

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

# VOICE

FOR THE DEFENSE

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## Recent Texas Exoneration: Tyrone Day

GARY A. UDASHEN

### Background of Case

At 2:00 a.m. on October 25, 1989, the Dallas Police Department responded to a location near Fair Park in Dallas where an 18-year-old woman told them she had been sexually assaulted. The young woman, identified as AC, was unable to hear or speak and communicated with the police by writing out what happened.

AC told the police that a man approached her while she was walking with a friend and offered her drugs. She said she refused the offer, and the man then forced her into an apartment where, along with two other men, he sexually assaulted her.

Tyrone Day, who was then 19 years old, was walking in the location where AC was talking to the police. AC pointed him out to the police and said he was one of the men who sexually assaulted her. Day was arrested and charged with sexually assaulting AC.

Day was placed in the Dallas County Jail and a lawyer was appointed to represent him. Day maintained his innocence. However, he was told by his lawyer that a jury, hearing that a young black man sexually assaulted a white, deaf, young woman, would likely give him a life sentence if he went to trial.

The state made a plea offer of 40 years in prison, and Day was told he would serve about four years if he accepted the offer. At the time, Day was suffering with health problems, which further deteriorated during his stay in the Dallas County Jail. He was told that he would receive better health care in prison than he was receiving in the Dallas County Jail.

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approached her on the street to exchange sex for drugs. However, after engaging in sexual intercourse, the man refused to give AC the drugs. As a result, she claimed she had been sexually assaulted. AC also told the CIU prosecutors that, if the man had given her the drugs, she would not have claimed she was sexually assaulted.

b. AC also told the CIU prosecutors that when she identified the person walking in the area as her attacker, he was on an upstairs breezeway of an apartment complex, and she was a substantial distance away and never got out of the police car to get a closer look. AC told the CIU prosecutors that she did not identify the man by his face. Rather, she identified him based on his hat and nothing else. She also told the CIU prosecutors that the person she identified as being involved may have been a completely different person than the persons actually involved.

c. One of the men identified by DNA as having sexual intercourse with AC admitted that he had agreed to trade drugs for sex, but refused to give her the drugs once he had sexual intercourse with her. This man also told the CIU prosecutors that Tyrone Day may have been in the vicinity, but he never approached AC.

On April 26, 2023, the Court of Criminal Appeals granted the habeas application and vacated the conviction under the new science provision of Article 11.073 of the Texas Code of Criminal Procedure based on the DNA evidence that showed Day was not involved in the incident.

On May 21, 2023, John Creuzot, Dallas County's District Attorney, and the District Attorney's Office's Conviction Integrity Unit, submitted a motion to dismiss the indictment. The dismissal motion stated that:

Newly-available DNA evidence has not only identified the individuals who came into sexual contact with the complainant, but also excludes Day as a contributor. Further investigation, including interviews with the newly identified individuals, corroborates these findings. During the course of its investigation, the CIU interviewed the complainant, learning, among other things, that her identification of Day was not based on any distinguishable physical characteristic(s); rather it was based on the fact that one of the participants on the night in question had on a generic hat and Day happened to be wearing a similar hat when she identified him to police from a long distance away. Further, documents reviewed by the State fail to show that the complainant was ever presented with a photo lineup, or made any additional identification of Day. There is no doubt that a case such as this would be investigated differently today than it was in 1989.

The motion concluded, "... on the basis that no credible evidence exists that inculpates Tyrone Day. Further, the state moves to dismiss the indictment in this cause on the basis of Tyrone Day's actual innocence. The dismissal motion was granted by Judge Carter Thompson, and Tyrone Day was found to be actually innocent.

### Lessons Learned

1. Shoddy police work leads to wrongful convictions. AC's story was not investigated at all by the police or the District Attorney. Her identification of Day as one of her alleged attackers was obviously questionable based on the distance he was from her when she made the identification. Yet the police failed to follow up with any further identification procedures. The result of the poor police work was Tyrone Day being arrested and charged with a sexual assault that he had nothing to do with and, in fact, did not even happen.

2. Ineffective representation by defense counsel can lead to wrongful convictions. Had Day's attorney investigated the case, including AC's story and her identification of Day, it is possible that some of the evidence that later exonerated him would have been discovered prior to him pleading guilty.

Moreover, incorrect information from defense counsel about how long Day would have to serve on a 40-year sentence induced his guilty plea. Defense counsel should be careful and accurate in explaining the consequences of a guilty plea to a client.

3. Many wrongful convictions are the result of guilty pleas. According to statistics compiled by the Innocence Project, over 25% of exonerations following wrongful convictions nationwide were the result of guilty pleas. The true number of wrongfully convicted persons who pled guilty is likely much higher than these statistics indicate based on the difficulty of obtaining an exoneration after



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This seminar is sponsored by CLE as a project of TDDA, funded by the Texas Council of Criminal Appellate.

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entry of a guilty plea.

4. False information provided to law enforcement officials is a leading cause of wrongful convictions. The most recent statistics from the National Registry of Exonerations indicates that over 60% of wrongful convictions are the result of perjury or false accusations.
5. The vast majority of convictions that were later shown to be invalid by DNA evidence were based on erroneous eyewitness identifications. Eyewitness identifications are notoriously unreliable and an extensive body of scientific literature examining the causes of wrongful eyewitness identifications has been published. Defense attorneys (and prosecutors) dealing with eyewitness identifications should carefully evaluate the circumstances surrounding eyewitness identifications and consult experts to determine if any recognized factors that lead to invalid eyewitness identifications are present.
6. Collaborative work between prosecutors and lawyers for convicted persons is crucial in finding and rectifying wrongful convictions. It is always difficult to obtain an exoneration of an innocent person when the prosecutors are resisting, rather than assisting, in the investigation. The Day case is a good example of cooperation between a Conviction Integrity Unit and a team of Innocence Project attorneys leading to the exoneration of a wrongfully convicted person. The active cooperation of the Conviction Integrity Unit was essential to achieving Day's exoneration.<sup>1</sup>

1. This story of Tyrone Day's exoneration is the third of what will be a recurring feature in the Voice. Mike Ware, Executive Director of the Innocence Project of Texas, Allison Clayton, IPTX Deputy Executive Director, and Gary Udashen, IPTX board member and former board president, will write periodic articles concerning particularly interesting exonerations from around the State of Texas. For purposes of these stories, the term "actual innocence" will follow the use of that term in the Texas statute providing compensation for the wrongfully imprisoned. (§103.001, Civil Practice & Remedies Code). Under that statute, wrongfully imprisoned persons are entitled to receive state compensation if they have received a pardon based on innocence, they have been granted writ relief by the Court of Criminal Appeals based on actual innocence, or they have been granted writ relief by the Court of Criminal Appeals on some other basis and the State's Attorney dismisses the charge on the basis that no credible evidence exists that incriminates the defendant and that the State's Attorney believes the defendant to be actually innocent.

**Gary Udashen** is a senior attorney with Udashen/Avton in Dallas. He is board certified in criminal law and criminal appellate law. Udashen is also a board member of the Innocence Project of Texas and served for nine years as board president.



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# VOICE FOR THE DEFENSE

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## Failure of Polygraphs

GEMMA MOFFA & MICHAEL PARSON

In the 1980's, there was a popular television series called Knight Rider, which starred David Hasselhoff and his artificially intelligent, wise-cracking car, K.I.T.T. A fan-favorite episode of Knight Rider included an evil twin version of K.I.T.T. called K.A.R.R. Both K.I.T.T. and K.A.R.R. were indestructible and formidable, but polar moral opposites, and they rivaled each other as the show's forces for good and evil. Ultimately, the rivalry came head-to-head, or bumper-to-bumper, and was framed by the show's writers in the philosophical question: "What do you do when an unstoppable force meets an unmovable object?"

This dilemma, the unstoppable force versus the unmovable object, is common in the juvenile system where stiff requirements of rehabilitation meet the limited time for rehabilitation. This is particularly true in using polygraph exams in juvenile sex offender cases to determine whether to revoke the juvenile on probation or to require the juvenile to register.<sup>1</sup> In both instances, polygraphs can have serious, long-lasting consequences that extend long beyond the client's juvenile case.

A court can only place a juvenile on probation until their 18th birthday.<sup>2</sup> However, the violation of a juvenile in placement at 18 who is on felony probation could result in placement at the Texas Juvenile Justice Department.<sup>3</sup>

1. The use of polygraphs in certain juvenile sex offender cases are authorized by Texas Family Code Section 54.005(a)(1)(B).

2. See Tex. Fam. Code § 54.040.

3. See Tex. Fam. Code § 54.04 (q). It should also be noted that, if the Motion to Modify is filed prior to the client's 18th birthday, the juvenile court still retains jurisdiction to sentence the client to the Texas Juvenile Justice Department, even if the client turns 18 during the pendency of the case.

What makes things more difficult is that while there are possible placements that may accept clients who are 17, very few, if any, take clients who are 18, much less those adjudicated on a sex offense. Accordingly, a judge has little to no options for a 17 or 18-year-old who has been adjudicated on a sex offense and who has violated their probation, even for something as minor as failing a polygraph exam.

Equally as troublesome are cases in which the juvenile has completed all the requirements of treatment and has been discharged (whether successful or unsuccessful) from their sex offender program, but, based solely on negative polygraph exam results, the State seeks sex offender registration.<sup>4</sup> Each of these situations set a direct collision between the unstoppable force, i.e., the reliance on a polygraph exam to support revocation or sex offender registration, and the immovable object, i.e., the jurisdictional limits of the court and the lack of available placements.

Polygraph exams are problematic. In "The Polygraph Test Strikes - and Strikes Out - Again," Scott Lilienfeld, Ph.D., attempts to correct the public misperceptions about polygraph tests.<sup>5</sup> He asserts that polygraph exams are not 100 percent accurate, pointing to one study that actually places the accuracy of polygraph exams at 70 percent. *Id.* Additionally, he states that contrary to popular belief, polygraph machines are not "lie detectors," rather,

4. See Tex. Code of Crim. Proc. §§ 62.351 & 62.352.

5. Lilienfeld, Scott, Ph.D. *The Polygraph Test Strikes - and Strikes Out - Again*. Psychology Today, (July 21, 2019). Available at: <https://www.psychologytoday.com/us/blog/the-skeptical-psychologist/200907/the-polygraph-test-strikes-and-strikes-out-again>.

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