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No. 1-20-1256

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee,	)	Appeal from the Circuit Court of Cook County
	)	Criminal Division
v.	)	
	)	92 CR 25596
CLAYBORN SMITH, Petitioner-Appellant.	)	
	)	The Hon. Alfredo Maldonado, Judge Presiding

PETITIONER-APPELLANT'S REPLY BRIEF

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INTRODUCTION

More than two decades ago, Petitioner testified under oath that Detectives Boudreau, Halloran, and O'Brien physically and mentally abused him until he falsely confessed to a double murder. At the time, he gave detailed testimony about this abuse, but his confession was nevertheless introduced into evidence and he was convicted. Now, there is substantial new evidence that these same detectives, using the same methods of torture, coerced many other men into confessing to serious crimes. This new evidence entitles Petitioner to a new suppression hearing, if not suppression itself.

In its response, the State distorts the facts of the case. It recounts testimony from five witnesses who implicated Petitioner, but fails to mention that four of them later testified that they did so only because they were threatened or beaten. And it ignores that the fifth witness later testified that he implicated Petitioner in exchange for leniency in his own case. The State also minimizes the relationship Boudreau and O'Brien maintained with Burge by omitting key details and findings. These distortions put the case in an entirely different light. Moreover, the State discounts significant evidence of systemic abuse by the three detectives. In fact, this evidence continues to build: in the short time since Petitioner filed his opening brief, this Court held that another person "establish[ed] a pattern of systemic abuse" by Boudreau. *People v. Plummer*, 2021 IL App (1st) 200299, ¶ 110. Finally, the State does not seriously dispute that Petitioner's allegations have been consistent for decades, that the three detectives he has identified were also identified in numerous other accounts of torture, and that Petitioner's claims are strikingly similar to other claims of torture.

In short, the State's response provides little reason to affirm the circuit court's decision on either prong of the analysis. Petitioner is entitled to a new suppression hearing because

he has shown that (1) "the officers who interrogated [him] may have participated in systemic and methodical interrogation abuse;" and that (2) "those officers' credibility at the suppression hearing might have been impeached as a result." *People v. Patterson*, 192 Ill. 2d 93, 145 (2000). Although the circuit court made a whole host of errors under both prongs of the analysis, this Court need not agree with Petitioner on each error to reverse the circuit court. Each of the circuit court's errors warrant reversal standing alone—and in combination they make an undeniable case for reversal. Accordingly, Petitioner is at least entitled to a new suppression hearing. And given the strength of the evidence in this case, this Court should also go further and order suppression itself.

ARGUMENT

I. The State's Brief Inaccurately Presents The Facts.

In its rendition of the facts, the State omits testimony from several witnesses. These omissions distort the case in important ways. Most egregiously, the State recounts testimony from Karen Tate, Israel Moore, and Roderick Sisson at the grand jury hearing where all three witnesses testified against Petitioner and said that they themselves were not abused by the detectives. State's Br. 18-23. What the State omits from that account is that all three witnesses later recanted. At trial, Tate explained that she testified falsely before the grand jury because the detectives threatened to arrest her and take her baby if she "didn't tell them what they wanted to hear." A1125-26. Likewise, Moore explained that he testified falsely before the grand jury "because [he] was scared" and the detectives were "hitting [him] . . . so [he] said what they wanted to hear." A1312. And at the suppression hearing, Sisson explained that he told the detectives what they wanted to hear because they threatened to "smack the shit out of [him]" and he "was scared." A875; A889.

The State presents similarly misleading accounts of two additional witnesses. The State notes ASA Lambur's testimony that Maurice Martin—who gave a statement against Petitioner—never complained of abuse. State's Br. 7. It does not mention that Martin later said he was beaten for *two days* before that statement was taken and that his court file showed that he requested medical attention after his interrogation. A1364. It also cites ASA Lambur's testimony for the proposition that Clinton Tramble did not complain of abuse by the detectives, State's Br. 7, but does not mention that Tramble admitted to testifying against Petitioner in exchange for the dismissal of charges against him, A1085-86.

Finally, the State does not discuss the entirety of the relationship Boudreau and O'Brien maintained with Burge. It references O'Brien's testimony that he "had very little contact with Burge," State's Br. 18, but doesn't mention that the Independent Third Party found that "Detective O'Brien was a known subordinate of Jon Burge," A2445. The State also attempts to underplay Boudreau's relationship with Burge, State's Br. 8, declining to mention various indicia of their relationship, including the fact that Boudreau "sold raffle tickets and donated money to help fund Burge's legal defense," A1368.

II. Petitioner Is Entitled To A New Suppression Hearing.

A. The Circuit Court Erred In Finding That The Pattern And Practice Evidence Did Not Establish That The Detectives May Have Participated In Systemic Abuse.

The first prong of the analysis requires Petitioner to show that "the officers who interrogated [him] may have participated in systemic and methodical interrogation abuse." *Patterson*, 192 Ill. 2d at 145. In holding that Petitioner did not carry his burden, the circuit court applied the wrong legal standard, discounted evidence of systemic abuse, and failed

to draw a negative inference from the detectives' invocations of the Fifth Amendment.[1] None of the State's arguments can rescue the circuit court's incorrect analysis.

i. The circuit court applied the wrong legal standard.

In a TIRC referral case, the first prong of the analysis requires Petitioner to show that "any of the officers who interrogated [him] *may have* participated in systemic and methodical interrogation abuse." *Patterson*, 192 Ill. 2d at 145 (emphasis added).[2] This Court has repeated that standard many times. *See, e.g.*, *People v. Whirl*, 2015 IL App (1st) 111483, ¶ 80 ("may have participated"); *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 193 ("may have participated").[3] Indeed, in outlining the legal standard applicable to this case, even the circuit court explained that this standard would apply. A805-07. Later in its opinion, however, the circuit court inflated this standard, holding that Petitioner did not "establish *conclusively* that the officers involved in [his] interrogation participated in systemic abuse." A817 (emphasis added).

The State attempts to cover for this mistake with a sleight of hand. It does not cite any caselaw holding that the first prong inquiry requires Petitioner to "establish conclusively" that the officers engaged in systemic abuse. Instead, the State discusses the issue of *res*

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[1] In an oral statement accompanying the written order, the circuit court explained that "[t]here's no question that there was torture and abuse that occurred under the Commander Burge era. No question about that as far as this Court is concerned." A2633. The circuit court then cautioned that its ruling was "*not to be read* as a judicial determination that the detectives involved in this case were not involved in any abuse or torture on a systemic level." A2634 (emphasis added). Nonetheless, the written order found that Petitioner did not satisfy the first prong of the analysis.

[2] *Patterson* predated the TIRC Act, but as the circuit court explained, the legal standards set forth in *Patterson* apply to this case. A808.

[3] The State argues that similar language in *People v. Harris*, 2021 IL App (1st) 182172, "does not establish a burden" because that case said it was only "relevant" whether the officers "may have participated" in systemic abuse. State's Br. 29-30. No such argument is possible with respect to the three cases cited here.

judicata and cites caselaw explaining that it may be relaxed in a post-conviction proceeding when there is evidence of such "conclusive character" that it "would probably" lead to a different result. State's Br. 30-31 (quoting *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 158). That is, the language relied upon by the State is referring to the ultimate question before the circuit court rather than the first prong analysis. *Whirl* illustrates the difference. In *Whirl*, this Court explains that under the first prong of the analysis, a petitioner must show that the officers who interrogated him "may have participated" in systemic abuse. *Whirl*, 2015 IL App (1st) 111483 at ¶ 80. Then, it explains that the ultimate question is whether the new evidence is so "conclusive" that it "would probably" lead to a different result at a new hearing. *Id*. at ¶ 108. So while it is true that Petitioner must ultimately identify new evidence that "would probably" lead to a different result at a new hearing, *Whirl* establishes that Petitioner satisfies this burden by showing, under the first prong, that the officers "may have participated" in systemic abuse and, under the second prong, that "those officers' credibility at the suppression hearing might have been impeached as a result." *Id.* at ¶¶ 80, 108, 110. For the reasons set out below, he has done so. In fact, the evidence is so strong that it would satisfy even the State's inflated rendition of the standard.

ii. The circuit court erred in discounting evidence that the detectives tortured other suspects.

In concluding that Petitioner did not show a pattern of systemic abuse by the detectives, the circuit court repeatedly erred by dismissing, discounting, or outright ignoring important evidence.

First, the circuit court incorrectly stated that "none of the allegations" against the detectives "resulted in a finding directly sustaining the allegations." A817. Doubling down on this error, the State does not refute, *or even mention*, the judicial findings of abuse made

by Circuit Court Judges Crane, Strayhorn, and Gaughan that Petitioner detailed in the opening brief. *See* Pet. Br. 23-24 (Judge Gaughan found "the pattern or practice of police abuse by Detective Boudreau . . . did occur"; Judge Crane found evidence of abuse against O'Brien "staggering" and "damning"; and Judge Strayhorn found that officers in the Jesse Clemon case—which included O'Brien—created a "horrendously oppressive" environment"). It also fails to mention findings by this Court against all three detectives. *See People v. Tyler*, 2015 IL App (1st) 123470, ¶ 189 (noting that the petitioner "establish[ed] a troubling pattern of systemic abuse" by O'Brien, Boudreau, and Halloran).

Indeed, judicial determinations of abuse continue to build: just a few months ago, after Petitioner filed his opening brief, this Court explained that yet another person had "establish[ed] a pattern of systemic abuse" by Boudreau. *People v. Plummer*, 2021 IL App (1st) 200299, ¶ 110. Notably, this judicial finding recounts methods of abuse that are strikingly similar to Petitioner's allegations of abuse. For instance, it explains that the petitioner in *Plummer* "consistently maintained" that detectives "pulled his hair" and "hit him while he was handcuffed to a wall and radiator." *Id.* at ¶ 75. Petitioner has likewise testified under oath that the detectives in his case grabbed him by the hair and "didn't let [his] hair go for a while," A909, and that his hand "was handcuffed to the wall," A900. These judicial findings of abuse are already extensive, and they will only continue to grow.[4]

[4] Earlier this year, Keith Walker—who was exonerated in August 2020—filed suit against several detectives, including Halloran, and alleged that they abused him. Tatyana Turner, Chicago Tribune, '*I'm seeking justice from people who treated me unjust.' Keith Walker sues city and Burge detectives, alleging wrongful conviction*, available at https://www.chicagotribune.com/news/breaking/ct-keith-walker-sues-midnight-crew-jon-burge-cpd-20210811-tk6eg6xwrrformrhmesblxzg2q-story.html.

Second, the circuit court discounted evidence that eight people claimed they gave false confessions because Boudreau, Halloran, or O'Brien physically abused them, and that all eight of these people were later shown to be innocent of the crimes to which they confessed. Pet. Br. 12-13, 25. Three of them were acquitted or exonerated by DNA evidence. *Id*. at 12-13 (Derrick Flewellen, Nevest Coleman, Harold Hill). Three were acquitted at trial. *Id* (Oscar Gomez, Eric Gomez, Abel Quinones). In one case, the State dropped charges after realizing that he was incarcerated when the crime occurred. *Id*. at 12 (Peter Williams). And finally, one man received a certificate of innocence after a special prosecutor asked that his conviction be vacated. *Id*. at 13 (Arnold Day).[5] Because these men ultimately prevailed in their cases because of DNA evidence, acquittal, and factual impossibility, the circuit court said they prevailed "for reasons apart from torture allegations" and discounted their allegations of abuse. A814-16.[6]

This Court rejected that exact reasoning in *People v. Galvan*, 2019 IL App (1st) 170150, ¶¶ 73-74. *See* Pet. Br. 25-26. The State does not dispute that *Galvan* found the circuit court's reasoning manifestly erroneous, but instead claims that the case is "distinguishable" because the individuals who alleged abuse in *Galvan* testified at the evidentiary hearing whereas in this case Petitioner did not present "live witness testimony" from the eight men. State's Br. 34. That makes no difference. As the circuit court explained, Petitioner "did not necessarily need to" present any witnesses. A811. In fact, this Court recently ordered a new suppression hearing after an evidentiary hearing at which the

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[5] *See also Arnold Day*, THE NATIONAL REGISTRY OF EXONERATIONS (last updated January 15, 2020).

[6] The circuit court applied this rationale to the allegations of Abel Quinones, Eric Gomez, Oscar Gomez, Derrick Flewellen, Nevest Coleman, and Harold Hill. A814-16. The circuit court did not even mention Peter Williams or Arnold Day.

Petitioner presented only documentary evidence. *People v. Harris*, 2021 IL App (1st) 182172, ¶¶ 28-36; *see also People v. Plummer*, 2021 IL App (1st) 200299, ¶ 98 (explaining that "if these reports [including complaints, investigations, and FOIA records] were allowed at defendant's motion to suppress, it would likely have changed the outcome on retrial"). Moreover, the documentary evidence as to these eight men has significant indicia of reliability: it includes transcripts from prior instances when the men testified about the abuse in court,[7] a signed and notarized affidavit describing the abuse,[8] and a court filing detailing the abuse.[9] And contrary to the State's incorrect assertion that some of these men did not claim abuse by the officers in question, State's Br. 34, all eight men complained of abuse against O'Brien, Boudreau, or Halloran, specifically. *See* Pet. Br. 12-13.

The State then suggests that the allegations by these eight men are "generalized" and that Petitioner does not explain their "significance to his case." State's Br. 34. Not so. As Petitioner set out in the opening brief, his testimony that he was hit in the head and slapped while handcuffed to a ring in the wall is comparable to reports by four of these men;[10] his testimony that he was dragged by the hair is reflected in reports by two of these men;[11] his testimony that Boudreau fed him details of the crime and coached his confession matches

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[7] Peter Williams, A1706-10, 1713-28; Oscar Gomez, A1752-63, 1767-69; Nevest Coleman, A2074-77; Harold Hill, A1521-24, 1530; Eric Gomez, A1773-77, 1779-80; Abel Quinones, A1797-1804, 1808-10, 1817-19.

[8] Arnold Day, A1516-18.

[9] Derrick Flewellen, A1622-24.

[10] Pet. Br. 34-35; A900-03, 939-41 (Petitioner); A1516-17 (Arnold Day); A1623-24 (Derrick Flewellen); A1800, 1803-04 (Abel Quinones); A1706-09 (Peter Williams).

[11] Pet. Br. 35; A902-04, 908-09, 911-12, 915-16 (Petitioner); A1757 (Oscar Gomez); A1776-77 (Eric Gomez).

allegations by four of these men;[12] and his testimony that O'Brien lied about being present during part of his interrogation is consistent with allegations by two of these men.[13] This Court has explained that a new suppression hearing is warranted where a petitioner's "allegations of coercion are comparable to the acts of coercion set forth in the new evidence." *People v. Harris*, 2021 IL App (1st) 182172, ¶¶ 57-60. Surely that is even more true when the comparable allegations come from those who were later found innocent.

Third, the circuit court improperly discounted the FBI report in which a former ASA explained that Boudreau fed suspects information about crimes to obtain false confessions.[14] According to the State, if this Court finds that the FBI report supports Petitioner's claim of torture, it would be "creat[ing] new law." State's Br. 38. It would do no such thing: this Court has previously held that where there is "evidence from a Chicago police detective that worked alongside [the accused detective] . . . that is corroborative of the other allegations" against him, a trial court's rejection of that evidence "is truly puzzling." *People v. Serrano*, 2016 IL App (1st) 133493, ¶ 33; *see also People v. Montanez*, 2016 IL App (1st) 133726, ¶ 34 (similar). That is exactly what happened here, the only (immaterial) difference being that the corroborative evidence came from an ASA interviewed by an FBI agent rather than a detective. The circuit court need only apply this precedent in holding that the report—along with all the other new evidence—supports a

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[12] Pet. Br. 37-38; A940-41, A925, A954-57, A58-59, A113-14, A233-34, A79, A96, A264 (Petitioner) A1617 (Arnold Day); A1523-24, A1371, A516-17 (Harold Hill); A1713-28, A1733-34 (Peter Williams); A1767-68 (Oscar Gomez).

[13] Pet. Br. 43-44; A1822, A1759-60 (Oscar Gomez); A55, A2074-77 (Nevest Coleman).

[14] The State appears to believe that the circuit court "excluded" this report. State's Br. 39. The State cites nothing to support this proposition and, as far as Petitioner is aware, the circuit court did not exclude the report. Rather, the circuit court listed the report in the list of exhibits. A829 (entry #65). However, the court did not discuss the report in its order. This was error as the report is highly relevant to Petitioner's claim.

finding that Boudreau likely "participated in systemic interrogation abuse." *People v. Harris*, 2021 IL App (1st) 182172, ¶ 50. The State then asks how the report "might somehow influence the outcome of [Petitioner's] suppression hearing." State's Br. 39. The answer is obvious: it corroborates Petitioner's longstanding allegation that Boudreau coached his confession by showing that Boudreau engaged in the same misconduct in other cases. The FBI report also independently highlights Boudreau's dishonesty—surely that would impact the outcome of a suppression hearing where Boudreau's credibility is at issue.

Fourth, the circuit court erred in discounting findings by the City of Chicago and TIRC. The City of Chicago found that eight men had "credible claim[s]" of torture against either O'Brien or Boudreau, and awarded them more than $700,000 in reparations. A2404-07 (awarding reparations to Curtis Milsap, Enrique Valdez, Clinton Welton, Marcus Wiggins, Jesse Clemon, Damoni Clemon, Imari Clemon, and Diyez Owens); Reparations Ordinance § 3. The circuit court made no mention of these awards in deciding there was insufficient evidence of systemic abuse by the detectives. That was error: this Court explained just a few months ago that records of reparations "gave credibility" to claims of abuse. *People v. Plummer*, 2021 IL App (1st) 200299, ¶ 94. The State's attempt to justify this error relies on a single unpublished decision: *People v. King*, 2017 IL App (1st) 122172-U. *King* would not help the State, even if it had precedential effect. The decision said only that the City's finding of torture was not "binding" because it did not come from a court. *Id*. at ¶ 86. No dispute there. The findings are not binding, but they are independent evaluations by a third party that should play a role in determining whether the detectives engaged in systemic torture.

The circuit court likewise erred by disregarding TIRC's conclusion in Ivan Smith's case that "the pattern and practice evidence against the police officers in this case, especially Detective O'Brien, is concerning." A2440. The State argues the circuit court "correctly discounted" this evidence. State's Br. 35. But this is out of step with this Court's precedent. *See People v. Plummer*, 2021 IL App (1st) 200299 ¶ 90-92 (discussing TIRC findings as relevant and credible evidence); ¶ 101 (explaining that TIRC reports "substantiated other, yet similar, allegations of abuse against Detectives Kill and Boudreau").

Fifth, the State does not dispute the fact that the three detectives were known subordinates of Burge, but, like the circuit court, underplays its importance by focusing on the location of the abuse instead. State's Br. 31-33. This Court explained in *Whirl* that when an accused officer previously worked under Burge, "[t]here is no basis to assume [his] use of physical force to obtain confessions ceased" simply because Burge was no longer his supervisor. 2015 IL App (1st) 111483, ¶ 104. Applying the same logic, it is hardly surprising that Boudreau, Halloran, and O'Brien would continue the abusive practices they employed while working under Burge in Area 3, *see* A321, A446, A585, when they moved to Area 1. The State argues that *Whirl* has no application here because the accused officer in *Whirl* had a "long history" of abusing suspects and that there is "*no* such established history" in this case. *See* State's Br. 32-33. That argument is perplexing: all three detectives in this case have long, established histories of abuse. App. Vol. III at A2572, *Plummer v. People*, 1-20-0299 (Ill. App. Ct. Sept. 11, 2020) ("[T]he pattern or practice of police abuse by Detective Boudreau . . . did occur."); A1511 (Judge Crane finding evidence of abuse against O'Brien "staggering" and "damning"); *People v. Tyler*, 2015 IL App (1st) 123470,

¶ 190 (finding that allegations against all three detectives "show a pattern and practice of misconduct" and coercion); Pet. Br. 23-28; 32-39. So, just as in *Whirl*, the detectives' histories of abuse and their connections to Burge are relevant even though Burge was not present at Area 1 when they abused Petitioner.[15]

iii. The circuit court should have drawn a negative inference from the detectives' invocation of the Fifth Amendment.

The circuit court made a legal error in refusing to draw a negative inference from the detectives' invocation of the Fifth Amendment.[16] The State argues that a negative inference from Halloran's invocation is not warranted because although he took the Fifth Amendment when asked about abusing Petitioner and others, he answered those questions at a later date. State's Br. 36. On the contrary, the suspicious timing of Halloran's change of heart makes his initial silence *more* alarming. Shortly after authorities arrested Burge, Halloran invoked the Fifth Amendment in response to questions about torturing Petitioner and others. A1386; Sup2 EI 2239 (noting that Halloran asserted his Fifth Amendment privilege "when testifying within one month of Burge's indictment").[17] More than a year

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[15] This point is bolstered by this Court's holding in *Mitchell v. People*. There, this Court was asked to decide whether TIRC was limited to reviewing "only those cases of torture that occurred at the hands of Jon Burge or officers under Jon Burge's command at the time the torture occurred." 2016 IL App (1st) 141109, ¶ 16. It held that it was "clear" that TIRC could review "those claims of torture committed by officers previously under Jon Burge's command" even if the alleged torture took place years after Burge was fired from CPD. *Id*. at ¶¶ 7, 28. This underscores the importance of the detectives' relationship with Burge, without regard for whether they were under Burge's command at the exact moment they are alleged to have abused a petitioner.

[16] The State says Petitioner made attempts at "obfuscation" by suggesting Halloran invoked the Fifth Amendment in this case. State's Br. 35-36. Petitioner did no such thing: he said Halloran invoked the Fifth Amendment when he was asked about abusing Petitioner "in a previous case," Pet. Br. 28, and that all three detectives admitted to previously asserting their Fifth Amendment rights during the evidentiary hearing in this case, Pet. Br. 30 n.8.

[17] *See also* Press Release, U.S. Department of Justice, available at https://www.justice.gov/archive/usao/iln/chicago/2008/pr1021_01.pdf (arrest and indictment of Jon Burge announced on October 21, 2008).

later—once the threat of additional indictments of Burge's co-conspirators had faded—Halloran decided to answer those questions. *See* A731; Sup2 EI 2238-39 (January 2010 docket entry requiring Halloran to be deposed again by February 25, 2010).

The Seventh Circuit's decision in *Harris v. City of Chicago*, 266 F.3d 750 (7th Cir. 2001), explains why an officer's initial silence is relevant *even if* the officer later answers the questions posed to him. In *Harris*, a federal civil rights case, the defendant-officer invoked his Fifth Amendment privilege during discovery. *Id*. at 751. At trial, the district court excluded all evidence of his silence during discovery because he answered the questions posed to him during the trial. *Id*. The Seventh Circuit reversed, holding that that the district court should have either prevented the officer's testimony at trial "or allowed [plaintiff] to impeach him with his prior silence." *Id*. at 754. The jury could have drawn a negative inference from the invocation of the Fifth Amendment, it explained, and "there is a significant chance that the outcome of the trial was affected by the exclusion of [the officer's] invocation of the Fifth Amendment." *Id*. The same is true here: although Halloran eventually answered the questions, it remains the case that "in the face of a credible allegation" he was "unwilling to assure the court that he . . . did *not* physically coerce a confession" because he determined that "a truthful answer could subject him to criminal liability" at that time. *People v. Gibson*, 2018 IL App (1st) 162177, ¶ 108 (emphasis in original). His initial invocation of the Fifth Amendment has significant import and the circuit court was wrong to hold otherwise.

The State makes two additional arguments that can easily be dispensed with. First, it repeats the circuit court's assertion that under *People v. Gonzalez*, 2016 IL App (1st) 141660, a negative inference is not necessary when a detective invoked the Fifth

Amendment in a prior case. State's Br. 36. Petitioner already explained that *Gonzalez* is inapposite: there, the court declined to draw a negative inference because the petitioner alleged that the detective took the Fifth Amendment in certain depositions "without including this deposition testimony." *Gonzalez*, 2016 IL App (1st) 141660 at ¶ 61; *see* Pet. Br. 30 n.8. That is not the case here. *See* Pet. Br. 28-30. The State simply does not respond to this point. The State also argues that a negative inference is not warranted here because "the State called multiple witnesses who discredited Defendant's claims." State's Br. 38. The "multiple witnesses" referred to include Sisson and Tate, who later recanted, A875; A1125-26, and the detectives themselves, who are hardly "disinterested witness[es]." *People v. Montanez*, 2016 IL App (1st) 133726, ¶ 37.

Ultimately, the "circuit court does not have unfettered—or unreviewable—discretion to decline [to] draw an adverse inference," and must do so where "there is no good reason" not to draw the inference. *People v. Gibson*, 2018 IL App (1st) 162177, ¶ 86. Here, there was "no good reason" not to draw the inference: all three detectives refused to testify about torturing suspects, and Halloran refused to testify about Petitioner specifically. *See* Pet. Br. 28-29. And while Halloran eventually answered the questions, he waited fifteen months to do so, when the threat of indictment had subsided. In refusing to draw an adverse inference, the circuit court made a clear error of law.

B. The Circuit Court Erred In Finding That The New Evidence Is Unlikely To Alter The Outcome Of The Suppression Hearing.

The second prong of the analysis requires Petitioner to show that the "officers' credibility at the suppression hearing might have been impeached as a result" of the evidence of systemic abuse. *Patterson*, 192 Ill. 2d at 145. As set out below, the State all

but concedes that Petitioner carried this burden and that the circuit court erred in finding otherwise.

i. Petitioner's allegations have remained consistent, the detectives were identified in other allegations of abuse, and those allegations are strikingly similar to Petitioner's allegations of abuse.

This Court has explained "that the outcome of the suppression hearing likely would [be] different" if an officer is "subject to impeachment" based on evidence showing that (1) the petitioner "consistently claimed he was tortured," (2) "the officers identified in the [newly-discovered] evidence were also involved in the [petitioner's] case," and (3) the petitioner's "claims of torture were strikingly similar to other claims depicted in the new evidence." *People v. Harris*, 2021 IL App (1st) 182172, ¶ 60 (quotation marks and citations omitted). Petitioner provided a detailed account of the new evidence and how he has satisfied each of these three factors. *See* Pet. Br. 32-39. In response, the State does not dispute the first or second factors at all and has only this to say about the third: "[Petitioner] did not prove facts to support a striking similar pattern of abuse exercised by officers with whom he himself had involvement." State's Br. 41. That's it. *See* State's Br. 39-41. But Petitioner pointed to myriad allegations of abuse in the new evidence that matched his longstanding claims of abuse in five specific ways: (1) the officers hit him on the head and slapped him while he was handcuffed to a ring in the wall, Pet. Br. 34-35; (2) the officers dragged him around by the hair, *id*. at 35; (3) the officers threatened his girlfriend and unborn child, *id*. at 35-36; (4) Boudreau fed him details of the crime and coached his confession, *id*. at 36-38; and (5) O'Brien denied being present during the interrogation even

though he was there, *id*. at 43-44.[18] The State never explains *why* those allegations are not strikingly similar to Petitioner's—it merely asserts that they are not. State's Br. 41. That is enough to resolve the second prong of the analysis in Petitioner's favor.[19]

Instead of meaningfully disputing these three relevant factors, the State makes several meritless arguments. *See* State's Br. 39-41. It argues that Petitioner's allegations that the detectives threatened his girlfriend lack support because she testified before the grand jury that she had not been threatened at all. State's Br. 41. But this selective quotation of grand jury testimony distorts the picture: his girlfriend testified at trial that she had testified falsely before the grand jury only because the detectives threatened to arrest her and take her baby if she "didn't tell them what they wanted to hear." A1125-26.

The State also challenges Petitioner's allegations of abuse by citing contrary testimony from the detectives and ASA Lambur. State's Br. 40-41. For instance, it cites Boudreau's testimony that he did not pull Petitioner from a chair and that O'Brien was not present

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[18] On this final point, there is new evidence showing that in three other cases, people testified that O'Brien abused them while he testified that he was not there—just as he did in Petitioner's case. *See* Pet. Br. 43-44. All three of those men were either acquitted or exonerated by DNA evidence. *Id*. The State argues that "[w]hether O'Brien's original suppression hearing testimony is undermined *is not the standard*" and that Petitioner is disregarding the applicable legal standard. State's Br. 46. What *is* at issue, however, is O'Brien's credibility. *People v. Patterson*, 192 Ill. 2d at 145. And new evidence showing a pattern of claimed absences when several other (acquitted and exonerated) men claimed he abused them goes to his credibility.

[19] On top of this, new evidence showing that Halloran and Boudreau abused juveniles in other cases provides additional support for the allegations of abuse by two juvenile witnesses in this case. Pet. Br. 39-40. Those witnesses—Roderick Sisson and Israel Moore—testified that they only implicated Petitioner because the detectives abused or threatened to abuse them. A875; A1312. The State, like the circuit court, argues that their contentions of abuse are "unavailing given their prior inconsistent sworn testimony to a Cook County Grand Jury." State's Br. 42. But as they explained, the reason for their inconsistent testimony to the grand jury *was the abuse*. A875; A1312. By bolstering this testimony, and undermining the credibility of the detectives, the new evidence of juvenile abuse makes it more likely that there will be a different result at a new suppression hearing.

during the interrogation. *Id*. at 40. But it is Boudreau's credibility (as well as Halloran's and O'Brien's) that is at issue in this proceeding, so resorting to their own contrary statements to prevent a suppression hearing just underscores the weakness of the State's position. In addition, the detectives themselves provide shifting and inconsistent accounts. Petitioner described several such inconsistencies in his opening brief that the State did not meaningfully refute. For instance, the State acknowledges that Halloran revised his testimony between the suppression and evidentiary hearings to match what Petitioner has always maintained: that Halloran transported Petitioner back to Area 1 along with other officers. State's Br. 43. And although the State insists there is no inconsistency between Halloran's testimony at different times about his presence at the court-reported statement, *see* State's Br. 43, the State says nothing about the inconsistency between the State's closing at trial where it said Halloran was there when "[he and Boudreau] took the court reported statement," A1341, and Halloran's contrary statement at the evidentiary hearing, A575; A606.

Finally, the State argues that allegations of misconduct "without evidence the officer was disciplined[] are not admissible as impeachment" by citing *People v. Porter-Boens*, 2013 IL App (1st)111074. State's Br. 39. But *Porter-Boens* is inapplicable here. For starters, the issue in that case was whether the defendant could subpoena confidential records during discovery—not whether certain documents are admissible as evidence. *Id*. at ¶ 7. More fundamentally, the *Porter-Boens* court explained that evidence of prior misconduct where the officer was not disciplined may be excluded *if* the allegations "involve[ed] different officers" and are "factually dissimilar to the officer's conduct in the pending case." *Id*. at ¶ 17. It went on to explain that "evidence of prior abuse *is admissible*

when the prior allegations involve the same officer and similar methods." *Id*. at ¶ 18 (emphasis added). This is not a controversial point: the circuit court in this case admitted the evidence and—as even *Porter-Boens* points out—the Illinois Supreme Court has explained that "that evidence of prior abuse is admissible when the prior allegations involve the same officer and similar methods and are close in time." *Id*. On top of that, *Porter-Boens* does not concern a TIRC evidentiary hearing, where this Court held that the Illinois Rules of Evidence do not apply. *People v. Gibson*, 2018 IL App (1st) 162177, ¶ 138.

In sum, the State does not meaningfully contest the three factors that this Court has deemed sufficient to change the outcome of the suppression hearing, and instead falls back on three alternative arguments that can easily be dispensed with.

ii. The circuit court incorrectly analyzed ASA Lambur's testimony.

In his opening brief, Petitioner noted that the circuit court's reliance on ASA Lambur's testimony was irrelevant as nearly all the abuse occurred outside her presence and she herself acknowledged that she cannot speak to what happened between Petitioner and the detectives when she was not there. Pet. Br. 48 (citing A433-34). The State has no response. *See* State's Br. 47-48.

Petitioner also explained in his opening brief that ASA Lambur's credibility was impeached because she prosecuted other cases where confessions were tortured out of innocent men. Pet. Br. 47. Specifically, newly-discovered evidence shows that she prosecuted Harold Hill and Dan Young after Boudreau and Halloran elicited confessions from them *even though* she knew that the detectives had also elicited a false confession from a third alleged co-conspirator, who was incarcerated at the time of the crime. A417 (Lambur testifying that she prosecuted Young and Hill *after* the case against Peter Williams was dropped); A1371 (Chicago Tribune article noting that although detectives "confirmed

Williams' alibi and he was released, [] prosecutors still tried Young and Hill"); A416 (Lambur testifying that she was the prosecutor in the Hill case). Hill and Young were later freed based on DNA evidence. The State again has no response. *See* State's Br. 47-48.

Finally, Petitioner noted that the newly-discovered evidence includes a statement by ASA Johnson explaining that detectives and ASAs often coordinated statements when questioned about the circumstances of particular investigations. A2183-85; Pet. Br. 47. The State argues that the report is too general to undercut ASA Lambur's credibility. *See* State's Br. 47. But the report specifically names Boudreau, who worked with ASA Lambur not only in this case, but also in the problematic Harold Hill, Dan Young, and Peter Williams case discussed above.

Ultimately, the circuit court's reliance on ASA Lambur's testimony is irrelevant because the central issues are whether "any of the officers" participated in systemic abuse and whether "those officers' credibility" might have been impeached as a result. *People v. Patterson*, 192 Ill. 2d at 145. It is doubly irrelevant because ASA Lambur was not present for almost all the claimed abuse. Should this Court find the circuit court's reliance on her testimony proper, however, it should hold that the court erred in discounting the newly-discovered evidence impeaching her credibility.

* * *

To obtain a new suppression hearing, "the petitioner has the burden of showing only that newly discovered evidence *would likely have* altered the result of the suppression hearing," and need not prove "the ultimate issue of whether [his] confession was coerced." *People v. Wilson*, 2019 IL App (1st) 181486, ¶ 52 (emphasis in original) (citation omitted). Petitioner has met his burden for a new suppression hearing.

III. Petitioner Is Entitled To Suppression.

Because Petitioner meets the burden for a new suppression hearing, this Court could simply remand the case for a suppression hearing. Alternatively, this Court could order suppression itself. In deciding whether to order suppression, the Court applies the burden-shifting framework governing suppression hearings. *People v. Wilson*, 2019 IL App (1st) 181486, ¶ 54. Under that standard, as both parties explain, the State bears the initial burden of "proving the confession was voluntary by a preponderance of the evidence." *Id*. at ¶ 53; *see also* Pet. Br. 19; State's Br. 24. If it meets this burden, Petitioner must "present evidence that the confession was involuntary," at which point "the burden reverts to the State." *People v. Wilson*, 2019 IL App (1st) 181486, ¶ 53. The State argues that this Court does not have the authority to order suppression and that only the trial court has that power. State's Br. 48-50. But Petitioner sought a new suppression hearing *and* suppression before the circuit court. C1077. The trial court denied both requests and, accordingly, this Court has the authority to reverse on either ground. The strength of the evidence in this case warrants outright suppression. Should this Court disagree, however, it should order a new suppression hearing.

CONCLUSION

This Court should reverse the circuit court and order suppression or grant a new suppression hearing.

Respectfully submitted,

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No. 1-20-1256

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee,	)))	Appeal from the Circuit Court of Cook County Criminal Division
	)	
v.	)	92 CR 25596
	)	
CLAYBORN SMITH, Petitioner-Appellant.	)	The Hon. Alfredo Maldonado, Judge Presiding

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the pages containing 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 appended to the brief under Rule 342(a), is 20 pages.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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No. 1-20-1256

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook
Respondent-Appellee,	)	County
	)	Criminal Division
v.	)	
	)	92 CR 25596
CLAYBORN SMITH,	)	
Petitioner-Appellant.	)	The Hon. Alfredo Maldonado, Judge Presiding

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

On January 7, 2022, the foregoing Petitioner-Appellant's Reply Brief were filed with the Clerk of the Appellate Court using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system.

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