered evidence that the state likely failed to disclose to Muhammad's attorneys lineup information specifically requested in discovery that was potentially helpful to his defense. Specifically, Muhammad's attorney asked for "names and addresses of any individuals who confronted accused and made no identification or identified him for other crimes."[124] The state replied in writing that "[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."[125] However, TIRC subpoenas for the Muhammad files of the Public Defender, the State's Attorney and the Chicago Police Department yielded just three pages (two handwritten and one typed) mentioning lineups. The two handwritten pages document two lineups viewed by unspecified witnesses: one on April 28, 2000 at 11:30 p.m. and a second on April 29, 2000 at 9:30 p.m. The typed CPD summary also mentions only two lineups at unspecified times, both resulting in positive identification of Muhammad as the shooter by witnesses Harris and Wilson.

However, Commission staff interviewed another eyewitness to the shooting, Bradley Huett, who was transported to the police station for a lineup and identified someone besides Muhammad as the shooter.[126] It does not appear that this lineup confrontation was ever reported to Muhammad's attorney. In addition, it appears Fidyk and McDermott omitted this potentially exculpatory information from police reports. Although Fidyk was not directly asked at trial about Muhammad lineups not resulting in identification, he mentioned only the positive identifications by Harris and Wilson in his trial testimony.[127]

II. STANDARD OF PROOF

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

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[123] *See* Supplemental EXHIBIT 2, Summary of Complaints Against Michael Grubbs.
[124] *See* Exhibit 28, Motion for Discovery by Muhammad attorney Guy Hoch, June 30, 2000, ¶13(e).
[125] *See* Exhibit 29, State's Answer to Discovery in Muhammad case, August 21, 2000 (emphasis added).
[126] *See* Exhibit 30, Witness Interview Report of Bradley Huett.
[127] *See* ROP of Muhammad Trial, November 15, 2001, I4-I31.

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 (emphasis added). 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 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.[128]

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.[129]

III. ANALYSIS

A. Factors Supporting Dungey's Torture Claim

- Dungey told his judge on the record and before trial, that his confession was involuntary and that he wanted his attorney to file a motion to suppress it.

- Dungey's allegation that his public defenders did not vigorously represent him is somewhat supported by the fact that a written motion to quash arrest that was filed was

[128] 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.

[129] 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."

never litigated by either of his public defenders, and the record confirms there was significant disagreement between Dungey and his attorneys.

- Dungey's allegations of beatings *by the arresting officers*, while not documented in pretrial motions, do arise before trial in the complaint he filed with the Office of Professional Standards.

- Dungey did testify at trial that detectives and ASA Mitchell threatened him during his interrogation, although he did not give any specifics regarding such threats.

- McDermott's extensive history of abuse complaints and negative credibility determinations by more than one court weigh in Dungey's favor. The extensive complaint histories against the arresting officers, and allegations of violence by them, also weigh in his favor.

- Dungey's detention at Area 2 was lengthy, beginning on June 1 around 1:30 p.m. and concluding some time after his written statement to ASA Mitchell on June 3 at 2 a.m. (approximately 36 hours).

- The state's apparent failure to turn over to Dungey's codefendant, Abdul Muhammad, potentially favorable lineup information that he specifically requested is, at best, an inadvertent oversight or, at worst, a deliberate *Brady* violation. The omission of such information from typed police summaries demonstrates a desire by police to gloss over or suppress information unfavorable to their conclusion and detracts from officers' credibility and the state's credibility in general and weighs in Dungey's favor.

- Dungey's family's affidavits attesting to seeing bruises or hearing Dungey speak of police abuse are minimally supportive of his claim; they are also severely undercut by Cermak Hospital medical records, and never having been asserted before now.

B. Factors Detracting from Dungey's Torture Claim

- Dungey's story has consistently and repeatedly grown in terms of his torture allegations, and has been self-contradicted at several points, severely detracting from his credibility.
  - First, no torture allegations were raised in court at the pretrial motion stage.
  - Then, in complaining to the judge before trial of his confession's involuntary nature, he mentioned only that the confession was involuntary; he cited no specific conduct by any officers.
  - Dungey's complaints to OPS around the time of Dungey's speech to the judge do indicate allegations of physical abuse, but they focus solely on the *arresting* officers'

conduct and do not mention any misconduct by interrogating detectives. These allegations of abuse by arresting officers are undercut by his attorney Eppenstein's notes which indicated initially that Dungey told Eppenstein he went voluntarily with police.

- The letter to the ARDC around the same time mentioned threats, but is not specific as to what those threats were.
- Later, at trial, Dungey mentioned threats by detectives and the ASA, but described the "threats" only as repeated questioning about what really happened. In the same testimony, Dungey also adamantly maintained that he was one "hundred percent" convinced at the time of the interrogations that he thought the ASA was trying to help him. It is unlikely that if threats were being made Dungey would have viewed the ASA's efforts as helpful.
- At sentencing, Dungey again mentioned the alleged physical abuse, but only in regards to the two arresting officers.
- Dungey's post-conviction petition also made allegations of threats by the ASA and detectives, but only in terms of their repeated questions.
- His successive PC petition mentioned the arresting officers' beating, but again referred to the conduct of detectives and the ASA only in terms of their repeated questioning of him. He also added the claim that he was in pain during the interrogation from a surgery that occurred 18 months prior to his arrest.
- Dungey's TIRC claim form also alleged he was "threatened constantly," but again only in terms of lengthy detention and repeated questioning.
- It was only in his TIRC interview, when pressed by an interviewer as to the nature of the threats, that Dungey claimed he was called racial slurs and threatened with beatings and murder charges by the detectives. Additionally, his claim as to the beating at his arrest grew during this interview when he maintained for the first time that he was knocked unconscious, pistol whipped and received a black eye from arresting officers. Also for the first time, he maintained he was actually beaten in the police station by an unnamed detective.
- Dungey claimed in court filings to have eaten only once in police custody, yet claimed in his TIRC interview to have never eaten.
- Dungey's claim to TIRC that he did not urinate for three days is physically improbable.

- Dungey's medical records, while carefully documenting myriad medical histories and illnesses and injuries, contain no indication of injury upon arrival at the jail, and no claims of abuse by police.

- According to Dungey's trial attorney, McBeth, her review of notes in the file showed *no* allegations of beatings or threats of beatings by *any* officer.

- The photograph that Dungey maintains shows a black eye does not appear to demonstrate any obvious injuries, despite his contention that he was grabbed by the back of the neck and had his head slammed against a car, knocking him unconscious.[130]

- Dungey's claim that he signed and repeatedly initialed a statement without reading it or asking for any changes, despite it not having his statements about Muhammad trying to kill him, is in contradiction with his demeanor observed by TIRC staff. In his interview with TIRC, Dungey was assertive, loquacious and quick to add material he perceived as favorable to his claim. If, as he contends, he thought during the police interrogation that the ASA was helping him, it is more plausible that he would have read the statement and demanded additions before he would have signed it.

- Dungey's claims about the way the crime occurred have grown in a manner similar to the way his claims about the torture have grown – from simple ignorance about what Muhammad was doing (in his statement to police), to full-blown kidnapping and a murder attempt upon Dungey by Muhammad (in Dungey's trial testimony). Likewise, the notes from the public defender's file seem to also indicate growing claims – from going voluntarily with arresting officers, to going unwillingly, and from giving a statement voluntarily, to giving it only because they would not let him go before he did so. So too do the court record and other documents seem to grow in respect to coercion claims. The consistent pattern of graduation of claims diminishes his credibility in respect to all stories.

- Dungey's own trial attorneys deny that he made allegations of torture against detectives.

C. Weighing the evidence

Although Dungey did claim before trial that his statement to police was involuntary, the overwhelming weight of his statements to OPS, ARDC and the judge around that time seem to indicate that he believed the confession was involuntary due to the alleged use of force at his arrest. Assuming, for the moment, (without finding) that such abuse claims regarding his arrest are true, the Commission does not find any evidence in the record that such physical mistreatment during his arrest was done for the purpose of securing a confession.

At no time did Dungey allege that the arresting officers inflicted the beating in pursuit of a statement. Indeed, his statements in his TIRC interview seem to imply that the beating was inflicted because he vocally asserted his rights regarding the search of his car.

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[130] *See* Exhibit 27, Photograph of Aubrey Dungey.

Nonetheless, TIRC does not assert that physical abuse by arresting officers can never be construed as torture that leads to a confession to other officers who did not threaten, abuse or even remind a suspect of earlier abuse by other officers. On the contrary, this Commission has specifically found such a scenario to be a factor in finding sufficient evidence of torture for judicial review, and the courts have found it to be a factor in ruling a confession coercive.[131]

Rather, the Commission cannot credit the allegations of abuse by arresting officers when his own attorney's notes indicate Dungey initially told him he went voluntarily with them; a photograph of Dungey taken after his arrest shows no signs of facial injuries from his head allegedly being slammed into a car, knocking him unconscious; and detailed medical records upon admission to the jail show no mention of such injury or even subjective complaints by Dungey of police abuse. To the contrary, the medical records reinforce the existence of Dungey's pattern of using some nugget of truth (a medical condition of blood in the urine that pre-dated his arrest) and using it disingenuously to allege a greater claim (beating by police).

Similarly, the Commission cannot credit Dungey's allegations against the detectives or the Assistant State's Attorneys of threats before his confession, and an actual beating after his confession. Until recently, Dungey was unable to articulate with specificity any "threats" or abusive conduct by detectives or the ASA. At trial and in post-conviction filings, the behavior characterized as "threats" was simply repeated questions about "what really happened." It was only at his TIRC interview that his story graduated to allegations of racial slurs, threats of beating and, after giving his written statement, an actual beating in Area 2.

Although Det. McDermott's past complaint history and credibility certainly received the Commission's consideration, the Commission finds that the lack of specific allegations against detectives and ASA Mitchell (until only very recently) make those allegations unbelievable.[132] The Commission also does not find that a surgery that took place at least 18 months prior to his interrogation was a significant factor in his statement to police.

The Commission does not seek to minimize the coercive or involuntary effect of alleged continual questioning, denial of a request for an attorney and a lengthy interrogation period. Rather, the Commission finds that the evidence in this case does not support Dungey's contention that these factors led to his confession. Given the clear pattern exhibited by Dungey

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[131] *See In re: Claim of Willie Johnson*, Case Disposition, Illinois Torture Inquiry and Relief Commission, 15 (May 17, 2017) (noting alleged previous beating at same station factored into decision to refer claim to court); *see also People v. Santucci*, 374 Ill. 395 (1940) (ruling that a gratuitous, unrelated beating by police given to suspect three days prior to his interrogation for a robbery charge was highly relevant to the issue of coercion: "After such abuse by policemen when they had no charge against him, it is obvious defendant would in all probability be afraid to invite the hostility and wrath of the officers by insisting he was innocent when arrested on the robbery charge."

[132] Where there is little credible evidence of torture beyond a detective's allegation history, the Commission has previously not referred such claims to court. *See In re Claim of Rickey Robinson, In re Claim of Reginald BoClair,* and *In re Claim of Charles Stewart*, all available at: https://www2.illinois.gov/sites/tirc/Pages/TIRCDecision.aspx.

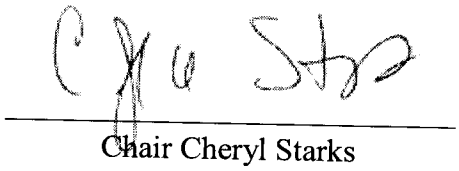
(both in the record and in his interview with Commission staff) to talk freely, frequently and with ever-evolving details, the Commission finds it more likely that Dungey voluntarily elected to try to explain his involvement in the shooting when confronted by police, and that voluntary explanation, made wisely or unwisely, was used to convict him.

IV. CONCLUSION

Pursuant to 775 ILCS 40/45(c), the Commission concludes by a preponderance of the evidence that there is insufficient credible evidence of torture to merit referral of this claim for further judicial review. 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).[133]

The Commission instructs its executive director to file its written findings and conclusion with the court and to notify Mr. Dungey of its decision to deny referral of his claim to court. It further instructs him to notify Mr. Dungey of his right to judicial review of the Commission's decision under the Illinois Administrative Review Law.

Date: December 18, 2018



Chair Cheryl Starks

[133] *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.