

BEFORE THE ILLINOIS TORTURE INQUIRY AND RELIEF COMMISSION

In re:
Claim of Arnold Day

TIRC Claim No. 2011.095-D
(Relates to Cook County Circuit
Court Case 92-CR-5074)

I. DISPOSITION OF CASE

Pursuant to 775 ILCS 40/45(c) and 2 Ill. Adm. Code 3500.385(b), the Commission (TIRC) concludes that, by a preponderance of the evidence, there is sufficient evidence of torture of the claimant, Arnold Day, to merit judicial review. The Commission hereby refers this claim to the Chief Judge of the Circuit Court of Cook County. This decision is based upon the Findings of Fact and Conclusions set forth below, as well as the supporting record attached hereto.

II. EXECUTIVE SUMMARY

Police arrested Arnold Day on February 4, 1992. They found him staying in the basement of a friend's house. They interrogated him for several hours, until he confessed to two murders – the unrelated shooting deaths of Raphael Garcia and Jerrod Erving.

Day alleges that he gave those confessions under duress. Specifically, he claims that Officer Judd Evans kicked him in the back of the head as he was arrested, and that Detective William Foley choked him and threatened to throw him out a window during subsequent questioning at Area 3 after Day was taken into police custody. On this basis, he filed a motion to suppress both of his confessions. That motion was denied. Day was subsequently and separately tried for both murders. Day testified at both murder trials and, at both, testified that his confession had been coerced. A jury acquitted Day of the Garcia murder but a different jury convicted him of the Erving murder in a separate proceeding.

Day filed a complaint with TIRC. To investigate that claim, the Commission reviewed several statements by Day regarding the interrogation. It also interviewed Day about his allegations. The Commission reviewed the transcripts of the murder trial that led to Day's conviction, as well as investigating the circumstances of Day's acquittal of the Garcia murder.

Based on the evidence gathered during the investigation – including the fact that Day was acquitted of the murder of Raphael Garcia despite confessing to that crime during the same session that generated his confession to the Erving murder and the fact that Day's account of the circumstances of his confessions has remained substantively constant for twenty three years – the Commission finds that there is substantial evidence of torture warranting judicial review.

III. FINDINGS OF FACT

A. The Crime and Investigation.

Jerrod Erving was shot to death just after midnight on May 17, 1991.¹ An officer arrived at 927 West 54th Street, and found Erving's body lying across the threshold leading into a three-

¹ Ex. 1 at 1.

story apartment; his feet were outside the building, while his upper body rested inside the building.² The police found two 9 mm casings at the scene, but found no other physical evidence to identify a suspect.³ No fingerprints were recovered from the shell casings,⁴ or on any surfaces at the scene.⁵ A large quantity of blood was present, but no footprints or other possible identifying markers were present.⁶

Officers interviewed the witnesses they identified. Krona Taylor told officers that she was on the street at the time of the shooting, and observed the offenders walking on the sidewalk toward the building.⁷ She stated that she could identify the offenders and supplied the officers with a description.⁸

In February 1992, police interviewed Ralph Watson about the Erving murder. Watson informed police that he and Day were both members of the Blackstone Nation Street Gang.⁹ He stated that several individuals, including both Watson and Day, went to 927 W. 54th Street on May 14 or 15, 1991. While there, Watson observed Day and others approach Jerrod Erving, speaking briefly before Day shot Erving.¹⁰ Watson also informed officers that Day was staying in the basement of a building located at 1825 W. Garfield Blvd.¹¹

Acting on Watson's information, on February 4, 1992, police proceeded to that address, with the hope of arresting Day. Several officers – Detective William Foley and Gang Crimes Specialists Judd Evans, Robert Schaffer, and Officer Bloore¹² – knocked on the door and spoke to the building's primary resident, Day's friend Kwame Tate.¹³ Tate let them in, and they searched the home for Day.¹⁴

Officers found Day in the basement.¹⁵ Officer Evans picked up a bed and found Mr. Day hiding under it.¹⁶ Evans then handcuffed Day. According to Day, Evans also stomped Day in the back of the head.¹⁷ According to Officer Foley, Day stood up and police found a 9 mm bullet under him.¹⁸ Officers completed their search of Tate's home, which took about thirty minutes, then transported Day to Area 3.¹⁹

² *Id.* at 3.

³ *Id.* at 2.

⁴ *People v. Day* (Erving Murder) Trial Tr. at D140-41 (hereinafter "Erving Trial Tr.").

⁵ *Id.* at D151.

⁶ *Id.*

⁷ Ex. 2 at 3.

⁸ *Id.*

⁹ Ex. 2 at 4.

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² Officer Bloore's first name is not apparent from the record.

¹³ Erving Trial Tr. at D155-56; *People v. Day*, Motion to Suppress Hearing, Dec. 29, 1992 at A6.

¹⁴ Erving Trial Tr. at D156.

¹⁵ *Id.* at D158-59.

¹⁶ *Id.*

¹⁷ *People v. Day*, Motion to Suppress Hearing Transcript, Jan. 29, 1993 at B-19 (hereinafter January 1993 Suppression Hearing).

¹⁸ Erving Trial Tr. at D159.

¹⁹ *Id.* at D160.

At Area 3, officers and an assistant state's attorney questioned him about two homicides: the shooting death of Jerrod Erving – the crime for which Day is currently incarcerated – and an unrelated murder of Rafael Garcia.²⁰ After initially denying any knowledge regarding these murders, Day eventually confessed to both.

B. The Trials.

Before he was tried for either murder, Day's counsel filed a motion to suppress the two confessions. As discussed below, at the hearing, Day asserted that his confessions to both murders were obtained under duress, and Day described the abuse that he asserted led him to make the false confessions.²¹ The trial court denied the motion to suppress.

Day was first tried for the murder of Raphael Garcia. The prosecution primarily relied on Day's signed confession. The defense countered with two pieces of evidence.²² First, Day testified that his confession was given under duress, claiming officers coerced him into confessing. According to Day's former defense counsel, this testimony was similar to the testimony given at his suppression hearing, which is described below. Second, the defense offered an alibi – a twelve-year-old girl testified that she was sitting on a porch with Day at the time she heard the gunshot believed to have killed Garcia. On September 10, 1993, the jury acquitted Day of the murder of Raphael Garcia.²³

Day was later tried for the murder of Jerrod Erving. Once again, the confession was the primary evidence offered against Day. Although Ralph Watson's statement to the police is what led them to arrest Day, Watson did not testify; by the time of the trial, Watson had recanted his statement.²⁴ Day again asserted that his confession had been obtained through coercion.²⁵ This time, the jury convicted Day of murder.

C. The Allegations of Torture.

TIRC investigators have located seven recorded instances of Day describing his alleged mistreatment while in police custody: (1) during his testimony in support of his motion to suppress his confessions;²⁶ (2) during his trial for the murder of Jerrod Erving, resulting in a conviction;²⁷ (3) in a sworn affidavit dated May 2004, apparently submitted in support of a challenge to his conviction;²⁸ (4) in a complaint form dated November 3, 2006 submitted to IPRA;²⁹ (5) during a deposition given in a civil suit captioned *Hill vs. Chicago*;³⁰ (6) in the TIRC

²⁰ January 1993 Suppression Hearing at B-5.

²¹ *Id.* at B-25-27.

²² Investigators have tried, unsuccessfully, to obtain the full transcript from the Garcia murder trial. Investigators spoke to Hon. Stuart P. Katz (currently an Associate Judge assigned to the Juvenile Justice Division), who served as Day's defense counsel for both murder trials. Judge Katz described the evidence presented in Day's defense during the Garcia trial.

²³ Ex. 3.

²⁴ Ex. 4.

²⁵ Erving Trial Tr. at E-85.

²⁶ January 1993 Suppression Hearing at B-3.

²⁷ Erving Trial Tr. at E-50.

²⁸ Ex. 5.

²⁹ Ex. 15.

form Day submitted to initiate his current claim;³¹ and (7) during an interview with TIRC investigators.³² Day also raised his claim that he was tortured in a Freedom of Information Act suit he brought against the City of Chicago, in which he successfully obtained documents pertaining to his arrest.³³

1. *Day's testimony at his suppression hearing, January 29, 1993.*

Before his trials for the murders of Jerrod Erving and Raphael Garcia, Day filed a motion to suppress the confessions he gave to both murders during his interrogation. At the hearing on that motion, Day testified that he was arrested while staying in the basement of Kwame Tate's home.³⁴ According to his testimony, officers arrested him at around 10:00 in the morning.³⁵ Day said that he was found hiding under a bed; the officer handcuffed him and then stomped him on the back of the head.³⁶ After handcuffing Day, officers spent 20 to 30 minutes searching the home.³⁷

After completing their search, officers transported Day to Area 3. They eventually took him to an interrogation room and handcuffed him to a steel ring attached to the wall.³⁸ Detectives Foley, Boudreau, and Evans each questioned Day, although not at the same time.³⁹ At some point, Day was alone with Boudreau, and Foley re-entered. Foley yelled at Day, then grabbed Day by the collar and pushed him against the wall, and threatened to throw him out the window.⁴⁰ Boudreau was present but did nothing.⁴¹ Day then agreed to confess to the murders of Garcia and Erving. A "couple of hours later," an assistant state's attorney wrote down his confession.⁴² Day stated that the officers removed his handcuffs while he confessed.⁴³ He testified that the initial confession contained some mistakes; they were "minor things," such as misspelled words.⁴⁴ Day stated that the officers did not tell him what to say during the confession.⁴⁵ According to Day, he had finished giving his confession by sometime in midafternoon.⁴⁶

³⁰ Deposition of Arnold Day, *Hill v. Chicago*, N.D. Ill. No. 06 C 6772, Mar. 4, 2008 at 92. (Hereinafter "Day Dep.").

³¹ Ex. 6.

³² As noted above, TIRC investigators have not been able to obtain a copy of Day's testimony at the Garcia murder trial, but were told by Day's defense counsel, Judge Katz, that Day testified at that trial that he was kicked, choked and threatened.

³³ *Day v. Chicago*, 388 Ill. App. 3d 70 (1st Dist. 2009).

³⁴ January 1993 Suppression Hearing at B-17-18.

³⁵ *Id.* at B-41.

³⁶ *Id.* at B-19.

³⁷ *Id.*

³⁸ *Id.* at B-21.

³⁹ *Id.* at B-24.

⁴⁰ *Id.* at B-26.

⁴¹ *Id.* at B-25-26.

⁴² *Id.* at B-26, B-31.

⁴³ *Id.* at B-36.

⁴⁴ *Id.* at B-38.

⁴⁵ *Id.* at B-37-38.

⁴⁶ *Id.* at B-41.

Day also stated that during the interrogation, he was given three or four cookies and two sodas.⁴⁷

2. *Day's testimony during the Erving murder trial, June 22, 1994.*⁴⁸

During the Erving murder trial, Day gave a version of his alleged torture that is largely (but not completely) consistent with his suppression hearing. He testified that he was staying in the basement of Kwame Tate's house, and that officers found him under a bed.⁴⁹ He testified that he was placed under arrest around 9:30 in the morning.⁵⁰ According to Day, after Evans found him under the bed, Evans kicked him in the back of the head before handcuffed him.⁵¹ Officers then led him upstairs, where they were completing a search of the home, before transporting him to Area 3.

When he arrived at Area 3, he was placed in an interrogation room, handcuffed to a steel ring on the wall.⁵² After a short time alone, Detectives Evans and Foley entered the room, telling Day that they knew he was responsible for Erving's murder.⁵³ Day testified that the two officers repeatedly entered and left, questioning Day about Erving's murder.⁵⁴ Boudreau also questioned Day at some points. Eventually, an Assistant State's Attorney questioned Day, who continued to deny any knowledge of the Erving murder. Boudreau entered again, and eventually the ASA left, with Foley then entering. When Foley came back in, he yelled at Day, slammed his hand on the desk, then grabbed him by the neck and threatened to throw him out the window.⁵⁵

After that threat, Day agreed to cooperate. The ASA returned to the room, and wrote down Day's confession, which Day then signed. According to Day, he used information he picked up during his interrogation, to dictate the confession.⁵⁶ The initial draft of the confession had some mistakes, which the ASA corrected, with Day initialing the corrections.⁵⁷ During cross-examination, Day went so far as to say that one of the mistakes – the ASA changing a statement that Day “went into the building” to a statement that Day “walked up to the front door” – was “made on purpose to make it look” as though Day had made the change.⁵⁸ On cross examination, Day denied that the police told him what to say to the ASA, but that they “put[] words in[to his] mouth.”⁵⁹ On redirect, Day clarified that none of the officers told him “word for

⁴⁷ *Id.* at B-31.

⁴⁸ After his suppression hearing but before the Erving trial, Day testified at the Garcia trial, which took place from September 8 to September 10, 1993. (*See Ex. 3.*) Investigators have not been able to locate the transcript of Day's testimony. Day's former counsel, Judge Katz, stated that his testimony during the Garcia trial was generally consistent with his testimony at the suppression hearing and Erving trial.

⁴⁹ Erving Trial Tr. at E-74.

⁵⁰ *Id.* at E-146.

⁵¹ *Id.* at E-74.

⁵² *Id.* at E-77.

⁵³ *Id.* at E-78.

⁵⁴ At the suppression hearing, Day discussed the officers' questions about both the Garcia and Erving murders. During the Erving murder trial, he only discussed the officers' questions regarding Erving's murder.

⁵⁵ Erving Trial Tr. at E-85.

⁵⁶ *Id.* at E-87.

⁵⁷ *Id.* at E-89.

⁵⁸ *Id.* at E-133.

⁵⁹ *Id.* at E-138.

word” what to say to the ASA.⁶⁰ The ASA finished taking his statement, according to Day, around 6:30 in the evening.⁶¹

3. *Day’s sworn affidavit, May 7, 2004.*

Day submitted a signed and notarized affidavit dated May 7, 2004.⁶² It appears that it was prepared for use in support of Day’s efforts to overturn his conviction. This affidavit tells a largely similar version of certain key points of his story. Day states that he was staying with his friend Kwame Tate on February 4, 1992, when police arrested him.⁶³ He avers that upon his arrest “at about 8:30 a.m., [he] was asleep in the basement” when officers woke him up by banging on the door.⁶⁴ He hid under the bed before officers entered the room; Detective Evans flipped the bed and handcuffed him.⁶⁵ Day also states that Evans stomped him in the back of the head before applying handcuffs.⁶⁶

Day affirms that he was handcuffed to a steel ring on the wall of the interrogation room, and that several officers questioned him about his involvement in the Erving and Garcia murders. Day states that at one point during the interrogation, “the ASA left the room, [and] Detective Foley came in and grabbed me by the neck and started to choke me while Detective Boudreau watched. Detective Foley choked me and threatened that if I did not cooperate he would throw me out the window.”⁶⁷ Day then gave his confession, a statement Day states he made “8 to 9 hours after [his] arrest.”⁶⁸

Day also states that he was not given food or water during the 8 or 9 hours he was detained, and that he was not permitted to use the restroom until he agreed to cooperate with officers.⁶⁹

4. *Day’s IPRA complaint, dated November 3, 2006.*

In late 2006, Day submitted a complaint with IPRA, accusing officers Kenneth Boudreau and William Foley of misconduct. Day wrote that upon his arrest, he was stomped in the back of the head and then placed in handcuffs, although he does not identify the officer who stomped him.⁷⁰ Day also wrote that he was questioned about Erving’s murder by Boudreau, Foley, and Evans, and also spoke to the ASA.⁷¹ Day denied any knowledge about the murder. According to Day, the ASA got upset and left the room. Foley then came into the room and “grabbed [Day]

⁶⁰ *Id.* at E-148.

⁶¹ *Id.* at E-145-46.

⁶² Ex. 5.

⁶³ *Id.* ¶ 2.

⁶⁴ *Id.* ¶ 3.

⁶⁵ *Id.* ¶¶ 4-5.

⁶⁶ *Id.* ¶ 6.

⁶⁷ *Id.* ¶ 2.

⁶⁸ *Id.* ¶ 21.

⁶⁹ *Id.* ¶¶ 24-25.

⁷⁰ Ex. 15 at 57.

⁷¹ *Id.* at 58.

by the collar, began choking [him] against the wall while threatening to throw [him] out the window.”⁷² Day also wrote that Boudreau was in the room but took no action.⁷³

5. *Day’s testimony during his Hill v. Chicago deposition, March 4, 2008.*

Day sat for a deposition in *Hill v. Chicago*, a civil suit brought against several Chicago police officers. During that deposition, he recounted the arrest and interrogation that led to his two confessions. He stated that he was staying with his friend Kwame Tate when the police arrived to arrest him.⁷⁴ His arrest took place around 8 or 8:30.⁷⁵ As he had previously, he testified that he was lying under a bed when officers found him in the basement.⁷⁶ Officer Evans lifted the bed, saw Day, and handcuffed him.⁷⁷ Day also stated that before Evans applied the handcuffs, he stomped Day in the back of the head.⁷⁸

As before, he testified that when he arrived at the police station, he was taken to an interrogation room and handcuffed to a ring on the wall.⁷⁹ Initially, Evans and Boudreau questioned Day about both murders.⁸⁰ After some time, ASA Danielian also questioned him.⁸¹ The officers continued to rotate during the interrogation. Eventually, the ASA left, leaving Day briefly alone with Boudreau. Foley then entered, grabbed Day by the neck and started choking him.⁸² Day again stated that Foley threatened to throw him out the window.⁸³ Day then agreed to cooperate. Officers removed his handcuffs while he confessed to the two murders.⁸⁴

During the deposition, Day testified that he was “coached” by Boudreau as to what to say during the confessions; *i.e.*, that “Boudreau would tell [Day] what to say,” Day would say it, and the ASA would write it down.⁸⁵ Once again, Day testified that there were corrections made to the confessions, and Day initialed those changes.⁸⁶

Day testified that officers offered him Oreo cookies and a soda.⁸⁷

6. *Day’s TIRC form, October 19, 2011.*

On October 19, 2011, TIRC received a claim form submitted by attorney Tara Thompson on behalf of her client, Arnold Day.⁸⁸ The claim form asserts that “Mr. Day was shoved against

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Day Dep. at 92.

⁷⁵ *Id.*

⁷⁶ *Id.* at 93.

⁷⁷ *Id.*

⁷⁸ *Id.* at 96-97.

⁷⁹ *Id.* at 102.

⁸⁰ *Id.* at 106.

⁸¹ *Id.* at 109.

⁸² *Id.* at 122.

⁸³ *Id.* at 123.

⁸⁴ *Id.* at 125.

⁸⁵ *Id.* at 127.

⁸⁶ *Id.* at 129-30.

⁸⁷ *Id.* at 135.

⁸⁸ Ex. 6.

the wall of the interrogation room and placed in a choke hold. A gun was placed against his head and he was threatened with being thrown out of the window of the third-floor interview room. Detectives Foley and Boudreau continued to use similar abusive tactics for hours before Mr. Day was coerced into giving a false statement.”⁸⁹

7. *Day’s interview with TIRC investigators, June 16, 2016.*

Day’s statement to TIRC investigators was broadly consistent with his prior statements. As before, he stated that he was kicked in the head as he was handcuffed by Evans.⁹⁰ He also stated that he was being questioned by Boudreau and the ASA, and the ASA left after Day denied involvement in any murders. Foley entered soon thereafter, quickly approached him and immediately began choking Day in Boudreau’s presence. Day also claimed that he was handcuffed while he gave his confession. When asked whether officers coached his confessions, he stated that they did not, but that he drew from their questions what they wanted the confession to say. Unlike his suppression hearing, where he stated he was given some cookies, during the interview he denied that he was ever given any food.

D. Testimony Regarding the Alleged Torture by Detectives Boudreau and Foley.

Both Detective Boudreau and Detective Foley have denied that Day was mistreated during the interrogation that led to his confessions to the Garcia and Erving murders. Detective Foley testified at the hearing on Day’s motion to suppress both confessions.⁹¹ Foley denied ever threatening Foley, striking him, or choking him.⁹² He also testified at the Erving murder trial, and similarly denied ever striking, choking, or threatening Day.⁹³ Boudreau testified at both the suppression hearing and both trials, but did not testify regarding Foley’s alleged actions.

In 2006, IPRA interviewed Boudreau in connection with a complaint to IPRA submitted by Day concerning Officer Evans – who Day claimed kicked him in the head as he was handcuffed – and Detective Foley. IPRA investigated both claims.⁹⁴ According to IPRA, Detective Boudreau testified that he did not see any officer take the actions Day describes. IPRA concluded that “although Mr. Day was acquitted of Mr. Garcia’s murder, he signed confessions to both crimes and was found guilty in Mr. Erving’s death.”⁹⁵ Accordingly, IPRA concluded that there was insufficient evidence to support Day’s claims against Boudreau and Foley.⁹⁶ As to Officer Evans, the IPRA report asserts that he was “not further identified.”⁹⁷ The IPRA report,

⁸⁹ *Id.* at 1.

⁹⁰ During the interview, Day was not explicit as to whether the kick occurred before or after he was handcuffed. As explained more fully below, when questioned about this portion of his story specifically, he admitted his memory of the actual arrest was a little blurry, and stated that the kick and the handcuffing took place at roughly the same time.

⁹¹ Suppression Hearing at B-4.

⁹² *Id.*

⁹³ Erving Trial Tr. at D154.

⁹⁴ Ex. 15 at 33.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 18.

however, attaches a copy of arrest report, which identifies officer “Evans,” with his star number.⁹⁸

In November 2008, Boudreau also testified at a deposition in *Hill v. Chicago*.⁹⁹ He acknowledged interviewing Day as part of his investigation into the Erving murder, but denied using any physical force during the interrogation.¹⁰⁰

E. Pattern and Practice Evidence for Detectives Boudreau and Foley.

There exists, for both Detective Boudreau and Detective Foley, a substantial body of evidence suggesting that the officers may have engaged in systematic conduct aimed at obtaining confessions through coercion. This evidence includes references to such conduct in published Illinois judicial opinions, media reports of overturned convictions, and city settlements with accusers.

Numerous individuals have claimed that Detective Boudreau used physical force and other improper interrogation measures to obtain confessions from suspects. Detective Boudreau has been specifically identified in at least six published Illinois opinions describing abuse allegedly perpetrated by Boudreau himself or officers working with him or under his supervision.¹⁰¹ During a Special State’s Attorney grand jury investigation in 2005, Boudreau asserted his Fifth Amendment right in response to any questions pertaining to his employment with the Chicago Police Department.¹⁰²

A December 2001 article in the Chicago Tribune stated that Boudreau “has helped to get confessions from more than a dozen defendants in murder cases in which charges were dropped or the defendant was acquitted at trial.”¹⁰³ The same article notes that Boudreau also “obtained a confession from a man who, records show, was in jail when the murder occurred.”¹⁰⁴

Detective Foley has also been the subject of many complaints of police misconduct.¹⁰⁵ Investigators have identified seven published Illinois cases detailing allegations of abuse leveled against Detective Foley or officers working with Detective Foley.¹⁰⁶ In 2013, the City of Chicago paid in excess of \$6 million dollars to settle a suit brought against several officers, including William Foley.¹⁰⁷ In addition, numerous criminal defendants have lodged formal complaints alleging that Detective Foley engaged in misconduct.¹⁰⁸

⁹⁸ Ex. 15 at 73.

⁹⁹ Deposition of Kenneth Boudreau, *Hill v. Chicago*, N.D. Ill. No. 06 C 6772, Nov. 20, 2008 (hereinafter Boudreau Dep.)

¹⁰⁰ *Id.* at 91.

¹⁰¹ See Appendix A.

¹⁰² Ex. 8.

¹⁰³ *Veteran detective’s murder cases unravel*, Chicago Tribune, December 17, 2001 (attached as Ex. 9).

¹⁰⁴ *Id.*

¹⁰⁵ Detective Foley passed away in 2004. See Ex. 10.

¹⁰⁶ See Appendix B for a list of such cases and description of relevant allegations.

¹⁰⁷ Ex. 11.

¹⁰⁸ Ex. 12.

IV. STANDARD OF PROOF

Section 40(d) of the Illinois Torture Inquiry and Relief Act charges the Commission with conducting inquiries into claims of torture.¹⁰⁹ If five or more Commissioners conclude by a preponderance of the evidence that there is sufficient evidence of torture to merit judicial review, the case shall be referred to the Chief Judge of the Circuit Court of Cook County.¹¹⁰

The Commission's Administrative Rules provide that the Commission may find that there is significant evidence of torture that is sufficient for it to conclude that a claim merits judicial review without the Commission also finding that it is more likely than not that any particular fact occurred.¹¹¹ If the Commission does find that it is more likely than not that one or more particular facts occurred, it shall so state that in its decision.¹¹²

V. WEIGHING THE EVIDENCE

A. Mr. Day's Acquittal of the Murder of Rafael Garcia.

As noted above, Day confessed to two murders during his questioning by Detectives Foley and Boudreau – the murder of Rafael Garcia, and the murder of Jerrod Erving. Day was convicted only of the murder of Erving. Although he was tried for the murder of Garcia, the jury acquitted him of the charge. The prosecution offered the confession against Day, and he responded by recounting the same allegations reported to the Commission; namely, that Foley had choked him and threatened to throw him out the window, all while Boudreau watched.¹¹³

Day also offered an alibi for the Garcia murder. As described above, a twelve-year-old girl testified that she was with Day on a porch when she heard the gunshot that killed Garcia. If her testimony is credited – and the jury, which acquitted Day, appears to have considered her at least sufficiently credible to eliminate the possibility that the state could prove Day's guilt beyond a reasonable doubt – then Day could not have committed the murder. Moreover, the fact that Day may not have been at the scene of the Garcia murder calls into doubt circumstances leading to his confession. If Day did not murder Garcia, then there is little reason to believe he would have confessed to that crime – a confession he gave concurrently with his confession of the Erving murder for which Day is now incarcerated – absent coercion.

Given the outcome of the Garcia trial, there is credible evidence suggesting that Day's confession to that murder was not accurate. This gives rise to credible evidence that Day was coerced into confessing to the Garcia murder. Because Day confessed to the Erving and Garcia murders during the same potentially improper interrogation, there is credible evidence suggesting that Day's confession to the Erving murder was obtained through physical coercion.

¹⁰⁹ 775 ILCS 40/40(d).

¹¹⁰ 775 ILCS 40/45(c).

¹¹¹ 2 Ill. Admin. Code 3500.385(b)(1).

¹¹² 2 Ill. Admin. Code 3500.385(b)(2).

¹¹³ Again, the Commission has not obtained a full copy of the transcript of the Garcia murder trial, and does not have a transcript of Day's testimony. But Judge Katz, who represented Day during both trials, has confirmed that Day's testimony was substantially similar during each trial.

B. Inconsistencies Between the Confession and Physical Evidence.

There are notable inconsistencies between Day's confession and the physical evidence present at the scene of Jerrod Erving's murder. According to the police report concerning Erving's death, the decedent's body was found lying across the front-door threshold to the apartment building. His feet were outside the building, and the rest of his body was inside the first-floor hallway of the building.

Corrections made to Day's confession may suggest that Day did not know critical facts about the Erving murder. As initially written, Day's confession reflects that Day "walked into the front door" before shooting the victim and then "ran out of the building."¹¹⁴ After the correction, the confession reads that Day "walked ~~into~~ up to the front door" before the shooting, and then ran "~~out of~~ away from the building."¹¹⁵ These changes are significant; before the changes were made, Day's confession indicated that he was physically inside the apartment building at the time of the shooting, which would make it impossible for him to shoot Erving in the front, leaving him on his back across the threshold to the building. Changing the confession such that Day admitted to standing in front of the building at the time of the shooting, therefore, is necessary for his confession to be consistent with the physical evidence at the scene.

As noted above, former prosecutors have stated to TIRC investigators that they would intentionally insert errors into transcribed confessions because the fact that the defendant corrected those errors would tend to undermine any subsequent claim that the confession was coerced. However, such errors typically concerned minor details, such as the defendant's age. Here, Day's age is among the corrections made to the confession.¹¹⁶ But the corrections described above go to the substance of the confession; without these corrections, the confession would be inconsistent with the physical evidence at the scene. The fact that such substantive corrections were required to conform Day's confession to the physical evidence at the scene provides some support to Day's contention that he was not at the scene.

C. Eyewitnesses Have Recanted.

Ralph Watson gave a statement to police implicating Day in the murder of Jerrod Erving.¹¹⁷ That statement led police to arrest Day, and ultimately charge him for Erving's murder. By the time of Day's trial, however, Watson had recanted his statement.¹¹⁸ He did not testify at Day's murder trial; the jury was not provided with an explanation as to why officers arrested Day. Instead, Boudreau testified that he spoke to Watson on January 20, 1992, and then returned Watson to a holding cell, after which officers proceeded to arrest Day.¹¹⁹

In support of Day's efforts to overturn his conviction, Watson submitted an affidavit. In it, he states that Boudreau threatened to charge Watson with additional crimes unless Watson implicated Day in Erving's murder. Watson states that he eventually agreed to Boudreau's

¹¹⁴ Ex. 13 at III.

¹¹⁵ *Id.* Strikethrough text indicates handmade deletions, bold and underlined text indicates handwritten additions.

¹¹⁶ *Id.* at 1.

¹¹⁷ Ex. 2 at 4.

¹¹⁸ *See* Ex. 4 at 2.

¹¹⁹ Erving Trial Tr. at D168-70.

demand, and provided the requested statement. By the time of the trial, he was no longer willing to testify.¹²⁰

Krona Taylor, an eyewitness who saw offenders approach Erving shortly before he was shot, also implicated Day during the police investigation.¹²¹ Like Watson, she has since recanted her statement. In a January 2007 affidavit, she states that officers detained her for hours demanding information regarding the Erving murder, and that she eventually provided them with names to secure her own release.¹²² Day's name was among those she gave to officers. She now states that she knows Day and that he was not one of the individuals she saw approach Erving shortly before his murder.¹²³ Taylor was subpoenaed to testify at Day's trial; she states that she arrived at the courthouse a day late, but would have testified that she did not see Day at the scene of Erving's murder.¹²⁴

Because neither Watson nor Taylor testified at the Erving murder trial, and because of the frequency of recantations in gang cases, these recantations do not carry great weight in undermining the evidence supporting Day's conviction. Moreover, the timing of these affidavits and the fact that both witnesses know Day personally weighs against the credibility of these recantations. However, the fact that both witnesses who provided officers with information leading to Day's arrest eventually recanted their stories does provide limited support for Day's contention that he is not responsible for Erving's murder.

D. Consistency of Day's Torture Claims.

As noted above, TIRC investigators have located seven instances in which Day described his alleged mistreatment: (1) during his testimony in support of his motion to suppress his confessions; (2) during his trial for the murder of Jerrod Erving, resulting in a conviction; (3) in a sworn affidavit dated May 2004, apparently submitted in support of a challenge to his conviction; (4) in a complaint form dated November 3, 2006 submitted to IPRA; (5) during a deposition given in a civil suit captioned *Hill vs. Chicago*; (6) in the TIRC form Day submitted to initiate his current claim; and (7) during an interview with TIRC investigators. Day also raised his claim that he was tortured in a Freedom of Information Act suit he brought against the City of Chicago, in which he successfully obtained documents pertaining to his arrest.

At the outset, the Commission notes that Day has been claiming since 1993 that his confession was coerced. He filed a motion to suppress his confession, and testified in support of that motion. He has also maintained his story for more than twenty years.

In addition, Day's story has been broadly consistent for those twenty years. Each time he has told his story, Day has stated that Evans kicked him in the back of the head while arresting him, that he was handcuffed to a steel ring on the wall in the interrogation room, that he and Boudreau were alone together before Foley entered, and that Foley grabbed him by the neck and threatened to throw him out the window.

¹²⁰ See Ex. 4.

¹²¹ Ex. 14.

¹²² *Id.* ¶ 3.

¹²³ *Id.* ¶ 19.

¹²⁴ *Id.* ¶¶ 29-30.

Day's stories contain some inconsistencies, however. For example, while Day has consistently stated that Evans kicked him in the head, Day's accounts have varied somewhat regarding the timing of that kick. During his motion to suppress testimony, he stated that Evans applied the handcuffs, *and then* kicked Day.¹²⁵ During his Erving trial testimony, his complaint form submitted to IPRA, his *Hill v. Chicago* deposition, and his affidavit however, Day stated that Evans kicked him first, before he applied the handcuffs.¹²⁶ During his interview with TIRC investigators, Day did not have an explanation for the apparent inconsistency, except to say that the entire event – the arrest and the kick – happened nearly simultaneously, and that it could have been true that the kick happened either before or after the handcuffs. He was adamant, however, that the kick did occur.

Day has been inconsistent as to when he was arrested. At this suppression hearing, he testified that he was arrested at approximately 10:00.¹²⁷ At the Erving trial, he testified that he was arrested at 9:30.¹²⁸ His affidavit states that he was arrested at 8:30.¹²⁹ And his deposition in the *Hill* case states that he was arrested between 8:00 and 8:30.¹³⁰ This distinction may be material, as the earlier Day was arrested, the longer he would have been interrogated before confessing, and therefore Day may have perceived an advantage by stating that his arrest was earlier in the day. Alternatively, Day's memory may have simply gradually faded over 20 years.

Another inconsistency concerns whether Day was given food during his interrogation. At his suppression hearing¹³¹ and his deposition in the *Hill* case¹³², Day stated that officers offered him cookies, but in his affidavit¹³³ and during his interview with TIRC investigators, Day denied ever being offered food. (Day did not discuss whether or not he received food during his trial testimony or in his IPRA complaint form.) During the TIRC interview, Day could not offer an explanation for the discrepancy, but insisted that he did not receive food.

Day has further been inconsistent as to whether he was handcuffed while giving his confession to the ASA. During his suppression hearing testimony, Day stated that officers removed his handcuffs while he provided his confession.¹³⁴ During his TIRC interview, however, he stated that he remained handcuffed during his confession. Again, Day did not offer an explanation for the discrepancy.

During his *Hill* deposition, Day testified that officers "coached" him on the content of his confession.¹³⁵ In his other statements and his affidavit, Day stated that the officers did not coach him.¹³⁶ During the TIRC interview, Day again stated that he was not coached, and that he gleaned the answers officers wanted from the questions posed during the interrogation.

¹²⁵ January 1993 Suppression Hearing at B-19.

¹²⁶ Erving Trial Tr. at E-74; Ex. 15 at 57; Ex. 5 ¶ 6; Day Dep. at 96-97

¹²⁷ January 1993 Suppression Hearing at B-41.

¹²⁸ Erving Trial Tr. at E-146.

¹²⁹ Ex. 5 ¶ 3.

¹³⁰ Day Dep. at 92.

¹³¹ January 1993 Suppression Hearing at B-31.

¹³² Day Dep. at 135.

¹³³ Ex. 5 ¶¶ 24-25.

¹³⁴ January 1993 Suppression Hearing at B-36.

¹³⁵ Day Dep. at 127.

¹³⁶ January 1993 Suppression Hearing at B-37-38; Erving Trial Tr. at E-148; Ex. 5 ¶ 20; Ex. 15 at 58.

Additionally, during his interview with TIRC investigators, Day stated that Foley began choking him immediately after entering the room, while during his suppression hearing and trial testimony, Day stated that Foley questioned him before choking him.¹³⁷

Finally, on the form his attorney submitted to TIRC, Foley is accused of placing a gun against Day's temple while threatening him.¹³⁸ TIRC has not identified any other instance of Day claiming Foley threatened him with a firearm. This inconsistency may be explained by the fact that the form was submitted by his attorney, rather than Day himself. Asked about the basis of the claim, the attorney who submitted the form, Tara Thompson, pointed to Boudreau's suppression hearing testimony in which Day's attorney asked Boudreau if Foley had put a gun to Day's head, and Foley's testimony, during which Day's attorney asked Foley if he had threatened to blow Day's brains out.¹³⁹ Day himself was not asked about, and did not volunteer, such an allegation, nor has he raised it in other testimony or affidavits. Citing attorney-client privilege, Thompson declined to divulge whether she asked Day about the gun allegation.¹⁴⁰ TIRC asked Katz about the gun allegation, but he did not have a clear memory of it.

In the Commission's view, while these inconsistencies may represent unreliability on Day's part, or an attempt to "gild the lily," the key elements of Day's allegations have remained consistent. Day's interview with TIRC investigators – which contains most of these inconsistencies – took place more than twenty years after the interrogation. The passage of time may explain the relatively minor differences in Day's stories. Weighed against the other evidence available to the Commission – most notably Day's acquittal in the Garcia case – Day's testimony is sufficiently credible to provide evidence in support of his request for an evidentiary hearing.

E. The Commission's Findings Regarding Mr. Day's Co-Defendant, Anthony Jakes.

Prosecutors charged Anthony Jakes as an accomplice to the Garcia murder, claiming that Jakes served as a lookout during the murder. Jakes confessed to serving as the lookout and was convicted by a jury for that crime.

Since his conviction, however, Jakes has maintained that he confessed due to police coercion. Jakes sought relief from this Commission and, after investigating his claims, the Commission found credible evidence of coercion and recommended that the case be evaluated through a judicial inquiry.¹⁴¹ Significantly, the Jakes case involves one of the same officers – Kenneth Boudreau – and similar allegations of abuse. Jakes claimed Detective Michael Kill slapped, punched and beat Jakes while Boudreau watched. Jakes also alleged that Kill

¹³⁷ January 1993 Suppression Hearing at B-26; Erving Trial Tr. at E-85.

¹³⁸ Ex. 6.

¹³⁹ See Boudreau December 29, 1992, suppression hearing testimony at A-23; Foley January 29, 1993 suppression hearing testimony at B-7.

¹⁴⁰ Ex. 16, "Memo RE contact w TARA THOMPSON on 12 21 2015.pdf".

¹⁴¹ *In re Anthony Jakes*, TIRC Claim No. 2011.035-J, ¶ 3 (July 25, 2013, as amended March 24, 2014).

threatened to throw [Jakes] out the window, and Kill stated that he was close to the Latin Kings gang and [Jake's] family would be 'jumped on' by the Kings if [Jakes] refused to talk."¹⁴²

Day has stated on several occasions that while Boudreau was in the room, Foley grabbed Day by the neck, choked him, and threatened to throw him out a window.¹⁴³ The physical assault and, in particular, the threat to be thrown from the window, all while Boudreau failed to intervene, is consistent with how Jakes described Boudreau's actions.

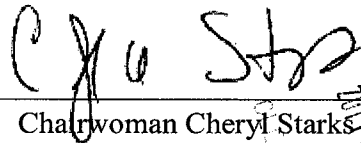
F. Credibility of the Arresting and Interrogating Officers.

Although Detectives Foley and Boudreau have denied that the incidents Day describes ever occurred, as noted above, there is pattern and practice evidence suggesting that both officers may have engaged in abusive conduct during police interrogations. Moreover, given that a jury acquitted Day of the murder of Raphael Garcia, despite a signed confession to that crime, it is reasonable to conclude that the jury did not credit testimony by officers contradicting Day's alleged mistreatment. In addition, while Day's description of the alleged torture has not been completely consistent, he asserted that his confession was coerced in a suppression hearing before his first trial, and has maintained substantially similar allegations for more than two decades. Finally, the Commission previously recommended a judicial inquiry into Anthony Jakes' claims; like Day's claims, Jakes' claims were contradicted by Detective Boudreau. Accordingly, the Commission finds that the officers' testimony is not sufficient to undermine the evidence suggesting that torture may have occurred.

VI. CONCLUSION

Day has consistently alleged that his confession to the murder of Jerrod Erving was obtained through coercion over multiple retellings spanning two decades. Moreover, a jury acquitted Day of the murder of Raphael Garcia – a murder for which Day had an alibi – despite a confession obtained during the same interview that yielded his confession to the Erving murder. This evidence, as well as the additional evidence described above, provides sufficient credible evidence of torture to merit judicial review under the TIRC Act.

Date: January 18, 2017


Chairwoman Cheryl Starks

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¹⁴² *Id.*

¹⁴³ January 1993 Suppression Hearing at B-25:22 – B-26:14.