

Transcript_Day 1 - 12.20.15

1 CRIMINAL DISTRICT COURT

2 FOR THE PARISH OF ORLEANS

3 STATE OF LOUISIANA

4

5

6 STATE OF LOUISIANA CASE NO. 520-385

7 VERSUS

8 CORIN WROTEN, ET AL

9

10

11

12 Transcript of the Court

13 Proceedings held on the 20th day of

14 November, 2015, in the above-entitled

15 matter, before the HONORABLE ARTHUR L.

16 HUNTER, JR., Judge presiding.

17

18 APPEARANCES:

19

20 ROBERT FERRIER, ESQ.,

21 Assistant District Attorney,

22 Parish of Orleans

23 JEE PARK, ESQ.,

24 Attorney for Corin Wroten, et al

25 COLIN REINGOLD, ESQ.,

26 Attorney for Corin Wroten, et al

27

28

29

30

31

32 REPORTED BY: SANDRA T. MINUTILLO, CCR
Page 1

Transcript_Day 1 - 12.20.15

1

♀ 1 INDEX OF WITNESSES:

2

3

4

page

5

6

7 JAMES DIXON, JR.....8

8 DERWYN BUNTON.....32

9 ELLEN YAROSHEFSKY.....54

10 ROBERT BORUCHOWITZ.....103

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

Transcript_Day 1 - 12.20.15

31

32

2

♀ 1

MS. PARK:

2

So, Judge, the remedy we're

3

seeking from this Court following

4

this hearing is for this Court to

5

stop appointing and assigning cases

6

to the Orleans Public Defenders

7

moving forward. We ask that we be

8

permitted to present our legal

9

argument in support of that remedy in

10

a posthearing memorandum of law.

11

We're not asking to withdraw

12

from cases in which public defenders

13

are currently providing

14

representation. We're asking that

15

the Court do not appoint us to new

16

prospective cases.

17

THE COURT:

18

What about you not accepting

19

cases?

20

MS. PARK:

21

That as well, your Honor. Cases

22

that are headed toward Section "K."

23

The reason being, your Honor, as

24

indicated, we would like an

25

opportunity to brief this fully in a

26

posthearing memorandum of law. But

27

just briefly, your Honor, our

28

attorneys are laboring under

Transcript_Day 1 - 12.20.15

29 excessive case law.

30 THE COURT:

31 Jee, I don't think I heard you
32 correctly or maybe I'm missing

3

♀ 1 something. My question was what
2 about you guys not accepting the
3 cases.

4 MS. PARK:

5 Not accepting cases?

6 THE COURT:

7 Yes. If you believe that you
8 can't provide constitutional
9 representation, why even accept
10 cases?

11 MS. PARK:

12 Judge, we're going to ask you to
13 not appoint us to cases moving
14 forward. We're going to ask for a
15 prospective relief and ask you not to
16 appoint us or assign us to any cases.

17 THE COURT:

18 But that wouldn't be an issue if
19 you stopped accepting cases because
20 it would not come to me.

21 MS. PARK:

22 Judge, it is the same thing. It
23 is the same thing.

24 THE COURT:

25 It's the same thing?

26 MS. PARK:

Transcript_Day 1 - 12.20.15

27 Right. We believe it is the
28 same thing.

29 THE COURT:

30 I know this is being litigated
31 in section "K," but is section "K"
32 the only section to deal with this

4

♀ 1 issue?

2 MS. PARK:

3 You know, the caseload problem
4 is not limited to section "K."
5 Obviously our attorneys practice in
6 every single section of this
7 courthouse and so we will be seeking
8 this remedy in the other courtrooms.

9 THE COURT:

10 In Criminal District Court.

11 MS. PARK:

12 In Criminal District Court.

13 THE COURT:

14 At Tulane and Broad, 2700 Tulane
15 Avenue.

16 MS. PARK:

17 That's where we are currently
18 standing.

19 THE COURT:

20 All right. Let's go.

21 MS. PARK:

22 If I could just briefly say, the
23 reason why we're asking for this
24 prospective relief is because our

Transcript_Day 1 - 12.20.15

25 attorneys are currently laboring
26 under an excessive caseload. One
27 attorney is handling the caseload of
28 two to three attorneys and we do not
29 have enough attorneys and
30 investigators to provide the
31 constitutional representation that
32 our clients, the poor individuals who

5

♀ 1 are charged with criminal offenses in
2 New Orleans, deserve.

3 we strongly believe that the
4 poor in this city deserve better and
5 we want to provide them with adequate
6 effective constitutional
7 representation. But OPD at this
8 moment is too under-staffed and too
9 under-resourced to do that.

10 Our attorneys and our
11 investigators work extremely long
12 hours. They work weekends. They
13 work evenings. They work early
14 mornings. They're not shirking their
15 responsibilities. There just isn't
16 enough time in the day to adequately
17 meet the demands of an excessively
18 huge caseload and workload.

19 The basic fact is we need more
20 attorneys. We need more
21 investigators and, until we get those
22 resources, we cannot take on any new

Transcript_Day 1 - 12.20.15

23 cases. So with that, your Honor,
24 we're actually ready to proceed and
25 we're ready to call our first
26 witness.

27 THE COURT:

28 Depending on my ruling, the
29 effective date of you not accepting
30 cases will be the date that I issue a
31 ruling?

32 MS. PARK:

6

♀ 1 That day or the next day.
2 Obviously, you can fashion your
3 ruling however you would like, your
4 Honor. You can say a week's time. I
5 mean but we would say as soon as
6 possible if the ruling is going to
7 agree with the request that we're
8 making.

9 THE COURT:

10 It's also a remedy for me to
11 take away cases from the public
12 defenders if they can't handle those
13 cases effectively. I can do that.

14 MS. PARK:

15 You can take the cases?

16 THE COURT:

17 Sure. If they have too many
18 cases. Tell me which cases you can
19 and cannot do. With the ones you
20 can't do, file a motion to withdraw.

Transcript_Day 1 - 12.20.15

21 Is that a remedy?

22 MS. PARK:

23 Yes. Motion to withdraw from
24 currently pending cases is a remedy.

25 But that is not a remedy that we're
26 asking for at this time. We're

27 asking for a prospective remedy.

28 We're asking that this Court does not

29 appoint future cases to our office.

30 THE COURT:

31 So you're saying you can handle

32 the cases you have.

7

♀ 1 MS. PARK:

2 It's not that we can't handle
3 the cases that we have, but we have
4 obligations and responsibilities and
5 beginnings of client relationships
6 there. So we don't want to do more
7 damage to those cases and those
8 clients than has already been done.

9 THE COURT:

10 All right. Proceed.

11 MS. PARK:

12 Judge, can we just approach
13 briefly?

14 (A bench conference followed.)

15 MR. REINGOLD:

16 For the record, Colin Reingold
17 on behalf of the Public Defenders.

18 JAMES DIXON, JR., called as a witness by
Page 8

Transcript_Day 1 - 12.20.15

19 the Defense, after first being duly sworn,
20 testified as follows:

21 DIRECT EXAMINATION

22 BY MR. REINGOLD:

23 Q. Good morning, Mr. Dixon.

24 A. Good morning.

25 Q. Could you introduce yourself to the
26 Court please?

27 A. My name is James T. Dixon, Jr. I am
28 presently the State Public Defender for the
29 State of Louisiana.

30 Q. Could you give a brief employment
31 background?

32 A. I've been a -- with respect to public

8

♀ 1 defense, I've been a public defender in a
2 number of parishes. Jefferson, Lafayette, and
3 St. John. I was the district defender for
4 Calcasieu and Cameron Parishes and then I
5 became the State Public Defender about two
6 years ago. I was the district defender for
7 about three years in Calcasieu and Cameron.

8 Q. Can you describe your duties as State
9 Public Defender?

10 A. I'm essentially the Executive Officer
11 for the Louisiana Public Defender Board. My
12 duties are broad. I am responsible for
13 essentially preparing standards and policies
14 for the board. I am responsible for
15 supervision of the various districts and
16 contract groups that we employ for both capital

Transcript_Day 1 - 12.20.15

17 appeals and other matters. I'm responsible for
18 essentially supervising and leading public
19 defense throughout the state and making sure
20 that the poor in this state are adequately
21 represented.

22 Q. And you mentioned being the Executive
23 with respect to the Public Defender Board.

24 A. Yes.

25 Q. Can you describe the Board and its
26 obligation?

27 A. Louisiana Public Defender Board was
28 created by statute in 2007, under the Public
29 Defender Act. It is comprised of 15 regular
30 members. They have the duty to basically
31 create and maintain public defense throughout
32 the state. That includes 42 districts. There

9

♀ 1 are a number of contract groups we have that we
2 contract with for various services. A total of
3 seven. So with that, we provide public defense
4 throughout the state.

5 Q. What are the Board's responsibilities
6 regarding plans and budgets?

7 A. We provide a strategic plan. We have
8 to budget every year. We have to make sure
9 that the districts and the people we contract
10 with budget every year. We provide an annual
11 report to the legislation and there are other
12 reports that we also provide throughout the
13 state.

14 we maintain a defender data system

Transcript_Day 1 - 12.20.15

15 state-wide, so that we can supervise and
16 basically watch caseloads throughout the state
17 to see what is happening in various districts.
18 We also -- The Board is also responsible for
19 supervising all 42 districts. I think there's
20 something like 12 hundred lawyers in all.

21 Q. Who comprises the Board?

22 A. Well, its established by statute.
23 The governor appoints six. Two that he
24 appoints directly and four that are through the
25 four universities: LSU, Tulane, Southern, and
26 Loyola.

27 The chief justice appoints two. The
28 Speaker of the House and the President of the
29 Senate each appoint one. The State Bar
30 President appoints one. The Louis Martinet
31 Society appoints one. The Law Institute
32 specifically involving children's matters

10

♀ 1 appoints one, and the Interfaith or Interchurch
2 Agency appoints one. So that's 15.

3 Q. I'd like to talk a bit about the
4 Board's funding situation.

5 A. Yes.

6 Q. Could you describe as it relates to
7 fiscal year 2015, the funds received by the
8 Board and how those were distributed?

9 A. All right. We receive funds from the
10 State and that goes into the State's Public
11 Defense Fund. In '15, it was about 33.7.
12 Wait. No, that's not right.

Transcript_Day 1 - 12.20.15

13 Yes. It was about 33.7 and a little
14 bit. This year for fiscal year '16, it was
15 33.67 million dollars.

16 what we do with those funds, some of
17 it is statutorily allocated. For example, we
18 receive about 900,000, between 900,000 to a
19 million. That goes directly to CINC
20 representation and there are a couple of other
21 things that are dedicated.

22 Q. I'm sorry. Can you just explain to
23 the court what "CINC representation" is?

24 A. I'm sorry?

25 Q. Could you explain what "CINC
26 representation" is?

27 A. Oh, I'm sorry. That's Child in Need
28 of Care. I'm sorry. It's an acronym. Correct
29 me at any time.

30 But most of the money is for use to
31 supplement local office funds. So each
32 district, judicial district, has local funds it

11

♀ 1 receives for tickets, court costs. That
2 accounts for about 66 percent of their budget
3 state-wide on average.

4 we supplement that with what is
5 called the District Assistance Fund. This
6 year, it was about 15.86 million dollars. Last
7 year, it was less. It was about 15.7-something
8 if I'm not mistaken, and so that's how we
9 supplement the districts.

10 we also provide capital

Transcript_Day 1 - 12.20.15

11 representation, appeals. There's -- and so
12 there are other funds that we have to use
13 because we provide all the appeals for the
14 state. So there are other costs that we have
15 that apply to capital and appeal matters.

16 Q. Of the 15.7 or 15.8 million dollars
17 distributed to the 42 judicial districts in
18 2015, how were those funds divided among the
19 districts?

20 A. Okay. We have a formula to keep
21 it -- to make it as fair as we can. The
22 formula is driven essentially by caseload. So
23 the district with the higher caseload is going
24 to receive a larger assistance fund.

25 I'll try to make it as simple as
26 possible, which is hard to do with math, but
27 I'll try. Essentially what happens -- what we
28 do is we take a district and we determine how
29 much money that district spends per attorney.
30 So that will include the average salary, but it
31 would also include all the average overhead.

32 So you take all the overhead and that

12

♀ 1 includes things like rent and utilities and you
2 figure out how much all of that is per attorney
3 in the office. Then we take the caseload
4 because the caseload determines how many
5 attorneys the office should have and so, once
6 we figure out how many attorneys the office
7 should have, we multiple that times the amount
8 per attorney and that's what we figure the DAF

Transcript_Day 1 - 12.20.15

9 is.

10 Then so that should make the office
11 whole and make it be able to run.
12 Unfortunately, we never have the funds to cover
13 what everyone needs. So we will take DAF, for
14 example, of Orleans -- I'm just throwing out a
15 number here. Let's say it's five percent of
16 the state. We take everybody's what they
17 should get and Orleans is five percent of that
18 total.

19 Then what we do is we take the money
20 we do have and we give them five percent of
21 that total. So that's essentially how it's
22 done. That's the math.

23 Q. And in the past, in addition to the
24 district assistance fund, you used a district
25 assistance fund adjustment formula, is that
26 right?

27 A. That is correct.

28 Q. Can you explain what that is?

29 A. So one thing we were concerned with
30 is, if you simply employ that formula, we were
31 concerned that there would be districts because
32 of their local income that would actually begin

13

♀ 1 to accrue funds.

2 So, for example, the 29th Judicial
3 District which is St. Charles. They're in that
4 perfect sweet spot between every interstate in
5 the State except for 49 and 20. So they have
6 lots of local income. If we were to give them

Page 14

Transcript_Day 1 - 12.20.15

7 their DAF, they would be basically accruing
8 more and more money every year. They don't
9 need a DAF, so they get none. They receive no
10 DAF from us.

11 So what we do with the adjustment
12 formula, we looked at districts who were
13 accruing funds and we took those accruing funds
14 and took those back. What we did is we would
15 distribute those funds to the districts that
16 were basically non-accruing. They were
17 actually -- they did not have enough money to
18 cover their expenses.

19 A perfect example is Orleans which
20 never had the local funding it needed to cover
21 its expenses. So we would pull back money from
22 accruing, so that they would not be in trouble,
23 but they would not be gaining money and we
24 would distribute that to the districts that did
25 have financial issues. So that's essentially
26 the formula.

27 Q. Now, you've been using past tense
28 when describing the adjustment formula. Why is
29 that?

30 A. Yes. At the end of last year --
31 Actually, it was well before then. It became
32 apparent very early on during fiscal year '15,

14

♀ 1 that there really was no -- there were no
2 districts accruing with the exception of the
3 38th, which is Cameron. So you're talking a
4 couple of thousand dollars. The Sixth, which

Transcript_Day 1 - 12.20.15

5 is the far northeast of the state. Again, very
6 small parish. You're not talking a lot of
7 money; and the 42nd, which is Desoto or Sabine.
8 I always flip them up. But those two parishes
9 work together and the one parish, Sabine, is
10 always short of funds. The 42nd has it, so
11 they kind of work together to balance it out.

12 So there are no funds to readjust.
13 There were no funds to pull out. So it no
14 longer made any sense and all it would have
15 done was cripple the three parishes that had
16 those funds and really would not have helped
17 anybody because it would have been such a small
18 amount.

19 Q. In light of that, could you talk
20 about the funds the Orleans Public Defender
21 received in fiscal year 2015 versus 2016, and
22 how that relates to the district assistance
23 fund adjustment formula?

24 A. Sure. So in FY '16 -- excuse me.
25 The FY '15 budget, we're looking at well before
26 FY '15 which began on July 1st, 2014. So we're
27 looking at that well ahead of time.

28 At that point we still had -- I mean
29 it made sense to employ the adjustment formula
30 and we did and so Orleans received -- I believe
31 it was 2.5 million dollars because we still had
32 money to move around with the adjustment

15

¶ 1 formula.

2 when it came to this year, there were
Page 16

Transcript_Day 1 - 12.20.15

3 no funds to basically redistribute. You had --
4 we just simply applied the DAF, which was a
5 straight 1.8 million dollars. So there was a
6 net decrease of 700,000 dollars in the local
7 DAF. In this local DAF.

8 Q. So the Orleans Public Defenders
9 received 700,000 less this year than last year?

10 A. Correct.

11 Q. Could you talk about what restriction
12 of services are and what the current status is
13 among the different defender offices across the
14 state?

15 A. Okay. So in 2009, the Louisiana
16 Public Defender Board passed the restriction of
17 services protocol and it's -- as with the
18 various standards we have, it is located in
19 Title 22 of the Louisiana Administrative Code.

20 The reason behind it was to have a
21 protocol such that if a district did not have
22 adequate funds to make it through the year --
23 their costs were greater than their increase --
24 we wanted to have some sort of protocol in
25 place such that the disruption locally would be
26 as -- it would be minimized.

27 Obviously, you wouldn't just have,
28 you know, "I've run out of money in March. I'm
29 closing my doors." That's what we were trying
30 to -- we're avoiding. So those protocols were
31 put in place and they're state-wide so that a
32 district, when it is going to not have enough

Transcript_Day 1 - 12.20.15

♀ 1 money to make it through the year because of
2 the costs, can make adjusts in various ways to
3 avoid that happening.

4 There are presently eight districts
5 in restriction of services. They are the
6 First, which is Caddo; the Fifth, which is
7 Franklin, West Carroll, and another one; the
8 Eighth which is Winn; the 19th, East Baton
9 Rouge; the 20th, which is East and West
10 Feliciana; the 26th which is Bossier and
11 Webster; and I think I'm missing one in there.

12 Q. 28th?

13 A. 28th. Yes, the 28th which is LaSalle
14 and then the 30th. Vernon Parish.

15 THE COURT:

16 I have a question. That
17 procedure, is that related to those
18 entities as well? Those parishes?

19 MR. REINGOLD:

20 It is, Judge, to the extent
21 that the State Board has no
22 additional funds to provide locally.

23 THE COURT:

24 Those parishes are in the same
25 predicament as Orleans?

26 MR. REINGOLD:

27 Yes.

28 THE COURT:

29 The exact same predicament?

30 MR. REINGOLD:

31 We're trying to establish the

Transcript_Day 1 - 12.20.15

32 comparisons among the predicaments.

17

♀ 1 THE COURT:

2 Is there any litigation in those
3 parishes?

4 THE WITNESS:

5 Yes. There's litigation taking
6 place in Caddo.

7 THE COURT:

8 Is that litigation that's been
9 going on for the last hundred years?

10 THE WITNESS:

11 No. This is new. There are a
12 couple. There are some essentially
13 citizen litigation that's taking place.

14 THE COURT:

15 I'm aware of that. But this is
16 not a citizen action. Do you agree?
17 Today, this is not a citizen action,
18 is it?

19 THE WITNESS:

20 No.

21 THE COURT:

22 In those other districts. Is
23 there any litigation involving what's
24 going on today in those districts?

25 THE WITNESS:

26 To my knowledge, at this point,
27 no.

28 BY MR. REINGOLD:

29 Q. You mentioned that districts and

Transcript_Day 1 - 12.20.15

30 restriction of services have to take
31 cost-cutting measures. Can you describe what
32 some of those are?

18

♀ 1 A. It varies. You have districts like
2 the 19th that have been able to implement
3 measures that have not drastically impacted the
4 criminal justice system. For example, they
5 have hiring freezes which will impact, but at
6 this point have not yet. You have cases that
7 they have not -- they have cut out some
8 representation in the collection of alimony
9 essentially or fighting alimony cases. So they
10 have -- it's relatively at this point mild and
11 it can vary to having waiting lists.

12 There could be an incidence -- for
13 example, when I was a district defender in
14 Calcasieu, we had to stop taking much of our
15 conflict cases and they were handed out to the
16 private bar. That is presently happening in
17 Caddo and Webster. The First and 26th. It's a
18 broad, broad range.

19 Q. You mentioned wait lists. Those
20 would be defendants who would not have
21 representation provided for some period of
22 time?

23 A. That is correct and they would be on
24 that wait list until the district defender's
25 caseload dropped enough so that they had the
26 ability to handle those cases properly.

27 Q. And some of those defendants might be

Transcript_Day 1 - 12.20.15

28 in custody?

29 A. Well, generally there is a hierarchy
30 of cases that you would take. The preference
31 generally is given to juveniles incarcerated,
32 serious cases of folks who are incarcerated.

19

♀ 1 So there actually is a hierarchy as to who
2 would be taken first and those incarcerated,
3 who are incarcerated, are near the top of that
4 list.

5 THE COURT:

6 So what happens to the
7 defendants who are at the bottom of
8 the waiting list?

9 THE WITNESS:

10 well, there's the rub. That's
11 the question that we are at the point
12 of litigating. If someone is -- For
13 example, if someone has a misdemeanor
14 and they're not in jail, they're
15 going to be on a waiting list and it
16 is foreseeable that the more serious
17 felonies would constantly jump in
18 front of them; and at some point
19 there's going to be an issue of, you
20 know, speedy trial, right to counsel.
21 Those issues will arise.

22 THE COURT:

23 So if you have someone charged
24 with an armed robbery or murder case
25 and someone charged with a drug case

Transcript_Day 1 - 12.20.15

26 and both of them are still in jail,
27 who has priority?
28 THE WITNESS:
29 Usually the murder case.
30 THE COURT:
31 So what happens to the guy who's
32 in jail for the drug case?

20

♀ 1 THE WITNESS:
2 That is a very serious issue.
3 That is something that -- it hasn't
4 arisen yet, but we understand that
5 that could be something that could
6 arise and then you have someone who
7 is incarcerated who's on a waiting
8 list and that is a whole different
9 can of worms. We have not faced that
10 yet, but that is a very real
11 possibility and something that we're
12 extremely concerned with.

13 BY MR. REINGOLD:

14 Q. So you'd agree that would raise
15 constitutional concerns?

16 A. Yes. Absolutely.

17 Q. You talked about the districts that
18 are currently on restriction of services. Can
19 you talk about a number of districts you
20 anticipate being on restriction of services by
21 the end of the year?

22 A. Well, let me clarify. We expect by
23 the end of the fiscal year for there to be at

Transcript_Day 1 - 12.20.15

24 least 19 in restriction of services.

25 Q. Of what year? To clarify, at what
26 point?

27 A. June 30th of '16. However, there are
28 a number of districts for which restriction of
29 services is imminent. By that, we expect them
30 to be in restriction of services by the end of
31 this year. The calendar year. December 31st.

32 Some of those are, you have the

21

♀ 1 Seventh, with is Concordia, Catahoula. You
2 have the 15th, which is Lafayette and Acadian
3 and Vermilion. You have the 22nd, St. Tammany,
4 Washington. You have the 23rd, Assumption,
5 Ascension and St. James. You have the 25th,
6 which is Lafourche. Excuse me. Plaquemines.
7 You have the 34th, St. Bernard. The 37th,
8 which is Caldwell, and Orleans Parish.

9 Q. You mentioned -- You talked about
10 Orleans Parish in the future. But you know
11 that Orleans Public Defenders have implemented
12 some parts of restriction of services. Can you
13 explain how that works?

14 A. Yes. Yes. So someone is officially
15 in restriction of services when they have
16 presented a restriction of services plan and
17 that plan has been approved. Orleans Parish,
18 we're very close. I mean it could be a matter
19 of days.

20 But we understand that even --
21 although someone has not had their plan

Transcript_Day 1 - 12.20.15

22 officially approved and is not officially in
23 restriction of services, in practice they are.
24 So Orleans Parish has, in fact, implemented a
25 number of restriction of services already and
26 we're aware of that.

27 So I would have to say that whether
28 someone is or isn't in ROS plan from where the
29 a district defender is sitting seems to be a
30 bit of a technicality.

31 Q. And just to clarify. For fiscal year
32 2016, does the Board anticipate having any

22

♀ 1 additional funds to provide to OPD?

2 A. It's unlikely. I mean even if we do,
3 it is not nearly enough to do any serious good.
4 I mean you have Caddo that's been in
5 restriction of services and has had the private
6 bar being appointed for nine months now. The
7 same with the 26th.

8 There are so many districts in
9 trouble that, even if we did have money, it's
10 really not going to make much difference, if
11 any at all.

12 Q. What are the district defenders
13 instructed to do during restriction of services
14 as it relates to caseloads?

15 A. So once you're in restriction of
16 services, the district defender is to provide
17 the state office a caseload report every week.
18 The reason for that is because, once someone is
19 in restriction of services, we're extremely

Transcript_Day 1 - 12.20.15

20 concerned their caseload will increase to an
21 extent the attorneys involved are providing
22 adequate and what is constitutionally-mandated
23 defense. So we watch caseloads very closely
24 from every district that is in restriction of
25 services.

26 Q. I want to talk briefly about the
27 trial court performance standards. Can you
28 first describe what those are and where they
29 came from?

30 A. The Louisiana Public Defender Act
31 mandates -- actually, I think it's Section 147.
32 -- mandates the Louisiana Public Defender Board

23

♀ 1 to establish standards for public defense
2 throughout the State, and we have a number of
3 those.

4 we have the trial performance
5 standards which are really targeted toward
6 felony and misdemeanor line defenders which
7 would provide really the bulk of representation
8 throughout the state. We also have capital
9 performance standards. We have
10 child-in-need-of-care standards, delinquency
11 standards.

12 But we, the board that is,
13 promulgated those. There's actually an act to
14 properly promulgate them -- the administrative
15 code -- and they have done so and they're found
16 in Title 22.

17 Q. would you recognize a copy of those

Transcript_Day 1 - 12.20.15

18 standards if I showed them to you?

19 A. I would.

20 MR. REINGOLD:

21 May I approach, Judge?

22 THE COURT:

23 Yes.

24 MR. REINGOLD:

25 I'm showing the witness what I

26 marked as Defense Exhibit One.

27 BY MR. REINGOLD:

28 Q. Can you explain to the Court what

29 those are?

30 A. These are the trial performance

31 standards. They were passed by the Board. The

32 document says "Spring 2010," but I believe they

24

♀ 1 were passed in 2009. I think spring of 2010,

2 is when these were actually printed out and

3 provided to line attorneys throughout the

4 state.

5 Q. I want to draw your attention to a

6 few of the performance standards that might

7 relate to caseloads and I'd like to start with

8 Performance Standard 707 C. If you could,

9 explain that standard to the Court and how it

10 might be impacted when attorneys have excessive

11 caseloads?

12 A. Sure. So section 707 deals with the

13 general duties of defense counsel. "C" in

14 particular basically establishes an obligation

15 to counsel that their client remain informed of

Transcript_Day 1 - 12.20.15

16 the progress of their case and that manifests
17 itself in a number of ways.

18 For example, if the client is
19 incarcerated, it requires the attorney to visit
20 that client in jail to keep them informed of
21 the progress of their case and that could be --
22 but it's more than that really because you also
23 have to -- and this is provided in other
24 sections which I'm sure you will get to. But
25 it also requires exchange of information,
26 interviews. You know, all the things that you
27 do in the course of a case you have to inform
28 your client of. Any plea offers or anything
29 else.

30 Q. All right. And you mentioned
31 visiting clients in jail. So I'd like to then
32 switch to Standard 709.

25

♀ 1 A. Yes. Well, that's the obligation of
2 counsel regarding pretrial release. Probably
3 the most prominent requirement in that section
4 is that counsel see his or her client within 72
5 hours of appointment, and that is essential for
6 a number of reasons.

7 Number one, an attorney needs to have
8 an in-depth interview with her client as
9 quickly as possible for a number of reasons
10 including the fact that, you know, you can lose
11 witnesses. You can lose evidence. You want to
12 get in as quickly as possible, which is why
13 that 72-hour requirement is there.

Transcript_Day 1 - 12.20.15

14 You're also required to do whatever
15 is necessary to obtain pretrial release. So
16 you need all the information that would be
17 pertinent to a bond reduction.

18 Q. All right. And then I think that
19 kind of dovetails then in with Standard 717.

20 A. Yes. 717 is counsel's duty to
21 investigate. Again, I think the linchpin of
22 that requirement is that that obligation exists
23 even should a client wish to enter a plea,
24 which as defense counsel I think all of us have
25 encountered.

26 You meet a client and they
27 immediately wish -- they tell you of their
28 desire to enter a guilty plea. You still have
29 an obligation to conduct adequate and thorough
30 investigation because that plea cannot be valid
31 if the client is not informed; and one of the
32 underpinnings of all these standards is the

26

¶ 1 rules of professional responsibility. They
2 tend to always fall back to that and clearly
3 you have a responsibility to your client to
4 make sure they're fully informed of the charges
5 against them, any defenses they might have,
6 whether or not they have been overcharged.

7 I mean all of these things have to be
8 relayed to the client and if you don't -- if an
9 attorney does not adequately investigate,
10 there's no way that client can be adequately
11 informed and you're violating both these

Transcript_Day 1 - 12.20.15

12 standards and I would suggest the code of

13 professional responsibility.

14 Q. Okay. So just to clarify. If a
15 client indicates the desire to plead guilty,
16 but you accept that at its face and don't do
17 any investigation relating to the case as a
18 defense attorney, that would be a violation of
19 your Standard 717?

20 A. That is correct.

21 Q. Do the standards have anything to say
22 about the experience levels of attorneys?

23 A. Yes. I mean it's kind of intuitive
24 really. Counsel has to be adequately trained
25 and have adequate experience to handle the case
26 before them.

27 Prime example would be someone who is
28 fresh out of law school. Although they've been
29 vigorously trained, clearly is not prepared for
30 a death penalty case. That's the extreme, but
31 that kind of illustrates what we're talking
32 about.

27

♀ 1 Q. Okay. Does Standard 705 B address
2 that?

3 A. Yes.

4 Q. The standards also address excessive
5 caseload, correct?

6 A. They do.

7 Q. Could you explain the Standard 707 A
8 and 707 E?

9 A. Sure. So 707 A basically puts -- the

Transcript_Day 1 - 12.20.15

10 responsibility is to the counsel. Before
11 accepting the case, they have to be sure that
12 they have sufficient time, resources,
13 knowledge, what they need, to adequately
14 represent that client; and so if the attorney
15 believes they're unable to, they're obligated
16 to move to withdraw and inform the court that
17 they are not adequately prepared or adequately
18 trained or they're overloaded, for example.

19 So that's A. C -- I'm sorry. It
20 wasn't C.

21 Q. "E." Let me clarify something for
22 707 A. You're talking about a staff attorney,
23 for example?

24 A. I'm sorry?

25 Q. You're talking about a staff
26 attorney, for example.

27 A. For example, a line defender.

28 Q. A line defender. To clarify. Who
29 should the line defender inform in the event
30 that they believe they have too many cases to
31 provide proper representation?

32 A. All right. So that is actually --

28

♀ 1 that is a little different. If they feel their
2 caseload is too high, they have an obligation
3 to inform the district defender for that
4 district and the court.

5 Q. So how does -- I guess just explain
6 707 E then.

7 THE COURT:

Transcript_Day 1 - 12.20.15

8 Repeat that last answer.

9 THE WITNESS:

10 Okay. Well, the question was
11 what is the obligation of the line
12 defender. He's to contact and inform
13 the district defender and the court.

14 THE COURT:

15 of?

16 THE WITNESS:

17 of an excessive caseload.

18 THE COURT:

19 And if there is an excessive
20 caseload then?

21 THE WITNESS:

22 well, then generally at that
23 point, the defender, line defender,
24 in some instances can -- well, they
25 can file a motion to withdraw. But
26 generally and what we recommend is
27 rather than have that happen, it's
28 probably that should be done with the
29 office. So that's why we suggest
30 they talk to the district defender;
31 and then the district defender
32 separately will make an assessment

29

♀ 1 because the district defender also
2 has access to more data and may be
3 able to craft a remedy.

4 For example, you know, in
5 Division "A," his attorney is

Transcript_Day 1 - 12.20.15

6 overworked, can't handle the
7 caseload, but he has a supervisor in
8 Division "D" that actually has the
9 time to help that person out.

10 So that could be a remedy that
11 we would rather employ before you
12 asked to withdraw because the office
13 might be able to be flexible enough
14 to draft or come up with a remedy
15 that is short of asking to withdraw.

16 BY MR. REINGOLD:

17 Q. So in 707 E, how is that -- explain
18 what the district defender should do in the
19 event that remedy cannot be crafted.

20 A. Okay. So if the line defender --

21 THE COURT:

22 Hold on a second. I'm assuming
23 that this remedy is futile with the
24 Orleans Public Defender's Office.

25 MR. REINGOLD:

26 Yes, Judge. We'll be getting
27 there shortly.

28 THE WITNESS:

29 So the line defender goes to the
30 district defender and says I have a
31 caseload that's too high, but the
32 district defender is in a position

30

♀ 1 where he really can offer no relief,
2 no remedy.

3 Then it is the district

Transcript_Day 1 - 12.20.15

4 defender's duty to go to the court
5 and inform the court of really the
6 cases in front of it and inform the
7 court that there is this crisis, this
8 caseload crisis. At that point it
9 becomes the duty of the district
10 defender to step in.

11 THE COURT:

12 Is that where we are now today?

13 MR. REINGOLD:

14 Yes, Judge, I believe so.

15 BY MR. REINGOLD:

16 Q. Just to clarify. The standards -- I
17 apologize. I don't remember if you said this.
18 Do you know if they were -- when they were
19 developed what sources they drew upon?

20 A. I was not with Louisiana Public
21 Defender Board when they were developed. My
22 understanding is that, you know, there were
23 various sources. The ABA has standards. NLADA
24 has standards.

25 But they're really -- My
26 understanding is also that they're really
27 grounded specifically in Louisiana by the rules
28 of professional responsibility.

29 So that really is the basis for -- I
30 would say that's the basis for these standards.
31 You have to provide adequate representation
32 under the rules of professional responsibility

31

♀ 1 and that's what these are geared for.

Transcript_Day 1 - 12.20.15

2 MR. REINGOLD:

3 Judge, at this time I'd like to
4 offer, file, and introduce Defense
5 Exhibit One and I have no further
6 questions of this witness.

7 THE COURT:

8 You can step down. Next
9 witness.

10 (A recess followed.)

11 DERWYN BUNTON, called as a witness by the
12 Defense, after first being duly sworn,
13 testified as follows:

14 DIRECT EXAMINATION

15 BY MS. PARK:

16 Q. Good morning, Mr. Bunton. Can you
17 introduce yourself to the Court?

18 A. I am Derwyn Bunton. I'm the Chief
19 Public Defender for Orleans Parish.

20 Q. And how long have you been Chief
21 Defender?

22 A. Since January of 2009.

23 Q. So you just recently heard the
24 testimony of the State Public Defender Jay
25 Dixon and his explanation of the state
26 budgeting process. So can you talk to us a
27 little bit about the local budgeting and the
28 current OPD budget and its situation?

29 A. Sure. Well, toward the end of our
30 fiscal year, fiscal '15, which ended in June of
31 this year, we were looking at incoming revenues
32 and saw that -- I'll just deal bottom up.

Transcript_Day 1 - 12.20.15

♀ 1 So we looked at the statutory revenue
2 that we receive as an office and that's fines,
3 fees, costs, that come out of the various
4 courts by and large. Also, we receive costs --
5 we receive revenue through application fees and
6 what we saw is that none of them were on track
7 to meet projections and we figured that out in
8 the spring of this year. That none of those
9 were on track to meet projections and that,
10 projecting out, we saw nothing that was going
11 to affect that trend; that is we expected them
12 to continue downward.

13 So the steps we had to take was we
14 had to revise those budget projections for the
15 local revenue and revise them down.

16 we also looked at non-state statutory
17 revenue that were received here in Orleans.
18 That actually remained fairly constant and
19 those are two revenue sources. By ordinance,
20 traffic camera revenue we receive; and by state
21 statute, but it only affects Orleans, seat belt
22 revenue. Those were staying fairly constant
23 although seat belt revenue was down slightly.

24 we looked at all the other statutory
25 fines and fees and figured, well, we're down
26 and we're going to stay down.

27 Moving up to the sort of
28 appropriations level. The city does give us an
29 appropriation for this year and we expected
30 that to remain constant and we saw that our
31 district assistance fund was at that point 2.5

Transcript_Day 1 - 12.20.15

32 million dollars and, looking at things in the

33

♀ 1 spring, expected that to remain constant.

2 we then learned in April that the
3 state district assistance appropriation --

4 THE COURT:

5 of what year?

6 THE WITNESS:

7 April of 2015. We discovered
8 that our initial -- our preliminary
9 appropriation for district assistance
10 funds was lower than what we had
11 planned for and I think, by May of
12 2015, it was confirmed that we were
13 going to lose about seven hundred
14 thousand dollars at the state level;
15 and it was really in March that I and
16 our leadership team and director of
17 administration really start making
18 plans for some service restrictions
19 because we didn't know if anything
20 was going to change or whether or not
21 there was going to be -- whether or
22 not this sort of declining situation
23 was going to be permanent.

24 BY MS. PARK:

25 Q. So what percentage of the New
26 Orleans -- the OPD budget is made up by the
27 fines and fees? The traffic cameras, the seat
28 belts, the statutory revenue.

29 A. Up to 50 percent. As much as 50

Transcript_Day 1 - 12.20.15

30 percent.

31 Q. Given the unreliability of that type
32 of revenue, how do you budget on an annual

34

¶ 1 basis?

2 A. Very carefully and unpredictably is
3 the way to put it. I continue to be a critic
4 of our user pay criminal justice system. It's
5 inadequate, unreliable, and unstable.

6 We also have to budget within two
7 different budget cycles; our state that runs on
8 a fiscal year and our city that runs on a
9 calendar year. So it's always trying to make
10 the two halves fit and so the best thing we
11 do -- we can do is with statutory revenue look
12 at running averages and make projections based
13 on that.

14 If there are some changes, some
15 statutory changes, like, for example, when the
16 state passed the law increasing the public
17 defender fee from 35 dollars to 45 dollars, we
18 calculated for an increase in revenue based on
19 that. That largely went unrealized, but we try
20 to take into account local factors and make our
21 best projections as we can for predicting our
22 budget.

23 Q. So explain to us OPD's restriction of
24 services and some of the details about
25 restriction of services and what parts of it
26 have already been implemented?

27 A. Okay. Our restriction of services
Page 37

Transcript_Day 1 - 12.20.15

28 plan contains a combination of expenditure cuts
29 and service restrictions. We cut some, some
30 budget items, training, experts. Some other
31 operating costs, we just reduced the line
32 items. We also instituted a hiring freeze and

35

♀ 1 so, as folks leave the office, we're unable to
2 fill those positions hoping to reduce
3 expenditures through attrition and we also had
4 a furlough plan in place to further save money
5 for the office to bring us in line with
6 projected revenue.

7 Q. Are those plans still in place?

8 A. All of those plans are in place
9 except for the furlough. The city budget
10 process increased our revenue that we had
11 projected for the city appropriation, that
12 revenue source, and that has effectively taken
13 furloughs off the table. But none of the other
14 parts of our restricted services plan.

15 Q. So OPD still is under a hiring
16 freeze?

17 A. That's correct.

18 Q. Now, in terms of -- you've explained
19 that one of the measures you took was cutting
20 operation expenses?

21 A. Correct.

22 Q. And one of the operating expenses
23 that you cut were expert services?

24 A. Correct.

25 Q. And what is the annual budget at this

Transcript_Day 1 - 12.20.15

26 time for expert services?

27 A. I believe it's 30 thousand dollars.

28 Q. And how do you use -- how do you
29 manage those funds? How do you dispense those
30 funds to attorneys who come to you or come to
31 the trial chief with expert requests?

32 A. Expert requests go -- generally

36

♀ 1 speaking go straight to the trial chief for
2 folks practicing in the trial division and he
3 will look over the expert requests and
4 determine whether or not to approve or not
5 approve those requests for funds.

6 If they're approved, then it will go
7 to our division director of administration and
8 they'll cut a check and then I will then look
9 at the funding request and either sign the
10 check or send it back.

11 Q. Is there a process in place where
12 you're triaging those funds given the limited
13 amount?

14 A. Well, our trial chief has been doing
15 this for a long time and so I think one of the
16 things he is empowered to do, of course, is to
17 look at the integrity of every request and also
18 check with our director of administration to
19 see if we have any money to satisfy the
20 request. So there is definitely a
21 prioritization of those funding requests.

22 Q. Since instituting the hiring freeze
23 and implementing some aspects of the

Transcript_Day 1 - 12.20.15

24 restriction of services, how many staff
25 attorneys has the Orleans Public Defenders
26 lost?

27 A. About 14 felony attorneys.

28 Q. And that's in fiscal year -- starting
29 fiscal year 2014?

30 A. That dates back to, yes, July of
31 2014.

32 Q. And then how many staff positions

37

♀ 1 total did Orleans Public Defenders lose?

2 A. Total positions, I believe is 29.

3 Q. So since July, 2014, Orleans Public
4 Defenders has lost 14 felony attorneys and a
5 total of 29 staff positions?

6 A. That's correct.

7 Q. And since this summer, since the
8 start of this fiscal year, how many staff
9 attorneys have you lost?

10 A. About six.

11 Q. Are you able at this time to replace
12 any of the six attorneys that you lost?

13 A. No, we're not.

14 THE COURT:

15 what happens to their cases?

16 THE WITNESS:

17 when people leave the office --

18 Right now what happens is those cases
19 are redistributed throughout the
20 office.

21 THE COURT:

Transcript_Day 1 - 12.20.15

20 staff numbers at OPD, can you explain to us how
21 many bar licenses you have total in your office
22 and then give us numbers of supervising
23 attorneys and staff attorneys?

24 A. Total licenses for the Orleans Public
25 Defenders Office, I think we have about half as
26 many as the DA's Office. Somewhere I think
27 around 53 total licenses.

28 Some of those are specialized
29 practice or part-time. So we have one
30 part-time attorney. We have one attorney that
31 does child-in-need-of-care representation. We
32 also have five attorneys who handle our

39

♀ 1 conflict cases in our conflict division.

2 There are four -- well, five
3 leadership including myself and there are four
4 other supervising attorneys I do believe, if
5 I'm correct. I think that's right.

6 Q. So that would leave you with about 34
7 staff attorneys, line attorneys, who can take
8 on a full caseload?

9 A. That's correct.

10 Q. And you also have three attorneys in
11 your capital division?

12 A. That is correct.

13 Q. Now, in October, you had ten new
14 attorneys start at Orleans Public Defenders?

15 THE COURT:

16 October of what year?

17 MS. PARK:

Transcript_Day 1 - 12.20.15

18 October of 2015.

19 BY MS. PARK:

20 Q. So can you explain that situation?

21 A. Sure. The way we hire new attorneys
22 is to conduct interviews the year prior and so
23 it's usually in the fall prior to their start
24 that we would have gone through the recruiting
25 and hiring process and then made offers based
26 on attrition in January of the following year.

27 So of the new staff attorneys we have
28 who came in, they received their offers early
29 in 2015 to begin as new attorneys in this fall.
30 This October once they passed the bar.

31 One of the reasons we do that is
32 to -- is because of resources in terms of

40

♀ 1 labor. Hiring early lowers costs in terms
2 of -- versus just straight laterals. It also
3 gives us a chance to train up our staff in the
4 way we want them to perform in our office.

5 Q. And of those ten new attorneys that
6 joined the office in October, how many were
7 actually on payroll and how many were actually
8 attorney fellows that received a grant or a
9 fellowship to begin working at OPD?

10 A. Only half of those lawyers went
11 straight to payroll. The other -- I think the
12 other five are fellows whose salaries, at least
13 in this first year, are paid from other
14 sources.

15 Q. And so in fiscal year 2015, you lost

Transcript_Day 1 - 12.20.15

16 14 staff attorneys and essentially you have
17 replaced ten of them. Is that fair to say?

18 A. Well, it's not fair to say because of
19 the varying levels of competence at which we
20 lost our attorneys, and so we've lost a number
21 of attorneys that have been with the office for
22 a long period of time.

23 So those that would handle what we
24 would -- those that we call our level five
25 attorneys, we've lost a good number of those
26 and those would be the people handling the
27 murders, rapes. Anything that had a mandatory
28 sentence of life without parole.

29 So bringing in ten new attorneys who
30 were recently barred and recent law graduates
31 isn't really a one for one. But in terms of
32 FTEs, yes. It's been ten to 14.

41

♀ 1 Q. You're saying because of budget
2 constraints it is more fiscally sound to hire
3 new attorneys because they cost less
4 essentially than a lateral hire?

5 A. Well, that's a bit crude. But it is
6 partly true, yes.

7 Q. Now, turning to the other staff
8 numbers. How many investigators do you have?

9 A. We have eight investigators.

10 Q. And how many other administrative
11 staff do you have in the office?

12 A. Let me see if I can remember. I
13 think we have somewhere around half a dozen

Transcript_Day 1 - 12.20.15

14 administrative staff.

15 Q. And how many client advocates and
16 associate workers do you have?

17 A. Well, full-time? We have our
18 director of our client services division who's
19 a social worker and then we have some
20 grant-funded social worker positions. We have
21 two grant-funded social worker positions as
22 well in our client services division.

23 we also have a number of volunteers
24 in our client services division as well and I
25 forget the -- I'm blanking on the total number
26 for the volunteers at this point. But I think
27 there are about four of them.

28 Q. Six?

29 A. Six of them. Thank you.

30 Q. So in fiscal year 2015, how many
31 cases did OPD handle? Approximately how many
32 cases.

42

♀ 1 A. Around -- somewhere around 20, 22
2 thousand.

3 Q. Do you recall the breakdown in terms
4 of number of felonies and misdemeanors and
5 LWOPs, life without parole, cases?

6 A. Nearly ten thousand misdemeanors.
7 Nearly eight thousand felonies, and I want to
8 say somewhere around 220 LWOPs.

9 Q. And you began to explain the practice
10 levels of your attorneys. Can you go into that
11 a little more?

Transcript_Day 1 - 12.20.15

12 A. Sure. When you come into the Orleans
13 Public Defender's Office, you're going to be
14 placed into a sort of lawyer level category,
15 and we have five of them.

16 So a level one attorney is basically
17 an attorney that handles misdemeanors and is
18 trained early on in the office. Level two and
19 three will handle the sort of middle felonies,
20 which is really the bulk of our work. So
21 you'll have a lot of drug cases, drug
22 possession cases that -- some gun cases.
23 You'll begin to get some person crimes; and
24 then a level four and five attorney handles the
25 most serious cases along with our capital
26 attorneys, of course, that handle cases where
27 the death penalty is an option.

28 So level fours are a lot of victim
29 cases, a lot of sex offense cases, and they
30 include cases that are effectively life
31 sentences. So things like armed robbery where
32 the range can be 15 to a 105 on a finding of

43

♀ 1 guilt and, of course, the level five is any
2 case that carries a mandatory life without
3 parole term.

4 Q. So when you have attorneys and
5 assigning cases to them depending on their
6 levels of practice, do you take into
7 consideration the habitual offender status of
8 the case or the defendant you're assigning?

9 A. We do not. Because of local

Transcript_Day 1 - 12.20.15

10 practice, we'd never assign any cases. The
11 habitual offender law in Louisiana, of course,
12 is quite stiff and can turn a crack possession
13 case -- can change it from zero to five to 20
14 to life depending on their prior criminal
15 history; and so we have level two and level
16 three attorneys because of the habitual
17 offender status of some their clients who would
18 be handling clients who are looking at 20
19 years, 30 years, to life.

20 Q. Or a triple offender who is actually
21 facing life?

22 A. Someone who is actually facing life.
23 For some violent offenses, their prior criminal
24 record actually makes the term a mandatory life
25 term.

26 Q. Now, can you tell the Court a little
27 bit about the jail visitation situation with
28 your attorneys and the time they spend visiting
29 jails and some of the difficulties they have in
30 trying to communicate with their clients who
31 are incarcerated?

32 A. The situation right now is pretty

44

♀ 1 terrible. There are a lot of -- there were a
2 lot of hiccups in the move from the old
3 facilities to the new jail and the processes
4 for being able to visit clients is still a work
5 in progress.

6 So there's a lot of waiting. A lot
7 of time spent waiting for a client you may

Transcript_Day 1 - 12.20.15

8 never see and so it's very difficult and you
9 have to carve out a lot of time or sometimes
10 you end up sort of wasting a lot of time trying
11 to see your client.

12 The move to East Carroll and Franklin
13 Parish made visitation impossible. We would
14 have to -- for the near two hundred clients
15 that are held in East Carroll and Franklin
16 Parish, for an attorney to go visit would have
17 to mean they can't schedule anything else
18 because it is a four-hour drive up and a
19 four-hour drive back, which will be a full
20 workday.

21 But you're also in the car for that
22 time period and so you're almost incapable of
23 doing anything else and yanking resources to
24 that regard is simply just not possible given
25 the incredible workload of our staff and
26 attorneys right now.

27 Q. And do your attorneys also have
28 clients who are being detained pretrial at Hunt
29 Correctional?

30 A. That is correct.

31 Q. Is visitation with a female inmate --
32 what are some of the difficulties of visiting

45

♀ 1 female inmates?

2 A. Well, female inmates are difficult
3 because it's a whole different transport and
4 then a different part of the jail. So waiting
5 for a female client is -- it's a crap shoot a

Transcript_Day 1 - 12.20.15

6 lot of times whether or not you're going to be
7 able to visit. Those are on a sort of separate
8 kind of transport and a schedule if you're to
9 visit them; and also going to Hunt.

10 Just so it's clear, Hunt is about an
11 hour away from New Orleans. So you're on the
12 road for two hours to try and schedule your
13 visit with your client as well. So no matter
14 the client, the difficulties and the time --
15 really which is the precious resource for our
16 lawyers and for our clients -- is really what's
17 being compromised.

18 Q. Are your attorneys required to keep
19 time?

20 A. They are.

21 Q. Do you occasionally take a look at
22 the times to see what the average amount of
23 time they've worked in a week or a month is?

24 A. Yes, I've taken a look at the time
25 sheets periodically from time to time.

26 Q. So the last time you looked, what
27 would you say would be the average hours that
28 your attorneys work in a given week?

29 A. Our lawyers on average work somewhere
30 between 60 and 65 hours a week.

31 Q. And would it be fair to say that
32 almost all, if not many attorneys and

46

♀ 1 investigators, also work on the weekends?

2 A. Yes.

3 Q. Just a couple more questions,

Transcript_Day 1 - 12.20.15

4 Mr. Bunton. So how soon after first
5 appearances is an attorney from the Public
6 Defenders assigned to a client who's been
7 deemed to be indigent and appointed to the
8 Public Defenders?

9 A. Well, as soon as possible. Usually
10 somewhere between 12 and 24 hours. But
11 oftentimes much less than that.

12 Q. And how soon after that assignment of
13 attorney is that assigned attorney supposed to
14 go then visit that client in jail?

15 A. Our office standard is 48 hours.

16 Q. And why do we have that policy in
17 place? Why do we say we need to go visit your
18 client within 48 hours of assignment?

19 A. Well, one, the sort of quick
20 establishment of a meaningful and trusting
21 lawyer/client relationship is an important
22 thing for our office. A value of our office;
23 and then, of course, there's substantive
24 reasons. Being able to get started on an
25 investigation very quickly. Some evidence may
26 be time sensitive. Some witnesses may be time
27 sensitive and so we want to be able to get to
28 work on the case as early as possible.

29 Also, we want to be able to limit
30 their time in custody if they're going to be
31 held in custody to a minimum; and that means
32 gathering information, talking with our client,

47

♀ 1 and making pretrial release arguments and
Page 50

Transcript_Day 1 - 12.20.15

2 arguing for bond reduction.

3 Q. Mr. Bunton, I think you're currently
4 in the tail end of the city budget process.
5 What can you tell us about OPD's budget as
6 compared to the district attorney's?

7 A. It's smaller. Our budget -- In
8 total, our budget is somewhere I think
9 approaching 50 percent, maybe a little less,
10 than the district attorney's budget. They have
11 I think somewhere around 90 lawyers. They have
12 30 investigators to our eight. There are --
13 Their appropriation from the city outweighs
14 ours by something like six to one, and they
15 have access to the city's fleet of cars. They
16 have retirement. They have free space. None
17 of those things are available to our office.

18 Q. You're not saying that the DA's
19 office should not be fully funded, right?

20 A. No. No. I'm not saying he doesn't
21 -- I'm not saying that the District Attorney
22 doesn't need what he has. I just need more
23 than what I have to keep up with the work that
24 is created in our jurisdiction.

25 we have the demand for public
26 defender services in Orleans. It's an urban
27 environment. It's fairly high. It's pretty
28 robust. You do that within the context of 140
29 million-dollar police force, a 61
30 million-dollar jail, somewhere between a 12 and
31 14 million-dollar district attorney's office.

32 You need to be able to handle the

Transcript_Day 1 - 12.20.15

48

♀ 1 work as it comes to you and I think it's good
2 policy -- we're all citizens, too -- to have a
3 robust, but also fair and effective criminal
4 justice system; and at current funding levels
5 that is just impossible for us.

6 Q. And what would you say -- what
7 percentage of clients who are arrested and
8 charged do Orleans Public Defenders represent?

9 A. Upwards of 85 percent in criminal
10 district court.

11 Q. And one final question about
12 supervisory writ practice. Can you talk to us
13 a little bit about who does the appeals in
14 Orleans Public Defenders?

15 A. Sure. We have about -- I think
16 there's three attorneys with a reduced caseload
17 who are specifically providing writ support
18 writing writs, but it's also true that lawyers
19 in my office write their own writs, do their
20 own writs from within their cases; and
21 comparatively that's less than half in terms of
22 the dedicated resources. It's less than half
23 the resources that are allocated at the
24 District Attorney's Office.

25 MS. PARK:

26 No further questions, Judge.

27 THE COURT:

28 A couple of questions, Derwyn.

29 MS. PARK:

30 Judge, can you speak a little

Transcript_Day 1 - 12.20.15

31 bit louder because our expert who is
32 on skype is having a hard time

49

♀ 1 hearing you.

2 THE COURT:

3 Okay. You're asking the Court
4 to not appoint any indigent
5 defendants to your office, is that
6 correct?

7 THE WITNESS:

8 That's correct.

9 THE COURT:

10 Are you also declaring that
11 you're not going to accept any
12 indigent defendant cases in Section
13 "K"?

14 There would be no need for me
15 not to appoint someone if you're not
16 going to accept the case.

17 Now if this hearing is about you
18 declaring, your office declaring
19 you're not going to accept any more
20 cases, based on what you perceive as
21 constitutional and ethical violations
22 and obligation which you have a
23 responsibility to do, you can refuse
24 to take any more indigent cases.

25 If you're also asking not to
26 appoint any indigent defendants to
27 you based on the fact you're not
28 going to accept anymore, I can deal

Transcript_Day 1 - 12.20.15

29 with that also. Is that what you're
30 asking me?

31 THE WITNESS:

32 well, your Honor, I think it's

50

♀ 1 almost six and one half dozen the
2 other.

3 THE COURT:

4 No. No. No, it's not. If you
5 make a declaration to every judge in
6 this building "I am not accepting any
7 more indigent defense cases based on
8 constitutional violations, ethical
9 obligations, and the lack of funding
10 from my office," once that happens,
11 then basically it belongs to the
12 judges what they're going to do with
13 that particular defendant before
14 them. You don't have to ask me to
15 not appoint anyone to you.

16 THE WITNESS:

17 I think in the explanation you
18 gave, that's sort of -- that's why I
19 said it's almost six of one, half
20 dozen of the other.

21 One, part of our protocol is
22 that we seek judicial remedy and so
23 we're seeking judicial remedy. But
24 also under our responsibility by
25 statute, under our own
26 responsibilities under the Code of

Transcript_Day 1 - 12.20.15

27 Professional Responsibility, and
28 constitutional obligations, we may as
29 a policy matter have to do the same
30 thing.

31 The reason why we ask for
32 judicial remedy is because, if there

51

♀ 1 is judicial remedy, then our refusal
2 in those cases becomes less
3 adversarial to a certain degree. If
4 this Court makes the ruling that
5 they're not going to be appointed,
6 then it's a much different posture
7 than us refusing those cases that are
8 appointed, which puts us in a
9 position of refusing a court order.

10 THE COURT:

11 well, you guys have refused
12 court orders before, am I right?

13 THE WITNESS:

14 well, we litigate court orders
15 from time to time, that's true. I
16 means that's the thing, but it is --
17 and I think that, again, is part of
18 the answer.

19 That is we -- if we're in this
20 position and we have to sort of
21 reduce the amount of work that we
22 take in, it is a much better position
23 organizationally to not be fighting
24 with our bench about it.

Transcript_Day 1 - 12.20.15

25
26
27
28
29
30
31
32

♀ 1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

THE COURT:
So basically, what you're saying is two things can happen. You come in the courtroom and say "Judge, look -- you don't even have to go in the courtroom. I mean you can just declare that from your office and let everybody in the justice system know,

52

look, the public defender office no longer is accepting cases because of A, B, C, and D. We're not taking any cases.

Now, the judge has a decision to make. Do I make you take the case or do I now do something else? Am I right?

MS. PARK:

well, Judge, I guess -- we have more witnesses and I think they might be able to answer your questions. I think there's a role the judiciary can play in this in terms of professional ethics and professional responsibility.

THE COURT:
That's why we're here today, Jee. That's why we're here today. I saw that article by Tina Peng. That's why we're here today.

I have done my part. I've done

Transcript_Day 1 - 12.20.15

23 my part. Now it's up to you guys to
24 do your part. I don't like doing
25 your part because I want to stay in
26 my lane. But whatever you present
27 before me, I will definitely make a
28 decision.

29 MS. PARK:

30 I think it's our position that
31 after we complete the presentation of
32 our evidence, we can present some

53

♀ 1 legal arguments as to why we believe
2 that you have certain authorities to
3 make a ruling that we're asking for.

4 THE COURT:

5 Are you finished with Derwyn?

6 MS. PARK:

7 Yes. I'm finished. Thank you,
8 Judge. We are going to call
9 Professor Ellen Yaroshefsky.

10 ELLEN YAROSHEFSKY, called as a witness by
11 the Defense, after first being duly sworn,
12 testified as follows:

13 DIRECT EXAMINATION

14 BY MR. REINGOLD:

15 Q. Good afternoon, Professor.

16 A. Good afternoon.

17 Q. Could you introduce yourself to the
18 Court please?

19 A. Yes. Good afternoon, Judge. I'm
20 Ellen Yaroshefsky. I'm a professor, a clinical

Transcript_Day 1 - 12.20.15

21 professor, at Cardozo Law School in New York.

22 Q. Thank you. And I'd just like to
23 start by getting into a little bit of your
24 background and training. Could you tell me
25 about your educational background?

26 A. Yes. I graduated from Rutgers New
27 Newark Law School in Newark, New Jersey, in
28 1975.

29 Q. And could you tell me then about your
30 employment history since then?

31 A. Yes. After law school, I moved to
32 Seattle, Washington. I was a attorney for a

54

♀ 1 Native American Tribe handling land rights and
2 economic rights for one year and then I went to
3 work for the Seattle King County Public
4 Defender for four years.

5 while I was there, I handled a range
6 of cases including serious felony cases and a
7 death penalty case. Subsequent to that, I went
8 into private practice in Seattle for two years.

9 I then moved back to New York as a
10 staff attorney for the Center for
11 Constitutional Rights where I remained until
12 1988. While there, I worked on international
13 human rights cases, on criminal cases, both
14 Federal and state criminal cases, and on civil
15 rights cases.

16 After that, I went into private
17 practice in New York primarily handling Federal
18 criminal cases, some civil rights cases, and a

Transcript_Day 1 - 12.20.15

19 number of state felony cases, and I remained in
20 private practice until I went to Cordozo Law
21 School as adjunct in order to teach in the
22 criminal defense clinic where we supervise
23 students in misdemeanors and state and Federal
24 felonies.

25 In 1994, I was named the executive
26 director of a new ethics center. We had
27 recently obtained money to set up an ethics
28 center and I became the director of that and
29 I've been in that position since.

30 Q. Could you state the name of the
31 ethics center?

32 A. Yes. It's the Jacobs Burns Center

55

♀ 1 for Ethics in the Practice of Law.

2 Q. Can you explain a little bit more
3 about what that institute does?

4 A. Yes. First of all, I teach a number
5 of courses. Every semester I teach a course in
6 professional responsibility. I taught courses
7 in ethics in criminal advocacy for both
8 prosecutors and defenders and taught a course
9 in wrongful convictions and evidence.

10 That's my teaching capacity as the
11 director. We also sponsor symposia. Scholarly
12 symposia. We also sponsor programs where we
13 bring practitioners and scholars together; and
14 then I'm also invited to speak on a number of
15 panels throughout the country on various issues
16 related to legal ethics.

Transcript_Day 1 - 12.20.15

17 Q. And either at the institute or in
18 your private capacity, do you publish on the
19 topic of ethics?

20 A. Yes. I publish regularly. I publish
21 numerous articles, particularly related to the
22 role of public defenders and the role of
23 prosecutors.

24 Q. And do you do consulting?

25 A. Yes. I consult numerous lawyers on a
26 regular basis and I'm on various hotlines. But
27 on top of that, I also have a private practice
28 where I'm hired by lawyers and law firms to
29 provide my counsel regarding legal ethics and
30 I've participated in a range of different civil
31 and criminal cases around the country.

32 Q. Okay. So to clarify. The hotline

56

♀ 1 and the other consulting you're doing, that's
2 in the field of ethics?

3 A. That's all -- Everything I'm doing
4 now is in the field of ethics, yes.

5 Q. And do you sit on any committees?

6 A. Many.

7 Q. Can you tell us about that?

8 A. Yes. Well, I'm currently -- I had
9 been for a long period of time, the co-chair of
10 the Ethics Committee of the National
11 Association of Criminal Defense Lawyers. I sit
12 on the New York State Committee on Standards of
13 Attorney Conduct. We are responsible for the
14 promulgation of the rules of professional

Transcript_Day 1 - 12.20.15

15 conduct in New York and any updates regarding
16 those many rules.

17 I sat on a committee called the
18 Joint Committee on Public Ethics which
19 considered a wide range of ethical issues for
20 the legislature in New York. I sat on
21 professional discipline committees. I sat on
22 professional responsibility committees.

23 From 2006 to 2014, I also was the
24 co-chair of the American Bar Association's
25 Criminal Justice Section Ethics Committee and,
26 in that capacity, actually worked significantly
27 on the Revised American Bar Association
28 Standards for the prosecution and defense
29 function.

30 I've served on a number of other
31 committees. I can go through those if you'd
32 like.

57

♀ 1 Q. No. That's fine. Thank you. Have
2 you received any honors in relation to your
3 work in ethics?

4 A. Yes. Probably the one that's most
5 relevant here is I received an award for
6 outstanding criminal law education.

7 Q. Professor, if I showed you a copy of
8 your CV, would you recognize it?

9 A. I would hope so.

10 MR. REINGOLD:

11 Judge, may I approach?

12 THE COURT:

Transcript_Day 1 - 12.20.15

13 Yes.

14 BY MR. REINGOLD:

15 Q. I'm showing you what I marked as
16 Defense Exhibit Two. Do you recognize that?

17 A. I do.

18 Q. And what is it?

19 A. That is a copy of my current CV.

20 MR. REINGOLD:

21 Thank you. Judge, at this time
22 I'd like to offer, file, and
23 introduce Defense Exhibit Two and I
24 also move to have Professor
25 Yaroshefsky qualified as an expert in
26 legal ethics.

27 THE COURT:

28 Yes.

29 BY MR. REINGOLD:

30 Q. Professor, what do you understand to
31 be your role here today?

32 A. I was contacted several weeks ago and

58

♀ 1 asked if I would be prepared to review a
2 factual basis and a number of affidavits for
3 rendering an opinion for the court as to
4 whether or not the conduct of attorneys at the
5 Orleans Public Defender and the office itself
6 comported with the rules of professional
7 conduct.

8 Q. Okay. And just to clarify, when you
9 were contacted, were you offered any
10 compensation for this service?

Transcript_Day 1 - 12.20.15

11 A. No. I'm appearing pro bono. Our
12 ethics center has actually paid for my
13 transportation.

14 Q. And so you mentioned reviewing a
15 factual basis. What did you review
16 specifically?

17 A. Factually, I was provided with, I
18 believe, eight different affidavits including
19 the affidavit of Chief Defender Bunton and a
20 number of other lawyers and one investigator in
21 the office.

22 Q. If I showed you those affidavits,
23 would you recognize them?

24 A. Yes.

25 MR. REINGOLD:

26 May I approach, Judge?

27 THE COURT:

28 Yes.

29 BY MR. REINGOLD:

30 Q. I'm showing you what I'm marking as
31 Defense Exhibit Three in globo. Let me know if
32 you recognize that.

59

♀ 1 A. Yes. I recognize these are the
2 affidavits that I reviewed.

3 MR. REINGOLD:

4 And, Judge, I would offer, file,
5 and introduce for the record Defense
6 Exhibit Three in globo.

7 BY MR. REINGOLD:

8 Q. For the moment, Professor, I'll let

Transcript_Day 1 - 12.20.15

9 you hold on to those in case you need to refer
10 to them in the remainder of your testimony.

11 A. Okay.

12 Q. In addition to reviewing those
13 affidavits, what other sources or materials are
14 you relying upon in rendering an opinion for
15 the court here day?

16 A. Well, I rely upon an extensive body
17 of legal ethics materials that are relevant
18 here. Beginning with, of course, the Louisiana
19 Rules of Professional Conduct that pertain to
20 all lawyers in the State of Louisiana; the
21 American Bar Association model rules of
22 professional conduct upon which the Louisiana
23 rules are based; the restatement of the law
24 governing lawyers; numbers of caseload
25 standards that have been promulgated by the
26 American Bar Association and by various state
27 bars, including the Louisiana standards; the
28 American Bar Association standards for the
29 defense function. I mentioned that previously.

30 I was on the committee that actually
31 revised those standards most recently. Lots of
32 many, many law review articles and reports of

60

♀ 1 various committees throughout the years that
2 have considered the question of excessive
3 caseloads and the role of lawyers in the
4 criminal justice system; and my knowledge and
5 experience in the last 20 years in working in
6 this field and participating in numerous

Transcript_Day 1 - 12.20.15

7 panels, including the 50th anniversary of
8 Gideon. We also actually held a number of
9 panels around the country about the role of
10 public defenders and resources.

11 Q. Did you review any books or
12 publications by any other experts in the field?

13 A. There's a very significant book by
14 Norman Lefstein, who is a professor, called
15 Securing Reasonable Caseloads that has been
16 cited significantly around the country.

17 Q. And the ABA standards. You mentioned
18 you had a role in developing those?

19 A. Yes. The ABA has a criminal justice
20 section which calls itself the Voice of Unified
21 Criminal Justice. It's composed of prosecutors
22 from around the country, defense lawyers,
23 judges, and academics. It meets several times
24 a year. Among its roles is considering
25 revisions to the criminal justice standards.

26 The first set of standards or the
27 most recent set of standards before the ones
28 that we just went through were promulgated in
29 1993, and they hadn't been updated; and the
30 standards are quite significant. They've been
31 relied upon by courts, by the supreme court,
32 some 53 times and so we undertook the

61

♀ 1 responsibility of very laboriously going
2 through the standards for a significant period
3 of time and considering what those standards
4 should be and they have been updated.

Transcript_Day 1 - 12.20.15

5 Q. I'm going to show you -- well, you
6 would recognize copies of some of the standards
7 you referenced as things you were relying upon?

8 A. Yes.

9 MR. REINGOLD:

10 Judge, may I approach?

11 THE COURT:

12 Yes.

13 BY MR. REINGOLD:

14 Q. I'm showing you what I marked as
15 Defense Exhibit Four and Five.

16 A. Well, Four are portions of the
17 Louisiana Rules of Professional Conduct. Yes.

18 Q. And you recognize -- is there
19 anything particular about the portions that
20 were selected?

21 A. Yes. I selected particular portions
22 that are relevant to my opinion today. Each of
23 these rules with the exception of Rule 1.6 here
24 are the rules that I believe are violated by
25 the excessive caseload problem and by the OPD
26 and its lawyers.

27 Q. Okay. And Defense Exhibit Five?

28 A. Yes. These are the ABA standards for
29 the prosecution and defense function and I
30 intended to refer to one in particular. But
31 these are the ABA standards that are updated.

32 MR. REINGOLD:

62

♀ 1 Judge, I'd offer, file and
2 introduce Defense Exhibits Four and

Transcript_Day 1 - 12.20.15

3 Five.

4 BY MR. REINGOLD:

5 Q. Professor, what are the governing
6 ethical standards for lawyers in Louisiana?

7 A. Louisiana lawyers are governed by the
8 Rules of Professional Conduct much like lawyers
9 throughout the country. Every state now with
10 the exception of California has a version of
11 the ABA model rules of professional conduct.
12 Louisiana's are called Louisiana Rules of
13 Professional Conduct.

14 Q. And how are those developed?

15 A. Well, what happens, the way rules are
16 developed, we started with the code of
17 professional responsibility. What happens is
18 the American Bar Association composed of now
19 over four hundred thousand lawyers around the
20 country has a committee and that committee
21 itself is composed of lawyers from around the
22 country in various fields of law. They
23 consider what the rules should be.

24 So in 1969, that committee got
25 together. They promulgated what was then the
26 code of professional responsibility. It was,
27 of course, the model code because it has no
28 force of law and then each state has its own
29 committee and that committee, state by state,
30 determines do we want to pass these rules, do
31 we want a different version of these rules, how
32 should they be modified.

Transcript_Day 1 - 12.20.15

♀ 1 So the code of professional
2 responsibility existed in Louisiana and then,
3 of course, the bar decided very quickly that
4 the code provisions did not actually assist
5 lawyers very much throughout the state and so
6 the ABA went back to the drawing board. I'm
7 doing the short version of this; and as a
8 result of that, they promulgated the model
9 Rules of Professional Conduct in 1983.

10 Then every state, once again, went
11 back to the drawing board. They made a
12 determination as to whether or not they would
13 adopt the rules. Louisiana in 1987, adopted
14 Louisiana's version of the rules of
15 professional conduct.

16 For our purposes today, they mirror
17 very closely the model rules of professional
18 conduct. The main difference for Louisiana is
19 they did not include the preamble that exists
20 in the model rules of professional conduct.
21 They don't include the scope and they don't
22 include the commentary. But lawyers actually
23 who are in the field of ethics in Louisiana
24 refer to the ABA commentary to help inform the
25 Louisiana rules.

26 Q. And what is the relationship with the
27 ethics 2000 committee?

28 A. Well, of course, once again, the bar
29 decided as we went forward that as we were
30 approaching the year 2000, there was a need to
31 once again review the rules of professional
32 conduct because the profession keeps changing

Transcript_Day 1 - 12.20.15

64

♀ 1 and there was a need to determine whether or
2 not the rules should be modified.

3 So the American Bar Association
4 formed a committee called Ethics 2000. It
5 considered a range of different rules and rule
6 changes. It made recommendations. Louisiana
7 then went forward and its committee considered
8 whether to change any of those rules. So they
9 modified rules slightly in 2004. Those
10 modifications have very little impact on
11 today's discussion.

12 Q. Okay. In Louisiana, how are those
13 rules used?

14 A. Well, the rules of professional
15 conduct in every jurisdiction are used as rules
16 of discipline. That's one function. So if a
17 lawyer violates the rule, they can be referred
18 to a disciplinary committee.

19 Louisiana though is a bit unique
20 compared to other jurisdictions around the
21 country in that the rules themselves also serve
22 as substantive law. What I mean by that is a
23 violation of a rule can also be a violation of
24 a duty that would give rise to a legal
25 malpractice claim.

26 In other jurisdictions, the rules are
27 often used to inform a duty, but they actually
28 do not provide that duty itself.

29 Q. And how do those rules relate to
30 obligations under the Sixth Amendment?

Transcript_Day 1 - 12.20.15

31 A. Well, for our purposes today, the
32 rules that we're going to be talking about

65

♀ 1 define a lawyer's obligation to the Sixth
2 Amendment, which is to say what should a
3 reasonable lawyer be doing in order to provide
4 effective assistance of counsel under the Sixth
5 Amendment. It's coterminous with the lawyer's
6 obligations under the rules of professional
7 conduct.

8 Q. Okay. You mentioned earlier -- you
9 identified a number of Louisiana rules that you
10 feel apply to your assessment of whether OPD
11 was providing ethical representation.

12 A. That's correct.

13 Q. And what rules are those?

14 A. Would you like me to give you the
15 numbers as well as the content or just --

16 Q. Yes, please.

17 A. Okay. So the first rule, the most
18 fundamental rule for lawyers, is Rule 1.1,
19 which is that you must be a competent lawyer
20 and we define that as you have to have the
21 knowledge, the skill, the thoroughness, and the
22 preparation in order to actually represent a
23 client.

24 The second rule is a rule called
25 "diligence" which requires a lawyer to act
26 promptly on behalf of the client and not to
27 neglect a client's case.

28 Q. And what's the number of that one?

Transcript_Day 1 - 12.20.15

29 A. That one is 1.3.

30 Q. Thank you.

31 A. The third rule is the rule on

32 communication with a client. It is Rule 1.4,

66

♀ 1 and that is a rule that requires the lawyer to
2 keep the client reasonably informed of all
3 matters in the case, so that the client can
4 actually participate in decision-making and
5 make decisions about the objective to the
6 representation and also about the means by
7 which they should be accomplished.

8 Louisiana -- one of the changes in
9 Louisiana from the model rules is it adds an
10 additional provision. Actually, if I could
11 read --

12 Q. Yes, please.

13 A. -- I would like to read that. A
14 clearer obligation for lawyers. It says "a
15 lawyer shall give the client sufficient
16 information to participate intelligently in
17 decisions concerning the objective to the
18 representation and the means by which they are
19 to be pursued."

20 The model rules do not indicate that
21 and certainly it is true that client
22 communication back and forth from the lawyer is
23 essential for adequate representation.

24 The next rule that I've cited is a
25 rule on confidentiality. That is a fundamental
26 obligation, of course, of any counsel that the

Transcript_Day 1 - 12.20.15

27 lawyer must keep information confidential
28 that's related to representation. The reason
29 that I have that in the rule is that is
30 directly connected to the lawyer's obligation
31 of competency and communication, which is to
32 say if the lawyer cannot adequately communicate

67

♀ 1 with the client and prepare thoroughly the way
2 a lawyer is supposed to, they're not going to
3 be able to obtain the confidential information
4 that they need to prepare a case.

5 Another rule that is quite
6 significant here is the rule on conflicts of
7 interest. It's a fundamental obligation of
8 lawyers to avoid a conflict of interest and
9 that doesn't just mean representing opposing
10 interests. The rule itself signifies that if
11 there's a significant risk that your obligation
12 to one client is going to be materially limited
13 by your obligation to another client, to a
14 third party, or by some personal information
15 that you have, that that is a conflict of
16 interest and that you may not participate in
17 that kind of a representation unless it meets
18 with, quote, informed consent under the rules,
19 which doesn't exist in this circumstance.

20 I will talk about each of these more
21 fully. I assume you just want me to tell you
22 what the body of the rule indicates.

23 Q. Yes, please.

24 A. The other rule that I cited is Rule
Page 72

Transcript_Day 1 - 12.20.15

25 1.16 which is the rule on withdrawal of
26 counsel. All rules in every jurisdiction
27 mandate that if a lawyer cannot comport with
28 the rules of professional conduct, any one of
29 those rules, they must withdraw from
30 representation. It is a mandatory rule. We
31 have some other circumstances where you may
32 withdraw. But if you're violating rules of

68

♀ 1 professional conduct, you must withdraw.

2 The final two rules are rules regarding
3 management and supervision. We have a specific
4 rule for lawyers as managers and supervisors in
5 offices. It's Rule 5.1 and that rule requires
6 the lawyers who are managers and supervisors to
7 actually engage in conduct, reasonable conduct,
8 to ensure that the lawyers in their office
9 comport with the rules of professional conduct.

10 It's more lengthy than that, but I --
11 unless you want me to read that into the
12 record, I will not do so. It's in the record.

13 Then there's Rule 5.2, which is the
14 rules of subordinate lawyers. The rule says
15 that even if -- essentially even if ordered by
16 a superior to engage in conduct, if the
17 subordinate believes that that conduct does not
18 comport with the rules of professional conduct,
19 they may not do so. They have an independent
20 obligation, in other words, to comply with the
21 rules of professional conduct.

22 If it's a question where there's an

Transcript_Day 1 - 12.20.15

23 arguable duty, the subordinate can rely on the
24 superior. But other than that -- let's say
25 here a lawyer were ordered to go forward in a
26 case where the lawyer believed they were
27 violating the rules of professional conduct and
28 it was clear it was not a question of arguable
29 duty, they would be violating Rule 5.2 by going
30 forward.

31 Q. Okay. So those are the rules that
32 you've identified as being relevant here.

69

♀ 1 Before we get into why you think that, I want
2 to clarify. Are these rules contingent on the
3 situation in any way or contingent on who the
4 client is?

5 A. Not at all. We as a profession have
6 rules for the profession. It doesn't matter.
7 From a professional point of view, if you're
8 maintaining a justice system that actually
9 functions, all of the lawyers within that
10 justice system are subject to the very same
11 rules.

12 So competency, does not matter
13 whether it's a private lawyer who's being
14 retained in a case and being paid a significant
15 amount of money or if the person is indigent
16 counsel. Nor does it matter if someone is a
17 corporate lawyer or a lawyer for a large firm.
18 There are standards of competency and those
19 standards are mandated throughout the
20 profession.

Transcript_Day 1 - 12.20.15

21 Q. So you've reviewed the affidavits
22 that were provided to you and essentially
23 applied the rules you just spoke about to the
24 situation of public defenders?

25 A. That is correct.

26 Q. So could you explain why these rules
27 you feel are relevant to this hearing?

28 A. Yes. Let me first say that I will
29 start with the rule regarding diligence, which
30 I indicated requires lawyers to act promptly
31 and not to neglect the case.

32 THE COURT:

70

♀ 1 Professor, let me ask you
2 something. Has the Orleans Public
3 Defender's Office violated any of
4 these rules?

5 THE WITNESS:

6 All of them.

7 THE COURT:

8 And what would be your
9 recommendation?

10 THE WITNESS:

11 well, my recommendation based
12 upon -- there's an ABA opinion on --
13 06:441 is precisely I believe what
14 they're requesting here, which is not
15 to take future cases because this is
16 not an individual case-by-case
17 problem. This is a systemic problem.

18 It puts the judiciary in a very

Transcript_Day 1 - 12.20.15

19 difficult role, Judge, because one of
20 the concerns that I have is that the
21 entire system here has put the
22 judiciary in a role where there's a
23 question as to the code of judicial
24 conduct which is to say all judges
25 are required to uphold the integrity
26 of our system. That's an obvious
27 mandate. That's the role separate
28 and apart from the role of individual
29 counsel and if, in fact --

30 THE COURT:

31 Professor, are you saying that
32 judges have more of an obligation

71

♀ 1 than the individual attorney who
2 believes he's not constitutionally
3 representing his client or he or she
4 is violating an ethical obligation?

5 THE WITNESS:

6 I don't think there's more. I
7 think everyone in the system has an
8 obligation. The lawyers here have
9 gotten to the point where there's a
10 systemic violation of the rules of
11 professional conduct. That office
12 cannot be maintained anymore going
13 forward in cases and do that
14 consistently with the rules.

15 They've now presented to the
16 judiciary the problem because of the

Transcript_Day 1 - 12.20.15

17 impact that has upon the court, which
18 is to say I believe -- and I think I
19 can explain in greater depth. You're
20 not operating a justice system here.
21 You're operating a processing system
22 and that each of the various parts of
23 the system, the prosecution, the
24 defense, and the judiciary have a
25 responsibility to go beyond case
26 processing to ensure that defense
27 lawyers who come before the court are
28 actually providing effective
29 assistance to their clients. To the
30 people who are accused of crime.

31 Some of those people are not
32 guilty of the crimes of which they're

72

♀ 1 accused. Some of those people are
2 totally innocent. It doesn't matter
3 for each of those people. Much like
4 the private lawyer would come in and
5 represent a client, they are entitled
6 to competent counsel.

7 When that doesn't happen, when
8 you have the kind of system here
9 whereby lawyers don't even see their
10 clients, they're not able to develop
11 a relationship with their client,
12 there's minimal investigation,
13 lawyers are standing up in court
14 pleading guilty to things like

Transcript_Day 1 - 12.20.15

15 habitual offender statutes without
16 even doing any research, having time
17 to actually represent the client,
18 that impinges upon the role of the
19 court and, in my mind, it
20 fundamentally undermines the role of
21 the judiciary, which is to
22 guarantee -- or attempt to guarantee
23 at least the integrity of the system.

24 So it can't just be the role of
25 the individual lawyer. It has to be
26 the role of the court as well.

27 THE COURT:

28 But not only.

29 THE WITNESS:

30 Not only, no.

31 THE COURT:

32 But there is a duty of the

73

♀ 1 individual attorney to step up and do
2 something, am I correct?

3 THE WITNESS:

4 well, I think that's what's
5 occurring here. But it's not just on
6 an individual basis. There may be
7 circumstance whereby an individual
8 lawyer has too many cases and so we
9 know in that situation, for instance,
10 there is a process.

11 They go to their office and they
12 will work perhaps with Mr. Bunton to

Transcript_Day 1 - 12.20.15

13 figure out how cases could be
14 reassigned. Can someone else do a
15 case? Can they figure out the way he
16 has, how do we bring in other lawyers
17 to actually assist us? Right.

18 So that may be an individual
19 problem. But when it becomes
20 systemic, which it now is, every
21 single one of those affidavits that I
22 have read indicate that lawyers are
23 handling two to three times the
24 national numbers that are recognized
25 as a baseline for determining whether
26 or not a lawyer can properly
27 represent a client.

28 When it gets to the point, I
29 think they are doing -- they're
30 comporting what's their
31 responsibility to come to the court
32 and say to the court now we need to

74

♀ 1 have judicial relief. That's what we
2 put in the ABA standards.

3 When we revisited -- we visited
4 this issue of excessive workload as
5 we sat around with the prosecutors,
6 judges, defenders, and academics
7 trying to determine a standard for
8 what should happen when there are
9 excessive caseloads. What do we do?

10 we recognized that in some

Transcript_Day 1 - 12.20.15

11 circumstances it was an individual
12 case-by-case problem and one could go
13 to the court and each lawyer could
14 come in and move the court to
15 withdraw; however, when it gets to
16 the point where it is systemic, where
17 we came to was a point where we said
18 go to the court for judicial relief.
19 That's what we agreed upon.

20 The judicial relief could be
21 that comporting with -- there's an
22 ABA opinion written in 2006, which
23 said you should go to the court and
24 ask not to be assigned any future
25 cases and that could either be on an
26 individual basis or when a record is
27 made, which I think here there's a
28 sufficient record of a systemic
29 violation. There could be a systemic
30 solution; particularly for the
31 problem of triage.

32 You have a situation where it's

75

♀ 1 acknowledged that the lawyers are
2 compromising some clients in order to
3 represent others. So, for instance,
4 if there was a homicide case and the
5 lawyer has another 127 cases on their
6 docket, they will spend their time on
7 that homicide case because it's going
8 to trial on Monday morning.

Transcript_Day 1 - 12.20.15

9 They still haven't -- and they
10 may be in trial for a week or longer.
11 They still haven't seen the clients
12 that they've just gotten assigned to.
13 They still haven't done any
14 investigation of those other cases,
15 but they make a decision of triage;
16 and triage is a conflict of interest
17 and that's a systemic problem in this
18 office.

19 Once you have a systemic problem
20 like triage, the system -- the system
21 has to change. It's no longer I
22 think from a court's prospective all
23 that helpful and frankly it will take
24 up a lot of court time for every
25 single lawyer to come before every
26 judge and say I can no longer handle
27 these cases.

28 I mean I suppose you could say
29 28 lawyers should go before the judge
30 in every single courtroom here and
31 say I can no longer handle my cases
32 and then every single judge will have

76

♀ 1 to hold a hearing to determine
2 whether that lawyer can actually
3 handle their cases. They'll call on
4 Mr. Bunton, I presume, to find out
5 whether or not he can assign them
6 elsewhere and that will continue; and

Transcript_Day 1 - 12.20.15

7 I don't think you're going to achieve
8 a solution that's helpful to the
9 judiciary. This is a problem now
10 that is a judicial problem and I
11 believe needs to be dealt with on
12 that level.

13 BY MR. REINGOLD:

14 Q. Professor, I believe you were talking
15 about Rule 1.3, diligence.

16 A. Yes. Often when people file charges
17 against lawyers for failing to be diligent,
18 those lawyers are negligent. Those lawyers
19 don't do work.

20 That's not the situation here. These
21 lawyers -- the lawyers whose affidavits I read,
22 it's not that they're not diligent because
23 they're not working hard. It appears that they
24 work many, many hours. The average that I saw
25 in these affidavits was upwards of 70 hours a
26 week. Both during the week, working 12 hours a
27 day, and then working on weekends. They do
28 their very best to try to see their clients.

29 But for reasons I'll explain in a
30 moment, it's very difficult for them to do so.
31 They can't investigate cases. They can't serve
32 subpoenas and so they haven't done what is

77

♀ 1 necessary to be a diligent lawyer. But it's
2 not -- I'm not suggesting that they're doing so
3 because of anything other than overwork. I
4 think people who work in the office are quite

Transcript_Day 1 - 12.20.15

5 committed and they care deeply about their
6 clients and their cases.

7 But the problem with diligence is the
8 same problem with respect to communication.

9 The same problem with respect to competence.
10 My understanding of the situation for OPD
11 lawyers is as follows: That they're assigned
12 cases. They are supposed to see the clients
13 within 48 hours. But because of the numbers of
14 cases that they have and many of their clients
15 remain in custody, they're just unable to go
16 see their clients.

17 Oftentimes, I know the average
18 seemed like it was about a week before they
19 actually saw a client. But there are cases and
20 there are instances where it was upward of many
21 weeks because the lawyer was in trial.

22 One of the significant problems
23 caused by the failure to actually consult a
24 client early on is the fundamental issue of how
25 is it that you establish a trusting
26 relationship with a person who's been accused
27 of a crime. That person is sitting in a jail.
28 That person is entitled to effective assistance
29 of counsel and, if counsel doesn't come early
30 on in representation to attempt to actually
31 gather information from them, to create a
32 relationship, to try to explain the importance

78

♀ 1 of gathering the information and providing it
2 as quickly as possible, it undermines any

Transcript_Day 1 - 12.20.15

3 ability to really obtain -- to engage in a
4 trusting relationship.

5 So the first problem is, one, just
6 the ability to see the client. My
7 understanding is, for the clients who are in
8 jail, because of the administrative problems in
9 the jail in terms of producing that particular
10 client, lawyers wait at least an hour it seems
11 to see the initial client. Even if they call
12 ahead, there often is not a record that they
13 have called. So they end up waiting; and even
14 if they've given the jail a list of a number of
15 clients, they may then still wait another hour
16 to see the next client.

17 So lawyers are spending hours and
18 hours after court attempting to see clients and
19 they often have very little time to actually
20 see them and obtain the information necessary.

21 It appears that the average lawyer --
22 I looked at seven affidavits in addition to
23 Mr. Bunton's -- spends somewhere between three
24 to seven or eight hours in court daily
25 depending on the court to which they're
26 assigned and so they're in court handling
27 matters not only of their own, but perhaps for
28 other lawyers. They then spend time in the
29 jail or trying to get into the jail to see the
30 client, which then leaves them very little time
31 to do anything else.

32 Q. Just to clarify regarding

Transcript_Day 1 - 12.20.15

♀ 1 communication.

2 A. Yes.

3 Q. You're saying they're having trouble
4 visiting or seeing these clients in person.
5 Could that be remedied over the phone?

6 A. Well, it could be if there was a way
7 to have a secure phone line. But my
8 understanding from these affidavits is that the
9 problem is there is no such thing as a secure
10 line between a defense lawyer and a client.
11 That all phone calls are overheard and so the
12 lawyers have indicated that they are reluctant
13 to discuss any confidential information with
14 their client over the phone.

15 There's a particular problem with
16 regard to female clients. It appears that
17 there's some video capability to be able -- for
18 the lawyer to talk to the clients by video.
19 But, in fact, the video does not seem to work.
20 I'm not really sure why, but it looks like it's
21 some kind of a technological problem. But a
22 consistent technological problem, so that the
23 lawyers really cannot communicate by video with
24 their female clients and to then visit the
25 female clients in jail is also a significant
26 amount of time.

27 I neglected to mention that there are
28 also clients who are three or four hours away
29 and the lawyers for clients three or four hours
30 away say they virtually never visit those
31 clients because they do not have the time to

Transcript_Day 1 - 12.20.15

32 travel six to eight hours.

80

♀ 1 There's a particular concern for
2 clients who have mental health issues because
3 if the lawyers are not visiting those clients
4 early on there may be significant problems in
5 terms of identifying the extent of a person's
6 mental health issue and actually what should be
7 done about that, what the lawyer possibly can
8 do.

9 So from the beginning, there are
10 significant problems that fall far below the
11 standards of what competent counsel should be
12 doing in terms of communicating with the
13 client. They're not getting the information
14 they need to investigate a case. They're not
15 getting the names of witnesses. They're not
16 going to the crime scene; and so without that
17 fundamental information, particularly early on
18 in a representation, the ability to provide
19 competent counsel to that client is undermined.

20 Experienced lawyers know that going
21 to the scene of the crime early on is
22 essential. Experienced lawyers know that
23 talking to witnesses early on is essential.
24 You may lose that witness. You may lose their
25 testimony. Their testimony may change.

26 It appears that the lawyers have very
27 limited capability of conducting any
28 investigation. Their investigators indicate
29 that they work primarily on the most serious

Transcript_Day 1 - 12.20.15

30 cases and so the affidavit from one of the
31 investigators that I reviewed indicated that he
32 carries about 50 cases and most of those,

81

♀ 1 almost all of those, are life without parole
2 cases.

3 If that's consistent with what the
4 investigation is within the office, the vast
5 majority of clients who are charged with crime
6 are not having their cases adequately
7 investigated.

8 Q. I want to clarify something. I
9 believe you heard the testimony of Mr. Dixon
10 who talked about the necessity of investigating
11 a case even if that case results in a plea.
12 Can you talk about the ethical implications
13 there?

14 A. Oh, that's correct. The duty to
15 investigate is throughout the case. It does
16 not depend on whether or not you think the
17 person may have said to you I committed the
18 crime. Merely because the person tells you
19 they may have committed the crime, first,
20 doesn't necessarily mean they did commit the
21 crime.

22 Secondly, it doesn't absolve you of
23 responsibility as competent counsel to go out
24 and investigate the case. The criminal justice
25 system is premised on the notion of whether the
26 prosecution can actually prove a crime beyond a
27 reasonable doubt, and an adequate investigation

Transcript_Day 1 - 12.20.15

28 may determine that they actually cannot meet
29 that burden and there would be circumstances,
30 therefore, when a client should not be pleading
31 guilty because inadequate investigation could
32 demonstrate that the actual case could not be

82

♀ 1 proven.

2 The other issue that has become of
3 greater significance as we spend more time on
4 wrongful convictions is we know that people who
5 are not guilty plead guilty and they plead
6 guilty because the consequences of going to
7 trial, known as the trial penalty, is so severe
8 that lawyers talk their clients into it and
9 clients will accept responsibility for a guilty
10 plea because they believe they will end up
11 serving less time than if they go to trial.

12 If a lawyer had conducted an adequate
13 investigation early on when they're supposed to
14 do so, they might be able to determine that
15 there was no need to take that guilty plea.

16 Those are just some examples of
17 reasons why we do not make a distinction in the
18 rules of professional conduct or under the
19 Sixth Amendment as to the need for an early
20 investigation and a thorough investigation
21 where the lawyer is prepared to either advise
22 that client that they should enter a guilty
23 plea or that they should go to trial.

24 THE COURT:

25 Is that occurring in Orleans

Transcript_Day 1 - 12.20.15

26 Parish with the public defender's
27 office?

28 THE WITNESS:

29 Is what occurring?

30 THE COURT:

31 what you just said.

32 THE WITNESS:

83

♀ 1 I said a number of things.

2 THE COURT:

3 The last thing you just said
4 about people pleading when they
5 should not plead.

6 THE WITNESS:

7 I don't know for a fact. I
8 haven't seen affidavits to that
9 effect. But I will tell you
10 nationally it's an issue and because
11 of what we call exploding plea
12 offers, which exist here and
13 elsewhere around the country, where a
14 person at the time of arraignment
15 shows up. They may have had prior
16 convictions and they may be offered a
17 deal just for that day and that day
18 only.

19 The consequence of not taking
20 that deal on that day may be life in
21 prison. It may be 20 years of
22 imprisonment, and a reasonable person
23 in that position who's done no

Transcript_Day 1 - 12.20.15

24 investigation, has no capability of
25 actually doing what they are supposed
26 to do as a professional, might advise
27 that client to take that plea.

28 So I can't say that it's not
29 occurring. Do I have factual
30 circumstances from which today as I
31 sit here I can say it has occurred,
32 no. On the other hand, I would not

84

♀ 1 be surprised if at some point in the
2 future we will see people who have
3 been proven to be innocent have pled
4 guilty.

5 BY MR. REINGOLD:

6 Q. And to clarify the Judge's question.
7 Are you aware of whether it is occurring that
8 the public defenders are pleading people guilty
9 when no investigation has been done in
10 situations such as you described?

11 A. That is my understanding. Yes,
12 that's my understanding. It's a consistent
13 practice. That at arraignments people are
14 being pled guilty, and I'm particularly
15 concerned about the habitual offender statute
16 where younger lawyers with very limited
17 experience -- two, three, four years of
18 experience -- are now faced with a client who's
19 charged with -- who's initial charge is cocaine
20 and, as they get to the arrangement, they find
21 out that actually it's three prior convictions

Transcript_Day 1 - 12.20.15

22 or at least that is the claim.

23 They have no opportunity to
24 investigate whether those convictions are
25 actually valid and they're offered a one-time
26 deal only to plead today or else if you go to
27 trial -- this is a habitual statute -- you will
28 spend upwards of ten, twenty years in prison or
29 perhaps life. That doesn't comport with a
30 justice system.

31 THE COURT:

32 And that is occurring with

85

♀ 1 Orleans Public Defenders?

2 THE WITNESS:

3 That's my understanding from
4 these affidavits. That's correct.

5 BY MR. REINGOLD:

6 Q. You spoke about investigation. I
7 want to talk about the related topic of experts
8 and forensics.

9 A. I saw very limited evidence in these
10 cases that on a regular basis lawyers were
11 bringing in the necessary experts in cases.
12 You have a number of gun cases. You have a
13 significant number of homicide cases and
14 there's limited amounts of money for expert
15 witnesses.

16 It's incumbent upon a lawyer,
17 particularly in those cases, particularly with
18 what we now know from the national academy of
19 sciences about the unreliability of various

Transcript_Day 1 - 12.20.15

20 aspects of forensic science to actually engage
21 an expert to determine, for instance in a
22 ballistics matter, when the expert for the
23 prosecution indicates this is a match, if you
24 will, and that term is often used, whether, in
25 fact, that's the case.

26 The same is true with respect to
27 fingerprint analysis. There's a report by the
28 National Academy of Sciences which has
29 significantly undercut and called into question
30 various aspects of forensic science as we once
31 knew them to be and it's incumbent upon a
32 defense lawyer to be knowledgeable, first of

86

♀ 1 all, about forensic science and to engage
2 experts to challenge in many cases the use of
3 fingerprints, the use of ballistics, the use of
4 DNA, the use of cell phone tower information.

5 Q. So are you suggesting that Rules 1.1
6 and 1.3 are implicated if in a ballistics case
7 where the State calls a firearm expert if the
8 defense does not similarly engage their own
9 expert?

10 A. When ballistics are involved in a
11 case, a competent lawyer must engage the
12 services of an expert or at least become
13 knowledgeable, so that they can, one, challenge
14 the prosecution's expert and/or call an expert
15 on their own.

16 Several years ago, we started a
17 forensic college at Cordozo Law School where we

Transcript_Day 1 - 12.20.15

18 gave scholarships actually to bring lawyers
19 from around the country to learn about various
20 aspects of forensics. It's a week-long
21 program. Two of the lawyers from this office
22 actually came to that program and they
23 learned -- it's an excellent program.

24 THE COURT:

25 I know about it. I know about
26 it, yes.

27 THE WITNESS:

28 Okay. So in any event, I think
29 incumbent upon them to be able to
30 come back to this office and be able
31 to use that knowledge and, with the
32 limited amount of expert resources,

87

♀ 1 it also appears that there's some
2 amount of triage that's been
3 undertaken in terms of when experts
4 can be used in particular cases
5 because with that limited amount of
6 money the person who is making the
7 decision, I believe it's often
8 Mr. Bunton, has to decide whether
9 this case is worth spending money on
10 versus another case and that's not
11 the way a private lawyer would
12 operate at all.

13 A private lawyer would actually
14 have the resources to be able to go
15 get that expert. That should be the

Transcript_Day 1 - 12.20.15

16 same standard for a lawyer
17 representing indigent defendants.

18 BY MR. REINGOLD:

19 Q. Is there a particular rule implicated
20 by that expert funding --

21 A. Disparity? No, there's not a rule
22 specifically on expert witnesses. But there
23 are ABA standards.

24 Q. To clarify my question. The fact
25 that the office is choosing between cases to
26 which one gets expert funding. Is there a rule
27 implicated by that?

28 A. Yes. That is a conflict of interest;
29 and I believe this entire system, the entire
30 operation of the OPD, operates with a conflict
31 of interest. Whether it be in terms of which
32 experts to assign to which cases or whether to

88

♀ 1 assign an expert to a case at all.

2 But more fundamentally which cases
3 should I work on the most; and the lawyers who
4 are going to trial apparently spend a lot of
5 time the weekend before trial working on the
6 trial. They don't have much time before that.
7 But they're making a decision as they do that
8 to neglect other cases. That's not because
9 they're neglectful people. It's because
10 they're so overwhelmed.

11 In my judgment, with the number of
12 cases that they have, particularly of the
13 clients who are staying and who are sitting in

Transcript_Day 1 - 12.20.15

14 jail, that they're simply not able to
15 adequately provide competent counsel to the
16 vast majority. So the office itself is engaged
17 in a conflict of interest.

18 Q. I want to move on to sentencing and
19 what you concluded regarding the ethics
20 surrounding the sentencing practice.

21 A. My understanding was not only for
22 sentencing, but even beyond the client
23 communication. If you would indulge me, I'd
24 just like to go through the problems with the
25 entire process during the system.

26 But to answer your question directly,
27 it appears that lawyers do not spend adequate
28 time preparing the necessary mitigating
29 information for sentencing and they, once
30 again, don't have the time to be able to do so.

31 I noticed that many lawyers also
32 handle revocation hearings and probation

89

¶ 1 hearings and it appears that they come in with
2 virtually no preparation. They do no
3 investigation. Once again, they don't have
4 time to handle the revocation cases or those
5 probation cases.

6 Now, I want to back up for a minute
7 because I want to talk about the necessity for
8 bond hearings. I've talked about the lack of
9 communication with clients. The next step in
10 the process though would be to determine
11 whether or not there should be motions for

Transcript_Day 1 - 12.20.15

12 certain clients. To go to the court and make
13 requests that the clients be released on bond.
14 Apparently, the lawyers do not even have time
15 to do that. They often, as we said, do not see
16 their clients in a timely fashion and so they
17 don't spend the time that's necessary and they
18 don't make the bond motions.

19 Going forward, there are a number of
20 motion hearings and, from the affidavits that I
21 reviewed, the lawyers rarely -- and I say
22 rarely. In some cases, they do. But they
23 rarely actually write original motions.
24 There's a lot of cutting and pasting of old
25 motions. They don't have time to do original
26 research. They don't have time to subpoena the
27 clients or the witnesses that they might need
28 until the morning thereof or until it's too
29 late to actually have those witnesses come
30 forward and testify. So they do not adequately
31 prepare the motions.

32 I've already discussed the problem

90

♀ 1 with guilty pleas. There are guilty pleas not
2 only at arrangements, which are based upon no
3 investigation. But my understanding is even
4 guilty pleas post-arraignment are also the
5 product of a fundamental lack of investigation,
6 lack of client counseling, and lack of the
7 thoroughness and preparation that we expect of
8 lawyers.

9 THE COURT:

Transcript_Day 1 - 12.20.15

10 Professor, some people would
11 think that's not the court's problem.
12 That's the lawyer's problem. It's the
13 public defender's problem.

14 THE WITNESS:

15 It's a systemic problem, Judge.
16 I mean if we're going to call this a
17 justice system, it has to be a
18 justice system. It can't be a system
19 where the courts, among other actors,
20 just expect lawyers are just going to
21 stand up without doing any work
22 essentially because they can plead
23 guilty and put people through a plea
24 mill; and this is not the only
25 jurisdiction in which we have
26 versions of a plea mill.

27 But that's not a justice system
28 and if we're serious and if the code
29 of judicial conduct is to be treated
30 seriously, it's incumbent upon the
31 judiciary to take this on as their
32 problem.

91

♀ 1 It is a judicial problem. It
2 cannot just be the problem of an
3 under-funded public defense system;
4 and that's why when you look at the
5 ABA standards and you look at an ABA
6 opinion that's considered this
7 problem over the course of years,

Transcript_Day 1 - 12.20.15

8 ultimately they say go to the court
9 for judicial relief.

10 Sometimes it may be individual
11 relief. But there are circumstances
12 where systemic relief is required.

13 BY MR. REINGOLD:

14 Q. You spoke about the habitual offender
15 law.

16 A. Yes.

17 Q. And the way it can change essentially
18 a low-level offense into one with more serious
19 sanctions. How does that implicate the ethical
20 rules?

21 A. Well, it implicates all of them. I
22 mean if a lawyer is expected to be competent,
23 communicate with the client, be diligent, and
24 have the knowledge and skill that's necessary
25 to be able to represent a client --
26 particularly for a client who's facing life in
27 prison oftentimes because of the habitual
28 offender standard -- he has to have the
29 requisite skill, number one, to be able to
30 handle that kind of a case.

31 I do not know in this circumstance
32 whether or not the lawyers who are handling

92

‡ 1 those cases actually are skilled to do so. The
2 affidavits do not indicate that.

3 But beyond that, for cases with such
4 significant consequences, there would be, I
5 believe, a heightened responsibility to ensure

Transcript_Day 1 - 12.20.15

6 that there's investigation conducted before

7 there is any guilty plea whatsoever.

8 Q. So would you have concerns -- I think

9 you heard Mr. Bunton's testimony --

10 A. I did.

11 Q. -- about the practice levels in the

12 office.

13 A. Yes.

14 Q. And the newest attorneys would be the

15 ones handling those low-level cases.

16 A. Yes.

17 Q. You also heard him say that the

18 office doesn't differentiate when making

19 assignments to lawyers regarding the alleged

20 criminal history of the defendant. So does

21 that -- the fact that the office doesn't have

22 the resources to differentiate by criminal

23 history and, therefore, the least experienced

24 attorneys can be handling these cases with

25 habitual offender laws, does that implicate

26 Rule 1.1?

27 A. It's extremely troubling. There are

28 circumstances I suppose under which one could

29 have specific training for young attorneys to

30 be able to challenge a criminal history and to

31 be able to challenge a case at an arraignment.

32 I don't know if that exists here.

93

♀ 1 But in general, you want experienced

2 attorneys to handle cases with serious

3 implications; and unless people have the

Transcript_Day 1 - 12.20.15

4 knowledge and the skill and the training to be
5 able to do that, they are not providing
6 competent representation.

7 Q. Professor, you talked about some of
8 the ABA standards that you thought also
9 applied --

10 A. Okay.

11 Q. -- separate from the ethical rules.
12 Are there particular ABA standards that you'd
13 like to highlight?

14 A. There are many that we added to the
15 1993 standards. One of them we haven't
16 mentioned at all is immigration consequences.
17 I don't know the extent to which that's a
18 problem in Louisiana. But it's a significant
19 problem nationally. It's incumbent upon
20 lawyers to communicate early on with a client
21 to determine immigration status, so that they
22 can adequately advise them about that.

23 we've added provisions regarding
24 waivers of certain kinds of rights. I don't
25 know the extent to which that is implicated
26 here.

27 The one that I think is most
28 significant, Judge, and I think may address
29 your concern, there is a particular provision
30 about excessive caseloads; and as I said, we
31 spent a good deal of time discussing what
32 should be done if you are a defense lawyer when

Transcript_Day 1 - 12.20.15

2 caseload. We have a particular standard
3 regarding that if you would like me to refer to
4 it.

5 THE COURT:

6 I think it's the one where they
7 have to go to their supervisor, am I
8 correct?

9 THE WITNESS:

10 Correct. That's initially. But
11 what happens if in a situation like
12 this you go to your supervisor; the
13 supervisor is unable because of the
14 caseloads of other people to be able
15 to reassign you?

16 THE COURT:

17 Then that supervisor should come
18 to court with a motion to withdraw,
19 am I correct?

20 THE WITNESS:

21 well, that's only in one case.
22 what if like in this circumstance,
23 the supervisor -- the office itself
24 is violating -- is systemically
25 violating the obligation to ensure
26 that all of its lawyers comport with
27 the rules of professional conduct.

28 what do you do in that
29 circumstance? In that circumstance,
30 what we indicated is you should go to
31 the court and seek judicial relief if
32 on an individual basis you cannot

Transcript_Day 1 - 12.20.15

♀ 1 actually ensure that your office is
2 going to be providing competent
3 counsel.

4 THE COURT:

5 So I believe there's State
6 Supreme Court law in this state. I
7 think it's from Pert.

8 THE WITNESS:

9 It's from Pert.

10 THE COURT:

11 It has to be done on an
12 individual basis. Am I correct?

13 THE WITNESS:

14 That's what Pert held. However,
15 I do not believe that Pert considered
16 systemically the problem and I know
17 it was this Court's case. But they
18 didn't consider that systemically.
19 They didn't consider the fundamental
20 conflict of interest; and also
21 there's a case out of Florida.

22 THE COURT:

23 I know. The Florida Supreme
24 Court.

25 THE WITNESS:

26 That looked at that situation.
27 Looked at it as a systemic problem.

28 So I think there's a greater
29 recognition that it's the judiciary
30 that bears responsibility when
31 there's systemic problems and there's

Transcript_Day 1 - 12.20.15

32 a record of systemic problems such as

96

♀ 1 there is here.

2 BY MR. REINGOLD:

3 Q. Regarding that ABA standard. Could
4 you identify it just for the record?

5 A. I don't know that I can readily find
6 the number. Do you have it in front of you?

7 Q. Is that 4-1.8?

8 A. I believe so.

9 Q. Professor, would any of your own
10 materials that you brought with you --

11 A. I did bring my own materials and I
12 have that rule underlined. This is a different
13 version.

14 Q. would it refresh your recollection to
15 review your own materials?

16 A. That would be fine.

17 MR. REINGOLD:

18 May I approach, Judge?

19 THE COURT:

20 Yes.

21 THE WITNESS:

22 Thank you. It's Standard 4-1.8.
23 It's called "appropriate workload."

24 Judge, I think it might be
25 helpful if I read it into the record.

26 THE COURT:

27 Sure.

28 THE WITNESS:

29 "Defense counsel should not
Page 103

Transcript_Day 1 - 12.20.15

30 carry a workload that by reason of
31 excessive size or complexity
32 interferes with providing quality

97

♀ 1 representation, endangers a client
2 interest, and independent, thorough,
3 or speedy representation or has a
4 significant potential to lead to the
5 breach of professional obligations.

6 A defense counsel whose workload
7 prevents competent representation
8 should not accept additional matters
9 until the workload is reduced and
10 should work to ensure competent
11 representation in counsel's existing
12 matters.

13 Defense counsel with a
14 supervisory structure should notify
15 supervisors when counsel's workload
16 is approaching or exceeds
17 professionally appropriate levels.

18 B) Defense organizations and
19 offices should regularly review their
20 workload of individual attorneys as
21 well as the workload of the entire
22 office and adjust workloads,
23 including intake, when necessary and
24 as permitted by law to ensure the
25 effective and ethical conduct of the
26 defense function.

27 C) Publicly funded defense

Transcript_Day 1 - 12.20.15

28 entities should inform governmental
29 officials of the workload of their
30 offices and request funding and
31 personnel that are adequate to meet
32 the defense caseload. Defense

98

♀ 1 counsel should consider seeking such
2 funding from all appropriate sources.
3 If workload exceeds the appropriate
4 professional capacity of a publicly
5 funded defense office or other
6 defense, that office or counsel
7 should also alert the courts in its
8 jurisdictions and seek judicial
9 relief."

10 That's the provision that I was
11 referring to and that actually leaves
12 it in the court's jurisdiction as to
13 an appropriate remedy which I
14 believe, given the trend of the case
15 law, suggests that there can be
16 systemic relief.

17 BY MR. REINGOLD:

18 Q. Thank you, Professor. I'm wrapping
19 up, so I'm wondering if you have any other
20 observations about either the ethical rules or
21 the ABA Standards --

22 THE COURT:

23 Hold on one second. What is
24 that citation?

25 THE WITNESS:

Transcript_Day 1 - 12.20.15

26 4-1.8 of the ABA Standards of
27 the defense function.

28 THE COURT:

29 Is that a model rule?

30 THE WITNESS:

31 It's not a model rule, no. It's
32 a standard. Model rules are the

99

♀ 1 rules of professional conduct.
2 Independently the ABA promulgates
3 standards for prosecution and defense
4 function. Those are independent.
5 Those are the ones that are often
6 cited by courts.

7 They are not binding. They are
8 not binding, but those standards
9 provide guidance. These are among
10 the ones that were recently updated
11 to take into account the current
12 situations of what prosecutors and
13 defense lawyers face around the
14 country.

15 we believe at least as a
16 profession that it's important to
17 constantly update the rules of
18 professional conduct and the
19 standards to assist lawyers and to
20 assist the court in assuring that we
21 actually have a criminal justice
22 system that functions in the way that
23 it should.

Transcript_Day 1 - 12.20.15

24 THE COURT:

25 And you said Louisiana follows
26 this standard as well?

27 THE WITNESS:

28 No one has yet adopted the ABA --
29 They're national standards.

30 THE COURT:

31 So Louisiana doesn't have a
32 counterpart?

100

♀ 1 THE WITNESS:

2 Not as far as I know.

3 BY MR. REINGOLD:

4 Q. Professor, any other observations you
5 have about the ethical challenges of the office
6 as they relate to any of the standards or rules
7 that you referenced as being the basis for your
8 opinion?

9 A. I have many observations. I don't
10 really know what else I can add here. I'm very
11 troubled by the position that this office is
12 in. There's exceedingly high caseloads.
13 They're under-funded. That's perfectly clear
14 and, as I said, to call this a justice system
15 is really a misnomer.

16 If all we're going to accept -- and
17 it's not just Louisiana. If all we're going to
18 accept is a system whereby we're just
19 processing people and keeping people in jails
20 and prisons for lengthy period of time without
21 adequate counsel, we've really let down our

Transcript_Day 1 - 12.20.15

22 profession and consequently we have really let
23 down the public.

24 If we want people to have respect for
25 the law, we actually have to uphold a system
26 that actually demonstrates that kind of respect
27 and we can't do so without a system where
28 people are provided adequate counsel.

29 MR. REINGOLD:

30 Thank you, Professor.

31 THE COURT:

32 Professor, based on what you

101

♀ 1 just testified to, I should not let
2 any public defender in my courtroom.

3 THE WITNESS:

4 well, I think it's troubling.
5 I'm not sure you shouldn't let any of
6 them in. I mean are you talking
7 about the Orleans Public Defender
8 system?

9 THE COURT:

10 Yes.

11 THE WITNESS:

12 I think it might be appropriate
13 to ask them as they appear whether or
14 not they can handle the case.

15 Actually, the State of
16 Washington has a court rule now.
17 They implemented a court rule where
18 it's incumbent upon the judge to
19 actually have the counsel appear

Transcript_Day 1 - 12.20.15

20 before them indicate the number of
21 felony trials they are handling. So
22 some courts at least are moving in
23 the direction of assuming
24 responsibility for the code of
25 judicial conduct, which is to ensure
26 the integrity of our judicial system.

27 THE COURT:

28 Do you think that would be a
29 remedy for me to follow?

30 THE WITNESS:

31 well, I don't know that -- you
32 couldn't impose a court rule. But in

102

♀ 1 your own courtroom, you might ask
2 lawyers independently whether or not
3 they have the ability to go forward
4 and handle additional cases.

5 I do not believe that that
6 individual remedy here would actually
7 take into account the fundamental
8 systemic problems. I think this is a
9 systemic problem that requires a
10 systemic solution.

11 THE COURT:

12 I can only give a solution for
13 Section "K."

14 THE WITNESS:

15 I suppose that's true; however,
16 you are considering not just the
17 cases before you. My understanding

Transcript_Day 1 - 12.20.15

18 is you ordered a hearing to consider
19 the overall problem.

20 So I don't know the procedures
21 in Louisiana sufficiently to be able
22 to indicate whether or not it would
23 be appropriate for this Court to
24 enter an order that would actually
25 bind the judiciary.

26 THE COURT:

27 I don't have that authority.
28 Only for section "K." That's it.

29 Thank you.

30 (A recess followed.)

31 ROBERT BORUCHOWITZ, called as a witness by
32 the Defense, after first being duly sworn,

103

♀ 1 testified as follows:

2 DIRECT EXAMINATION

3 BY MS. PARK:

4 Q. Professor, can you hear me?

5 A. Yes.

6 Q. Is that volume loud enough for you?

7 A. Yes.

8 Q. Professor, can you introduce yourself
9 to the Court?

10 A. Yes. I'm Bob Boruchowitz. I'm a
11 Professor at the Seattle University School of
12 Law.

13 Q. And how long have you had been a
14 professor at the law school?

15 A. Since January, 2007.

Transcript_Day 1 - 12.20.15

16 Q. And what types of courses do you
17 teach at the law school?

18 A. I'm not teaching this year, but I
19 have taught in the juvenile clinic. I've
20 taught criminal procedure. I have taught a
21 seminar I developed on the use of executive
22 power. I taught a seminar I developed on the
23 right to counsel, and I taught a clinic I
24 developed on the right to counsel.

25 Q. Is there a defender initiative at the
26 University?

27 A. I'm the Director of the Defender
28 Initiative.

29 Q. I'm just taking a step back. Where
30 did you go to college?

31 A. I went to Kenyon College in Ohio.

32 Q. And where did you go to law school?

104

♀ 1 A. I went to Northwestern University in
2 Chicago.

3 Q. Have you been admitted to practice
4 law?

5 A. Yes. I'm admitted in California.
6 I'm inactive in California. I'm admitted in
7 Washington in the Federal District Court in
8 Washington, the Ninth District Court of Appeal,
9 and the United States Supreme Court.

10 Q. And prior to becoming a professor,
11 where did you work and what did you do?

12 A. Initially, I was a staff attorney at
13 the defender association in Seattle. I became

Transcript_Day 1 - 12.20.15

14 director there in 1978, and I was director
15 there for 28 years.

16 Q. And while you were director, did you
17 also receive a senior fellowship and what was
18 that about?

19 A. Yes. I had a Soros Senior Fellowship
20 from Open Society Foundation and I worked -- at
21 that time my board agreed to let me work
22 part-time as director and part-time on the
23 fellowship and I worked on issues of access to
24 counsel in misdemeanor cases in particular and
25 I took a number of cases in which people had
26 been denied counsel and I obtained relief for
27 them; and I did a lot of educational programs
28 for lawyers and judges on the right to counsel.

29 Q. Let me spend a couple of minutes
30 talking about your experience drafting caseload
31 and practice standards. Did you have a role in
32 drafting the revision to the Washington State

105

♀ 1 Defender Standards?

2 A. Yes. I was involved both in writing
3 the original standards and in the revision. In
4 the revision, I was co-chair initially and then
5 chair of the subcommittee of the Washington
6 State Bar Counsel and Public Defense which
7 reviewed existing standards and proposed
8 amendments which were eventually adopted by the
9 Board of Governors of the State Bar and
10 endorsed by the Supreme Court of Washington.

11 Q. And did you also play a role in

Transcript_Day 1 - 12.20.15

12 drafting a statement of interest for the
13 American Counsel of Chief Defenders?

14 A. Yes. I was a chair of the
15 subcommittee that spent about a year developing
16 that statement and then I led the discussion
17 that led to the adoption of that statement on
18 caseload and workload.

19 Q. And, Professor, let's talk about your
20 experience evaluating public defender systems.
21 You've served as the evaluator of public
22 defender systems to determine whether they're
23 providing adequate and effective
24 representation, right?

25 A. Yes. Both for the National Legal Aid
26 and the Defender Association and then more
27 recently in a partnership between my Defender
28 Initiative and the Sixth Amendment Center. So
29 I've evaluated programs in Idaho, Nevada,
30 Louisiana, Michigan, Washington DC. I think I
31 may be missing one or two.

32 But I've also looked at other

106

♀ 1 jurisdictions in other roles initially with a
2 group in Los Angeles and then through my
3 fellowship work, and then some grant work for
4 Open Society I've looked at defender systems in
5 other states.

6 Q. So you mentioned Louisiana. What
7 jurisdictions did you look at when you were in
8 Louisiana?

9 A. I helped to look at Avoyelles Parish

Transcript_Day 1 - 12.20.15

10 and, right after Katrina, I evaluated the
11 capital defense program of the Orleans
12 Defender.

13 Q. Now, have you ever served as a
14 consultant on public defense?

15 A. Recently, I worked for the City of
16 Edmonds, which is a smaller city in Washington
17 State, advising them on the selection of their
18 public defense provider.

19 Q. And have you been recognized as an
20 expert by a court of law?

21 A. Yes. The intermediate appellate
22 court of New York found that I was qualified as
23 an expert in public defense services.

24 Q. And can you tell the Court how many
25 different times you've been consulted as an
26 expert in different cases?

27 A. I testified in New York. I testified
28 in deposition in -- that was by deposition.
29 Also by deposition in a case here in Washington
30 in Grant County. It was on a systemic
31 challenge in Grant county, Washington, to the
32 felony defense practice. I was an expert in a

107

♀ 1 couple of cases involving ineffective
2 assistance of counsel.

3 I also have provided declarations or
4 affidavits in Kentucky, Miami, and New
5 Hampshire on cases involving right to counsel.

6 Q. Now, Professor, just looking at your
7 CV, is it fair to say that you've been an

Transcript_Day 1 - 12.20.15

8 invited speaker, a panelist, and trainer more
9 than 150 times at various conferences,
10 seminars, focused on indigent defense and
11 indigent defense systems?

12 A. I think that's about right. I
13 haven't counted them up, but it's in that
14 ballpark for sure.

15 Q. And is it fair to say, again in your
16 CV, that you have over 30 publications in
17 journals and newspapers and various criminal
18 justice publications writing about right to
19 counsel and excessive caseloads?

20 A. That sounds correct also.

21 Q. So, Professor, I'm going to show you
22 what I'm marking as Defense Exhibit Six. Can
23 you see it? It's a 25-page document with your
24 name on the top. It says "Robert C.
25 Boruchowitz."

26 THE COURT:

27 The Court will accept the CV as
28 being that of the witness.

29 MS. PARK:

30 Judge, it's going to be Defense
31 Exhibit Six. Judge, I would at this
32 time move Professor Boruchowitz as an

108

♀ 1 expert on indigent defense systems
2 and professional standards governing
3 the legal representation of indigent
4 criminal defendants.

5 THE COURT:

Transcript_Day 1 - 12.20.15

6 Yes. The witness can testify.

7 BY MS. PARK:

8 Q. Now, before we start, Professor, are
9 you being compensated for your testimony this
10 afternoon?

11 A. No. I'm working pro bono.

12 Q. And what is your understanding of
13 your role here today?

14 A. Your office asked me to render an
15 opinion about whether you're able to be
16 effective in the representation that you're
17 providing and offer an opinion about that in
18 support of a motion to stop taking new cases.

19 Q. And, Professor, before we get into
20 your opinion, let's talk about the basis for
21 your opinion. What ethical opinions and
22 standards are you relying on to form your
23 expert opinion today?

24 A. Well, I would rely on the Rules of
25 Professional Conduct in Louisiana; the
26 Louisiana Standards of Practice and Performance
27 Guidelines; case and limits set by the
28 Louisiana Board; the American Bar Association
29 formal opinion 06-441; the ABA Standards for
30 Criminal Justice Defense Function; the ABA Ten
31 Principles of the Public Defense Delivery
32 System; the American Council of Chief Defender

109

♀ 1 Ethics Opinion 03-01; the American Council of
2 Chief Defender Statement on Cases and
3 workloads; case law of the United States

Page 116

Transcript_Day 1 - 12.20.15

4 Supreme Court as well as the Florida case,
5 which I think is the one that Professor
6 Yaroshefsky mentioned regarding systemic
7 ineffective assistance; State versus Pert;
8 probably some other things I forgot to mention.

9 Q. Are you also -- Did you review any
10 material that was provided by us?

11 A. Yes. I reviewed a number of
12 affidavits from your staff attorneys, from
13 Mr. Bunton, and from an investigator.

14 Q. Now, one of the sources you're
15 relying on to support your opinion is the ABA
16 Standards for Criminal Justice. The
17 Prosecution and Defense Function. What is
18 that?

19 A. It's a collection of standards
20 developed by the American Bar Association to
21 guide lawyers and courts in determining what is
22 effective representation and in guiding lawyers
23 on how they should practice.

24 Q. And are standards considered black
25 letter law?

26 A. I'm not quite sure what you mean by
27 that, but it's not the same as a statute, for
28 example. But State Supreme Courts and Federal
29 District Courts and Federal Courts of Appeal
30 and the United States Supreme Court have relied
31 on both the American Bar Association standards
32 and on state standards in appropriate cases.

110

♀ 1 Q. And so you listened to the testimony
Page 117

Transcript_Day 1 - 12.20.15

2 of Professor Yaroshefsky and she talked a lot
3 about the ethics rules. So what's the
4 relationship between ethics rules and practice
5 standards?

6 A. Well, effective standards made clear
7 that they're not to be inconsistent with, but
8 to support ethics rules and so, for example,
9 the most important ethics rule, 1.1 on being
10 competent, relates pretty closely to a number
11 of the standards that explicate more fully what
12 lawyers should be doing as they represent
13 defendants.

14 Q. Okay. So both the ABA standards that
15 you and I just talked about and also the
16 Louisiana Public Defender Board Trial Court
17 Performance Standard, they explicate further
18 what the rule is supposed to stand for?

19 A. That is correct, and I believe the
20 Louisiana standards specifically mention the
21 ethics.

22 Q. Mention -- I'm sorry, Professor. I
23 didn't hear you.

24 A. I think they specifically mention the
25 ethical rules.

26 Q. So, Professor, let's go through the
27 applicable -- Can you identify for us which
28 standards from the ABA Standards for Criminal
29 Justice and Defense Function you would be
30 relying on today?

31 A. Well, I would rely on the 1.8 one
32 that Professor Yaroshefsky mentioned as well as

Transcript_Day 1 - 12.20.15
111

♀ 1 the duty to keep informed, the duty to
2 investigate, the duty to explore disposition
3 without trial, and sentencing. Those in
4 particular as well as the excessive workload.

5 Q. So turning first to the duties to
6 establish and maintain an effective client
7 relationship, and that is 4-3.1. Is that
8 right?

9 A. Yes. I don't have that one in front
10 of me, but I think that's correct.

11 Q. So from the materials that you have
12 reviewed, the affidavits from the Orleans
13 Public Defenders, are our OPD attorneys
14 establishing and maintaining effective client
15 relationships? Are they following those
16 standards?

17 A. I would say that in the bulk of their
18 cases they're not able to do that because
19 they've indicated that they're not able -- in
20 most cases not able to comply with the 48-hour
21 initial contact rule that the office has nor
22 the 72-hour that the state board has and often
23 it's a week or sometimes two or three weeks
24 before they can see their clients and often,
25 for some clients, it could be even longer; and
26 when they do see their clients, it's very
27 difficult to see them and they have extreme
28 time limits on their opportunity to meet with
29 them.

30 So it's very difficult for them and

Transcript_Day 1 - 12.20.15

31 in most cases I don't think they're complying
32 with the rules or the standard.

112

♀ 1 Q. Can you point to any specific
2 examples from the affidavit, Professor?

3 A. Well, I'll give an example from
4 Mr. Moroz, M-o-r-o-z. His affidavit. He
5 mentioned that he had a trial set yesterday, I
6 guess, for a client who was housed at the Hunt
7 Correctional Facility because of mental
8 illness. He tried to make an appointment to go
9 see him last Friday. He was told he had to
10 wait until Monday because the scheduler went
11 home.

12 On Monday, he was told he couldn't
13 schedule a visit because the computer system
14 wouldn't allow it. So on Tuesday, the day
15 before trial, he was going to have a scheduled
16 visit with his client. In order to make that
17 visit, he had to tell the judge in another
18 court that he couldn't do a scheduled motion
19 hearing even though the officer was there and
20 available.

21 That's obviously a major problem in
22 being able to communicate with your client and
23 see your client. He also mentions in the same
24 affidavit that because the jail phone system
25 does not permit voice messages to be left on
26 his answering machine, he misses somewhere
27 between 30 and 50 calls a week from in-jail
28 clients who are not able to let him know what

Transcript_Day 1 - 12.20.15

29 their concerns are.

30 Q. And does that -- what Mr. Moroz is
31 saying, does that violate or come at odds with
32 any other practice standards?

113

♀ 1 A. Well, it implicates almost all of
2 them in terms of not only establishing a
3 relationship with the client, but also being
4 able to prepare adequately and thoroughly to
5 meet the 1.1. If you're not even able to see
6 your client until the day before trial,
7 particularly a mentally-ill client, it's nearly
8 impossible to prepare adequately for whatever
9 kind of hearing you have and certainly for
10 trial.

11 It makes it very hard to form what
12 kind of investigation you need and, of course,
13 what all the affidavits indicate is that it's
14 very hard to get investigation for anything
15 other than the very most serious cases and,
16 even then, it's hard to get the work done.

17 Q. Is there anything else you would like
18 to add, Professor, in talking about the
19 Standard 3.1?

20 A. I think in general the difficulty
21 that the lawyers have in going to see their
22 clients because of time and then the arbitrary
23 limits that are set by the jail in terms of the
24 number of clients that you can see at one time
25 and the difficulty that was mentioned earlier
26 about the inadequate video facility with regard

Transcript_Day 1 - 12.20.15

27 to talking to women clients and the fact that
28 at least one of the lawyers mentioned -- I
29 think it might be Mr. Frampton -- that he has
30 on occasion had to leave without seeing clients
31 because he had to wait so long that he had to
32 leave and I think it was also --

114

♀ 1 Let me just check. One of the
2 lawyers indicated that he had a mentally-ill
3 client who the family of the client told him
4 that there was a serious issue about the
5 client's mental health and he wasn't able to
6 address it. No one in the office was able to
7 address it and then the client died as a result
8 of the mental illness issues in the jail. So
9 that obviously is the worst possible outcome of
10 not having adequate communication with the
11 client.

12 Q. Turning to standard 4.1. The 4-4.1.
13 The duty to investigate and engage
14 investigators. Can you talk about that
15 standard in context with the affidavits you
16 reviewed?

17 A. Yes. The standard is that counsel
18 should conduct a prompt investigation,
19 including acquiring -- I mean looking at
20 physical evidence when it's available and going
21 to the scene.

22 The staff investigator's affidavit
23 makes clear that he's triaging his assignments.
24 That many cases, he is not able to do anything

Transcript_Day 1 - 12.20.15

25 at all for months at a time because he's
26 prioritizing life without parole cases that
27 have trial dates and, for many of his cases,
28 they're just names on a spreadsheet.

29 He also said that it's very hard for
30 him to get all the work done that he needs on
31 the cases because there's so much work that
32 needs to be done and he has so many cases; and

115

♀ 1 then the lawyers in their affidavits indicate
2 that sometimes they don't even have time to
3 think about what investigation they want and
4 it's very hard to get investigation done on the
5 bulk of their cases.

6 I would note also that the national
7 standards are that you should have one
8 investigator for every four staff attorneys.
9 In your office, it's more like one for six or
10 seven.

11 Because of the large volume of life
12 without parole cases that you have, the
13 severity of sentencing which is very different
14 than a lot of places, it makes it even more
15 disproportionate in terms of the inadequate
16 investigation resource.

17 Q. So, Professor, you mentioned the word
18 "triage" and you mentioned that the
19 investigator and the attorneys are using that
20 word in their affidavits. What concerns you
21 about that?

22 A. It's very concerning to me because it

Transcript_Day 1 - 12.20.15

23 indicates that there's a recognition that
24 people are not able to provide effective
25 representation to all of their clients. The
26 word "triage" is really not appropriate for
27 criminal justice work. The definition of
28 "triage" is the process of sorting victims as
29 in a battlefield, and using it to apply to a
30 situation of representing individuals in
31 criminal cases is very disturbing; and I would
32 note that in the 11th Judicial Circuit, a

116

♀ 1 Florida case, 115 Southern Third 261, the court
2 described as evidence of ineffective assistance
3 a situation very similar to the one in Orleans.

4 They described meet and great pleas
5 as being routine procedure. The defender
6 meeting sometimes the client for the first time
7 at arraignment, knowing nothing about the case,
8 but told about a plea offer from the State; and
9 the Supreme Court of Florida specifically
10 referenced the use of triage and mentioned that
11 the public defenders were mere conduits for
12 plea offers. All of that indicated a measure
13 of non-representation and, therefore, denied
14 the Sixth Amendment right to counsel.

15 So both Gideon versus Wainwright and
16 the Cronin case, which requires meaningful
17 adversarial testing, are violated when you have
18 that kind of situation, and so the Eleventh
19 Circuit makes it clear that it's condemning
20 triage and I would agree with them.

Transcript_Day 1 - 12.20.15

21 Q. The word "triage" was also used in
22 the context of expert resources. Can you talk
23 about that?

24 A. Yes. I was stunned to find out the
25 lack of expert resources in the Orleans
26 Defender practice. The budget I believe
27 Mr. Bunton indicated is in the 30 thousand
28 range per year. I understand that it might be
29 higher in the next fiscal year to as much as 60
30 using some grant funds.

31 But I would note that Orleans has
32 about 22,000 cases a year, spending between 30

117

♀ 1 and 60 thousand on experts. There's several
2 problems here. One is that the triages, in
3 fact, are presenting a conflict of interest
4 which raises the ethical concerns that
5 Professor Yaroshefsky talked about.

6 But I'll give you an example of how
7 dramatically out of proportion this situation
8 is. In King County, Washington, where I live,
9 in 2012, with 17,814 cases -- so fewer cases
10 than Orleans has -- the county approved 2,980
11 expert requests for a total budget of 2.8
12 million dollars. 2.8 million dollars.

13 So they approved in Class C felony
14 cases, which are the lowest level felony in the
15 State of Washington -- 527 requests for expert
16 witnesses were approved. The Orleans Defender
17 can't come close to do that even in LWOP cases.

18 So the dramatic lack of ability to

Transcript_Day 1 - 12.20.15

19 test the kinds of forensic evidence that could
20 be provided by the State as well as to examine
21 the mental health issues of a client, both in
22 terms of competency, possible defenses, and for
23 sentencing mitigation, not to mention
24 negotiations with the prosecutor who might very
25 well want to take a less severe approach to
26 someone who is mentally ill, the defenders are
27 not able in most cases to be able to do that
28 because the resources are so limited. You've
29 got something like two or three dollars for
30 every case that you can spend an experts on
31 average.

32 Q. Now, is there anything else you'd

118

♀ 1 like to add, Professor, to that standard? The
2 duty to investigate and engage investigators.

3 A. One thing that I wanted to mention is
4 that investigation is necessary to be able to
5 conduct effective negotiations with the
6 prosecutor; and so as I understand it, the
7 Orleans Defender's Office will have a case for
8 several weeks before they may advise their
9 client about a plea offer. But they rarely
10 have time to investigate the case or do
11 research.

12 There is a right to effective
13 representation in the plea negotiations. Based
14 on the affidavits I've read, it's rarely
15 possible for the Orleans Defenders to do that
16 kind of effective negotiation because they

Transcript_Day 1 - 12.20.15

17 don't know whether the prior pleas -- whether
18 the prior convictions are valid. They don't
19 know anything about the investigation because
20 they don't have that information in most of
21 their cases when they're making these
22 negotiations and haven't had time to research
23 the case law.

24 They really are in some ways doing
25 what the Florida Supreme Court condemned as
26 meet and plead because they're not prepared to
27 have the type of investigation they need. With
28 that investigation, the defender could say to
29 the prosecutor these priors are not valid and
30 then a conscientious prosecutor will not pursue
31 trying to have a habitual offender on someone
32 who's prior convictions are invalid.

119

♀ 1 The defender might be able to raise a
2 search issue or suppression issue, a confession
3 issue, that a conscientious prosecutor will
4 take into account; and so not being able to
5 investigate the cases in most of the cases
6 cripples the defender in his ability to
7 negotiate effectively with their client.

8 Q. Now, Professor, in reading the
9 affidavits and reviewing the affidavits, does
10 it seem as though the attorneys are just not
11 putting in the hours? Is that what's going on?
12 They're just not putting in the effort to try
13 to do the investigative requests and try to get
14 the experts?

Transcript_Day 1 - 12.20.15

15 A. No. It's striking to me that it's
16 quite the opposite. That they're working far
17 more than might be expected and that the
18 problem is they have so many cases and so many
19 complex cases and so many barriers that they're
20 simply not able to do the work that they know
21 they should be doing.

22 It strikes me that they are quite
23 diligent in the sense of working hard, but
24 they're not able to meet the ethical standard
25 of being thoroughly prepared that diligence
26 requires.

27 Q. Turning to the next standard.
28 Standard 4-3.3, interviewing client. Can you
29 talk about that?

30 A. Well, as we talked about earlier, if
31 you're not able to spend enough time with the
32 client to get them to trust you and understand

120

♀ 1 what's going on, it's very difficult both for
2 the lawyer to be able to figure out what the
3 best course is and for the client to understand
4 what the options are.

5 You need to do this as soon as
6 possible initially to establish a relationship
7 with the client. But then subsequent to that,
8 learning as much of the application as possible
9 so that that informs the lawyer's decisions
10 about investigation, what he asks the
11 investigator to look for as well as what issues
12 the lawyer should be researching legally.

Transcript_Day 1 - 12.20.15

13 So the inability to have adequate
14 interviews with the client initially
15 dramatically undercuts effective
16 representation. Including -- since most cases
17 go to sentencing, being able to adequately
18 affect sentencing.

19 Q. So can you talk about the sentencing?

20 A. Well, sentencing really in a way
21 begins at the very beginning of the case.
22 Obviously, there are going to be cases where
23 you vigorously contest the matter and you're
24 going to go to trial. Some of those case will
25 result in a guilty finding. Other cases, the
26 majority of cases, will be a plea of some sort
27 and so the lawyer should from the very
28 beginning be thinking about negotiating the
29 possibility of a plea and a sentencing
30 recommendation and what kind of mitigation will
31 be prepared for the client at sentencing.

32 Under 8.1 of the ABA standards, from

121

♀ 1 the very earliest time the defense counsel
2 should be considering sentencing alternatives
3 and developing information to present to the
4 court.

5 In my experience, it's a good
6 practice in any kind of contesting of
7 sentencing or in a serious felony sentencing to
8 have a presentencing report and, if possible,
9 to have some sort of sentencing testimony. For
10 example, whether it's a social worker or case

Transcript_Day 1 - 12.20.15

11 advocate. It seems like the Orleans Defender
12 lawyers by and large in the bulk of their cases
13 are not able to do that.

14 Q. Turning to Practice Standard 3.2 --
15 I'm sorry. 4-3.2. Seeking a detained client's
16 release from custody. Can you talk about that,
17 Professor?

18 A. It's important for the defender and
19 for the client to, if possible, get the client
20 out because there are many studies that show
21 that clients that are out of custody have a
22 much better chance of having a more favorable
23 outcome than clients in custody because they're
24 much more able to help the lawyer prepare the
25 case and, of course, it's also much more --
26 it's more fair to the individual who's still
27 innocent and presumed innocent and the impact
28 on the defendant of losing their job, losing
29 their housing, having an impact on the family
30 for not having them home is major.

31 So what's clear from the affidavit is
32 that the lawyers are simply unable in a great

122

¶ 1 bulk of cases to do anything about seeking
2 pretrial release for their clients and that's a
3 severe limitation on their ability to provide
4 effective representation.

5 Q. Is that because they're not able to
6 go see them soon after assignment of cases?

7 A. It's a combination of not being able
8 to go see them and, when they go see them, not

Transcript_Day 1 - 12.20.15

9 having enough time with them to learn what they
10 need to learn.

11 Q. Professor, what other ABA standards
12 did you review?

13 A. Well, I think we talked a little bit
14 about 6.1, the duty to explore disposition
15 without trial and under no circumstances
16 recommending to the defendant acceptance of a
17 plea without appropriate investigation and
18 study of a case, including analysis of
19 controlling law and the evidence likely to be
20 introduced at trial.

21 From the affidavits, it's clear that
22 in a substantial number, high percentage of
23 cases, the Orleans Defenders do not have --
24 have not done investigation and study of the
25 case. They have not analyzed the controlling
26 law and they have not looked at the evidence or
27 reviewed the evidence likely to be introduced
28 at trial. So they're not complying in a great
29 number of cases with standard 4-6.1.

30 Q. Are there any others?

31 A. Nothing that jumps into my mind, but
32 I'm happy to be reminded of others.

123

♀ 1 Q. Now, looking at the ABA Standards and
2 looking at the Louisiana Practice Standards,
3 are there any significant differences between
4 them or are the Louisiana Standards based on
5 the National ABA Standards?

6 A. You know, in my experience in looking

Transcript_Day 1 - 12.20.15

7 at the Louisiana standards, there are a number
8 of very similar sets of standards. For
9 example, there's the Louisiana Performance
10 Guidelines. There's the National Legal Aid and
11 Defender Association Performance Guidelines.

12 My state bar association has issued
13 performance guidelines that I helped to draft.
14 They're all very similar and they're all based
15 on the same principles that are set out in the
16 rules of professional conduct and in the ABA
17 Standards Defense Function.

18 So they're all very similar and
19 they're all related to each other.

20 Q. Now, Professor, can you talk a little
21 bit about -- one of the things you're relying
22 on is the ABA formal opinion 06-441. Can you
23 talk a little bit about that opinion and what
24 that opinion says about excessive caseloads?

25 A. Right. The ABA opinion is designed
26 to help guide defenders who find themselves in
27 an excessive caseload situation and, by the
28 way, the book that Professor Yaroshefsky
29 mentioned by Professor Lefstein is also
30 designed to do that, Securing Reasonable
31 Caseload, and the ABA has a document called the
32 Eight Guidelines for Defender Services

124

♀ 1 Caseload. These all relate to each other and
2 rely on each other in a sense.

3 The ABA formal opinion, which was
4 published in 2006, addresses specifically

Transcript_Day 1 - 12.20.15

5 what's going on here. If the workload prevents
6 a lawyer from providing competent and diligent
7 representation to existing clients, she must
8 not accept new clients.

9 So the idea is that the defender
10 presents to the court the situation of
11 excessive caseload that interferes with
12 competent representation and says I can't take
13 any new cases.

14 Q. And the American Counsel of Chief
15 Defenders Ethics Opinion 0301, does that
16 address a similar problem?

17 A. Yes, and that was aimed specifically
18 at the chief defender as well. The ABA
19 addressed both the chief defender and the
20 individual defender. But the chief defender is
21 not to take any new cases under the ACCD's
22 opinion for the same reason: That you're not
23 able to represent your existing client
24 effectively because you have all these new
25 clients that you're being asked to take.

26 So the ACCD says that when confronted
27 with a prospective overloading of cases which
28 will cause the attorneys to exceed their
29 capacity, the chief executive is ethically
30 required to refuse appointments to any and all
31 such excess cases, and that was in 2003.

32 Q. And are there any other ethical

125

♀ 1 opinions or statements that's relevant in this
2 situation?

Transcript_Day 1 - 12.20.15

3 A. Well, we mentioned briefly the ACCD
4 statement on caseload and workload. It makes
5 clear that defenders should not exceed the
6 recommended caseload limits which, for example,
7 are 150 felonies per lawyer per year or four
8 hundred misdemeanors per lawyer per year; and
9 those are the maximum caseloads for full-time
10 defense attorneys with adequate support staff
11 representing cases of average complexity
12 without any geographic challenges.

13 Your lawyers have cases that are --
14 many of them -- far above average complexity
15 and they don't have adequate support staff and
16 they have significant geographical barriers.

17 Q. So let's talk about caseloads,
18 Professor. You began to mention some of the
19 factors to consider in determining what is an
20 appropriate caseload for a jurisdiction for
21 public defenders. So what are those factors
22 that need to be taken into consideration?

23 A. Well, of course, the complexity of
24 the cases. So, for example, if you're in a
25 jurisdiction where there's very few violent
26 cases where the prosecutor is not seeking
27 habitual offenders status for the client, you
28 can handle more cases than in situations where
29 that's an "other than that."

30 Again, the ACCD and the national
31 advisory commission and various other states
32 and cities have set maximum limits if you have

Transcript_Day 1 - 12.20.15

♀ 1 difficult prosecution policies or a greater
2 than average complexity in cases and your
3 research is not adequate. Then you can do
4 fewer cases. If your lawyers are less
5 experienced, you can do fewer cases.

6 For example, in my state, the
7 standards that have been adopted by the supreme
8 court indicate that less-experienced lawyers
9 should be doing fewer cases than the maximum;
10 and so in setting a reasonable workload, it's
11 important to understand what's actually going
12 on in the practice and the severity of
13 sentencing, the severity and complexity of the
14 cases that you're facing, whether you have to
15 travel a lot in representing your clients,
16 whether there's barriers in the court
17 procedures.

18 One of the big problems your lawyers
19 have is that they have to be in many places at
20 the same time. The affidavits indicate that on
21 a typical day, an Orleans Defender will have to
22 be in four sections of court often at the same
23 time and one of the lawyers mentioned that he
24 literally had to be taken physically out of a
25 courtroom by a judge to go do a trial in that
26 judge's courtroom, leaving behind all the other
27 cases in the first courtroom.

28 So the number of hearings that are
29 going on at the same time in multiple courts,
30 you don't have enough lawyers to cover all of
31 those because of all the cases that are being
32 heard. So all of those kinds of barriers

Transcript_Day 1 - 12.20.15

127

♀ 1 reduce the number of cases the lawyer can
2 handle.

3 I mentioned, by the way, in terms of
4 caseload limits, there's just recently in Texas
5 been a very comprehensive study of what the
6 defender caseloads ought to be and they
7 concluded that, if you're doing the most
8 serious felonies, you should not do more than
9 77 a year and, if you're doing the most serious
10 misdemeanors, it should be not more than 216 a
11 year.

12 So when you look at those numbers and
13 you compare them to what's going on in Orleans
14 where people are doing double or triple the
15 bigger number, the national standard of 400
16 misdemeanors and 150 felonies, the Orleans
17 Defenders are doing double and triple that
18 amount; and then you take a look at Texas which
19 has done this very detailed study. You realize
20 that the Orleans Defenders are extremely
21 limited in their ability to provide effective
22 representation.

23 Q. So in the affidavits, the attorneys
24 discussed how many cases they currently have
25 pending, how many cases they have touched or
26 handled during the course of this year, how
27 many new cases they received this year, and how
28 many of their clients are incarcerated, how
29 many of their clients are quad offenders or
30 triple lifers. How do you make sense of that,

Transcript_Day 1 - 12.20.15

31 all of that, in coming to a caseload number?

32 A. well, all three of those are

128

♀ 1 relevant. In other words, how many they have
2 pending at the moment, how many new cases
3 they've received both recently and annually,
4 and how many cases carry over from last year.

5 what struck me in some of these
6 affidavits that some of the lawyers have quite
7 a lot of cases that were carried over from last
8 year in addition to the ones they have now and
9 several of the lawyers have gotten a lot of
10 cases recently; as many as eight a week or more
11 and, obviously, if you're getting eight felony
12 cases a week, you're going to be doing four
13 hundred felonies a year which is probably
14 triple what they should be doing.

15 One of the lawyers had, I think 150
16 open felony cases. That's about triple what I
17 think somebody should have open in terms of
18 felony cases and it makes it nearly impossible
19 to do your work. When you think about 150 open
20 clients, how do you even keep track of that? I
21 mean it's a major case management job for the
22 individual lawyer to keep track of 150 open
23 client files; and what am I doing on these 150
24 cases?

25 when you think about you've got maybe
26 40 available hours a week if you're going
27 quickly berserk. You really should have more
28 like 30 to 35 billable hours a week. But if

Transcript_Day 1 - 12.20.15

29 you take 40 billable hours a week and you have
30 150 open clients, that means you've got less
31 than four hours a week to work on those
32 clients.

129

♀ 1 when I looked at the case numbers for
2 some of the lawyers, it indicated to me that
3 they have so many clients that they're
4 averaging total less than four hours on their
5 clients and you simply can't do all the work
6 you need to do. Meeting your client,
7 researching the cases, talking to the client,
8 doing investigation, writing memoranda. You
9 simply can't do it when you have less than four
10 hours a case.

11 I looked at Tina Peng's affidavit and
12 she's got 32 new cases in two weeks. That's a
13 rate of eight hundred a year. You can't see 32
14 new clients in a week when you're in court five
15 to six hours a day.

16 If all you had to do was see new
17 clients, you might be able to. But that's if
18 the jail doesn't get in the way, which they
19 are. So when you take 32 new clients in two
20 weeks and 150 open cases that you had before
21 that and all the cases that they're trying to
22 deal with, it's simply impossible to do the
23 work that is needed to be done and, of course,
24 she has clients that are in East Carroll and
25 Franklin that she can't go to see.

26 The majority of new clients, now that

Transcript_Day 1 - 12.20.15

27 she's a level four attorney -- which by the way
28 she has two years of experience. The majority
29 of the new clients are charged with armed
30 robbery, forcible rape, or attempted murder,
31 and she indicates that she was unable to --
32 even though she saw most of those 32 new

130

♀ 1 clients within a week, she was unable to do any
2 follow-up work on their cases, including phone
3 calls, basic contact, and it took more than
4 three weeks to do an investigation request for
5 one of those clients; and 12 of those clients
6 were still in jail, meaning that it was going
7 to be hard for her to maintain contact with
8 those clients.

9 She works very hard. Many, many
10 hours, but she cannot meet her obligations
11 under the -- either under the ethics rules or
12 the Louisiana Performance Standards.

13 Q. One of the affidavits you have is
14 from a supervisor and so how do you account for
15 the caseload of a supervisor?

16 A. Well, the national standards indicate
17 that for every ten lawyers that you're
18 supervising, you should have one full-time
19 supervisor and, in fact, that's not what
20 happens in Orleans because the supervisors are
21 carrying caseloads.

22 I believe that Mr. Carpenter was the
23 supervisor you're referring to?

24 Q. Yes.

Transcript_Day 1 - 12.20.15

25 A. Mr. Carpenter had, according to his
26 affidavit, a caseload that I would interpret as
27 being roughly 20 percent caseload of life
28 without parole cases, a 52 percent caseload of
29 felonies, about a 3.75 percent misdemeanor
30 caseload, and a 4.7 percent revocation
31 caseload.

32 Since he's supervising eight people,

131

♀ 1 he's doing more than one and a half workloads
2 and it's complicated even more than that in his
3 case because he's supervising people and he's
4 indicated that because of his workload he's
5 often not able to supervise effectively and
6 that, when he tries to supervise effectively,
7 he can't represent his clients effectively.

8 He also is one of the lawyers -- Let
9 me just double check. But I think he's one of
10 the lawyers who said I really can't keep up on
11 the law. I need to rely on other lawyers to do
12 that. He does say that and, of course, he's a
13 supervisor, so he should be up on the law
14 himself so that he can advise others and
15 because --

16 And one thing I would mention about
17 the revocations. He indicates that he had so
18 far this year 26 revocations and he also
19 indicates that basically he can't do anything
20 on those cases unless they're tied to new
21 clients on new criminal charges that he's
22 already representing.

Transcript_Day 1 - 12.20.15

23 So like his colleagues, he indicates
24 that he's able to do almost nothing on these
25 revocation cases, again, indicating the
26 conflict of interest that results from triage.
27 All of these clients that are facing
28 consequences that likely include incarceration,
29 he cannot help them and he's simply standing
30 there with them in the courtroom and that
31 implicates the problem of triage. It
32 implicates conflict of interest. It implicates

132

♀ 1 inability to be diligent and competently
2 representing those clients.

3 So even if the only issue is he's not
4 doing work on revocation, he is being
5 ineffective on those clients and violating the
6 ethics rules and standards on that. But, of
7 course, those are not the only clients that are
8 suffering. He indicates that because of his
9 workload, which includes the supervision, that
10 he's not able to look at, for example, hours of
11 video that the police have taken in cases
12 involving his clients, including the arrest of
13 his clients.

14 So there might be issues raised not
15 only about the arrest, but also about the
16 charge itself; and he's simply not able to look
17 at them to figure out what he ought to do with
18 those.

19 Again, that's the inability to
20 investigate, inability to be thoroughly

Transcript_Day 1 - 12.20.15

21 prepared, and competent representation.

22 Q. Now, one of the -- something that the
23 prior expert spoke about was in Washington
24 state there was a certification process that
25 happens with the judges. Can you talk a little
26 bit about that, Professor?

27 A. Yes. By rule of court, all public
28 defenders have to certify on a quarterly basis
29 in every court that they appear in the number
30 of cases that they've had and that they're not
31 violating the caseload limit.

32 So, in other words, if a lawyer is

133

♀ 1 doing, say, half misdemeanors and half
2 felonies, that lawyer would have to certify
3 that they're not taking more than 200
4 misdemeanors and 75 felonies per year and they
5 would have to pay attention to how many this
6 year, so that they know they're not going to go
7 over that limit; and they cannot accept a new
8 case and the court cannot assign a new case
9 once they've exceeded their annual limit.

10 Q. Professor, one of the cases that you
11 mentioned way in the beginning was Cronin, but
12 also Pert. Louisiana versus Pert. How is this
13 situation that we face today in terms of the
14 process different than Pert?

15 A. Well, Pert involved an individual
16 defender moving to withdraw from cases and here
17 the Orleans Defender is moving not to accept
18 new cases, so it's very different in that

Transcript_Day 1 - 12.20.15

19 regard.

20 what I think is interesting about
21 Pert is that the supreme court in Pert talked
22 about the very kinds of issues we're talking
23 about here. Not being able to investigate
24 adequately and the court said in Pert "we take
25 reasonable effective assistance of counsel to
26 mean that the lawyer not only possesses
27 adequate skill and knowledge, but also that he
28 has the time and resources to apply this skill
29 and knowledge to each of his individual
30 clients."

31 The court also specifically said that
32 a trial court can make a decision about

134

♀ 1 effective assistance before the case is over.
2 You don't have to wait until an appeal; and the
3 difference between what this hearing is about,
4 which is motion to withdraw, and Pert, is that
5 in Pert it was -- excuse me.

6 In Pert, it was a motion to withdraw.
7 In this case, it's a motion to stop taking
8 cases. In other words, decline to accept new
9 cases. Whereas in Pert, it was a motion to
10 withdraw which the court said would require an
11 individual hearing in each individual case.
12 But here, as Professor Yaroshefsky indicated,
13 when they're making a systemic request not to
14 take new cases, that's a different matter.

15 But I think the court can be informed
16 by the supreme court's review in the language I

Transcript_Day 1 - 12.20.15

17 just mentioned. In order to be effective, the
18 lawyer has to have time and resources
19 necessary, which the Orleans Defender lawyers
20 do not have.

21 Q. So, Professor, is it fair to say that
22 the Orleans Public Defender attorneys have an
23 excessive caseload based purely on their
24 numerical figures, but if you factor in
25 everything else about the nature of the
26 practice here -- the case complexity, the
27 sentencing severity, the access to client
28 issues and everything else that you've talked
29 about, the attorneys' caseload and their
30 excessiveness -- it increases dramatically? Is
31 that a fair statement?

32 A. Yes.

135

♀ 1 Q. And so what would be your expert
2 opinion on whether OPD attorneys are able to
3 meet their constitutional obligations to their
4 clients?

5 A. I would say, based on what I've
6 reviewed, that in the bulk of cases, they're
7 not able to provide the representation required
8 by the Sixth Amendment or by the Louisiana
9 Performance Guidelines or by the ethics rules.

10 MS. PARK:

11 The Court's indulgence one
12 second.

13 Judge, I have nothing further.

14 THE COURT:

Transcript_Day 1 - 12.20.15

15 I don't have any questions.

16 MS. PARK:

17 Thank you, Professor. I think
18 we're done. Thank you.

19 THE WITNESS:

20 It was my pleasure and thank
21 you, your Honor, for allowing me to
22 appear by video.

23

24

25

26

27

28

29

30

31

32

136

♀ 1 C E R T I F I C A T E

2

3

4 I, SANDRA T. MINUTILLO, CCR, employed as
5 an Official Court Reporter for Section "K" of
6 the Criminal District Court for the Parish of
7 Orleans, State of Louisiana, as the officer
8 before whom this testimony was taken in the
9 matter of State of Louisiana vs CORIN WROTEN,
10 ET AL, Case No. 520-385, do hereby certify that
11 this testimony was reported by me in the
12 stenotype method, was prepared and transcribed

Transcript_Day 1 - 12.20.15

13 by me, and is the true and correct transcript
14 to the best of my understanding.

15 The transcript has been prepared in
16 compliance with transcript format guidelines
17 required by statute or by rules of the board or
18 by the Supreme Court of Louisiana.

19 I am not related to counsel or to the
20 parties herein nor am I otherwise interested in
21 the outcome of this matter.

22

23

24

SANDRA T. MINUTILLO, CCR

25

26

27

28

29

30

31

32

137

♀