

1 Transcript of Barry Scheck - 12.23.15
2 CRIMINAL DISTRICT COURT
3 FOR THE PARISH OF ORLEANS
4 STATE OF LOUISIANA
5

6 STATE OF LOUISIANA NO. 520-385

7 VERSUS

8 CORIN WROTEN

9 DYLAN A. DELATTE NO. 525-790

10 KENNETH RICHARDSON NO. 526-168

11 NO. 526-264
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16

17 Transcript of the Proceedings
18 held on the 23rd day of November,
19 2015 in the above-entitled
20 matter, before, CHERYL E. MACHAUER,
21 Certified Court Reporter, before the
22 HONORABLE ARTHUR L. HUNTER, JR., Judge
23 presiding.
24

25 APPEARANCES:

26 ROBERT FERRIER, ESQ.,

27 RACHEL HURD, ESQ.

28 Assistant District Attorney,

29 Parish of Orleans

30 JEE PARK, ESQ.,

31 Orleans Parish Defenders Office
32

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P R O C E E D I N G S

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MS. PARK:

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Good morning, Your Honor, Jee Park

4

here on behalf of the Orleans Public

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Defenders. This is a continuation of a

6

hearing that started on Friday. We have

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our final witness to call this morning.

8

That witness is Mr. Barry Scheck. He is

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appearing before Skype this morning and,

10

I think, he is ready to be sworn in.

11

BARRY SCHECK

12

Called as a witness by the Defense, after first

13

being duly sworn, testified as follows:

14

DIRECT EXAMINATION

15

BY MS. PARK:

16

Q. Can you hear us okay, Professor,

17

Mr. Scheck? Can you hear and see us okay?

18

A. I can hear you. The sound is breaking up

19

a little bit and the Judge's face is obscured. So

20

if he makes any facial reactions like I'm testifying

21

like a lunatic, I won't be able to see it. So I

22

apologize.

23

Q. He says that's good.

24

A. Okay.

25

Q. Mr. Scheck, can you tell us what is your

26

current position and employer?

27

A. Yes. I am a professor of law at the

28

Benjamin N. Cardozo School of Law and I am a

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29 emeritus director of clinical education and a
30 emeritus fund director of the Jacob Burns Center on
31 law and the practice of ethics and I also am a
32 partner in a civil rights law firm, Neufeld Scheck &

3

♀ 1 Brustin.

2 Q. Can you give us a brief background of your
3 education, where you went to college, where you went
4 to law school, and your bar admissions?

5 A. Yes. I went to college at Yale University
6 from 1967 to '71. I went to law school at the
7 University of California at Berkeley from 1971 to
8 1974. I took the California and New York Bar at the
9 same time because you could in those days, so I'm
10 barred in both the State of New York and California.

11 Q. And prior to becoming a professor at
12 Cardozo, what other positions did you have?

13 A. Well, when I first got out of law school,
14 I wrote a book on "Raising and Litigating Claims of
15 Electronic Surveillance" and worked for the United
16 Farm Worker's Union doing strikes in the valley.
17 And in 1975, I became a staff attorney at the Legal
18 Aid Society in New York in Bronx County.

19 Q. And can you discuss --

20 A. Then after that -- you want me to do all
21 of this, right?

22 Q. Sure, yes.

23 A. Then after that in 1978 and '79, I started
24 teaching at Cardozo Law School, which was its first
25 graduating class, and I have remained on the faculty
26 there ever since. I was director of clinical

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27 education. I created many of the clinics at that
28 law school, a defense clinic, a criminal law clinic,
29 a prosecutor's clinic, an appeals clinic, an
30 intensive trial advocacy program with Professor
31 Yaroshefsky, who I know testified on Friday. We
32 created the Jacob Burns Ethics Center and we also

4

♀ 1 created a clinical program, the Innocence Project,
2 the Innocence Project in Cardozo Law School. Then
3 it was replicated in many ways by other
4 organizations, which what is now known as the
5 "Innocence Network" across the country. The
6 Innocence Network has, I believe, 56 organizations
7 within the United States and six abroad. The
8 Innocence Project in New York City now is an
9 independent nonprofit entity and still affiliated
10 with Cardozo Law School and we service the
11 headquarters and the network. I personally was very
12 much involved in setting up the Innocence Project in
13 New Orleans first with Emily Bolton and now working
14 with its director, Emily Maw.

15 Q. Thank you, Professor. Can you take us
16 briefly through some of the relevant committees,
17 boards, and associations, that you are affiliated
18 with in terms of indigent defense and innocence work
19 and exonerations?

20 A. Well, of course, first, the Innocence
21 Project -- I should mention in passing that
22 obviously we set up the law firm, Neufeld Scheck &
23 Brustin, which originally was Cochran, Neufeld &
24 Scheck, and we do civil rights litigation all across

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25 the country. Some of them also involve bringing
26 systemic ineffective assistance claims. So we have
27 brought a few of them. I have been involved in
28 litigation with all of those. One in particular
29 that may be of interest to the Court is the case
30 that we brought in Detroit involving an individual
31 named Eddie Joe Lloyd. Mr. Lloyd was an individual
32 who literally gave a confession, a false confession,

5

♀ 1 while he was in a mental institution. His
2 court-appointed lawyer did not have enough funds to
3 even think about hiring a psychiatrist to examine
4 him. Mr. Lloyd was convicted claiming he was
5 innocent. The DNA subsequently proved that he was
6 innocent. Our law firm brought a civil rights claim
7 on behalf of Mr. Lloyd, not just against the city
8 because the police fed him facts that brought about
9 his false confession, but we also sued the county,
10 Wayne County, for a systemic ineffectiveness claim.
11 They settled with both of us for significant
12 monetary damages and the City of Detroit settled
13 with us and agreed as part of its settlement to
14 videotape interrogations in the homicide unit. The
15 reason I mention this is that the kind of claim in
16 the Lloyd case, and in a number of others, is very
17 similar to these kinds of actions that the Court has
18 taken on here.

19 Q. Thank you, Professor. Can you talk about
20 your relevant committee work?

21 A. Yes. When I started at the Legal Aid
22 Society in 1975, that was a period of great tumult

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23 where the Legal Aid Society lawyers formed a union,
24 The Association of Legal Aid Attorneys, in order to
25 hold job actions in order to get better working
26 conditions. Eventually, we were able to have a
27 contract where we limited the case loads and were
28 able to establish the rights where we literally have
29 a certain number of square feet in an office and
30 every lawyer got a telephone. I was on the
31 bargaining committee that negotiated a lot of this.
32 when I became a law professor in 1978 and '79, I was

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♀ 1 an advisor to the leaders of the Legal Aid Society
2 in trying to bring about a number of reforms. I was
3 also a member of the committee of the Association of
4 the Bar of the City of New York. And in 1987, we
5 did an analysis of the Legal Aid Society and the
6 court-appointed lawyer plans in New York. I think,
7 evidently, we put into evidence, Your Honor, at some
8 time, an article called "A System in Crisis -- The
9 Assigned Counsel Plan in New York: An Evaluation
10 and Recommendation for Change," in 1987, "New York
11 University Review of Law and Social Change." It was
12 also accompanied by an article by Chester Mirsky and
13 Michael McConville, but this report became very
14 influential because we were able to -- we hired
15 Robert Spangenberg, who did an entire study of the
16 criminal defense system in New York City, and we
17 came up with recommendations to form what we called
18 a "mid-range defender," that is, the need for public
19 defender offices for other than just legal aid and a
20 court-appointed lawyer system. This led in turn to

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21 the creation of the Neighborhood Defender Service of
22 Harlem. Along with Chris Stone and Rick
23 Fleckenstein, who were the executor directors of
24 that organization, and Professor Charles Huckletree,
25 who was on the board, NDS, we established this model
26 public defender program and he introduced the
27 concept of holistic representation. I'm proud to
28 say that a number of people that worked with NDS
29 went on to form other organizations with the same
30 philosophy including one in New York known as "The
31 Bronx Defender System." And there are a number of
32 other organizations in New York City with these

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♀ 1 defender organizations to try to meet -- so I spent
2 a lot of time working on that.

3 In addition, I was a member of the National
4 Association of Criminal Defense Lawyers and part of
5 its leadership for many years. Jim Boren, in Baton
6 Rouge, and I founded what we called "an indigent
7 defense committee" in the NACDL that eventually led
8 to the hiring of permanent staff people. Now we
9 have a number of staff people at the National
10 Association of Criminal Defense Lawyers that are
11 dedicated to indigent defense reform. I was
12 president of that organization. And when I was
13 president of the NACDL, we focused actually on the
14 criminal defense system in Louisiana. And as
15 president, I commissioned a report of indigent
16 defense in Avoyelles County Parish, which we will
17 move to put into evidence and supplement this
18 record.

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19 I believe, I testified, or representatives
20 testified, around the time that IDAB was creating
21 some of the current standards that govern the
22 provision of defense purposes in the state. I
23 should mention as well that in 1993, I think it was,
24 I was a witness in the Peart case. In fact, Your
25 Honor, ironically enough, I was teaching at the
26 NACDL Criminal Defense College in Macon, Georgia
27 when a young lawyer named Rick Teissier approached
28 saying that he could not adequately represent his
29 clients given his case load particularly because he
30 had a DNA case and he wanted to challenge the DNA
31 evidence. By this time, my partner and I, Peter
32 Neufeld, had developed a great deal of expertise in

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♀ 1 DNA evidence and he approached me about it. I
2 advised him as to what resources he needed and I
3 even have a witness to this. The other day I was
4 with Pam Metzger of Tulane Law School and we were
5 talking about this and she was actually a defender
6 in New York City at that time, but attended the
7 college and remembered the meeting between
8 Mr. Teissier and I. Eventually, Mr. Teissier, as
9 you know, brought an action before Judge Calvin
10 Johnson and, I think, I was among the first
11 witnesses in the Peart case and reviewed at that
12 time the status of representation of the defendants
13 in Orleans Parish. I also -- what is relevant here
14 is, for over twenty years, I have been a
15 commissioner in New York. We have a New York
16 Commission on Forensic Science that oversees all of

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17 our crime labs. I have been an active part of the
18 criminal justice section of the American Bar
19 Association and Diplomat of the American Academy of
20 Forensic Sciences. I've worked with one of the
21 commissioners in the American Judicature Society and
22 helped put together his study of forensic science
23 years ago and currently serve as a -- I will
24 describe in a minute -- on the Legal Resource
25 Committee of the Organization of Scientific Area
26 Committees of the National Institute of Standards
27 and Technology, which is a major federal effort to
28 change forensic science in the United States and
29 educate members of the bar.

30 In terms of trainings, most importantly
31 probably for our purposes, Your Honor, we did just
32 get -- in the last two years, we created something

9

♀ 1 called "National Forensic Science College for
2 Defenders," which selects key federal defenders and
3 key public defenders across the country and tries to
4 train trainers to deal with complex forensic science
5 issues, and we extend scholarships to the learned
6 counsel who is asking me the questions and one other
7 member -- and, I think, two other members of the
8 Orleans Public Defenders system so they could attend
9 because they could not pay to attend. We will seek
10 to introduce the curriculum, the first two years of
11 that college today, because it illustrates some of
12 the problems about what OPD cannot do, but should be
13 doing in the ordinary defense of their clients.

14 Q. Thank you, Professor. I think, you

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15 touched on some of the trainings you have done and
16 then going into some of the scholarships and
17 publications you have done in your career. Can you
18 talk specifically about -- and we will discuss more
19 later in your testimony, but about your piece with
20 the American Judicature Society?

21 A. Yes. Your Honor, I have written a lot
22 about indigent defense over the years, but what I
23 found particularly striking, and I would really
24 commend to your attention, is that in 2013 at the
25 time of the anniversary of Gideon, I was asked to
26 write an article for the American Judicature Society
27 publication, Judicature, which is a publication that
28 goes to all the chief judges, I take it, in the
29 United States in state and federal courts. I wrote
30 an article called "Four Reforms for the Twenty-First
31 Century," which I would commend to your attention.
32 This article starts with the most important reform

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♀ 1 is indigent defense reform and I asked the judiciary
2 literally to take a lead on that. And just as part
3 of the introduction to that I wrote, "Without
4 adequate counsel for the poor, one cannot even begin
5 to effectuate meaningful solutions to the
6 debilitating problems posed by mass incarceration,
7 over-criminalization, and racial bias.
8 'Problemsolving courts,' whether targeting drugs,
9 juveniles, family violence, and communities, works
10 best when there are quality defense teams, not just
11 lawyers, but investigators, paralegals, and social
12 workers, who can counsel clients and their families

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13 holistically. A strong indigent defense does not
14 just provide assurance the innocent are protected
15 and the abuses by the state are exposed, but holds
16 families together, helps addicts stay sober, keeps
17 young defendants in school, facilitates re-entry
18 from prison and supports public safety and
19 communities."

20 "Viewed from this perspective, indigent defense
21 reform is a cause that should, and still can, garner
22 bipartisan political support and appeal across class
23 and racial divides." Now, this article then goes
24 on, Judge, to call upon courts, such as yourself, to
25 take the lead in indigent defense reform and
26 literally lays out what a number of us, Yaroshefsky,
27 Professor Yaroshefsky, a whole group of people over
28 the years, have recommended, and that is, when a
29 defender find him or herself -- if an indigent
30 defender in the field feels that he or she cannot
31 take on any more cases because they will be
32 ineffective to the clients that they have, they must

11

♀ 1 declare themselves unavailable and go to their
2 supervisor and ask for help. If the supervisor
3 can't ask for help, they have to go to the head of
4 the office. And if the head of the office can't
5 help because they can't take any more cases, then
6 they should go to the courts to declare themselves
7 unavailable. I know that is in the LIDAB rules. I
8 know you took testimony about this on Friday. It is
9 also in the standards of the American Bar
10 Association for the defense function. It's

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11 supported by ethics rules and that is exactly what
12 is recommended in this article and that is exactly
13 the defender, Mr. Bunton, has done now. I know that
14 he has indicated he is going to declare himself
15 unavailable. And at some point, I would love to
16 testify about remedies here and what this Court can
17 do. In the article I wrote in Judicature, the
18 section on indigent defense, which is only two or
19 three pages long, it literally calls for defenders
20 and judges to step forward on this. Particularly, a
21 legal theory that my colleague Martin Guggenheim at
22 NYU Law School, and others, pursued, which is what
23 we call "a separation of powers opinion."

24 Q. Professor, I am going to show you what's
25 been marked as Defense Exhibit 7 and, hopefully, you
26 can see it. I just put a sticker on it. Can you
27 see it okay?

28 A. Yes, I can see.

29 Q. Okay. So on the top it says, "Barry
30 Charles Scheck" and it states your address, bar
31 membership and it's a 25-page -- I will get the page
32 number. It's a 13-page document that was emailed to

12

♀ 1 me by your office. Can you identify what I'm
2 showing you as Defense Exhibit 7?

3 A. Yes, that's a copy of my CV.

4 THE COURT:

5 Admitted.

6 MS. PARK:

7 Judge has admitted the exhibits.

8 And, Your Honor, at this time I would ask

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9 you -- Judge, at this time, I would ask
10 you to qualify Mr. Scheck as an expert in
11 indigent defense systems and ineffective
12 assistance of counsel and also on
13 forensics.

14 THE COURT:

15 Yes.

16 MS. PARK:

17 Great.

18 BY MS. PARK:

19 Q. Before we get started, Professor Scheck,
20 can I ask you whether or not you are being
21 compensated today for your testimony?

22 A. No, I'm not.

23 Q. And were you at all compensated to prepare
24 for your testimony for this morning?

25 A. No.

26 Q. What is the purpose of your testimony here
27 today as you understand it?

28 A. Well, I would like to assist the Court in
29 considering the issues. Judge, if it would help
30 any, I have reviewed the affidavits that have been
31 submitted to the Court by various attorneys from OPD
32 and Mr. Bunton. I have reviewed what I understand

13

♀ 1 to be an outline of what Mr. Dixon testified to. I
2 have spoken to Professor Yaroshefsky about her
3 testimony and some of the questions that you asked.
4 And to be of assistance to the Court, please,
5 interrupt me at any time if there is something you
6 want to ask or that's on your mind or if I could be

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7 of any assistance to the Court because that's the
8 purpose of my testimony here today.

9 Q. Thank you, Professor. So let's start
10 about the innocence movement and your involvement in
11 that movement and the wrongful conviction cases that
12 you have handled in the last twenty years. Can you
13 talk to us a little bit about what lessons you have
14 learned from the innocence movement and the wrongful
15 conviction cases and their applicability to indigent
16 defense?

17 A. All right. Well, I'm sorry. Go ahead?

18 Q. Uh-huh. (Affirmative Response.)

19 A. There is no question that indigent
20 defense, bad lawyers, inadequate lawyers, lawyers
21 that are not adequately compensated, is among the
22 most important contributing factors to wrongful
23 convictions. The problem, of course, is that it's
24 very hard to document this specifically because
25 there are only a few cases where lawyers have been
26 found to be inadequate as a matter of law and then
27 subsequently there were postconviction DNA
28 exonerations. But in reviewing the transcripts of
29 these cases, and I dare say I probably viewed as
30 many of these transcripts whether in civil
31 litigation or as part of my work as co-director at
32 the Innocence Project or as an advisor to Professor

14

♀ 1 Sam Gross, and others, at the Registry of
2 Exonerations -- I read so many of these transcripts,
3 and I can tell you, Your Honor, that inadequately
4 compensated counsel, counsel that are simply not up

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5 to the task, is a key contributing factor even when
6 there are other contributing factors, particularly,
7 those dealing with forensic science. Nothing
8 contributes more to the conviction of an innocent
9 person than a lawyer that is simply inadequate to do
10 the job, but I really want to point out for these
11 purposes that this also has an enormous impact on
12 public safety, because every time an innocent person
13 is convicted who did not commit the crime, the
14 person who really did it is out there free to commit
15 more. When you look at the Innocence Project's web
16 site, over 330 postconviction DNA exonerations, Your
17 Honor, in 47 percent of those cases we have been
18 able to identify through the DNA testing the person
19 who really committed the crime. And in so many of
20 those cases, there has been a problem that lawyers
21 were simply not adequately prepared to challenge
22 forensic evidence that was invalid or just simply
23 misleading and false, which is something on the
24 order of 50 percent of the cases. When you look at
25 the ineffective assistance cases where courts have
26 actually reached this issue, one would see -- for
27 example, in the case of Jimmy Bromgard in Montana,
28 who had a lawyer that just literally didn't do the
29 job, a court-appointed lawyer, who they literally
30 had to pull out of a bar when the verdict came in,
31 he was granted a new lawyer and subsequently got DNA
32 testing after his first conviction was invalidated

15

♀ 1 by ineffective assistance of counsel grounds. The
2 person who was running the crime lab in the State of

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3 Montana was exposed as having given false evidence
4 in case after case after case. Ron Williamson of
5 Oklahoma, who was five days from execution and, in
6 fact, the book that Peter Neufeld, Jim Dwyer, and I,
7 called, "Actual Innocence: Five Days to Execution
8 And Other Dispatches From The Wrongly Convicted,"
9 tells that story. And John Grisham, after Ron
10 Williamson had died, told it again in his only
11 non-fiction book, "The Innocent Man." But what's
12 not always noted is that Ron Williamson, his capital
13 conviction, within five days of his execution, was
14 reversed based on ineffective assistance of counsel
15 in Oklahoma because of false hair testimony, exactly
16 the same kind of misleading hair testimony that is
17 now subject to review by the FBI itself. In
18 conjunction with the Innocence Project and the
19 National Association of Criminal Defense Lawyers, we
20 can put into the record what's going on now that
21 hundreds of cases have now been reviewed by the FBI
22 itself admitting that its agent examiners gave
23 misleading testimony about hair evidence. All
24 across the country, FBI agent cases are being
25 reexamined. The FBI itself has reviewed transcripts
26 over the last two years and concluded that to the
27 first close to 300 we've looked at that something on
28 the order of 95 percent of the cases agents gave
29 misleading hair testimony. The question is, where
30 were the lawyers? Where were the defense lawyers?
31 They didn't adequately litigate this issue. That
32 was true in the Bromgard case. It was true in the

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♀ 1 Ron Williamson case. It's true in quite a number of
2 cases.

3 Another case that's symptomatic of this is
4 Jeffrey Pierce in Oklahoma, which was a DNA
5 exoneration, but the lawyer in that case failed to
6 to challenge Joyce Gilchrist, who again was another
7 well-known crime lab analyst, who was engaged in
8 systematic misconduct. So the lawyers in Oklahoma
9 were not challenging Joyce Gilchrist's evidence
10 adequately. In the Pierce case, he was exonerated
11 by DNA and it led to a whole scandal where all kinds
12 of Gilchrist cases were then being examined. A
13 Washington case in Virginia is another one like this
14 and there's one in Texas. I can go on and on and on
15 talking about cases where lawyers that simply
16 weren't adequately funded, or not up to the task,
17 did not challenge forensic evidence, which led in
18 turn to crime lab analysts. In the case of Zane and
19 Gilchrist, they were dry labbing, not even doing the
20 tests. So the failure to have an adequately funded
21 defense team who cannot vet forensic evidence and do
22 not have adequate funds to call in experts to
23 challenge it not only endangers the innocent, but it
24 undermines public safety because we do not expose
25 those in the laboratory who are not doing the job
26 correctly and we do not expose unreliable science
27 and that happens again and again and again and that
28 is one of the major legacies of the innocence
29 movement.

30 Q. So kind of bringing that down to what is
31 happening in New Orleans and taking a look at the

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32 affidavits that you reviewed, is it your opinion,

17

♀ 1 Professor, that when there is lack of adequate
2 indigent defense funding, the indigent defenders
3 will not have the resources, will not have the time,
4 will not have the support to challenge these
5 forensic scientists at a systemic level; is that
6 right?

7 A. Yes. I don't believe right now the
8 Orleans Public Defenders can provide adequate
9 effective assistance of counsel on these forensic
10 cases. And I'm not talking, Your Honor, what some
11 might pejoratively term "Cadillac challenges" to the
12 forensic science evidence. I'm talking about very
13 basic things and they only have a \$30,000 expert
14 witness budget and 22,000 clients. It's literally
15 impossible. Some of the things that I know to
16 supplement the testimony in the record is, it's
17 really troubling that when the district attorney
18 makes a decision -- and I'm not quarreling with
19 their decision -- that they are not, for example,
20 going to swab guns for evidence of DNA or they are
21 not going to try to take fingerprints from guns in
22 gun possession cases, because they are not the most
23 serious of cases from the point of view of the
24 district attorney, but the Defense needs to do that
25 because these gun possession cases, particularly,
26 when we are dealing with a defendant who could be,
27 what I guess you call, "multiple billed" or made
28 part of the habitual offender situation, can go to
29 jail for decades, if not life. But this public

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30 defender office does not have the funds to have a
31 gun swabbed, or even bullets within the gun swabbed,
32 for DNA, something we actually know can be done very

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♀ 1 effectively to prove it's somebody else's DNA on
2 that gun in the probative places, or to have that
3 gun tested for fingerprints, again, something that
4 can be done. Frankly, you can do both. But if the
5 Defense does not have the funds to do that, these
6 people are at risk.

7 In addition, there are other kinds -- DNA
8 itself must be challenged adequately, or even if you
9 want to do DNA testing on items of evidence that the
10 State hasn't done. Articles of clothing, for
11 example, they haven't tested, but the Defense thinks
12 might be relevant, they could enter the DNA profile
13 into the database for the discovery of the real
14 perpetrator. Also, right now ongoing is the serious
15 problem of DNA mixture cases. It turns out DNA
16 laboratories across the country have not been
17 following the guidelines that were handed down in
18 2012 with respect to mixtures and sometimes known as
19 the "CPI number" that determines the likelihood that
20 a potential suspect, or defendant, may be a part of
21 a mixture. And these mixture cases, mixture
22 interpretations, were not just competently done by
23 crime labs, even apparently good crime labs all
24 across the country. So right now, for example, the
25 forensic science commission in Texas in conjunction
26 with the court of criminal appeals, their highest
27 criminal court, the governor's office, and the

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28 legislature, is engaged in a review of hundreds, if
29 not thousands, of past cases because the mixture
30 interpretations were done incorrectly. OPD does not
31 have the resources to begin to challenge that. I
32 mentioned the hair review that's going on by the

19

♀ 1 FBI. We are asking different states and defender
2 offices in different states to conduct reviews of
3 prior hair testimony in their cases. Obviously, OPD
4 can't do that, but, of course, that's one of the
5 problems in Orleans that this office doesn't even
6 have the capacity to do postconviction cases that
7 involve non-capital cases. We don't even have that
8 function in the State of Louisiana in the public
9 defender office. The lawyers that came to the
10 National Forensic Science College the past two years
11 are getting training on how to call statisticians to
12 challenge tool marks on bullets and the probative
13 value of that evidence, a very important kind of
14 challenge that's going on now all across the country
15 as those standards are changing, how to look at
16 fingerprints and call statisticians and others to
17 testify about the latest one with respect to the
18 probative value of fingerprint evidence and also how
19 to learn how to put fingerprints into the AFIS
20 system to find the real perpetrator.

21 Cellphone tower records are a very common form
22 of evidence now. I noted in one of the affidavits,
23 maybe it's digital evidence, taking evidence from
24 computers. There's a lot to be learned in this
25 area. We need adequate defense challenges to that.

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26 These lawyers took a course in it, but they don't
27 have the money to hire experts and they really don't
28 have the time to do these kinds of challenges that
29 are going on all across the country. This would
30 include, by the way, forensic assays that are really
31 in my judgment, and in the judgment of many others,
32 should be coming into evidence as well, like bite

20

♀ 1 marks. There are also issues with respect to blood
2 spatter evidence and shoe prints. All of these
3 things should be done by any minimally competent
4 defender office. The training these wonderful
5 lawyers in the Orleans Public Defender Office got,
6 and they are very, very smart, but totally
7 overburdened. They can't do the things that they
8 feel they should be doing and they don't have the
9 money to hire experts to make sure it's done. This
10 not only endangers their innocent clients, but also
11 frankly is endangering the public safety because we
12 simply cannot expose those people in crime labs that
13 are not doing the job right. So this really hurts
14 the prosecution and hurts the police because the
15 whole area of forensic science is changing today.

16 Q. So, Professor, can you connect the dots
17 between what you are saying and with the rules of
18 professional conduct, rule 1.1, having to do with
19 competence and also the ABA practice standards and
20 the Louisiana State practice standards regarding
21 what an attorney should do in terms of providing, as
22 you said, "minimally competent representation" using
23 these forensic sciences?

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24 A. Yes. Particularly, when it comes to
25 minimally adequate challenges and examination of
26 forensic science evidence, the budget is totally
27 inadequate for access to expert services. This
28 endangers the innocent. It also is going to
29 endanger the entire police apparatus and crime scene
30 apparatus in the State of Louisiana because it's not
31 being adequately challenged or vetted. This helps
32 no one as experience has taught us. I don't want to

21

♀ 1 repeat what I know was testified to on Friday, but
2 it's plainly in my opinion unethical and
3 unconstitutional for lawyers to be this inadequately
4 funded and unable to challenge forensic science
5 evidence in these cases. It is everywhere.
6 Forensic science evidence is heartland stuff now.
7 This is not some kind of esoteric problem when you
8 are talking about fingerprints, ballistics, DNA,
9 cellphone, digital evidence, blood spatter,
10 cellphone tower records. All of this we see in
11 prosecution after prosecution. Frankly, if the
12 prosecution themselves are not offering this
13 evidence, it's incumbent upon the Defense to follow
14 up on it to see whether or not they can prove their
15 client is innocent.

16 Q. I will show you what's been marked as
17 Defense Exhibit 8. Can you identify for the Court
18 what I'm showing you as Defense Exhibit 8?

19 A. Yes. That's the article I referred to
20 before in Judicature about four reforms,
21 particularly, urging the judiciary to take the lead

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22 on indigent defense reform.

23 MS. PARK:

24 Your Honor, I am going to offer,
25 file, and introduce, the American
26 Judicature Society's article written by
27 Mr. Barry Scheck.

28 THE COURT:

29 Admitted.

30 BY MS. PARK:

31 Q. In your article, you speak a little bit
32 about checks and balances -- apologize, Court's

22

♀ 1 indulgence, give me one second -- checks and
2 balances and separation of power situations that
3 arise when an indigent defense system is willfully
4 underfunded and the system becomes unreliable
5 because the judges can no longer serve their role
6 effectively. Can you discuss a little bit about
7 that, Professor?

8 MS. PARK:

9 well, Court's indulgence as we figure
10 out the technical problem here. Judge,
11 given the fact that we are having some
12 technical difficulties, and for some
13 reason I'm not able to get Mr. Barry back
14 on Skype, and for some reason he's not
15 able to connect with us either -- we are
16 at the tail end of our testimony -- I'm
17 wondering if we can just finish it by a
18 conference call, having him on a phone
19 call? Is that possible?

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THE COURT:

Yeah. You are going to do it on here?

MS. PARK:

Yes. It is okay to put him on a phone here?

THE COURT:

Yes.

MS. PARK:

I just have two more questions to ask him and he's going to wrap it up. I think, we're at the tail end of everything.

23

♀ 1

THE COURT:

2 Yes.

3 MS. PARK:

4 Okay. I will give a phone number
5 where he can be reached to your minute
6 clerk. Barry, I have you on conference
7 call.

8 BY MS. PARK:

9 Q. Mr. Scheck, I'm just going to ask you a
10 couple of more questions and then we'll wrap it up
11 here. Before we lost you on Skype, we were talking
12 about your article in the Judicature. Can you talk
13 a little bit more about that and about separation of
14 power issues and what happens system wide when the
15 indigent defense system is underfunded?

16 A. When I talk about it in this article, and
17 others have talked about it -- I'm talking in

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18 particular of Professor Guggenheim and others -- is
19 that in thinking about indigent defense systems,
20 which are so severely underfunded, that a defender
21 office must ethically, and as a constitutional
22 matter, declare itself unavailable, that is, cannot
23 take any more cases, because they cannot provide
24 constitutional representation to their current
25 clients. Legally, how is that kind of an issue
26 going to be adjudicated? What has been pointed out
27 is that a good way to think about this is separation
28 of powers. Ordinarily, separation of powers are
29 used as sort of a shield. There's the belief that
30 courts are acting ultra vires, going beyond their
31 proper authority if they in any way sanction a
32 defender office that is saying it's systemically

24

♀ 1 ineffective, they cannot take additional cases out
2 of a particular section, or a series of sections, in
3 a jurisdiction. And what Professor Guggenheim, and
4 others, have argued now and was most notably
5 accepted and it was exactly the issue in the case of
6 the Public Defender of the 11th Judicial District
7 versus Florida, a case that I know the Court
8 indicated to Professor Yaroshefsky it was aware of,
9 but right on point, is that the separation of powers
10 actually works the other way. That is to say, when
11 the defenders are not adequately funded by the
12 legislature, it makes it impossible for the Court to
13 do its job adequately. And I mentioned, Your Honor,
14 at the very beginning about the role of public
15 defenders and holding families together and reentry

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16 and things of that nature. I'm very familiar with
17 the extraordinary special courts that you have in
18 Orleans Parish dealing with reentry and veterans.
19 Those are very important functions that defenders
20 should be able to do. When they are not adequately
21 funded to represent all of their clients, then all
22 of this falls apart. But most importantly the
23 executive branch accumulates too much unchecked
24 power to prosecute an outcome on grounds other than
25 the merits when the Defense literally cannot do its
26 job. And as a consequence, the judicial branch is
27 denied its duty to decide cases independently. So
28 this kind of way of looking at the 6th Amendment
29 issue as a separation of powers problem demonstrates
30 that it is a structural protection for the
31 protection of everybody's rights including those
32 people who have never even arrested or prosecuted.

25

♀ 1 This kind of formulation of the problem of systemic
2 ineffectiveness resonates with all of the examples
3 and all the learning we have from these innocence
4 cases, which really have been transformative in us
5 understanding how the criminal justice system works.
6 All these crime lab scandals, as I've already
7 testified to, and all the problems in keeping just
8 even forensic evidence, to just choose one working
9 correctly, simply cannot be handled and it
10 dramatically undermines the ability of the judiciary
11 to do its job at every level. I mean, taking pleas
12 in cases where lawyers -- in habitual offender
13 matters where people are getting decades, if not

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14 life, sentences that everybody in the courtroom
15 knows that the defender just literally met the
16 client, literally is faced with a very coercive plea
17 bargaining offer, and nobody has conducted any
18 investigation of the case on the Defense side, that
19 also undermines the independence of the judiciary
20 because you really can't count on the information
21 that you are getting to be reliable because it has
22 never been tested in the adversary system.

23 One other thing I would just ask Counsel to
24 mark and to put into evidence just to give you a
25 sense of how this works is what I was saying about
26 the forensic science problems. Last week I gave a
27 keynote lecture to the Wisconsin State Public
28 Defenders, so I've included the power point of that.
29 Jee, could you just give the Judge a copy of that so
30 I can call attention to certain parts of it?

31 Q. Sure.

32 A. Right. So you will see in these slides

26

¶ 1 I'm talking about, starting with slide No. 3, the
2 National Academy of Science Report in 2009, which in
3 the next slide indicates, with the exception of DNA,
4 no other forensic method has been rigorously shown
5 to have the capacity consistently with a high degree
6 of certainty demonstrate a connection between
7 evidence and a specific individual source. And it
8 goes on to talk about other forensic science
9 disciplines now have to be reviewed. Particularly,
10 in chapter 5 of the NAS report, they are talking
11 about pattern evidence, tool marks on bullets,

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12 fingerprints, bite marks, hair comparison. They
13 talk about digital and arson evidence. If you look
14 at slide 7, Judge --

15 THE COURT:

16 I'm familiar with the --

17 MS. PARK:

18 The Judge has a question, Professor.

19 THE WITNESS:

20 Oh, yes, please.

21 THE COURT:

22 No, I'm familiar with the report.

23 THE WITNESS:

24 Oh, okay. What I'm trying to point
25 out on slide 6, 7, and 8, is we now have
26 this structure where all these different
27 forensic science disciplines -- after the
28 NAS report, on slide 7 and 8, just show
29 -- what's happened is we have a National
30 Commission on Forensic Science that the
31 justice department and the National
32 Institute of Standards and Technology

27

♀ 1 have created. Slide No. 8, Your Honor,
2 is what we call "the OSACA, Organization
3 of Scientific Area of Committees," and
4 you can see that National Institute of
5 Standards and Technology, one of the
6 venerable federal agencies that sets the
7 standards for everything from the tensile
8 strength of girders to bullet proof
9 vests, to you name it, it is now looking

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at forensic science. We are going
11 through a process where each of these
12 different disciplines that you see in
13 green are being vetted and they have to
14 see if they can actually post standards
15 that are scientifically sound and I'm one
16 of the members of the legal resource
17 committee that is assisting in this
18 process. So the rest of this power point
19 talks about how statisticians and others
20 are all looking at each of these
21 different forensic assays that come into
22 court every day. Lawyers have to know
23 about this. They have to be trained in
24 order to help the crime lab, frankly,
25 help the prosecution, as well as
26 adequately represent their clients. It's
27 for the sake of the system. While this
28 whole effort is going on nationally, the
29 Orleans Parish Public Defender Office,
30 which has remarkably bright and
31 idealistic young people because they have
32 been able to attract that,

28

♀ 1 notwithstanding the low salaries and the
2 new furloughs that will have to be
3 instituted, which make it hard to keep
4 anyone, they are prepared, ready, and
5 able, to do this for the sake of the
6 system. But they cannot do anything that
7 is recommended in this power point that I

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just presented to the Wisconsin Public
9 Defenders and others have presented all
10 across the country. They can't do it
11 because they don't have an expert budget
12 and they literally don't have time to
13 deal with it in terms of their cases.
14 Reading those affidavits from these
15 lawyers about going to the jail, waiting
16 for hours, being unable to talk to their
17 clients, unable to prepare, it's
18 heartbreaking. I just find it
19 heartbreaking.

20 MS. PARK:

21 Thank you, Professor, just one
22 moment, please. Your Honor, I have no
23 further questions for Mr. Scheck. For
24 record purposes, I'm going to number the
25 power point as Defense Exhibit 9. And at
26 this time, Judge, I have no further
27 questions for Mr. Scheck. I think, he
28 may be excused, Judge? Thank you,
29 Professor Scheck.

30 THE WITNESS:

31 One other point -- I couldn't hear.
32 Your Honor, there was one other thing

29

♀ 1 that I would like to address under the
2 separation of powers argument and the
3 upcoming litigation, if it would not be
4 an imposition?

5 THE COURT:

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6 Sure.

7 THE WITNESS:

8 That is, I can well understand from
9 your point of view, because as you will
10 see from this Judicature article, it is
11 exactly the kind of hearing you are
12 holding here today. I think, it is
13 vitally important and other judges should
14 be doing it. At the end of the day,
15 where does this go? And one of the
16 thoughts I would bring to your attention
17 is, I would expect Mr. Bunton, and the
18 office, is going to either ask for an
19 order permitting them to declare
20 themselves unavailable in your section or
21 they will simply declare themselves
22 unavailable given the evidence presented
23 here because they simply cannot take any
24 more cases. So then the question arises,
25 what would happen then in other sections
26 in the courthouse in Orleans Parish?
27 what I would expect to happen is, if this
28 Court were to make findings of fact and
29 conclusions of law with respect to the
30 defenders' rights not to take any more
31 cases, declare itself unavailable at this
32 particular time in your section, these

30

⊘ 1 findings of facts and conclusions of law
2 could then serve as a defense if the
3 refusal to take any more cases in other

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4 sections would potentially result in a
5 citation of contempt by any other judge,
6 because that would be the issue if the
7 defender comes in and says, as he has
8 indicated he will, that he cannot take
9 any more cases and he is declaring his
10 office unavailable until such time as his
11 case loads can become manageable and he
12 can provide constitutionally adequate
13 representation to the clients that he
14 has. The question is, by not coming into
15 court and taking new cases, can he be
16 held in contempt by a judge or will the
17 Court recognize he has the right to do
18 this under separation of powers and
19 under, I guess, the Peart line of cases
20 and, I think, that's the way this
21 litigation may and should end. I think,
22 it would be very important in making
23 these findings of fact and conclusions of
24 law that when the Court does it that your
25 colleagues on the bench will recognize
26 its wisdom and that would be the
27 trajectory of what happens next. I know
28 you did ask that question a number of
29 times to my colleague, Ms. Yaroshefsky.
30 I was reading the Peart decision. Again,
31 having literally been a witness and there
32 at the very beginning of the case, you

31

♀ 1 know, it does seem to me that, you know,

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the Court was wise in its majority

3 decision, but, I think, even some of the
4 dissents by Judge Dennis in his
5 references to Luckey v. Harris, I mean,
6 this really is a situation where there is
7 a clear and imminent danger, I would
8 believe, to the clients and there has to
9 be recognition that it is the judiciary's
10 right to have cases before it that are
11 adequately prepared, so you, the
12 judiciary, can make clear and just
13 decisions and it really is a public
14 safety issue. If there is anything that
15 I've communicated in the course of this
16 testimony, I think, it's in the article I
17 wrote for the Judicature and I just thank
18 you for allowing me to share this with
19 you.

20 MS. PARK:

21 Thank you, Professor, we really
22 appreciate it. Now we are signing off at
23 the moment, thank you.

24 THE COURT:

25 Until next month.

26 MS. PARK:

27 At this time, Your Honor, we have no
28 other witnesses to call, so we would ask
29 for a briefing schedule. We would ask to
30 submit a memorandum of law in support and
31 would ask for two weeks, if that's okay?
32 Judge, could we submit our memorandum of

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♀ 1 law in support of our position some time
2 the week of December 7, Your Honor?

3 THE COURT:

4 what day do you want?

5 MS. PARK:

6 I would ask for the 11th, if that's
7 okay?

8 THE COURT:

9 11th.

10 (Recess)

11 THE COURT:

12 All right. This is the matter of
13 State of Louisiana versus Corin Wroten,
14 Dylan Delatte, Kenneth Richardson. This
15 is a ruling on the Court. On November 20
16 and 23, 2015, a hearing was held to
17 determine whether the Orleans Public
18 Defenders Office is capable of providing
19 competent and constitutional
20 representation to indigent defendants.
21 The Orleans Public Defenders Office
22 argues that it suffers excessive case
23 loads and cannot provide adequate
24 representation to each client. The
25 Orleans Public Defenders Office seeks to
26 have this Court declare their office
27 unavailable to accept new cases. The
28 Court considered the following: The
29 testimony from three expert witnesses;
30 Constitutional violations of ineffective
31 assistance of counsel; ethical violations

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32 of conflicts of interests, lack of

33

♀ 1 communication to clients, incompetence
2 and diligence; op-ed piece from a public
3 defender; and the chief public defender;
4 ABA Eight Guidelines of Public Defense
5 Related to Excessive Workloads,
6 specifically, Guideline 5, which outlines
7 public defense providers should take
8 before approaching the Court for a
9 remedy.

10 Given the foregoing considerations,
11 this Court cannot offer remedy at this
12 time. This Court finds the evidence
13 presented compelling, but the evidence
14 fails to establish affirmative actions as
15 outlined in the above-named ABA
16 Guidelines taken by the Orleans Public
17 Defenders office. Such actions include
18 notifying the Court that the officers are
19 no longer available to accept additional
20 appointments. Until the Orleans Public
21 Defenders Office has shown it has
22 complied with applicable guidelines, the
23 Court is unable to act. This ruling is
24 without prejudice. The Court will
25 revisit the issue on December 11, 2015 to
26 allow a showing by the Orleans Public
27 Defenders Office that all reasonable
28 steps to prevent the suspension of duties
29 have been attempted, signed today's date.

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30 This matter will be recessed until
31 December 11. Court is adjourned.
32 (Whereupon, the Proceedings were concluded.)

34

♀ 1 C E R T I F I C A T E

2

3 This certification is valid only for a
4 transcript accompanied by my original signature and
5 original raised seal on this page.

6

7 I, CHERYL E. MACHAUER, Registered
8 Professional Reporter, in and for the State of
9 Louisiana, as the officer before whom this
10 testimony, do hereby certify that the witness to
11 whom the oath was administered, after having been
12 duly sworn by me upon the authority of R.S. 37:2554,
13 did testify as hereinbefore set forth in the
14 foregoing pages;

15

16 That the testimony was reported by me in
17 the stenotype reporting method, was prepared or
18 transcribed by me or under my personal direction and
19 supervision, and is a true and correct transcript to
20 the best of my ability and understanding; that the
21 transcript has been prepared in compliance with
22 transcript format guidelines required by statute or
23 by rules of the board or by the Supreme Court of
24 Louisiana.

25

26 That I am not related to counsel or the
27 parties herein, nor am I otherwise interested in the

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28 outcome of this matter.

29

30

31

32

CHERYL E. MACHAUER
REGISTERED PROFESSIONAL REPORTER
35

♀