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No. 1-20-1256

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CLAYBORN SMITH, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois, Criminal Division Case No. 92CR25596 Hon. Alfredo Maldonado, Judge Presiding

BRIEF OF PLAINTIFF-APPELLEE

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BRIEF AND ARGUMENT OF APPELLEE

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POINTS AND AUTHORITIES

ISSUES PRESENTED FOR REVIEW

Whether Circuit Court erred in finding that Defendant was not entitled to a suppression hearing on the voluntariness of his confession where none of his proffered newly discovered evidence was of *such a conclusive character* that it would probably change the result on retrial when Detectives and Assistant State's Attorneys gave sworn live witness testimony and contradicted Defendant's claim of torture in all material respects.

STATEMENT OF FACTS

Defendant Clayborn Smith was convicted of the 1992 murders of his grandfather, Miller Tims, and great aunt, Ruby Bivens, after a bench trial – his conviction was affirmed on appeal. (C 1006) Defendant filed a claim with the Illinois Torture Inquiry and Relief Commission ("TIRC") in 2011, which was referred by TIRC for judicial review. (C 1007)

TIRC Hearing

The Circuit Court commenced an evidentiary hearing in this cause on March 2, 2018, following the TIRC referral, pursuant to the Illinois Torture Inquiry and Relief Commission Act, 775 ILCS 40, e*t seq*. ("the Act"). (R 212)

At the hearing, Defendant called himself as his only live witness and freely question the detectives whom he accused of coercing his custodial statement at Area 1. (R 179:8-180:6) The People called numerous witnesses, including three detectives – Kenneth Boudreau, John Halloran and James O'Brien – and three former Cook County Assistant State's Attorneys ("ASA"), Laura Lambur Hynes, Judge Anna Demacopoulos, and Judge Steven Rosenblum. (R 208:16-19) As more fully set forth below, all of the State's witnesses categorically denied mistreating or witnessing any mistreatment of Defendant or any other civilian witness who they interviewed during the investigation into the murders of Miller Tims and Ruby Bivens.

a. CLAYBORN SMITH'S LIVE TESTIMONY

On March 2, 2018, Defendant testified at the evidentiary hearing in support of his TIRC claim[1]. (R 229-579)

The Circuit Court summarized Defendant's testimony as follows:

> Again, he claimed detectives hit him while driving him to Area 1; detectives, primarily Halloran, entered the interview room on multiple occasions in which they yelled at him, punched him, kicked him, and pulled his hair; Detective Boudreau kept telling him to give an account that made it seem like self-defense; Smith's request to Rosenblum for a lawyer went unheeded; he was told a lawyer was upstairs for him to deceive him to leave the lockup; detectives pulled him out of the room after he 'went off' on ASA Lambur; he denied any involvement in the murders when he first poke with Lambur; Detective O'Brien entered at some point and pulled his fingers back; three detectives were in the room and the court reporter was outside the door when he gave his statement; and Boudreau fed him what to say and interjected during the reported statement.

(C 1030).

On cross-examination, Defendant acknowledged that he knew Detective Boudreau from an earlier questioning at Area 3 Violent Crimes at 3900 S. California Avenue. Defendant testified that, in that earlier interaction, he denied knowledge about a murder that had occurred and was released without being charged. (R 332:8-333:22) He explained – and the detectives verified – that he was at a funeral at the time of the crime, which occurred in the summer of 1992. (R 330:17-332:7). When asked whether he complained of any mistreatment at all during this prior investigation, Defendant testified that he remembered talking to Boudreau and Boudreau did not do anything to him (R 336:7-16) Defendant testified further that he knew Detective Foley from this same prior incident in the summer of 1992 but denied knowing Detectives O'Brien and Halloran. (R 336:18-338:7) Defendant further testified that Foley treated him like a "human being" and told him that he was going to "take care of this." (R 338:18-339:4)

Despite not identifying Clancy at his suppression hearing or to OPS or to the Independent

[1] The cross-examination of Defendant continued on March 20, 2018 and May 2, 2018.

Police Review Authority ("IPRA"), he insisted that Clancy was the detective who hit him while sitting on his left in the back seat of the car. (R 340:2-344:1) Even though he knew Detective Clancy from the earlier incident and testified about him, He testified before the Court at this evidentiary hearing that only identified Clancy in this incident by process of elimination and after Detective John Halloran testified. (R 351:8-17)

The State then called witnesses in its case in chief:

b. HONORABLE STEVEN ROSENBLUM LIVE TESTIMONY

Judge Rosenblum worked as a Cook County Assistant State's Attorney for approximately 25 years and began working for its Felony Review Unit in May 1992. (R 700:14-22) On October 20, 1992, he received a call at about 5 p.m. and went to Area 1 Violent Crimes at 5100 S. Wentworth Avenue, Chicago, Illinois. (R 701:3-14) Judge Rosenblum worked with Laura Lambur, his trial supervisor at that time, and Judge Anna Demacopoulos, another trial supervisor. (R 702:10-20)

Judge Rosenblum testified that Defendant Clayborn Smith was not the only one being considered at the time for charges. (R 703:20-21) The ASAs were there to conduct due diligence to determine what charges were appropriate at the time, while the police were conducting their investigation. (R 703:21-23) Judge Rosenblum testified that he spoke with Defendant maybe two times for approximately one minute total. (R 704:5-6) Ms. Lambur was primarily working with Defendant, while Judge Rosenblum was working with several other witnesses. (R 704:9-10) Then-ASA Rosenblum did not advise Defendant of his *Miranda* rights, but merely stuck his head in the room, gave him a cigarette and asked him if he needed something to eat or drink. (R 704:8-16)

Judge Rosenblum testified that he was present at Area 1 for approximately 30 hours in total on the days of Defendant's interrogation and these brief encounters were his only interaction

with Defendant. (R 704:17-21) Defendant did not complain to him about being struck by the police or of any mistreatment, did not appear to be injured, and did not tell him he wanted an attorney. (R 705:1-11) He did not say anything to Defendant about Smith's girlfriend or about whether he should cooperate or be charged with murder. (R 705:17-23) He did not see anyone threaten Defendant and did not hear any screaming, yelling or loud noises of any sort while he was present. (R 705:23-706:10)

Judge Rosenblum identified People's Exhibit 24, a handwritten statement from Maurice Martin taken before himself, ASA Lambur and John Halloran at 6 AM on October 21, 1992. (R 706:23-7) Judge Rosenblum testified that he was involved in multiple interviews during his 30-hour shift. (R 711:2-11) Judge Rosenblum testified that during the investigation, a number of individuals were taken to the Cook County Grand Jury but he was not involved in that process. (R 713:17-714:5) Judge Rosenblum testified that no one was beaten in his presence. (R 714:12-13) He never saw anyone threatening to charge Karen Tate with murder or take her baby away after she gave birth. (R 716:1-4) Judge Rosenblum denied all of Defendant's allegations that Defendant requested from him an attorney and that Defendant told him about any abuse or threats. (R 726:13-727:22)

c. HONORABLE ANNA DEMACOPOULOS

Judge Ann Demacopoulos testified that she began working as a Cook County Assistant State's Attorney in 1985 and worked as a trial supervisor in the Felony Review Unit in 1992. (R 730:3-9) She went to Area 1 on October 21 and October 22 to assist Steve Rosenblum and Laura Lambur and completed paperwork and took some witnesses to the grand jury on October 21, 1992. (R 730:17-731:12) She had no direct contact with Defendant. (R 731:14-17) She saw no one being mistreated or struck by the police at Area 1. (R 731:21-24)

Judge Demacopoulos identified People's Exhibit 15, the grand jury testimony of Karen

Tate, Tina Tate, Israel Moore, and Roderick Sisson which was then admitted into evidence. (R 732:7-23) Judge Demacopoulos testified that Karen Tate testified voluntarily, did not complain about any mistreatment by anyone in the police department, and did not appear to be under any duress or pressure when she testified before the grand jury on October 21, 1991. (R 733:2-15).

Judge Demacopoulos further testified that none of the other witnesses complained of any mistreatment, and each was asked about their treatment in the grand jury. (R 733:16-734:17). Judge Demacopoulos identified People's Exhibit 23, a handwritten statement of Clinton Tramble she took at 3 a.m. on October 22, 1992. (R 735:2-7). Judge Demacopoulos testified that she was present on October 21 and October 22, 1992 and took over the interviewing of some of the witness because Ms. Lambur and Mr. Rosenblum had worked almost 2 full days since October 20th. (R 735:8-21). Judge Demacopoulos also took the statement of Leo Green prior to taking the statement of Clinton Tramble. (R 736:20-737:3). Judge Demacopoulos testified that at no time did she see any mistreatment of any witness or of Clayborn Smith. (R 737:4-9). Judge Demacopoulos denied that she ever promised Leo Green that he would not be charged if he gave a statement. (R 760:8-16). Judge Demacopoulos also affirmatively answered that she never witnessed any misconduct by Detective Halloran, Boudreau and O'Brien at any time during this investigation at Area 1. (R 767:4-768:13).

d. LAURA LAMBUR HYNES

Laura Lambur Hynes ("Ms. Lambur" or "ASA Lambur") worked as a Cook County Assistant State's Attorney in its Felony Review Unit in October 1992 and in that position reviewed evidence presented on a case for possible approval of charges. (R 781:3-16). On October 20, 1992, she received an assignment to go to Area 1 and arrived at around 6:15 p.m. that night. (R 781:20-782:1).

Ms. Lambur testified that she spoke with Defendant in an interview room in the presence

of Detective Boudreau. (R 781:2-24). Before speaking with Defendant, she advised him of his constitutional rights, and he agreed to speak with her. (R 783:4-9). Defendant told her that he had gone over to his grandfather's house, that an argument ensued and that he ended up killing his grandfather and his great aunt and stole money from his grandfather. (R 783:12-15). Defendant told her that he set the bodies and the house on fire and was trying to leave the city when he wound up arrested. (R 783:15-17). Defendant admitted guilt to her in this initial oral conversation which took place at 10:00 p.m. on October 21. 1992. (R 832:4-7).

Ms. Lambur testified that Defendant was not handcuffed at any point during the, interview which lasted 45 minutes. (R 783:18-23). At the conclusion of the interview, Defendant agreed to give a court-reported statement. (R 783:24-784:2). Defendant began to give a statement to ASA Lambur, Boudreau and a court reporter around 12:01 a.m. on October 22, 1992. (R 784:4-11). ASA Lambur testified that she had two conversations with Defendant about the murders. (R 784:16-19). She also had a brief conversation alone with Defendant and asked him if everything was okay, if he had been treated well, and if he needed anything. (R 784:20-785:6).

Ms. Lambur testified that the court reporter typed the statement, and Ms. Lambur went through the statement with Defendant. (R 785:7-12). Defendant was permitted to make changes, and he signed the statement in her presence. (R 785:12-15). Ms. Lambur identified People's Exhibit 8, the statement of Defendant. (R 785:16-786:9). Ms. Lambur testified that no other detectives were present when the statement was taken except Boudreau. (R 786:21-24). Defendant made changes that were not directed by either her or Boudreau and at no time during the statement did Boudreau interrupt her or take over questioning. (R 787:12-24).

Ms. Lambur testified that at no time during her conversations with Defendant did she witness any detective slap, kick, punch or threaten him. (R 788:1-13). Ms. Lambur testified that he never asked for an attorney and never told her he had been beaten. (R 788:14-19). Ms. Lambur

also testified that Detective Boudreau did not grab him by the neck or remove him from the room. (R 788:23-789:3). She described Defendant's demeanor as upset but not confrontational. (R 789:4-22). She offered Defendant no promises of leniency and did not observe injuries on his person during her conversations with him which lasted over an hour and 15 minutes. (R 789:23-790:22). She described how Defendant played with his hair braids throughout her conversations with him, that he put his hands to his head and would touch his hair in conversations and even saw him smoking cigarettes while speaking with her. (R 791:24-792:16). She was shown a photograph of Defendant at his admission to Cook County Jail and testified that the photo truly and accurately depicted his face when she spoke with him. (R 791:12-23).

Ms. Lambur stated that she was at Area 1 for about 36 hours and also had two conversations with Maurice Martin who told her that he was trying to assist Mr. Smith in getting away. (R 792:17-793:15). She authenticated People's Exhibit 24, the handwritten statement of Maurice Martin taken on October 21, 1992. (R 793:18-794:13). She testified that Martin never complained of abuse to her or Rosenblum and she was unaware of any motion to suppress filed by Martin concerning his treatment. (R 794:14-795:1).

ASA Lambur also testified that she spoke with Karen Tate, Clinton Tramble, Israel Moore (aka Lookout) and all the witnesses who were at the police station. (R 795:13-17). She testified that not one of those witnesses made a complaint of abuse and she did not hear any screaming or yelling while she was at Area 1 between October 20 at 6:00 p.m. and October 22 at 12:01 a.m. (R 795:18-796:3). She recounted that Defendant filed an ARDC complaint against her alleging that he had asserted his Miranda rights and that she had ignored him. (R 796:4-9). She testified that Defendant did not mention that he had been physically abused, grabbed by Boudreau in her presence and forcibly removed by neck from a room. (R 796:10-16).

Finally, ASA Lambur testified that Detective O'Brien was not present at all during the

time she was at Area 1 on this case. (R 820:10-12).

e. DETECTIVE KEN BOUDREAU

Kenneth Boudreau testified that he started employment with the Chicago Police Department on July 14, 1986 and in 1990 was promoted to the rank of detective. (R 837:1-3). He was activated and served in the Gulf War in October 1990 and did not return to the Chicago Police Department until 1991. (R 837:4-6). Boudreau worked at Area 3 until October 15, 1992, when it was closed, and was reassigned to Area 1. (R 838:14-24). He worked at Area 1 until 1998. (R 864:22-23).

Detective Boudreau testified that Jon Burge was Commander at Area 3 but never worked at Area 1. (R 839:6-11). Boudreau testified that he knew of Jon Burge but he was not Boudreau's immediate supervisor and never had investigations with him during the approximate 4 months that they worked at Area 3 during this time period. (R 839:9-17; R 861:115-862:9).

Detective Boudreau testified that he and John Halloran, his partner, were assigned to investigate a double murder and the police were seeking Defendant as a person of interest. (R 839:18-840:11). Boudreau testified that he knew Defendant from working as a tactical officer in the 9th district, in particular from a homicide where Defendant cooperated in recovering guns that were used by the Black Stone street gang. (R 840:16-20). Boudreau testified that Defendant was the leader of the Mickey Cobra street gang and had the rank of sultan. (R 840:20-22).

Detective Boudreau testified that he was involved in the arrest of Defendant. (R 841:3-20). Upon the police entering, it was discovered that inhabitants had connected a hole through the apartment to the next room; Defendant was fleeing from unit 1504 into unit 1505 at the time he was arrested. (R 841:20-23). Defendant was taken to Area 1, about three blocks away and less than a five-minute car ride from the site of his arrest. (R 842:9-16) Boudreau and Halloran were among the officers who transported Defendant, who sat between two gang crimes and rode in

the back seat. (R 842:21-843:1) Defendant was not struck or hit during that short car ride and was not questioned before the gang crimes officers. (R 843:2-7).

Halloran and Boudreau walked Defendant to the second floor and had a 20-minute conversation with him wherein he agreed to answer questions after being read his rights. (R 843:8-12) Defendant gave an exculpatory alibi which they knew to be false because they had already spoken with Karen Tate. (R 843:13-19) Detectives observed what appeared to be blood on Defendant's shoes and inventoried them. (R 843:20-23) Boudreau and other detectives left to look for other witnesses while Defendant remained in a secure interview room. (R 844:4-22)

During his witness examination, Boudreau was shown police reports, including a lockup keeper's section of the report in People's Exhibit 18. (R 845:9-12). Boudreau explained that it contained five questions that the lockup keeper would ask an arrestee concerning the arrestee's health. (R 845:15-23). Specifically, the second page of People's Exhibit 18 reflects that Defendant was brought into lockup on October 21, 1992 at 8:30 a.m. and did not complain of any health-related problems and had no complaints. (SUP2 EI 461). Boudreau had no personal knowledge of the first two entries on the report. (R 848:2-9). Boudreau testified that there was no lineup in this case. (R 848:16-17). Boudreau and Halloran asked Foley to move Defendant from lockup at around 20:00 on October 21 and that the event was referenced in the lockup keeper's report mistakenly as a lineup. (R 849:1-4). Halloran and Boudreau spoke to Defendant about the results of their investigation and Defendant gave a statement to them at around 10:00 p.m. (R 849:4-22). He testified that Defendant ultimately gave a court-reported statement to Laura Lambur about 2 hours later just after midnight on October 22. (R 849:23-850:2).

Boudreau testified that ASA Lambur first conducted an oral interview and advised Defendant of his rights, telling him she was an attorney but not his attorney, and then engaged in a free flow of information with Smith who gave an inculpatory statement to her. (R 850:13-17).

Boudreau testified that Halloran was not present during the statement. (R 850:24-851:6). Further, he testified that James O'Brien was not present at all between October 20-22. (R 851:7-13).

Boudreau explained his involvement in the investigation of the murders between the time of Defendant's arrest and initial statement. He testified that he and John Halloran left the Area to locate several witnesses, visited a Cole Taylor bank, and took shoes to the crime lab. He testified that he learned what clothing Defendant was wearing, and that other detectives located the clothing, finding it soaking in a bucketful of bleach, and brought to the Area. (R 851:22-853:4).

Boudreau testified that he knew Judge Rosenblum, and believed he came to work on the case, but did not believe Judge Rosenblum ever spoke with Defendant about the case. (R 854:8-16). Boudreau denied that Defendant asked him for an attorney and did not witness anyone slap, punch, kick, strike or pull Smith's hair braids. (R 854:17-856:5). He denied threatening Defendant or his girlfriend or offering him promises of leniency if he claimed self-defense. (R 856:6-17). He denied that he suggested answers or made any comments during Defendant's court-reported statement. (R 856:14-24). He testified that Defendant never complained that someone threatened him or physically assaulted him between October 20 and October 22. (R 857:4-7).

Boudreau testified that when Defendant confessed, he was distraught with tears. (R 72:19-20). Defendant alluded to the fact that he felt that Boudreau was responsible for the crime happening because after Boudreau talked to him about quitting the street gang, he had no respect in the neighborhood and no money. (R 872:21-873:2). Defendant explained to Boudreau that he needed money, that he was being evicted and that he went to ask his grandfather for money and was denied. (R 875:16-877:10).

Boudreau was then asked by Defendant's counsel about allegations of misconduct in

other cases, and testified in rebuttal to questions concerning physical abuse in the taking of those statements. (C 1034).

(i) Derrick Flewellen

Detective Boudreau testified that he took a confession from Flewellen but Flewellen was acquitted of the charges against him. (R 888:19-24). Flewellen accused Detective Buglio of striking and kicking him in the face. (R 891:3-5). Boudreau was shown a copy of Flewellen's federal complaint and an allegation that accused Boudreau of choking him with his left hand and striking him in the face and that Boudreau continued striking and kicking Flewellen to prevent him from sleeping. (R 892:21-893:15)). Boudreau testified that he did not abuse Flewellen nor did Flewellen's girlfriend claim that he threatened to have her child placed with DCFS. (R 934:22-935:13).

(ii) Michael Sanders

Boudreau testified that Sanders was part of the Englewood Four case and that he himself did not take any written statement from Michael Sanders. (R 898:2-8). He testified that he took an oral statement from a Terrill Swift. (R 898:2-10). He denied using physical coercion to take any statement. (R 900:1-3).

(iii) Nevest Coleman

Boudreau testified he that took no part in Nevest Coleman's statement and that he interviewed Coleman and released him without charge. (R 904:13-905:9). He denied knowledge that Coleman complained against him for feeding Coleman false information. (R 905:16-20).

(iv) Kilroy Watkins

Boudreau testified that he did not recall that Watkins even accused him of abusing him. (R 906:3-10).

(v) Marcus Wiggins

Boudreau also disclaimed any involvement in the interview of Marcus Wiggins. (R 906:16-18).

(vi) Harold Hill

Boudreau testified that he took statements from Hill and Peter Williams. (R 907:22-908:2). Hill accused Boudreau of slapping him and also said that Boudreau struck him 3 or 4 times in his leg and chest areas and that he hit him with a blackjack. (R 909:9-17). Boudreau testified that he took Hill to the crime scene and did not abuse him. (R 909:22-24).

(vii) Johnny Plummer

Boudreau denied that he abused Johnny Plummer. (R 910:24-911:3).

(viii) Tyrone Hood

Boudreau testified that he did not take the statement from Tyrone Hood. (R 917:9-12).

(ix) Alfonzia Neal

Boudreau testified that Neal confessed to him but was acquitted and that Boudreau did not remember whether Neal testified at trial that he had an IQ in the 40s. (R 918:1-10).

(x) Jonathon Tolliver

Boudreau testified that Tolliver gave a statement about the shooting of a police officer. (R 918:16-20). Some witnesses who gave statements to detectives in that case later recanted and were charged with perjury. (R 918:21-919:3).

(xi) Emmett White.

Boudreau testified that he did not believe Emmett White lodged allegations against him personally but did recall the allegation made against other detectives. (R 921:5-7). Boudreau recalled that White had tried to flee in a vehicle during a pursuit and was wanted for a quadruple homicide in the State of Wisconsin. (R 921:19-22).

(xii) Styles, Johnson, Ezell and McCoy (Marquette 4 Case).

Boudreau did not recall whether there were confessions in this case without reviewing the reports. (R 937:9-12). Several detectives worked on it. (R 937:17-20). He did not recall whether any of them were exonerated. (R 940:20-24). He testified that was not involved in the Styles interrogation and he was not involved when anyone else interrogated him. (R 946:14-22). He made no threats against Styles and did not see anyone physically abuse Styles. (R 947:14-20).

f. JOHN HALLORAN

John Halloran testified that he was a Chicago police officer for 32 years – and a detective for 27 of those years – before he retired in May 2017. (R 953:20-24). He was assigned to Area 3 at 3900 S. California and later assigned to Area 1 at 5101 S. Wentworth Avenue after Area 3 facility's closure on October 16, 1992. (R 954:7-13).

On October 19, 1992, Halloran and his partner, Ken Boudreau, were assigned a follow-up investigation into the Tims and Bivens murders. (R 955:16-22). Halloran testified that prior to their involvement, witnesses had been interviewed and indicated to other detectives that Defendant Clayborn Smith had an altercation with the murder victim, Miller Timms. (R 956:17-957:1). Halloran testified that he knew Defendant from a prior murder investigation and Defendant was not charged. (R 957:2-22).

Halloran testified that he was involved in the arrest of Defendant on the morning of October 20, 1992 and transported Defendant with Detective Boudreau and two other gang crime specialists. (R 957:23-960:7). Halloran testified that the two gang crime specialists sat in the back seat with Defendant and the drive was a matter of a couple minutes. (R 959:21-960:7). Halloran denied that anyone struck or attempted to strike Defendant or threatened him or tried to talk to him about the murders in that short car ride to Area 1. (R 960:8-17).

Halloran and Boudreau had an initial 20-minute conversation with Defendant at about

10:00 a.m. on October 20, 1992 and Halloran, like Boudreau, testified that Defendant gave an alibi they knew was false. (R 963:4-964:3). Halloran corroborated Boudreau's testimony regarding the recovery of the bloody shoes from Defendant. (R 964:4-13). They had a second conversation with Defendant at around 8:00 p.m. on October 21. (R 964:14-23).

Halloran testified that he and Detective Boudreau interviewed Defendant a second time on October 21 at around 8 p.m. after Defendant was brought up from lockup. (R 969:3-10). Halloran testified that after giving Defendant of his *Miranda* rights, they confronted Defendant with the information detectives had learned. (R 969:10-15). Defendant was crying and said he wanted to talk to the detectives, understood his rights and then waived them and spoke for about an hour. (R 969:15-970:18). Halloran testified that he did not threaten or strike Defendant and that he was not physically accosted in any way. (R 970:19-971:8). Defendant did not refuse to talk or ask for an attorney. (R 971:9-13). Halloran testified that he was not present for conversations had among Defendant, ASA Lambur and Detective Boudreau. (R 971:17-972:12).

Halloran had no other questionings other than these two conversations with Defendant. (R 973:3-6). He testified unequivocally that he did not slap, kick, punch or choke Smith or witness anyone else do the same. (R 973:7-15). He made no promises of leniency to him and did not tell him that if he gave a statement his pregnant girlfriend would not be charged with murder. (R 973:16-974:23). Halloran denied that he pulled Defendant's braids. (R 974:24-975:7). Halloran authenticated an intake photo of Smith taken at the Department of Corrections. (R 975).

Halloran testified that Defendant's hair was fully braided when they first talked to him, and that Defendant played with and unbraided portions of his hair during the conversations. (R 976:1-9). Halloran testified that he interviewed Defendant with Boudreau for about an hour and 20 minutes and then interviewed by Boudreau and Lambur twice, for no longer than an hour each time. (R 976:10-19).

Halloran further testified that he initially invoked Fifth Amendment rights in the Harold Hill v. City of Chicago, case on November 26, 2008, but came back and answered all those qu4estions subsequently at a later date. (R 1021:17-1024:2). Halloran was questioned by Defendant's counsel about allegations of misconduct in other cases. Halloran denied striking Eric Gomez, Oscar Gomez and Abel Quinones. (R 1031:12-1032:5). Halloran denied beating Harold Hill. (R 1034:16-24). Halloran denied beating Tyrone Hood and Wayne Washington. (R 1038:21-1039:7). Halloran denied that Detective Boudreau abused Derrick Flewellen while he was present. (R 1045:8-17).

(i) Nicholas Escamilla

Halloran testified that he was involved in the investigation of Escamilla (who gave an affidavit alleging that he was handcuffed to a ring in an interrogation room for 15 hours, was unable to use a washroom, denied sleep, and that he threatened the lives of his wife and children and threatened that his daughter would be taken to DCFS and his wife arrested). (R 1068:6-1070:19). He was asked and testified about his recollection as to the allegations made by Escamilla. (R1067-1070).

Nicholas Escamilla made a statement to police that he had driven the car from which other gang members exited to commit the murder in that case. *Escamilla v. Jungwirth*, 425 F.3d 868, 870 (2005). Escamilla later contended that his attorney was ineffective for withdrawing a motion to suppress that statement and for not finding potential alibi witnesses. *Id*. The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the district court in that case, which denied Escamilla's petition for a writ of habeas corpus. *Id*. at 872. In particular, the Seventh Circuit noted that Escamilla's petition was based upon his own perjured testimony and no court could credit his statements:

> Escamilla maintains that, once his lawyer withdrew the motion to exclude the statement, he had "no choice" but to testify consistently with it. Not at all. He could have asked the court for a new lawyer, remained silent at trial, or testified to what he now insists is the truth and asked the jury to disregard what he had said before. The legal system offers many ways to deal with problems; perjury is not among them. How could any court credit statements made by a litigant such as Escamilla who trumpets a willingness (indeed, asserts an entitlement) to lie under oath whenever deceit serves his interests?

Escamila, 426 F.3d at 870 (citing *Brogan v. United States,* 522 U.S. 398 (1998).

(ii) George Anderson

Halloran testified that he did not arrest George Anderson. (R 1071:2-4). Halloran denied abusing Anderson or witnessing abuse. (R1071:5-24, R1072:1-R1074:18).

(iii) Nevest Coleman

Halloran testified that he conducted an initial examination of the crime scene and spoke to Nevest Coleman and other circumstantial witnesses. (R 1075:6-12). Halloran did not secure any inculpatory statements from Coleman and indeed after his interview, Nevest Coleman was sent home and released. (R 1076:10-16). He did not believe he was involved in any further interviews with Coleman who would later be arrested for the murder. (R 1078:24-1079:8). He denied abusing Nevest Coleman. (R 1083:1-5).

(iv) William Lee Hughes

Halloran testified that he interviewed Hughes. (R 1085:16-17). Although Hughes was listed on a TIRC spreadsheet on allegations of abuse, the physical force allegations were not directed against Halloran. (R 1086:7-14).

(v) John Wiler, Miguel Morales, Raphael Robinson, Tyrone Reyna

Halloran testified that he worked on Wiler's investigation but did not recall whether he talked to him. (R 1086:20-1087:5). He denied punching or choking him. (R 1087:21-1088:7). Halloran had no recollection of Morales or Robinson and there is no indication that Morales named Halloran as having abused him. (R 1093:21-1098:23). Halloran had no recollection if he was involved in the interview of Reyna. (R 1102:10-1103:14).

(vi) Antonio Tollfree and Mickey Grayer

An incomplete OPS Report was introduced as Defendant's Exhibit 60 and objected to because the entire investigation file was omitted from the Report. (R 1091:6-1093:13). Halloran denied any physical force allegations against Tollfree or Grayer. (R 1090:21-1091:5).

(vii) Sheila Crosby

Halloran testified that Sheila Crosby was more afraid of the gang members against whom she testified at trial than the detectives; he denied threatening Crosby. (R 1099:16-19). Halloran testified that although Crosby was reluctant to testify she did ultimately testify in the case. (R 1099:22-23).

g. **RETIRED DETECTIVE JAMES O'BRIEN**

Detective O'Brien testified that he was employed as a homicide detective for the Chicago Police Department from July 1990 until his retirement in May of 2017. (R 628:6-13). He was working at Area 3 in the beginning of October 1992 and was assigned to Area 1 after Area 3 was closed. (R 628:23-629:7). On October 20, 21 and 22 he was sent to the Training Academy for computer training. (R 629:19-21).

Detective O'Brien identified People's Exhibit 5, his attendance and assignment sheet for this period. (R 631:4-21). O'Brien pointed out that the entries of "IST" for October 19th through the 22nd which O'Brien clarified stood for in-service training. (R 633:2-10). He testified was not present at Area 1 during this investigation and had no role in it. (R 633:11-18).

Detective O'Brien testified that in July or August of 1992, before Area 3 closed, O'Brien interviewed Clayborn Smith in connection with a murder that occurred at 51st and May. (R 633:19-634:4). He testified that Smith was interviewed and released and made no complaint of mistreatment. (R 634:12-635:4).

He testified that Jon Burge was his commander at Area 3 but that Burge never worked at Area 1 before his suspension in November of 1991. (R 635:5-18). O'Brien testified that he had very little contact with Burge when he was commander at Area 3 and did not recall receiving any orders from him. (R 635:19-637:19).

Detective O'Brien was cross-examined by Defendant's counsel about allegations of misconduct in other cases and did not invoke Fifth Amendment. (R 657:5-6). He denied abusing Cortez Brown, Oscar Gomez, Stephen Riley, Glenn Dixon, Antonio Nicolas, George Anderson, Jovan Deloney, Harold Hill, Nevest Colman (R 651-675; R1150:11-1151:3).

GRAND JURY TESTIMONY, OCTOBER 21, 1992

The State introduced testimony given by civilian witnesses before a Cook County Grand Jury, on October 21, 1992. (SUP2 EI 332).

Karen Tate testified that she was eighteen years old, lived in a boarding house at 5136 S. Bishop Avenue with Defendant and was six months pregnant with his child. (SUP2 EI 333-335). Tate testified that Defendant was a member of the Mickey Cobras and had been kicked out of his house for selling drugs by his grandfather, Miller Tims, with whom they had formerly resided in 1992. (SUP2 EI 336-337). Karen testified that Clayborn left the apartment on Saturday October 17, 1992 at around 2:00 p.m., wearing a Georgetown T-shirt, pull-over, and was wearing a black jacket with a green hood and a blue and black and white Nike jacket over the black jacket. (SUP2 EI 337-338). He was also wearing black jeans, and Karen's red snakeskin belt. (SUP2 EI 338). According to Karen, Clayborn did not return between 2:00 p.m. and 10:30 p.m. which

struck her as unusual. No one told her he was at the boarding house. (SUP2 EI 338-339).

Karen testified that at around 10:30 p.m., October 17, 1992, she saw Defendant with Clint [Tramble], another Mickey Cobra, and a fat guy in the hallway of the boarding house. (SUP2 EI 339). Karen testified that she overheard Cadeen [the Defendant, Clayborn Smith] say to the fat guy and Clint to take a cash station card and go and see if they could get three hundred dollars out of it. (SUP2 EI 341). According to Karen, Defendant was wearing a different jacket than that he had left with and a navy blue overshirt that had a zipper in the middle. (SUP2 EI 341-342). Further, Defendant was wearing Grey Guess pants and a black leather belt. (SUP2 EI 342). Yet, Defendant was wearing the same White and black Reeboks he had left the house with. (SUP2 EI 342).

Karen asked Defendant where his clothes were at and he said, "They not far" and that he "did a stain" to which Karen believed he meant "armed robbery." (SUP2 EI 342-343). Defendant told Karen that he got a cash station card. (SUP2 EI 343). Karen testified that a little while later, Clint and the fat man returned to her building and the fat man said that the cash station card didn't work. (SUP2 EI 343-344). Karen testified she quarreled with Defendant and went to asleep early Sunday morning [October 18]. (SUP2 EI 344). The next morning she witnessed Defendant wiping his gym shoes off with spit and then demonstrated that she could see he was rubbing off blood. (SUP2 EI 344-345). Later, on Sunday evening, a fourteen-year-old named Lookout ("Israel Moore") came with Shadow and Sugarman. (SUP2 EI 345-346). Lookout said, "Cadeen, your grandfather dead" and Defendant appeared to Karen Tate to be acting "all phoney" as he was not crying. (SUP2 EI 346). Lookout told Defendant not to go to his grandfather's house, because Herbert Tims, his uncle, told authorities that Defendant did it. (SUP2 EI 347).

Karen Tate testified that she overheard Shadow say, "T, tell us what happened," and Defendant said that "Me and my grandfather got into an argument," that he hit his grandfather

and that his grandfather hit him back and that Cadeen said, "I picked up the pole and started hitting my grandfather with the pole." (SUP2 EI 349-350). Defendant said he turned and noticed June Bug, his great-uncle, and hit him. (SUP2 EI 350). Defendant then told her that, "I went into the room where Aunt Ruby was at. She was on her knees praying, I dropped the pole and started hitting her with the iron." (SUP2 EI 351). Karen and Lookout then left the bathroom but not before she overheard Defendant relate to Shadow and Sugarman, that, "Clint told him to leave out the house, and he [Clint] was going to pour gas on them." (SUP2 EI 352).

Karen and Tina walked upstairs to the apartment Karen shared with Defendant and gathered her belongings and his papers. (SUP2 EI 352-353). Defendant had a plastic note pad containing his Grandpa Miller Tim's social security number and his birthday. (SUP2 EI 353-354). Defendant and his father "used to be scheming on getting some of Granddaddy's money because they knew he had a lot of money." (SUP2 EI 354). Karen instructed Tina to erase the board with his grandfather's social security number and birthdate and Karen put the board in a bag together with a lot of papers. (SUP2 EI 354-355). While both were at the Bishop boarding house, Lookout arrived and told both to quickly return to Shannon's house where Shadow and Defendant were. (SUP2 EI 355). Defendant replaced his belt with his own belt, the red snakeskin belt that he wore the previous day. (SUP2 EI 355-356).

Karen testified that Tina eventually left when Shadow and Lookout returned with a beeper to give to Defendant. (SUP2 EI 356-357). Tina said that Shadow told her to have Karen and Defendant meet them on the corner of 51st and Laflin and to leave the house through a back way and walk across a lot. (SUP2 EI 357-358). They would be in a Blazer. (SUP2 EI 358). Karen and Defendant complied, arrived at 51st and Laflin, and were picked up by a Chevy Blazer with Shadow and Lookout. (SUP2 EI 358). Shadow drove and Defendant was sitting on the floor in the back seat so that the police would not see him. (SUP2 EI 358). The group went to hide

Defendant at the Hole, a Mickey Cobra controlled area at 53rd and State within the Robert Taylor Homes project. (SUP2 EI 358-359). When they arrived, Defendant asked Karen to go and see if the police were around. (SUP2 EI 359). Karen and Defendant went up to apartment 1508 where Cookie and Ron lived. (SUP2 EI 360).

Karen testified that she woke up that Monday morning and watched the news. She noticed dried blood was on the bottom of Defendant's feet. (SUP2 EI 360). She asked Defendant what it was, and he said, "I don't know." (SUP2 EI 361). Ron came in and had them move to 1504 because police had checked on the apartment at 1506. (SUP2 EI 361). After they changed rooms, she asked Defendant about where he had put the pants he wore and he said, "If I can get to Clint, I can show you where the pants at" and told her there was blood on the knee of the pants. (SUP2 EI 362).

When Karen arrived home, her sister told her that detectives had come to the family house. (SUP2 EI 363). She then called the police and volunteered to go to Area 1 to tell what she knew and stayed at the police station from the early evening of October 20 until the next morning before attending the Grand Jury on October 21. (SUP2 EI 363-364). Karen testified that she had been treated fairly and well by all the police officers and assistant state's attorneys who asked her questions, that she was given "McDonald's or anything I wanted," permitted to use the bathroom, allowed to sleep and was not threatened to give a statement. (SUP2 EI 364-365).

Tina Tate next testified to her knowledge of the investigation. (SUP2 EI 366). She was 19 years old and on Sunday, October 18, she was at her sister Shannon's house, when her cousin, Karen Tate, arrived with her boyfriend, Cadeen a/k/a/ Butch (the Defendant). (SUP2 EI 367-368). Tina and Karen left Shannon's apartment while Defendant and friends were in the bathroom to go to Karen and Defendant's house where they removed papers identifying Karen and Defendant. (SUP2 EI 369-370)

Tina gave a similar account to Karen's account. (SUP2 EI 371-378) Tina testified that Lookout came to the apartment while they were there and prodded Tina and Karen to hurry up saying, "You all better come on because the police is going to come here" and that the pair returned with Lookout to 51st and Justine Avenue where they found the same people, including Defendant and Sugarman still in the bathroom. (SUP2 EI 373) Tina testified that she and Karen left the apartment to go purchase cigarettes and that on the way back to the apartment, Karen stopped to call her father. (SUP2 EI 374)

Israel Moore, a/k/a Lookout, testified that he was fourteen years of age and lived at 51st and May. (SUP2 EI 379-380) Lookout knew Defendant, a Mickey Cobra, and had been a member for about a month. (SUP2 EI 381) Lookout testified his older brother, Marcel, was also a member and that Defendant was one of the older members of the Mickey Cobras. (SUP2 EI 382) He testified that Shadow asked Defendant "what happened" and that Defendant initially denied it but later admitted to wrestling with his grandfather, hitting him with a pole, that his uncle tried to grab the pole, and that Defendant hit him with a frying pan. (SUP2 EI 386-387)

Moore testified before a Cook County grand jury on October 21, 1992 that he met Karen and Defendant in the parking lot in the Blazer, and then drove to the Hole. (SUP2 EI 385-389) He testified that Defendant was riding on the floor of the Blazer so as not to be seen and that Defendant was staying on the 15th floor of the Hole. (SUP2 EI 389-391)

Moore testified that he stayed overnight at the police station on October 20, 1992, and he had refused food overnight but, in the morning, had McDonalds to eat and drink. (SUP2 EI 392) No one threatened him but he was told that if he lied that he would go to jail. (SUP2 EI 393) He testified that he played video games at the police station and was permitted to use the bathroom. (SUP2 EI 393) He swore he was not coerced to testify before the grand jury. (SUP2 EI 393)

Roddrick Sisson testified that his name was "Sugarman" and that he was fifteen years old

and lived at 5134 S. May Avenue with his mother. (SUP2 EI 394) He testified to his own familiarity with Defendant through membership in the Mickey Cobras, where Defendant served in a ranking position. (SUP2 EI 395-396)

Sisson testified to meeting Defendant and Karen at an apartment on 51st and Justine and witnessed the discussion in the bathroom of that residence with Shadow, Defendant, Lookout and Karen present. (SUP2 EI 397-398) He also heard Defendant admitted to barging into his grandfather's house and having an argument with him which ended when Defendant his grandfather across the head with a pole, hit his aunt, and cousin [uncle June Bug]. (SUP2 EI 398) Defendant told him that Clint was there and that Clint got gasoline, poured it over his relatives and set them on fire. (SUP2 EI 398-399) Then Defendant and Clint searched the apartment for money and credit cards. (SUP2 EI 399)

Sisson testified that was at the police station from the evening of October 20 to the daytime of October 21 and did not complain of any abuse. (SUP2 EI 400-401) He did not ask for food but received water to drink. (SUP2 EI 401) He was not threatened and did not receive any promises of leniency in exchange for his testimony. (SUP2 EI 401)

All of this testimony was given and presented to the Cook County Grand Jury in the afternoon of October 21, 1992. (SUP2EI 333). Defendant gave admissions to investigators about his involvement on October 22, 1992 at 12:01 AM. (SUP2 EI 77, People's Exhibit 8).

STANDARD OF REVIEW

An evidentiary hearing under the Torture Inquiry Relief Commission Act "has been likened to" a third-stage post-conviction hearing. People v. Wilson, 2019 IL App (1st) 181486, ¶ 51. In such proceedings, the standard of review differs for factual findings and legal conclusions. This Court "review[s] fact-finding and credibility determinations for manifest error and questions of law de novo.'" People v. Tyler, 2015 IL App (1st) 123470, ¶ 195 (citing

People v. Morgan, 212 Ill. 2d 148, 155 (2004)).

For legal conclusions, "*de novo* consideration means that the reviewing court performs the same analysis that a trial judge would perform." *Tyler*, 2015 IL App (1st) 123470, ¶ 195.

"Manifest error is 'clearly evident, plain, and indisputable. Thus, a decision is manifestly erroneous ONLY when the opposite conclusion is clearly evident." *People v. Marshall*, 2019 IL App (1st) 190441-U, ¶ 39 (quoting *People v. Coleman*, 2013 IL 113307, ¶ 98) (internal citations omitted).

The circuit court acts as the finder of fact at the evidentiary hearing, resolving any conflicts in the evidence and determining the credibility of witnesses and the weight to be given their testimony. *People v. Williams*, 2017 IL App (1st) 152021, ¶ 22. The Illinois Supreme Court has noted that a higher court generally defers to a circuit court "as the finder of fact since it is in the best position to observe the conduct and demeanor of the parties and witnesses." *In re D.F.*, 201 Ill. 2d 476, 498 (2002).

"'[T]he reviewing court does not retry the defendant, and the trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence.'" *People v. Williams*, 2017 IL App (1st) 151889-U (quoting *People v. Christian*, 2016 IL App (1st) 140030, ¶ 111 (quoting *People v. Ross*, 229 Ill. 2d 255, 272 (2008))).

Defendant misstates the burdens applicable at a motion to suppress hearing:

> At a hearing on a motion to suppress, "the State bears the burden of proving the confession was voluntary by a preponderance of the evidence." *People v. Slater*, 228 Ill. 2d 137, 149 (2008)). Once the State has established a *prima facie* case that the Defendant's statement was voluntary, the burden shifts and the defendant must present evidence that his confession was involuntary. *People v. Richardson*, 234 Ill. 2d 233, 254 (2009). If the defendant satisfies his burden, the burden reverts to the State.

People v. Wilson, 2019 IL App (1st) 181486, ¶ 53.

As the Circuit Court noted below, legal standards set forth in *People v. Whirl* and *People v. Patterson* apply to this case. Accordingly, its task was to determine "(1) whether the officers who interrogated Smith participated in a systemic pattern of abuse in the interrogation of other suspects, and (2) whether the officers who denied abusing Smith would have been impeached as a result such that the outcome of his suppression hearing likely would have differed." (C1040).

"At a third stage evidentiary hearing, the trial court serves as the fact finder; the court's function is to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts." *People v. Plummer*, 2021 IL App (1st) 200299, ¶ 78 (citing *People v. Domagala*, 2013 IL 113688, ¶ 34). "At a postconviction hearing, a defendant bears the burden of proof to show a denial of a constitutional right by the preponderance of the evidence." *People v. Plummer*, 2021 IL App (1st) 200299, ¶ 78 (citing *People v. Coleman*, 2013 IL 113307, ¶ 92).

ARGUMENT

I. Summary of Argument.

At a third-stage evidentiary hearing, a petitioner who has made a claim of torture must show a denial of a constitutional right by a preponderance of the evidence. *People v. Plummer*, 2021 IL App (1st) 200299, ¶ 71.

In this case, Defendant called only one witness at the evidentiary hearing (himself). He sought to introduce documents to show evidence of other allegations of abuse. Those documents did not show a document pattern of abuse that is strikingly similar to the facts ascertained at the evidentiary hearing in this case. The documentary proofs themselves, to the extent they even properly as evidence against the officers, i.e, an allegation that he or someone in his presence did something, do not establish a pattern of coercion or one that is strikingly similar to explain conduct of the detectives in this case. Further, there were other witnesses who rebutted under

oath material aspects of the Defendant's TIRC claim.

Defendant now appeals the Circuit Court's denial of his claim, urging a repeated review of the same materials Defendant has already sought to introduce below. He asserts that the Circuit Court's denial of his claim below was manifest error. Appellant's Brief at 26-34.

The Circuit Court denied Petitioner's claim and his subsequent motion for reconsideration. (C1006-1062, 1454). Despite Defendant's contention that the Circuit Court's ruling "focused on" the location of the abuse, the reasoning set forth in the Circuit Court's opinion evidences the inaccuracy of that assessment.

Contrary to Defendant's arguments below and before this Honorable Court, generalized allegations of coercive activity, without other evidence, do not establish that a defendant was coerced into confessing. The evidence Defendant sought to introduce in support of his claim below has no connection to his case whatsoever.

The Circuit Court did note that "substantial evidence has established systemic abuse occurred at Area 2 under Burge, the same has not been established for Area 1, at least not yet." (C1043) However, it went further: after detailing the facts of the *Whirl* opinion – which Defendant also relied upon below – the Circuit Court first noted that the Defendant's "claim seem[ed] to rely on the sheer quantity of allegations" against the officers he claimed interrogated him. (C1043).

Further, the Circuit Court observed that while the evidence proffered by Defendant might be relevant, "most of the pattern and practice evidence contain[ed] some feature that work[ed] against its persuasiveness. (C1044). It found that 1) several claimants asserting abuse by the same officers use Defendant's own allegations to support their claim ("circular, self-reference"), 2) many of the exhibits were civil complaints amounting to "no more than bare allegations" which lacked any "findings on the merits regarding allegations of abuse by the

officers who interrogated Smith" and – in the only cases where the allegations of abuse were actually litigated, the claimants did not prevail and 3) the evidence of settlement of civil claims provides "at best" "ambiguous support for establishing systemic abuse" where the civil complaints at issue named many other officers and set forth multiple theories of liability including those not based on torture allegations. (C1044-45).

Ultimately, the Circuit Court found that Smith's evidence was generalized in nature and not conclusive evidence in this case after deliberation of the evidence presented at hearing:

> simply shows several other arrestees have accused these and other officers at Area 1 of abuse. But none of the allegations have resulted in a finding directly sustaining the allegations. Nor has systemic abuse been established like it was for Area 2. Merely compiling a list of accusers and allegations, however lengthy, does not substitute for such a finding. In *Patterson,* the petitioner compiled 60 cases alleging abuse. But the court did not find that alone established systemic abuse or warranted relief. If it did, the court would have granted Patterson relief in its ruling. Instead, the court only found the evidence entitled him to an evidentiary hearing where the trial court could evaluate it. Notably, the court said the evidence, *"as pleaded,* would likely change the result upon retrial." *Patterson,* 192 Ill. 2d at 145 (emphasis added). Nothing suggests the court expected the hearing to be perfunctory on remand. Rather, it contemplated a meaningful hearing where the trial court would determine whether the evidence was "of such conclusive character that it would likely change the result." *Id.* at 139. There is an important difference between presenting sufficient evidence to warrant a hearing and proving entitlement to relief on the weight of that evidence at the hearing. The latter does not follow automatically from the former. For the reasons stated, the Court finds the pattern and practice evidence presented in this hearing, while numerous, is largely ambiguous and not of substantial character to establish conclusively that the officers involved in Smith's interrogation participated in systemic abuse.

(C1049).

The Circuit Court could have ended its analysis there. However, it undertook to analyze the second *Patterson* factor, whether (had the officers been shown to have participated in systemic abuse, which they were not) "such evidence impeached their credibility so as to alter the outcome of the suppression hearing in this case." (C1049-50). In so doing, the Circuit Court noted that the standard articulated in *Patterson* and *Whirl* "seems to implicitly recognize that

even if officers abused suspects in some cases, that does not mean they did so in every case." (C1050).

In this case, the Circuit Court noted that "several factors in Smith's 1994 suppression hearing worked against him" and went on to provide a thorough, detailed, reasoned analysis over several pages of its opinion and concluded:

> To sum up Smith's case, he claimed abuse as soon as his preliminary appearance; he has consistently maintained his account; and several other suspects who gave inculpatory statements alleged the same officers abused them. The Court agrees that Smith was not required to show allegations that match his exactly. But, he needed to show evidence with enough similarity and weight to conclude it would have changed the outcome of his suppression hearing. However, the evidence did not undercut the testimony of ASA Lambur which was essential to the outcome of the suppression hearing. Her testimony contradicted Smith's allegations on several points, but the pattern and practice evidence did not cast Lambur's testimony in a negative light. Ultimately, the Court is not persuaded the numerous allegations against these detectives is sufficient to conclude the outcome of Smith's suppression hearing would differ. That is not to say the evidence would not be sufficient in *any* case; only that in light of the particular facts and circumstances of *this* case, it is not availing.

(C1055-56).

In this case, as the Circuit Court's opinion rightly reflects, Defendant's claims lacked proof. (C1057). The Circuit Court relied on evidence adduced at the hearing including the testimony of Laura Lambur. Had the Circuit Court ignored the sworn testimony of Lambur and others, such a ruling would have been in error.

Furthermore, the caselaw cited in Defendant's appellate brief ("Appellant's Brief") in support of his argument for an adverse inference is inapposite to the instant case where none of the officers Defendant accused of misconduct invoked his Fifth Amendment rights before the circuit court and Defendant was permitted to cross examine with respect to the prior invocations to establish credibility. The Circuit Court considered their testimony and defense counsel's attempts to impeach them. It concluded, following its analysis, the evidence confirmed the result

of the suppression hearing, that Defendant's inculpatory statements were voluntary.

Defendant seeks this Court to deem irrelevant the sworn testimony and documentary evidence that rebuts his claim. He relies on unsupported testimony and papers containing allegations from individuals whose own cases did not result in a sustained finding of torture. Regardless, the State's witnesses below, by contrast, testified in opposition that no such abuse occurred.

The Circuit Court employed the correct standard in rejecting Defendant's claim. Defendant bore the burden to show that newly discovered evidence *would likely have* altered the suppression hearing result. *People v. Wilson*, 2019 IL App (1st) 181486 (citing *People v. Whirl*, 2015 IL App (1st) 111483, ¶ 80; *People v. Galvan*, 2019 IL App (1st) 170150, ¶ 74, "Given the similarities between evidentiary hearings under the Post-Conviction Act and the Torture Act, we find a petitioner's initial burden under the Torture Act is the same") (emphasis in original).

Despite the standard clearly articulated in the cases Defendant cites, he argues that he need only show "that the detectives '*may* have participated' in systemic abuse." Appellant's Brief at 21-22 (citing *People v. Harris*, 2021 IL App (1st) 182172, ¶50). *Harris* does not establish any such burden. The quoted language is part of a greater passage, that provides:

> The sole issue before the circuit court was whether the outcome of defendant's suppression hearing would have been different if the officers who denied using physical coercion had been subject to impeachment based on defendant's evidence showing a pattern and practice of police abuse. *Id.* Relevant to the court's determination are (1) whether any of the officers who interrogated defendant may have participated in systemic interrogation abuse at Area 2 and (2) whether those officers' credibility at the suppression hearing might have been impeached as a result.

People v. Harris, 2021 IL App (1st) 182172, ¶ 50 (citing *People v. Patterson*, 192 Ill. 2d 93, 144-45, 249 Ill.Dec. 12, 735 N.E.2d 616 (2000)). Whether any of the officers Defendant accused may

have participated in systemic interrogation is *relevant* to a trial court's determination – it does not establish a burden. Defendant argues that the Circuit Court inflated the standard and "demand[ed] that Petitioner 'establish *conclusively* that the officers involved in [his] interrogation participated in systemic abuse." Appellant's Brief at 20 (citing A817 (emphasis in original)).

Conclusiveness is, indeed, a factor in the analysis:

> [F]or new evidence to be sufficient to relax *res judicata* and warrant an evidentiary hearing, 'the evidence (1) must be of such conclusive character that it will probably change the result on retrial; (2) must be material to the issue, not merely cumulative; and (3) must have been discovered since trial and be of such character that the defendant in the exercise of due diligence could not have discovered it earlier.' " (Internal quotation marks omitted.)

People v. Tyler, 2015 IL App (1st) 123470, ¶85 (quoting *People v. Mitchell*, 2012 IL App (1st) 100907, ¶ 61, 362 Ill.Dec. 120, 972 N.E.2d 1153).

That is not an incorrect assertion. The Court received evidence directly bearing on Defendant's claim and considered documents that Defendant presented finding that the documents together with his testimony did not establish newly discovered evidence that would change the result in this case. The judgment of the Circuit Court was correct and must stand, as the State sets forth in more detail below.

II. The Circuit Court Correctly Found That the Proffered Pattern and Practice Evidence Did Not Establish That Officers Boudreau, Halloran, and O'Brien Participated in Systemic Abuse.

A. The Circuit Court Applied the Correct Legal Standard.

Defendant incorrectly argues that "[t]he circuit court misunderstood Petitioner's burden and incorrectly required conclusive proof of a systemic pattern of torture." Appellant's Brief at 21. However, as noted *supra*:

> [F]or new evidence to be sufficient to relax *res judicata* and warrant an evidentiary

hearing, 'the evidence (1) must be of such conclusive character that it will probably change the result on retrial; (2) must be material to the issue, not merely cumulative; and (3) must have been discovered since trial and be of such character that the defendant in the exercise of due diligence could not have discovered it earlier.' " (Internal quotation marks omitted.) *People* v. Tyler, 2015 IL App (1st) 123470, ¶85 (quoting *People v. Mitchell*, 2012 IL App (1st) 100907, ¶ 61, 362 Ill.Dec. 120, 972 N.E.2d 1153).

This Court should disregard Defendant's attempts to confuse the relevant standards. The finding from *Baggett v. Indus. Comm'n*, 201 Ill. 2d 187, 202 (2002), cited in Appellant's Brief, that the term "conclusive" is akin to proof beyond a reasonable doubt is wholly inapplicable to this case where *Baggett* is not even a criminal case. Appellant's Brief at 21 (citing *Baggett v. Indus. Comm'n*, 201 Ill. 2d 187, 202 (2002)). In the context of a motion to suppress hearing, "[e]vidence is conclusive if it would probably lead to a different result when considered alongside the trial evidence; that is, it places the trial evidence in a different light and undercuts the court's confidence in the factual correctness of the guilty verdict." *People v. Plummer*, 2021 IL App (1st) 200299, ¶ 98 (citing *People v. Coleman*, 2013 IL 113307, ¶ 97).

B. The Circuit Court Correctly Noted Differences Between Defendant's Allegations and Other Allegations.

Appellant's Brief suggests in multiple places that the Circuit Court's reasoning below depended upon erroneous requirements placed on Defendant. It tries to estrange itself from the facts of this case. It argues that the Court improperly held it to a higher standard because the Defendant was interrogated at Area 1. However, Defendant's new position is inconsistent with his prior litigation. He has argued that the officers who interrogated him were known subordinates of Burge. (Appellant's Brief at 22-23, citing A2445) He has tried to bootstrap them to complainants who have confirmed allegations against the former Police Commander.

His complaint that Judge Maldonado observed that he was interrogated at another police department in which Jon Burge was not employed is then invited by his own argument and was proven evidence at hearing. Thus, of course, the absence of the association to this case is a consideration for the Court. The evidence at hearing showed that the interrogation took place in another Area of the Chicago Police Department.

Incredibly, Defendant appears now to ask this Court to now find that the Circuit Court forced Defendant to shoulder a heavier burden than other petitioners. Appellant's Brief at 23, "[T]he circuit court determined that Petitioner should face a "harder" task than other victims of abuse simply because he was interrogatedand abused at Area 1. This makes little sense, and is a further example of the circuit court artificially inflating Petitioner's burden of proof." Appellant's Brief at 23, citing A811, 817.

As elsewhere in Appellant's Brief, Defendant selectively cites small portions of prior decisions of this Court when he asserts that "where an accused officer previously worked under Burge, '[t]hereis no basis to assume [his] use of physical force to obtain confessions ceased' simply because Burge was no longer his supervisor." Appellant's Brief at 23 (citing *People v. Whirl*, 2015 IL App (1st) 111483, ¶ 104).

Defendant's reliance on *Whirl* is unavailing. In *Whirl*, this Court found evidence against the sole accused officer "establishe[d] a long history, going back to at least 1973, of Pienta's involvement in abusing suspects in order to obtain confessions." *Whirl*, 2015 IL App (1st) 111483, ¶ 104. The Court also considered an invocation of the fifth amendment in that proceeding and observed it. (Id.) There, the Court noted, "[t]he only evidence of change appears to be that the methods became less brutal over time and more care was taken to avoid causing detectable injuries." *Id*. Nothing like that happened here. There is *no* such established history,

that Detectives Boudreau, Halloran, or O'Brien had any involvement in abusing suspects. (C1049 ("none of the allegations have resulted in a finding directly sustaining the allegations")).

C. The Circuit Court Correctly Found That No Previous Finding Had Been Made "Directly Sustaining the Allegations" Against the Three Detectives.

Defense counsel would have this Court create a new legal standard and permit City of Chicago reparations paid to claimants to stand as precedent in post-conviction proceedings.

He urges this court to consider what his Brief calls "findings" made by the Chicago Torture Justice Memorials organization ("CTJM") City of Chicago pursuant to the Reparations for Burge Torture Victims Ordinance ("Ordinance") – which clarifies that any Burge victim is eligible for reparations if they have a credible claim of torture, and that:

> [c]ritera to be considered when 2 determining whether a claim is a credible claim include: (1) when and under what circumstances the claim of torture or physical abuse was first made or reported to someone, (2) the consistency of the claim over time, and (3) any credible affirmative proof rebutting the claim; provided, however, that denials by Jon Burge or other officers who have invoked the Fifth Amendment in response to questions about police torture or physical abuse shall not be considered affirmative rebuttal proof. Using these criteria, if an individual is deemed to have a credible claim, he or she shall be entitled to financial reparations in the manner provided in this Ordinance. The nature and severity of the torture or physical abuse and the claimant's guilt or innocence of the underlying crime shall not be considered when determining either eligibility for or the amount of financial reparations.

The Ordinance further lays out a process for determining eligibility for reparations:

> Within 45 days of the effective date of this Ordinance, CTJM will provide the City with a list of individuals whom CTJM has determined: (1) are eligible Burge victims, and (2) wish to apply for financial reparations. Within 45 days of receiving CTJM's list, and after consultation with CTJM attorneys, the City will specify the individuals on CTJM's list whom the City agrees have a credible claim. Those individuals whom both CTJM and the City agree have a credible claim shall be entitled to financial reparations from the Fund.

This Court has determined that a City of Chicago determination that a defendant was tortured has no binding effect on it, as the City of Chicago "is not a court with jurisdiction over the issue." *People v. King*, 2017 IL App (1st) 122172-U, ¶ 86 (citing *Talarico v. Dunlap*, 281 Ill.App.3d 662 (1996) (for collateral estoppel to apply it must be

established, *inter alia*, that "a court of competent jurisdiction rendered a final judgment on the merits in the prior action").

Defendant offers no transcripts from those proceedings to establish what if any evidence was taken before the City of Chicago, what was considered, and whether the State was allowed to participate in proceeding prior to the settlement's being effectuated.

D. The Circuit Court Correctly Weighed the Evidence Presented Below.

Defendant offers no support for the assertion that "the very fact that the detectives were involved in so many [cases wherein petitioners prevailed on non-torture grounds] supports an inference that the confessions were physically coerced" beyond a mere citation to *People v. Galvan*, 2019 IL App (1st) 170150 which, he says, makes his argument "clear." Appellant's Brief at 25-26.

And yet, *Galvan* is easily distinguishable from this case. In *Galvan*, each of the individuals who accused the officer Galvan was accusing came forward at his evidentiary hearing, and each subjected themselves to cross-examination and impeachment attempts – the *Galvan* court found that there "without [Galvan]'s confession, the State's case was nonexistent." 2019 IL App (1st) 170150, ¶ 74. In this case, none of the individuals whose claims of abuse Defendant seeks to rely upon have come forward to testify against the detectives accused here to offer strikingly similar allegations of coercive activity that make it more likely than not that the result of his suppression hearing would be different and that his own allegations are corroborated. Defendant presented no live witness testimony from individuals alleging strikingly similar allegations that led to the taking of a tortured confession. He relies on documentary proofs from individuals who in some cases never even complained of abuse against the officer in question and otherwise offers generalized allegations of coercive activity without explaining the document's significance to his case.

E. The Circuit Court Correctly Analyzed Statements Alleging Physical Abuse By Boudreau, Halloran, and/or O'Brien.

As the Circuit Court noted in its ruling, "compiling a list of accusers and allegations" is insufficient. A817. In analyzing statements alleging physical abuse by the officers accused in this case, the Circuit Court in particular referenced the *Patterson* case, wherein the petitioner compiled 60 cases alleging abuse. A 817. The Circuit Court found that

> The pattern and practice evidence presented at [the] hearing…[wa]s largely ambiguous and not of substantial character to establish conclusively that the officers involved in Smith's interrogation participated in systemic abuse.

A 817.

F. The Circuit Court Correctly Discounted Settlements and TIRC Referrals Involving Boudreau, Halloran, and O'Brien.

As with his other arguments, Defendant offers no legal support for his conclusory argument that "[s]urely, the enormous settlements and payouts attributed to these three detectives . . . suggest that they engagedin systemic abuse." Because Defendant offers no factual context as to the investigation that led to the issuance of the settlements themselves, the Court should disregard "the fact" of settlement as holding weight in the case at bar.

G. The Circuit Court Erred In Failing To Draw A Negative Inference From The Detectives' Invocation Of The Fifth Amendment When Questioned About Torturing Petitioner And Many Others.

An adverse inference should be drawn when an officer invokes the fifth amendment when no other evidence rebuts credible evidence of torture. *Gibson,* 2018 IL App (1st) 162177, 108; *Whirl,* 2015 IL App (1st) 11483, 107.

As noted hereinabove, the Circuit Court correctly found that "[h]ere, none of the officers invoked the Fifth Amendment in response to any question concerning Smith or any other suspect." (C1055).

Despite Defendant's attempts at obfuscation, Detective Halloran did not invoke his Fifth

Amendment rights in this case. He presented himself to testify and explained answers given during a first deposition taken in *Harold Hill and A.C. Young, on behalf of the estate of Dan Young, Junior v. City of Chicago et al.*, Case No. 06 C 6772. Appellant's Brief at 27-28 (citing A514-15). He testified to prior invocations and explained them. Detective Halloran testified:

> Q. Did you take the Fifth?
>
> A. There was a date when I took the Fifth and then I subsequently came back and submitted myself to questions concerning the investigation that I took the Fifth on. So on one date I took the Fifth. I then came back and gave that deposition.

Given this evidence and the other evidence supporting the voluntariness of Defendant's statements on October 21, 1992, the Circuit Court plainly did not err when it declined to make an adverse inference here – this is not a case like *Gibson* or *Whirl where "no other evidence rebut[ted] credible evidence of torture*." Six witnesses rebutted Defendant's proffered evidence. *See Gibson,* 2018 IL App (1st) 162177, 108; *see also Whirl,* 2015 IL App (1st) 11483, 107. As the Circuit Court noted below, and contrary to Defendant's assertions (*see* Appellant's Brief at 28) "[a] negative inference need not be drawn when an officer only invoked the fifth amendment in another case and there is no indication he would do so in the particular case at issue." (C1055 (citing *People v. Gonzalez,* 2016 IL App (1st) 141660, 61)). Thus the Circuit Court did not err in declining to consider any invocation of the Fifth Amendment in other cases.

Defendant misstates dicta found in the *Wilson* opinion, which (when read in full), clearly indicates that an appellate court's analysis of a fifth amendment invocation is case-dependent and must not be applied across distinct cases. The quoted language comes from a paragraph of the opinion which reads, in full:

> Furthermore, the decision of government actors to invoke their fifth amendment privilege against self-incrimination is judicially deafening *under the facts of this morbid tale* of improper law enforcement. As the trial court recognized, as we affirm, the fifth amendment *does not preclude a trier of fact from making an adverse inference* that a party's refusal to testify is evidence of guilt. *Gibson*, 2018

> IL App (1st) 162177, ¶ 85, 423 Ill.Dec. 242, 105 N.E.3d 47. Instead, the court may treat a party's refusal to testify as evidence of the misconduct alleged. *Id.* This court has stated, "when, in the face of a credible allegation, an officer of the court is unwilling to assure the court that he and his colleagues did not physically coerce a confession, when he determines that a truthful answer could subject him to criminal liability, the court should take careful note." (Emphasis omitted.) *Id.* ¶ 108.

People v. Wilson, 2019 IL App (1st) 181486, 158 N.E.3d 1067, 1080-81 (*emphasis added*).

Defendant's own authority contradicts his position. The *Wilson* court clearly took the circumstances of that particular case into consideration ("under the facts of [that] morbid tale" and not all cases in which the accused officers were involved). *See id.* at 1080.

Defendant's assertion that a court should attribute even more significance to the invocation of the Fifth Amendment *in cases not before the circuit court* simply lacks support in our state's appellate decisions – which is why defense counsel relied on mere selections of the appellate opinions cited in Defendant's brief. Indeed, the Circuit Court analyzed this issue and found specifically that none of these "prior invocations carry enough significance to draw a negative inference in this case." (C1055). This Court must not find that the Circuit Court's refusal to make an adverse inference here was manifest error because the trial court had discretion. This Court has held that, while a circuit court may draw an adverse inference from one party's refusal to testify, it need not automatically do so. *People v. Gibson*, 2018 IL App (1st) 162177, ¶ 86 (citing *People v. Houar*, 365 Ill. App. 3d 682, 689 (2006); *Whirl*, 2015 IL App (1st) 111483, ¶ 107). An examination of the factual findings made here demonstrates that the Circuit Court's finding was neither unreasonable nor arbitrary, and was clearly based on the multitude of evidence presented to it. (People v. Marshall, 2019 IL App (1st) 190441-U, ¶ 86) The Circuit Court is entitled to deference here. *In re D.F.*, 201 Ill. 2d 476, 498 (2002).

In further support of his argument, Defendant cites *Gibson*, asserting that "a court should attribute 'special significance' to such invocations. . ." Appellant's Brief at 29.

Gibson is entirely distinguishable from this case. In *Gibson* this Court stated that:

> When, in the face of a credible allegation, an officer of the court is unwilling to assure the court that he and his colleagues did *not* physically coerce a confession, when he determines that a truthful answer could subject him to criminal liability, the court should take careful note. *Here, because most of the witnesses disclaimed any ability to directly address the allegations of abuse, and the only material witnesses capable of so rebutting asserted his fifth-amendment rights*, it was error not to draw an adverse inference.

Gibson, 2018 IL App (1st) 16217747, ¶ 108.

Here, the State called multiple witnesses who discredited Defendant's claims and testified under oath. (C1011-1024). Each of them subjected themselves to cross examination. The Circuit Court considered their testimony, and Defendant had ample opportunity to cross examine. Following its analysis, it concluded that those attempts had zero impact on the voluntariness of Defendant's statement.

H. The Circuit Court Correctly Analyzed the Proffered FBI Report.

Defendant fails to cite any law in support of his argument that a 2012 FBI Report proffered below constituted evidence sufficient to support a finding that he had satisfied his burden. Petitioner now appears to ask this Court to create new law for his benefit and conclude that extrajudicial assertions claiming a detective provided a custodial suspect with information about a crime may now support a claim of police torture. Appellant's Brief at 14-15. This Court should decline the invitation.

Defendant simply did not demonstrate that – with this proffered evidence – any of the detectives accused here would likely have been impeached. *Whirl*, 2015 IL App (1st) 111483, ¶ 80.

Defendant does not – and cannot – explain to this Court and the State how evidence of former ASA Johnson's report (which states that he, among other things, "felt the detectives

coached and fed the subjects information during [their] statements") establishes a pattern of torture or might somehow influence the outcome of Defendant's suppression hearing. (*See* Appellants Brief at 17-18 (citing A2183)). The unsubstantiated report, which was not subject to cross-examination below, cannot support a finding by this Honorable Court that the Circuit Court's ruling was manifestly erroneous. Under *Porter-Boens* and *Coleman*, this evidence was properly excluded below by the Circuit Court. *People v. Porter-Boens*, 2013 IL App (1st) 11074, ¶ 17; *see also People v. Coleman*, 206 Ill.2d 261, 279 (2002) ("Mere evidence of a civil suit against an officer charging some breach of duty unrelated to the defendant's case is not admissible to impeach the officer").

III. *The Circuit Court Correctly Found that Defendant's Proffered New Evidence Was Unlikely To AlterThe Outcome Of The Suppression Hearing.*

In this case, Defendant has not offered new evidence that would have changed the result of his suppression hearing. The Circuit Court considered evidence submitted on Defendant's behalf and gave it proper weight.

A. The Proffered New Evidence Was Properly Discounted Below.

This Court has considered whether allegations of misconduct are admissible for impeachment purposes. In *People v. Porter-Boens*, this Court held that "mere allegations of misconduct, without evidence the officer was disciplined, are not admissible as impeachment and do not raise an inference of bias or motive to testify falsely." *People v. Porter-Boens*, 2013 IL App (1st) 111074 (2013), ¶ 20 (internal citations omitted). This Court may "properly exclude evidence of prior allegations of misconduct involving different officers if the prior allegation is factually dissimilar to the officer's conduct in the pending case, and if the officer did not receive discipline from his department." *Porter-Boens*, 2013 IL App (1st) 11074, ¶ 17; *see also People v. Coleman*, 206 Ill.2d 261, 279 (2002) ("Mere evidence of a civil suit against an officer

charging some breach of duty unrelated to the defendant's case is not admissible to impeach the officer"). Thus, the evidence Defendant sought to rely upon in support of his argument that the Circuit Court erred was not admissible in any case; it certainly did not support a finding of a pattern and practice of police torture so conclusive that it would likely have changed the result below. *See Whirl*, 2015 IL App (1st) 111483, ¶ 80.

Portions of Defendant's evidence include allegations that have been discounted by a Circuit Court. (*See, e.g.*, Appellant's Brief at 34 (citing A2409 regarding George Anderson, whose claims have been discredited (*See, e.g.*, *People v. George Anderson*, No. 91 CR 22152, No. 91 CRE 22460 (Cir. Ct. Cook County), after conducting a hearing on George Anderson's TIRC claim, the circuit court judge in that case found that there was no credible evidence supporting Anderson's claim of being either physically or psychologically abused over the course of his time in police custody since August of 1991).

Most importantly, the Circuit Court specifically addressed the Defendant's allegations of physical force in this case. It evaluated the allegations that his braids were pulled: Detective Halloran and ASA Lambur both testified that Defendant was playing with his hair while in custody, and "the photo [of Defendant introduced at the hearing below] did not make it evident that Smith was injured while in police custody." (C1051).

It evaluated his allegations that he was pulled from a chair by Detective Boudreau and pulled away from Laura Lambur after calling her a bitch. (C1020). Both sat before the Court and testified that that was untrue *in this proceeding*.

Defendant alleged that Detective O'Brien was present at the station and came in to abuse him. Laura Lambur testified O'Brien was not present. Boudreau and Halloran testified O'Brien was not present. O'Brien's time record was introduced and corroborated his testimony that he was not physically at Area 1 on the date that Defendant was present and in the interview room.

As with Defendant's allegations that the detectives abused him physically, his allegations that detectives threatened his girlfriend lack support in the evidence submitted to bolster them. *See* Appellant's Brief at 35-36.

His girlfriend, Karen Tate, testified before the Cook County Grand Jury that she was not threatened at all and was treated well by the City of Chicago police officers.

Defendant offers no sustained findings of abuse of any of these officers in even unrelated incidents. Defendant's case is based on paper accusations and conjecture; he did not prove facts to support a striking similar pattern of abuse exercised by officers with whom he himself had involvement on October 20-21, 1992.

The Circuit Court denied him relief. The Circuit Court's ruling was correct and this Court should affirm it.

B. Defendant's Proffered "New Evidence" Fails to Impeach the State's Witnesses.

In addition to claiming that the Circuit Court ignored evidence of a pattern and practice of torture, Defendant also asserts that "several other factors undermining the credibility of the detectives that further supports [sic] Petitioner's right to a new suppression hearing." Appellant's Brief at 39 (citing *People v. Galvan*, 2019 IL App (1st) 170150, ¶ 68). The State will address each argument in turn.

1. Juvenile abuse allegations.

The Circuit Court analyzed unrelated allegations concerning cases where juveniles gave statements to the accused officers and accused the officers of impropriety. The circuit court found "that evidence regarding the 'treatment ofjuveniles' was 'not on point' because Petitioner 'was not a juvenile.'" Appellants Brief at 39 (citing A816).

In respect, to Defendant's own case, the Circuit Court declined to consider the proffered evidence where "the argument [that the juveniles who implicated him were coerced to do so]

ha[d] little bearing on the issue here" and "effectively veer[ed] into re-litigating the trial issue about Smith's statements at Sharon Tate's house admitting to the murders." (C1048). The Circuit Court noted that "Israel Moore was impeached with his grand jury testimony on that point" and that the question was "a decided matter not at issue" below. (C1048). The Circuit Court addressed Defendant's evidence concerning the taking of statements from juveniles in his case and found Defendant's contentions that they were coerced unavailing given their prior inconsistent sworn testimony to a Cook County Grand Jury.

Furthermore, The Circuit Court's denial of Defendant's request to call Maxine Franklin below was not error, as Defendant suggests, but rather within the Circuit Court's sound discretion where it heard Defendant's counsel's proffer as to her intended testimony (that she was denied access to her son during his interrogation at CPD) and reasoned that the proffered testimony would not shed any light on the treatment of Clayborn Smith in this case:

> THE COURT: There were some individuals that were related to this instance that were juveniles, I've heard quite extensive testimony about all of that. So what exactly is this going to shed light on?
> MR. ABDALLHAH: Your Honor, this is a pattern and practice that Detective Boudreau used to be involved in that he would not allow parents or – to go ahead and access –
> THE COURT: My question to you here, again, let me make it clear, shed light on the main issue in this case. Whatever happens with the juveniles in regards to Mr. Smith, that's an ancillary issue, that's a aside issue regarding Mr. Smith. So I'm not quite sure about where this is going to lead us.

(R1158). The Court and defense counsel then engaged in additional discussion, following which the Court first denied the request to put on the witness, and then afforded defense counsel an opportunity to make an additional proffer, which defense counsel declined. (R1159).

Thus, Defendant's argument that the Circuit Court "actively prevented additional such evidence from entering the record" (*see* Appellant's Brief at 40) is a misrepresentation, shown to incorrect and belied by the report of proceedings in this case. (R1158-59).

2. Halloran's statements.

Consistent with a kitchen-sink approach, Defendant asserts that the Circuit Court erred because it should have found Detective Halloran's statements to be inconsistent, and if it had done so, they "would cast his testimony in an entirely new light at a suppression hearing held today." Appellant's Brief at 41. Defendant goes so far as to suggest that this Court infer that Detective Halloran committed the crime of perjury. *Id*.

The assertion is false. Detective Halloran gave credible testimony before the Court and testified freely in this proceeding to his involvement in this case. Defendant has asserted that Detective Halloran accompanied him to Area 1 after his arrest, and while Detective Halloran did not initially recall, he later testified that he recalled riding with Defendant, Detective Boudreau, and two gang crime specialists back to Area 1. (R 960).

Defendant also mis-quotes Detective Halloran and attempts to contradict his testimony that he was not present during Defendant's court-reported statement. (R972, 1003).

Yet, Halloran never testified that he was present for that court-reported statement. Halloran testified that in the late evening hours of October 21st of 1992 and the early morning hours of October 22nd of 1992 he learned information regarding Clayborn Smith' clothes. This is not inconsistent with other testimony that Detective Halloran could not recall how he learned about Defendant's bloodied clothes. A1321, A606. His testimony was not inconsistent at all. Further, other witnesses including Laura Lambur and Kenneth Boudreau did testify to the individuals present for the court reported statement, and Halloran was not present.

3. Witness Statements Regarding Petitioner's Shoes.

Defendant's arguments asserting minor inconsistencies in Detective Halloran's testimony concerning the timing of discovery of Defendant's shoes in a questioning concerning

an incident in 1992 (Appellant's Brief at 42-43) are irrelevant.

The Circuit Court properly disregarded this argument. It has zero relevance to this case. Further, Karen Tate testified at the Cook County Grand Jury regarding Clayborn Smith scraping, without success, Miller Tims' dried blood from his Reebok shoes. (SUP2 EI 344-345). That is entirely consistent with Halloran's and other officers' discovery of blood on his shoes. The Court specifically addressed Defendant's claims about his shoes, finding Defendant's assertion that his shoes were taken "odd" and declining to find it relevant to his assertions of coercion; it was not material at the time of the suppression hearing, nor is it material now. (C1051) Had the Defendant truly been wearing the shoes during his suppression hearing he could have made that proffer.

Defendant's new "laboratory findings" argument is a sideshow. The laboratory findings do not relate to his claim of torture under the TIRC Act. See, Appellant's Brief at 43. Detective Halloran, when asked at the evidentiary hearing convened 26 years later, testified:

> I know we had information from his girlfriend that she watched him wipe off blood. We took the shoes. We looked at them. We believed we also saw blood. We took them to the crime lab. They determined that there was in fact blood on them and in them.

(R1123). Detective Halloran also testified that they *saw* human blood, not that test results indicated human blood (Appellant's Brief at 43) There is nothing inconsistent here.

Karen Tate testified before the grand jury that on the Monday before he was arrested, Defendant had blood on his shoes that he was attempting to scratch off. (SUP2 EI 345). Thus Defendant's claim is even further contradicted by the testimony of Ms. Tate. Tate's affidavit later contradicting this testimony is unavailing, where she testified before the grand jury that she was not threatened or given anything in exchange for that testimony and thus her testimony at that proceeding was voluntary, and properly considered by the Circuit Court.

Her testimony wholly corroborates Halloran's that Defendant had blood on his shoe. Defendant offers no rebuttal to this plain fact. That, further testing was precluded due to insufficient amount of sample" does not impeach anything Halloran said.

Furthermore, and critically, given that Defendant attempted to wipe the blood off his shoes, (SUP2 EI 345) the insufficiency of the sample precluding additional testing beyond the chemical tests surprises no one.

4. O'Brien's Presence at Area 1.

Detective O'Brien was not present at Area 1 during Defendant's interrogation. ASA Lambur's testimony, which is unimpeached, confirms as much: Detective O'Brien was not present at all during the time she was at Area 1 on this case. (R820). She was aware of every detective who worked on this case and O'Brien was not one of them. (R820). Thus, even if O'Brien's timecard contained inconsistencies – as argued by Defendant (Appellant's Brief at 43-45) - the new evidence hardly corroborates the allegation that O'Brien was present during his interrogation when ASA Lambur unequivocally testified that he was not. (R820). The Circuit Court found ASA Lambur credible; nothing Defendant has raised at the time of his interrogation or since undercuts her credibility, despite his current attempts to smear her.

Any assertions based on Detective O'Brien's timecard were also addressed in detail by the Circuit Court. (C1053). Boudreau, Halloran, and Lambur all testified O'Brien was not present. Defendant sought to refute this sworn testimony of multiple officers by relying on a photocopy of O'Brien's time card for the relevant period. Defendant contended that the boxes for October 19th, 20th, and 21st indicating he was in training on those days are marked inconsistently. (C1053). Smith believed this showed O'Brien altered his time card after the fact when he produced it to OPS to conceal his presence at Area 1 on October 21st. (C1053). The Court viewed the exhibit and did not find the purported discrepancy—a slash mark in two boxes

but not in the other — "anywhere near sufficient to draw the highly conjectural conclusion Smith urges." (C1053). Additionally, Smith argued that O'Brien had a pattern of claiming he was not present during interrogations where other suspects alleged abuse. (C1053). However, as the Circuit Court noted in its opinion, "Smith did not present any evidence to show O'Brien was ever positively impeached or shown to be present when he claimed otherwise." (C1053).

The Circuit Court's ruling relied on its assessment of witness credibility and the credibility of Defendant's evidence (his own testimony). It found Defendant's evidence wanting. This Court must not override that logic simply because Defendant suggests that others have accused Detective O'Brien of abuse and he has denied being present for their interviews.

Whether O'Brien's original suppression hearing testimony is undermined *is not the standard*. Defendant's willful disregard for the applicable legal standards and tests here must not be rewarded. To ask this Court to make that leap, from considering evidence that one witness has repeatedly disclaimed his presence during allegedly abusive interrogations to a ruling that the trial court erred here, and that the outcome of the Defendant's suppression hearing *would likely have been different* (*Whirl*, 2015 IL App (1st) 111483, ¶ 80) defies logic.

5. Alleged Inconsistencies Between Petitioner's Statement And The Crime Scene

The Circuit Court considered Defendant's argument that alleged inconsistencies between the confession and crime scene further support his assertion that Boudreau fed him details of the crime. (C1053-54). The Court noted that it did not find Defendant's arguments persuasive on this score, reasoning that:

> [a] confession is, like any witness statement, just that, a statement. Experience shows that witness statements, even inculpatory statements, may contain truths, half-truths, falsehoods, mistakes, omissions, or accounts that put the witness in a more favorable light or some combination of these. The trier of fact ultimately determines what to make of it. There is nothing special about a confession that renders it false in total or proves it was coerced merely because of a conflict with

> some aspect. To the contrary, the omission of stabbing Miller Tims or describing two points of origin tends to support that Smith's statement was not coerced. The record shows this information was available to the detectives and ASA before they took Smith's statement. The medical report for Miller Tims and arson report were completed on October 19th.53 If Boudreau and Lambur were steering Smith to give a statement that fit the crime scene evidence, they would have likely made sure to include this information. Thus, the omissions tend to support that the source of the content of Smith's statement was Smith.

(C 1054).

This Court has held that generalized allegations of abuse are unavailing to petitioners seeking to have an Illinois court suppress a confession. *See People v. Orange*, 168 Ill.2d 138, 151 (1995); *see also People v. Jones*, 156 Ill.2d 225, 245 (1993) (occurrences of past police brutality have no relevance to instant case).

The allegations cited by Defendant from other complainants are not offered for a specific relevant purpose that impeaches or discredits any of the live witness testimony given at evidentiary hearing conducted by the circuit court in this case.

C. The Circuit Court Correctly Analyzed ASA Lambur's Testimony.

The Circuit Court considered the impact of the new evidence on ASA Lambur's testimony, holding that "the pattern and practice evidence did not cast Lambur's testimony in a negative light" and that her testimony "was essential to the outcome of the suppression." (C1055-56).

In fact, the new evidence proffered by Defendant below did nothing to undercut ASA Lambur's credibility. Defendant insists on attempting to paint all detectives and state's attorneys with the same brush – despite the inarguable fact that only certain detectives have ever been found to have committed acts of abuse in interrogating suspects. He asks this Court to do the same and find that the Circuit Court "incorrectly analyzed" ASA Lambur's testimony. Appellant's Brief at 47-48.

ASA Lambur's credibility is not at issue here – her testimony below remains

unimpeached and the Circuit Court analyzed Defendant's attempts to discount her sworn statements in detail. (C1051-56). Defense counsel's continued attempts to smear an officer of the court belie the weakness of Defendant's position. If Defendant had any evidence demonstrating any misconduct by ASA Lambur or any other officer who testified, he should have raised those issues on cross-examination; he may not now re-try his case before this Honorable Court.

Defendant's reliance on *Galvan* does not support its position here. In *Galvan*, this Court found that the trial court's conclusion was manifestly erroneous where:

> without [Galvan]'s confession, the State's case was nonexistent. The witnesses all testified at the evidentiary hearing that they did not gain anything in exchange for their testimony, and several of the witnesses testified that while their convictions were reversed, they plead guilty as a direct result of the State's offer of a lesser sentence. The new evidence presented at the postconviction hearing, when weighed against the State's original evidence, was conclusive enough that the outcome of the suppression hearing likely would have been different if Detective Switski had been subject to impeachment based on evidence of abusive tactics he employed in the interrogation of others.

Whirl, 2015 IL App (1st) 111483, ¶ 113.

In this case, the State's case was far from non-existent. *See* Statement of Facts, *supra*. Petitioner in no way met his burden – "of showing only that newly discovered evidence *would likely have* altered the result of a suppression hearing." *People v. Wilson*, 2019 IL App (1st) 181486 (citing *People v. Whirl*, 2015 IL App (1st) 111483, ¶ 80 (emphasis in original)).

IV. The Court Should Affirm the Judgment of the Circuit Court.

Defendant offered but one live witness with knowledge as to the events of October 20-21, 1992 - himself. His claim and newly discovered evidence were rebutted by witness testimony and other evidence undermining the conclusiveness of his claim of pattern.

Remarkably, Defendant now claims entitlement to a new trial based upon his paper claim. He has failed in his burden of production for a new suppression hearing and a new trial.

There is no basis for the remarkable suggestion that his case is like *Wilson*, in which this Court affirmed the judgment of the trial court where "the evidence added in [that] hearing establishe[d] that the State [wa]s incapable of rebutting that [Wilson's] statement was voluntary." *Wilson*, 2019 IL App (1st) 181486, ¶ 55. *Wilson* in no way stands for the proposition that an appellate court can suppress a defendant's confession and this Court must decline to do so. Defendant misstates the finding in *Wilson* and selectively quotes the Illinois Appellate Court's opinion. The entire paragraph of the opinion reads:

> We find that *after a petitioner satisfies his initial burden of showing that new evidence would likely have resulted in the suppression of his confession*, the State *has the burden of proving* petitioner's statement was voluntary, just as it would at a motion to suppress hearing. The burden shifting provisions involved in a motion to suppress likewise apply.

2019 IL App (1st) 181486 at ¶ 54 (*emphasis added*).

This Court defined the procedure in terms of the burden-shifting applicable at a motion to suppress hearing. *Id*. at ¶¶ 53-54. Here, the State has already met its burden of showing Defendant's statement was voluntary at trial. Petitioner had the burden to show new evidence would likely have resulted in the suppression of his confession. He failed to do so. The State called witnesses to rebut Defendant's contentions that he was actually innocent and a victim of police torture. Each of those witnesses exposed themselves to cross examination; Defendant was afforded a wide scope and latitude in questioning into this and other claimed instances of police misconduct.

There is no basis for this Court to remand for a new suppression hearing or trial where the Circuit Court properly analyzed evidence within the applicable framework and where it conducted a hearing involving witnesses who testified without rebuttal that Defendant gave a voluntary confession. This Court should not order outright suppression, especially where no authority exists for it to enter such an order; that authority rests with the trial court.

"The appellate court's role is to apply the facts to the law and make a determination on whether the trial court's decision complied with the law." *People v. Qurash*, 2017 IL App (1st) 143412, ¶¶ 38-39. "A court is not free 'to ignore an entire body of relevant case law and the principles and guidelines articulated therein.'" *Id*. (citing *People v. Luedemann*, 222 Ill.2d 530, 552 (2006)). Should this Court agree with Defendant's position, it may only remand for a new suppression hearing.

Defendant asks this Court to do the trial court's job for it and circumvent well-established requirements for the discretion being left for the Circuit Court's consideration.

CONCLUSION

This Court should affirm the judgment of the Circuit Court because it was proper – the State showed conclusively that Defendant made a voluntary statement on the night of October 21, 1992, and the newly discovered evidence offered to show that statement was involuntary was all contradicted.

"Manifestly erroneous means arbitrary, unreasonable and not based on the evidence." *People v. Carter*, 2017 IL App (1st) 151297, ¶ 132 (internal citations and quotation marks omitted). The Circuit Court's consideration of the evidence in this case was neither arbitrary nor unreasonable. It looked critically at the facts of the case. It considered the testimony of individuals who subjected themselves to the sworn oath and its consequences.

The Circuit Court rendered its decision based on its analysis of relevant, admissible testimony and its witness credibility determinations. Defendant failed to support his account with any testimony beyond his own, while the State defended against his claims with multiple eyewitnesses – each of whom denied abusing Defendant and denied observing any abuse of Defendant. The judgment of the Circuit Court is sound and must stand.

Respectfully submitted,

People of the State of Illinois

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 50 pages or words.

/s/ Elisabeth Gavin

CERTIFICATE OF SERVICE

The undersigned, caused a copy of the foregoing BRIEF AND ARGUMENT OF APPELLEE to be served via Odyssey efile pursuant to SRC 11(c) to parties mentioned below who have appearance in the case:

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This 15th day of November, 2021.

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