

Superior Court of New Jersey
Appellate Division
Docket No. A-1580-11T4

CRIMINAL ACTION

STATE OF NEW JERSEY
Plaintiff-Respondent

v.

Stephen Scharf,
Defendant-Appellant

On Appeal from Judgment of Conviction
of the Superior Court of New Jersey, Law
Division, Bergen County

Sat Below:

Honorable Patrick J. Roma, J.S.C.
And a Jury

BRIEF AND APPENDIX OF *AMICUS CURIAE* JAMES F. KELLINGER

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pro se

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¹ Details omitted. County of Bergen, Dept. of Public Safety, report of Medical Examiner Mary Ann B. Clayton, M.D., September 21, 1992, revised January 4, 2007 9 pages

RULES

R. 2:10-115

OTHER AUTHORITY

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STATEMENT OF INTEREST OF AMICUS CURIAE

I am a citizen of the State of New Jersey, County of Bergen and I have an interest, which I share with the general public, that the criminal justice system and judiciary are competent to make use of scientific knowledge to ensure a just outcome in criminal judicial proceedings, such that I or any citizen of the jurisdiction shall remain safe from a miscarriage of justice if falsely accused. The recent use of DNA evidence has exonerated many individuals where the trial system had failed to accurately ascertain the facts involved, resulting in a miscarriage of justice. The proceedings in the Scharf case cry loudly that the science of physics is poorly understood by the lay public, and even by professionals, and that trial system is apt to make poor use of evidence presented by physical scientists, resulting in gross miscarriages of justice. The uncontroverted physical evidence in this case unequivocally precludes the defendant from having had the physical strength to accomplish the act constituting the crime, and therefore the jury's verdict was against the weight of the evidence.

IDENTITY OF AMICUS CURIAE

I, James Kellinger, am a citizen of New Jersey, County of Bergen, and a graduate of Rutgers University with a bachelor's degree in physics. I can speak with sufficient authority in the area of science which pertains to this case, i.e. the physics of falling bodies.

PROCEDURAL HISTORY

Amicus adopts the procedural history in the defendant's brief and adds the following information: On June 5, 2011, defendant entered a Motion for a New Trial on the ground that the Verdict was a Against the Weight of the Evidence. On October 21, 2011, the trial judge denied the Motion for a New Trial (Aa 1a – 3a)¹.

STATEMENT OF FACTS

Stephen Scharf was in the company of his wife Jody Scharf at the Rockefeller Lookout in Englewood Cliffs, when she fell to her death in 1992. Scharf flagged down a motorist and requested police assistance. Defendant informed police that his wife fell accidentally from the cliff. The police summoned a rappelling team who descended the cliffs at the point where defendant said she fell, and found Mrs. Scharf lifeless at the bottom of the cliff.

The medical examiner found that death resulted from “multiple fractures and injuries” and ruled on 1/18/93 that the Manner of Death “could not be determined.” (Aa 4a)

The medical examiner revisited the case beginning in August 2005 and visited the site for the first time in January 2006. She concluded that “the events surrounding the death of Jody Scharf are not consistent with passive descent from the ledge but rather indicate that a propulsive force was necessary. Therefore the manner of death is amended to homicide.” (Aa 5a). Scharf was indicted for murder and stood trial in Bergen County beginning in April 2011.

¹ Aa designates Amicus appendix

Regarding the physical evidence at trial, the rappelling team, Michael Cioffi (14T 44-12) and Raymond Pagan (15T 44-17) testified as to the location of the body at the point of impact.

Richard Rowhart, the county surveyor, testified as to the physical measurement of the fall, from the cliff top to the point of impact. (16T 47-7 to 53-19).

The medical examiner, Maryann Clayton, testified as to the straight flight of Mrs. Scharf to the point of impact: "...nothing on the cliff face struck Mrs. Scharf prior to her contact with the tree." (17T 110-23,24) and "her first, and primary contact, was to the tree." (17T 117-10)

Q. And -- and would you agree with me that that canopy, depending on the thickness of the branch, if she hit those branches, could have propelled her further away from the cliff face?

A. No. (17T 111-3 to 7)

Criminalist John Wright testified as to a videotaped drop test conducted at the cliff. His team prepared sandbags the same weight as Mrs. Scharf: "Hundred and sixty seven pounds was a little heavy. We had to find a detective that was large enough to lift a hundred and sixty seven pounds." (16T 68-9 to 11) From the top of the cliff he "asked the officer to pick up the hundred and sixty seven pound bag and to direct it towards the victim impact tree" (16T 73-5 to 7). "The officer threw the bag in the direction as best he could, of the tree." (16T 68-17,18) and the bag landed "about twenty five feet away from the victim impact tree"(16T 81-9).

Pathologist Michael Baden testified that he was hired by the Prosecutor "...to see if there was information available to determine if it was -- if it was accident,

homicide, or suicide.” (17T 149-12 to 14). He said “...it’s my opinion that all of her injuries were consistent with a single impact against the tree beneath which she was found and was not -- were not consistent with somebody tumbling down a mountain face.” (17T 159-25 to 160-3). “...if Mrs. Scharf had fallen in the way that Mr. Scharf describes, the body’s -- her body would have suffered injuries front and back. The back would not have been clear. She would not have reached the area of the tree.” (17T 162-10 to 15). And “my position is it didn’t happen the way the husband says it happened (17T 164-21) He was asked under cross, “do you think it’s possible for someone on that small ledge to swing someone by the hand and the leg, fifty feet or so out where the impact occurred? “ He answered: “I think that would be very difficult to -- to get out that far.” (17T 179-1 to 5).

Civil Engineer Steven Schorr testified “So the calculation is very clear that a body needs to leave the cliff at about 13 miles an hour in order to strike the tree.” (18T 42-10). Schorr’s testified that Mrs. Scharf could not have been thrown from the cliff: “think about a push. I’m not the biggest guy in the world, but, you know, if I was going to push something, it’s really the extent – extent of my arms. So that would mean that – that I or even somebody, even without longer arms, would have to take a body at rest and push and accelerate in that length of their arm, accelerate the body to 13 miles an hour. That – that – that’s not going to happen.” (18T 43-7 to 14).

Pathologist Cyril Wecht’s testimony disputed that Mrs. Scharf fell unimpeded to her death at the tree because her head was still intact:

“That would have been an impact of very substantial force, a 122 feet of a freefalling 167 pound object, in this case Mrs. Scharf, hurtling through space, coming up against the tree. This would be a -- a -

- a tremendous impact that would lead to almost a bursting open." (19T 44-23 to 45-3)

"...if the aorta and liver and spleen had all been lacerated at the time of the impact of the body against the tree without having struck anything before, there would have been an outpouring of blood." (19T 48-6 to 10)

which he noted was absent at autopsy. He testified that Mrs. Scharf had become lodged in a crevice just below the ledge:

As the head is released from the crevice between the base of rock C and D, by the weight and force of the body with the legs and the torso flipping out, then there is that significant catapulting force added to the force generated by a downward fall. So, that would throw the body out further from that point. (19T 50-12 to 17)

The jury found the defendant guilty and he presently appeals.

PRELIMINARY STATEMENT

The State brought a case that Mrs. Scharf fell from a cliff and came to rest 120 feet below at a horizontal distance of 52 feet on September 20, 1992 and that the defendant threw her to her death to that point. The medical examiner ruled the fall a homicide on January 7, 2007, almost 15 years after the incident, after visiting the scene of the fall, and concluded that, for the decedent to reach the point of impact from the ledge, some propulsive force was necessary.

At trial, beginning in April of 2011, almost 19 years after the incident, the State posited a single impact theory, that the defendant threw his wife from the ledge and that the decedent then fell unimpeded coming to rest at the base of a tree. The defense posited a deflection theory, that the decedent fell accidentally, falling downward initially, then being catapulted by a tree limb, propelling her horizontally outward 52 feet outward

to the point of impact, or alternately, that she was catapulted after becoming lodged in a crevice just below the ledge.

In ruling the death a homicide, the medical examiner assumed that the propulsive force required was, and could only have been, provided by the defendant. This brief posits that the propulsive force required was, and could only have been, provided by the decedent herself when she ran from the cliff to commit suicide, and that the defendant was physically incapable of providing the necessary force. This is a conclusion of the science of physics and the application of Newton's Laws of Motion as per the uncontroverted testimony of a qualified expert witness, and the videotaped drop test adduced by the State.

SCIENCE BACKGROUND

Newton's Laws of Motion, the physical laws which precisely describes the motion of falling bodies, have never been proven wrong. They are so precisely accurate, that in 1969, using these laws as a basis for calculation, the United States was able to land a man on the moon, some 238,900 miles away from earth. Indeed, during the Apollo 12 mission, the lunar module landed only 600 feet from the target point. During the 20th century, Newton's Laws were extended into the regime of bodies moving at high velocities, near the speed of light, by the Theory of General Relativity.

Simply stated, Newton's Laws tell us, among other things, how long it takes a body released from rest, to fall any given distance, toward earth. The mass of the object does not matter. Thus, a marble or a bowling ball falling from a height of 16 feet, will take 1

second to impact the ground. Caveat: Bodies falling from great heights which attain high velocities will experience a slowing from air resistance. This type of “drag” is of negligible influence in a fall from 120 feet. These laws also tell us how much force is required to accelerate a mass to a given velocity. The force could be a Saturn V Rocket accelerating a space capsule into orbit, or, the force of a human being’s arms or legs, accelerating a human body off a cliff.

THEORIES OF THE CASE

SINGLE IMPACT THEORY

In this case, Mrs. Scharf, under the State’s theory of a single impact, fell 120 feet in vertical distance unimpeded contacting a tree. Newton’s Laws tell us that the time of flight in this descent is 2.74 seconds (Aa 8a). Since Mrs. Scharf also traversed a horizontal distance of 52 feet in the fall, she must necessarily have left the cliff with a horizontal velocity of 19 feet per second or 12.95 miles per hour (Aa 9a) . This was confirmed in testimony by Defense expert witness Steven Schorr: “So the calculation is very clear that a body needs to leave the cliff at about 13 miles an hour in order to strike the tree.” (18T 42-10). Schorr also testified that the Prosecutor’s expert, Dr. Kurt Becker, in his report of September 14, 2003, came to the very same conclusion: “Yeah. Actually his analysis and our analysis is essentially the same, basically saying that a body has to leave there at 12 or 13 miles an hour” (18T 45-23).

Under cross:

“Q. “You and Mr. Becker agree on the point that the acceleration speed to go from point A to Point B unimpeded would be 13 miles per hour?

A. Correct.” (18T 53-1)

The testimony was uncontroverted by the State, who called no witness with expertise in physical science. The State's expert Baden, a noted pathologist, under cross examination, disclaimed any expertise in physics or falling bodies:

Q. And did you calculate the speed that the body would be traveling from the top to the bottom when it impacted the tree?

A. No.

Q. That clearly could be done, could it not?

A. I'm not sure, but that's above my pay grade. (17T 170-7)

Further Dr. Baden testified:

Q. Okay. Now with regard to the opinion that Mrs. Scharf was forcibly propelled off the top of the mountain, how much force would be required to push her fifty feet out from the ledge? Did you calculate that?

A. No. I'm not basing my opinion on calculations....she'd have to be propelled with force. I don't know how much. (17T 176-25 to 177-11)

Also, the Medical Examiner, Dr. Clayton addressed the issue:

Q. All right. Now, after she hit the impact tree without any significant interruption, her head – the right side – comes in contact after 119 feet, correct?

A. Again, assuming the ledge is the initiating point.

Q. Okay. And how fast would her body be traveling at that point?

A. It depends on the acceleration she received initially.

Q. Okay. If she had slipped and fell, would you agree with me that her body, if she didn't hit anything from top to bottom, would be traveling in excess of 60 miles per hour?

A. I don't know that sir.

Q. Did you ever attempt to calculate or have someone calculate that rate of speed?

A. No, sir. (17T 111-8 to 25)

Thus we must accept as uncontroverted the testimony of the Defense expert Schorr that the horizontal velocity with which Mrs. Scharf left the cliff was 12 to 13 miles per hour (or 19 feet per second). This is a *fact of nature*, based on Newton's Laws, and *not an opinion*. Other facts of nature are, for example, that water boils at 212 degrees F. at sea level. This also is also *not an opinion*.

We must also accept as uncontroverted Schorr's testimony that Mrs. Scharf could not have been thrown from the cliff: "think about a push. I'm not the biggest guy in the world, but, you know, if I was going to push something, it's really the extent – extent of my arms. So that would mean that – that I or even somebody, even without longer arms, would have to take a body at rest and push and accelerate in that length of their arm, accelerate the body to 13 miles an hour. That – that – that's not going to happen." (18T 43-7 to 14). No other witness testified that it was *possible* for a person to provide enough force to accelerate Mrs. Scharf to the tree.

Given this knowledge of the fall in question, we are in a position to know conclusively and without doubt, that it was not possible for Steven Scharf to accomplish the act constituting the crime, i.e. throwing his wife from the cliff to the point of impact.

DEFLECTION THEORY

The Defense posited a theory that Mrs. Scharf fell accidentally and passively from the cliff and on her descent, she contacted a tree limb which then flexed under her weight and sprung back, catapulting her horizontally outward, where she continued her descent to the point of impact 52 feet away from the cliff, or alternately, that she became lodged in a crevice and then was catapulted outward. The State's videotaped drop test failed to show that such a deflection is possible.

SUICIDE THEORY

The only plausible scenario in the face of the State's single impact theory, would have been that Mrs. Scharf provided the necessary propulsive force, by using the very large muscles of the legs, to run off the cliff. Only by this method could the necessary velocity be achieved for her to reach the tree unimpeded.

Interestingly, though neither the State nor the Defense addressed suicide as a theory, it was the jury itself that addressed suicide as a theory. During deliberations, the jury sent a question to the Court: "Suicide—would insurance be payable in '92?" (21T 6-23). The Court instructed the jury to rely on its recollection of the testimony, though I find no reference to it in the transcripts and I was not able to determine if it was available to the jury in any exhibit, since trial exhibits are no longer under the Court's control and are otherwise inaccessible. Also, very interestingly, during the testimony of John McCauliffe, the decedent's brother, he was asked under direct examination how he found out about his sister's death. He responded that the defendant called him and told him "He said your sisters dead. That she committed suicide." (16T 25-12)

What follows is a sidebar where the attorneys discuss how they were surprised by the testimony and they discuss how to suppress any further testimony about suicide. When the testimony resumed, the witness recounted how he told investigators about what the defendant had said and he was confronted with the fact that in none of the investigator's reports had the statement about suicide been mentioned. (16T 43-11). Witness responded "Again, I didn't write the report." (16T 44-2)

The question was raised by the defense with defense expert Schorr on redirect: "From a scientific standpoint, you're talking about someone going off that flat rock at approximately 13 miles an hour. Is it feasible, based on your experience, for even a world class sprinter to run in that location, jump over the wire fence, and leap out at 13 miles per hour, to the tree in question?" The State objected to the question and Court sustained the objection. (18T 55-9)

LEGAL ARGUMENT

VERDICT WAS AGAINST THE WEIGHT OF EVIDENCE

POINT 1: STATE HAS BURDEN OF PROVING DEFENDANT GUILTY BEYOND A REASONABLE DOUBT

The State alleged that the defendant threw his wife to her death from a cliff top, down 120 feet, to the base of a tree some 52 feet away from the cliff top horizontally. The State adduced the testimony of the medical examiner, who testified unequivocally, that the decedent fell to her death in an unimpeded, "straight flight" from the cliff top to the base of the tree. Though the defense attacked the medical examiner's conclusion on this point, the fact is that *this is exactly the case the State brought--* that the defendant

threw his wife straight to the bottom of the cliff. *And it is this case which must be proven beyond a reasonable doubt.* Certainly, it would be unreasonable for the trier of fact to think that the State's case is proven, if it could be shown, that the act alleged is *physically impossible*. And that is exactly what the uncontroverted evidence shows.

The testimony by expert Schorr agrees with the conclusion of the Prosecutor's expert Becker, that a) the decedent left the cliff at high speed and b) it was not possible for a human to accelerate another human to that speed by throwing them. Not a scintilla of evidence did the Prosecutor adduce to contest this. Rather, the State adduced the videotaped drop test which showed that the conclusions of Schorr and Becker were correct-- that it was *physically impossible to do the act constituting the crime*. (the videotaped drop test produced by the State, showed that none of the sandbags were able to come close to the point of impact (unavailable Aa 6a to 7a; testimony 16T 56 to 111).

Neither expert Baden, Clayton, Wecht testified that it was physically possible for the defendant to throw his wife unimpeded to the point of impact. Expert Schorr testified that it is *not possible* for the defendant to throw his wife unimpeded to the point of impact. Therefore, *it is an uncontroverted fact of the case, that the defendant could not have thrown his wife unimpeded to the point of impact*. The State's case is *exactly*, that the defendant threw his wife unimpeded to the point of impact. The State's case is wholly unsupported, and in fact is completely disproven by it's own evidence and by the expert Schorr. Thus the State has utterly failed to prove its case beyond a reasonable doubt. The doubt in this case is more than just reasonable—it is more than compelling. *The doubt in this case is inarguable.*

POINT 2
TRIAL JUDGE ERRED IN DENYING MOTION FOR NEW TRIAL BY PLACING
THE BURDEN OF PROOF ON THE DEFENSE

The trial judge denied Motion for New Trial on Grounds that Verdict was a Against the Weight of the Evidence. The Judge cites expert Schorr's testimony, " The defense also points to Steven Schorr's testimony that the victim would have had to spring off the cliff at around 13 mph to hit the impact tree unimpeded, and it would have been impossible for defendant to propel the victim at that speed." The judge fails to note that the testimony is uncontroverted. The Judge then goes on "However, this Court notes that Dr. Baden was adamant during his testimony that the victim's death could not have occurred the way the defense asserted." While the judge puts much weight on Dr. Baden's adamancy, the Judge fails to note that Dr. Baden disclaimed any knowledge of physics which would bear on Schorr's testimony.

The Judges comments are tantamount to saying, that the defense failed to prove its case. The decision is in error because the burden of proof is squarely upon the State and never shifts.

POINT 3
THE JUDGE ERRED IN DENYING MOTION FOR NEW TRIAL BECAUSE THE
UNCONTROVERTED PHYSICAL EVIDENCE COMPLETELY
NEGATES THE CIRCUMSTANTIAL EVIDENCE

The calculation showing the speed with which Mrs. Scharf left the cliff is sufficient to prove the defendant's innocence. Conflicting accounts of the incident attributable to the defendant, became the nexus of the State's circumstantial case.

Statements the defendant made were the subject of Miranda hearings (2T and 3T). The statements were admitted (Da a6) and their admissibility is being reviewed by the Court in this appeal. The State's theory, as reiterated in the summation, was that if it didn't happen the way Scharf said it happened, then he is guilty: "It could not have happened the way he said it did. And if he lied, if he lied, which he did, which you know, then he is a killer." (20T 137-16). Accepting the facts of the case presented, it is the argument of this brief that it is physically impossible for Mr. Scharf or anyone else to have completed the act constituting the crime and he is therefore necessarily innocent *regardless of anything he may have said*. Indeed, had the defendant confessed in open court to having thrown his wife from the cliff, the court would necessarily have to find the defendant not guilty since *it is impossible for him to have done the act confessed to*. For this reason, the basis for the trial judge's decision denying a new trial, is in error.

The defense also points to Steven Schorr's testimony that the victim would have had to spring off the cliff at around 13 mph to hit the impact tree unimpeded, and it would have been impossible for defendant to propel the victim at that speed. However, this Court notes that Dr. Baden was adamant during his testimony that the victim's death could not have occurred the way the defense asserted. Dr. Wecht conceded that the victim's fall was consistent with either accidentally falling or being pushed. Thus, while there was testimony that Ms. Scharf may have fallen, there was also testimony that Ms. Scharf's death was not an accident. (Aa 2a)

The judge clearly did not understand the implications of the scientific evidence. The uncontroverted scientific evidence *precludes* the State's theory of homicide by throwing Mrs. Scharf unimpeded to the point of impact. The Judge's counter argument cites the testimony of Dr. Wecht: "Dr. Wecht conceded that the victim's fall (under a

deflection theory) was consistent with either accidentally falling or being pushed.” Dr. Wecht was testifying as to a deflection theory, but the State’s own videotaped tests (unavailable Aa 6a to 7a), failed to show such a deflection is possible (16T 56 to 111). The Judge concludes “Thus, while there was testimony that Ms. Scharf may have fallen, there was also testimony that Ms. Scharf’s death was not an accident.” The Judge here displays an acceptance of the binary logic of the State: “If it was not an accident-- then it was a homicide.” This is a logical and factual fallacy. Deductive logic requires a closed set to be valid. There must be a finite number of possible states (2) before deductive logic can prove anything in an “either-or” question. Here, in the State’s mind it was either an accident or a homicide--the State attacked the accident theory to prove a homicide. This is fallacious reasoning in view of a third possibility--suicide. The State’s theory of the case was built on false logic and the Court adopted the reasoning of the State. For this reason the verdict must fall and the defendant is entitled to a new trial.

POINT 4
APPELLATE COURT HAS SAME POWER AS TRIAL COURT JUDGE TO
REVIEW MOTION FOR NEW TRIAL ON GROUNDS THAT JURY VERDICT WAS
AGAINST WEIGHT OF EVIDENCE

The Appellate Court is empowered to review the Motion for a New Trial
R. 2:10-1 “The standard governing an appellate tribunal’s review of a trial court’s action on a new trial motion is essentially the same as that controlling the trial judge” Dolan v. Anastasia, 55 N.J. 2, 7 (1969).

The Appellate Court is obligated to determine if “it clearly and convincingly appears that there was a manifest denial of justice under the law.” State v. Sims, 65 N.J.

359, 373-74 (1974). “The evidence should be sifted to determine whether any trier of fact could rationally have found beyond a reasonable doubt that the essential elements of the crime were present.” State v. Carter 91 N.J. 86, 96 (1982)

An essential implied element of any case, is that the act constituting the crime is physically possible. The defense of alibi is based on the physical principle that a person cannot be in two places at one time. For the State to prove that Stephen Scharf killed his wife, it must prove *sine qua non* that it was physically possible to do the act of which he is accused.

The Appellate Court, when it sifts through the evidence, shall find a compelling weight of evidence that it in fact is not possible to do the act constituting a crime. The Court will not find a scintilla of evidence, that the act was physically possible. The jury was without any reasonable basis for the verdict and the Appellate Court has a compelling justification to grant a new trial.

POINT 5
APPELLATE COURT OWES NO DEFERENCE TO TRIAL COURT JUDGE ON
ISSUES OF CREDIBILITY WHERE CREDIBILITY OF
WITNESS IS NOT PIVOTAL.

“The standard governing an appellate tribunal’s review of a trial court’s action on a new trial motion is essentially the same as that controlling the trial judge.” Dolan v. Anastasia 55 N.J. 2, 7 (1969)

though, regarding important aspects that the trial judge is peculiarly situated to determine such as

“-- witness credibility, “demeanor”, “feel of the case”, or other criteria which are not transmitted by the written record --, the appellate court must give deference to the views of the trial court thereon.” *Ibid*

but trial judge's decision

“is not entitled to any special deference where it rests upon the determination as to worth, plausibility, consistency or other tangible considerations apparent from face of record in respect to which trial judge is no more peculiarly situated to decide than the appellate court.”
Ibid

The Court elucidates the principle by quoting the dissent in *Kulbacki*:

...the trial judge has the feel of the case and is better situated than an appellate court to assay credibility when credibility is pivotal. Accordingly a reviewing court must take into account the views of the trial judge insofar as firsthand observation may be significant, but, having done so, it remains the duty of the reviewing court to determine whether in its view there was a manifest denial or miscarriage of justice
Kulbacki v. Sobchinsky, 38 N.J. 435, 459 (1962)

In a hypothetical case where the full extent of the evidence is two eyewitnesses to a crime, and the accounts differ, the credibility of the witnesses become the critical, pivotal issue. Evaluations of the credibility of those witnesses are best made by triers of fact in the court room. In the instant case, the credibility of the pertinent witnesses was not called into question. Schorr testifies as to the speed with which the decedent left the cliff and that it was not possible for a person to throw someone off the cliff at that speed. The State did not adduce evidence that it was in fact possible for a person to throw another person the distance in question. The State's witnesses disclaimed knowledge as to these facts (Ab8). The State's videotaped evidence confirmed Schorr's conclusions. No other evidence weighed on these conclusions since no expert testified that it is possible for a person to throw another person the distance required to accomplish the act constituting a crime. Thus, Schorr's testimony, that it is not possible to throw a person the distance required, is uncontroverted. Schorr's

veracity was never questioned, in fact, at the end of cross examination of Schorr, the State commented: "Thank you for a very interesting presentation." (18T 55-4) Thus, credibility being a non pivotal issue, the Appellate Court need not defer to the observations of the trial Court on the issue, and can proceed to its own determination.

POINT 6
APPELLATE COURT MUST DISTURB JURY VERDICT WHERE IT CLEARLY
APPEARS THAT THERE WAS A MISCARRIAGE OF
JUSTICE UNDER THE LAW

Amicus asserts the self-evident proposition that the conviction of an innocent person is a miscarriage of justice under the law and, that the Court must vacate the conviction. Here, the State utterly failed to prove an essential element of the crime; that it was possible for the defendant to accomplish the act constituting a crime and Court should reverse the conviction.

POINT 7
IT WAS ERROR FOR JURY TO DISREGARD DEFENSE EXPERT'S
UNCONTROVERTED TESTIMONY PRECLUDING DEFENDANT'S GUILT

In Dolson, like here, the jury disregarded the uncontroverted evidence as to an essential element in a tort case. The Court vacated the verdict:

"It is clearly erroneous for a jury to disregard uncontradicted testimony by defendant himself on issue of liability merely because of disbelief of plaintiffs' damage testimony. In such event a new trial is required."
Dolson v. Anastasia, 55 N.J. 2, 12 (1969)

In the prosecution of Stephen Scharf, the jury presumably weighed the scientific evidence against an array of circumstantial evidence. The admissibility of much of this circumstantial evidence is under review in the present appeal. Included in this array are the decedent's purported statements relayed by her bartender and other drinking cohorts; undocumented statements recounted by her therapist; poorly documented, statements

made by defendant to the police; the suspicions of honest, well-meaning policemen; the highly impeached statements by his son, an insurance policy on the decedent; infidelity by the defendant; and divorce proceedings brought against defendant. The circumstantial evidence casts a hue upon the events that transpired on the cliff on the night in question. Absent any physical evidence to the contrary, the circumstantial evidence, if properly admissible, might tend to weigh on the question of guilt. But in the face of the actual, uncontroverted physical evidence, which thoroughly precludes the defendant from doing the act accused of, the circumstantial evidence is shown to be nothing more than a perfect storm of curiosities. The jury verdict, which gives weight to the circumstantial evidence, in the face of the uncontroverted scientific evidence, cannot be, and is not reasonable. The historic record is replete with cases where direct eyewitness testimony to a crime is proved false by a solid alibi or by DNA evidence. How much less is the circumstantial evidence in this case in the face of solid, uncontroverted scientific evidence that precludes the guilt of the defendant?

CONCLUSION

This is a case which a high school physics student can solve. The medical examiner's testimony was clear. The decedent died after an unimpeded direct flight from the cliff to the point of impact, and that to achieve the path to the point of impact "there had to be a propulsive force. She had to be propelled out to be able to reach that tree..." (17T 61-5 to 62-13).

The Comedy of Errors begins when she makes the assumption that the propulsive force could only have been provided by the defendant. The medical examiner did not realize *how much* force was necessary to propel the decedent to the point of impact. Had

she done a simple physics calculation *which is done every day in high school classrooms*, she would have realized the point of impact was *too far* for the defendant to have provided the propulsive force, and she *could not have concluded* that the death was a homicide.

It is not possible for a human being to have thrown the decedent to her death under a direct flight/single impact theory. The solid scientific evidence is uncontroverted. It is disproven by the State's own evidence that a deflection is possible much less probable. Amicus asserts that there is nothing left with which to convict the defendant.

The jury's verdict was against the weight of the evidence, and the defendant is entitled to a new trial.

Respectfully submitted,

James Kellinger
amicus curiae

FILED

OCT 21 2011

PATRICK J. ROMA, J.S.C.

THE STATE OF NEW JERSEY,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BERGEN COUNTY

vs.

INDICTMENT NO. S-1485-09

**ORDER DENYING MOTION FOR NEW
TRIAL**

STEPHEN F. SCHARF,

Defendant.

THIS MOTION, coming before the Honorable Patrick J. Roma, J.S.C., on October 21, 2011, by Edward Bilinkas, on behalf of defendant Stephen Scharf, and Assistant Bergen County Prosecutor Wayne Mello, appearing on behalf of the State, the Court having considered the oral and written arguments of the parties, for good cause shown:

IT IS on this 21st day of October 2011.

ORDERED that the motion for a new trial is denied.

The defense has brought a motion for a new trial. The defense submits that the jury erred when they found the defendant guilty because the verdict is against the weight of the evidence and caused a manifest denial of justice.

A new trial based on a claim that the verdict was against the weight of the evidence may not be granted unless, "having given due regard to the opportunity of the jury to pass on the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of

justice under the law.” R. 2:10-1; R. 3:20-1. Unless no reasonable jury could have reached the challenged verdict, “a reviewing court must respect a jury’s determination.” State v. Afanador I, 134 N.J. 162, 178 (1993).

Here, this Court finds no miscarriage of justice under the law.

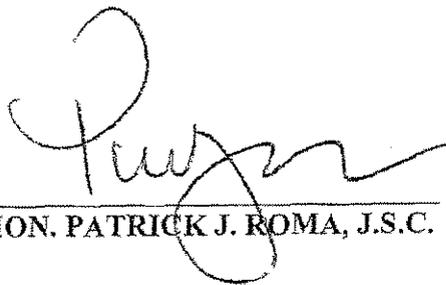
First, the defense asserts that the scientific evidence clearly exonerates the defendant. Specifically, the defense points to Dr. Baden’s testimony on cross-examination that contact with the tree could have propelled the victim away from the cliff. Additionally, Dr. Wecht testified that the victim must have struck some portion of the cliff before hitting the tree, and the sharp rocks caused the victim’s chest to become impaled and scalped her head. The defense also points to Steven Schorr’s testimony that the victim would have had to spring off the cliff at around 13 mph to hit the impact tree unimpeded, and it would have been impossible for defendant to propel the victim at that speed.

However, this Court notes that Dr. Baden was adamant during his testimony that the victim’s death could not have occurred the way the defense asserted. Dr. Wecht conceded that the victim’s fall was consistent with either accidentally falling or being pushed. Thus, while there was testimony that Ms. Scharf may have fallen, there was also testimony that Ms. Scharf’s death was not an accident. Upon conclusion of the trial, the jury made credibility determinations based on all the evidence, both that of the scientific experts and the lay witnesses. Accordingly, upon review of the record, this Court finds that that the defendant has failed to meet his high burden of showing a miscarriage of justice clearly and convincingly.

Essentially, defendant speculates that the jury misunderstood the scientific evidence and photographs and convicted the defendant based on evidence that he may have acted immorally prior to Ms. Scharf’s death. This Court will not second-guess the jury’s determination because

of the defense's interpretation of how the jury reached their verdict. There is ample evidence to support the jury's verdict.

Accordingly, for the reasons stated above, the defendant's motion for a new trial is denied.



HON. PATRICK J. ROMA, J.S.C.

FINDINGS:

1. Multiple fractures and injuries.
 - a. Large laceration/avulsion of scalp.
 - b. Multiple skull fractures, vault and base.
 - c. Cerebral laceration and diffuse subarachnoid hemorrhage.
 - d. Multiple facial fractures and laceration of globe of right eye.
 - e. Gaping laceration and abrasion of chest wall.
 - f. Multiple rib fractures.
 - g. Fracture of mid sternum.
 - h. Fractures of clavicles.
 - i. Compression fracture of T6 vertebral body.
 - j. Pericardial laceration.
 - k. Endocardial lacerations of heart.
 - l. Laceration of aorta and posterior mediastinal soft tissue hemorrhage.
 - m. Hemothorax.
 - n. Rupture of right main bronchus.
 - o. Multifocal pulmonary hemorrhages.
 - p. Laceration of left upper lobe of lung.
 - q. Visceral and parietal pleural lacerations.
 - r. Liver lacerations.
 - s. Laceration of spleen.
 - t. Multiple contusions, lacerations and abrasions of face, trunk and extremities.

2. Single uterine leiomyoma.

CAUSE OF DEATH:

Multiple fractures and injuries.

MANNER OF DEATH:

Pending investigation.

01-18-93 Amended to Could not be determined.

DATE DICTATED: 9-21-92
DATE TRANSCRIBED: 9-23-92
DATE FINALIZED: 1-19-93
DATE RETYPED: 12-27-12

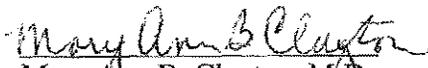
02921419
SCHARF, Jody Ann

ADDENDUM REPORT

In August 2005, I participated in a comprehensive review of this case with members of the Bergen County Prosecutor's Office and Dr. Michael Baden. This review included photographs, physical files, items of evidence and aerial videos of the scene of the incident.

On January 27, 2006, I re-visited the site, namely the Rockefeller Lookout on the Palisades Interstate Parkway in Englewood Cliffs, accompanied by Sgt. Stallone and Det. Bordino of the Prosecutor's Office, Lt. Pagan of the Palisades Interstate Parkway Police and Lt. Cioffi of the Englewood Cliffs Police Department. We walked from the parking lot through the wooded area to the rock ledge where the event originated. Lt. Pagan and Lt. Cioffi recounted their observations on the night of the incident and pointed out the location where the subject's body was found.

We then drove down to the base of the cliffs and hiked up to the site where the subject's body was retrieved. Lts. Pagan and Cioffi recalled observing blood, hair and tissue on the trunk of a tree several feet above ground level. The location of the tree was 52+ feet out from the ledge and 119+ feet down from the ledge. I noticed the relationship between the ledge and the tree; the perspective was very different from this angle. After reviewing the subject's injuries as documented in the autopsy report, considering the observations and recollections of experienced rescue/recovery lieutenants, and analyzing myself the three-dimensional configuration of the scene from below, I conclude that the events surrounding the death of Jody Ann Scharf are not consistent with passive descent from the ledge but rather indicate that a propulsive force was necessary. Therefore the manner of death is amended to homicide.


Mary Ann B. Clayton, M.D.
County Medical Examiner
January 4, 2007

This is not a certified copy unless the raised seal is affixed hereunto



JOHN L. MOLINELLI
Bergen County Prosecutor

Office of the County Prosecutor
County of Bergen

Justice Center, 10 Main Street
Hackensack, New Jersey 07601
201-646-2300

JOHN L. HIGGINS, III
First Assistant Prosecutor

FRANK PUCCIO
Executive Assistant Prosecutor

CAROL NOVEY CATUOGNO
Trial Chief

STEVEN CUCCINIELLO
Chief of Detectives

June 10, 2013

James Kellinger
660 Palisade Avenue
Cliffside Park, NJ 07010

Re: Request for Public Records
State v. Stephen Scharf
Indictment No. S-1485-09; Docket No. 3467-08

Dear Mr. Kellinger:

This is in response to your request for public records dated 05-30-13, which this office received on 05-31-13, and in which you requested State's exhibits S202 and S203 that were introduced during the trial of the above-captioned matter. Those exhibits were video recordings of an experiment that involved propelling weighted objects off of the cliff from which the victim is alleged to have fallen to her death. The State had the recordings prepared as part of the investigation of this matter for eventual presentation during trial. As you are aware, this matter was tried to a jury in 2011 and the defendant was convicted. The conviction is now on appeal.

The video recordings you requested are *criminal investigatory records* and are therefore exempt from disclosure. *N.J.S.A. 47:1A-1.1*. A criminal investigatory record remains exempt from disclosure even after the criminal investigation has been closed. *West Solloway v. Bergen County Prosecutor's Office Custodian of Records, GRC Complaint No. 2011-39; Woojin Hwang v. Bergen County Prosecutor's Office Custodian of Records, GRC Complaint No. 2011-348; Donna Janeczko v. New Jersey Department of Law and Public Safety, Division of Criminal Justice, Custodian of Record, GRC Complaint Nos. 2002-79 and 2002-80; Andrew Johnson/Press of Atlantic City v. New Jersey Division of State Police, Custodian of Record, GRC Complaint No. 2004-46.*

Additionally, because this case is on appeal, the investigation remains in progress and the recordings are also exempt from disclosure on that basis. *N.J.S.A. 47:1A-3a*. The importance of the case being on appeal and the possibility of retrial



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cannot be overstated. Retrial would require re-interviewing witnesses. Witnesses may forget things or remember information that they did not previously recall. Each side may choose to retain new experts, who may render different opinions. The physical evidence, including the crime scene (which the jury was allowed to view on site), may be reexamined. This process can result in new evidence or change the significance of existing evidence. It is for this reason that an investigation is always considered open while a case is pending appeal. Accordingly, at least until the appellate process is completed, records responsive to this request and all records associated with this case pertain to an investigation in progress and are exempt from disclosure on that basis.

Based on the forgoing, your request is denied. This office also reserves the right to raise any other ground for denial not raised in this response. The failure of the Bergen County Prosecutor's Office to assert an exception or privilege does not act as a waiver of any ground for denial.

You have a right to appeal the decision that the document or documents are not public records or are otherwise exempt from disclosure. At your option, you may either institute a proceeding in the Superior Court of New Jersey or file a complaint with the Government Records Council ("GRC") by completing the Denial of Access Complaint Form. You may contact the GRC by toll-free telephone at 866-850-0511, by mail at PO Box 819, Trenton, NJ, 08625, by e-mail at grc@dca.state.nj.us, or at their web site at www.state.nj.us/grc. The Council can also answer other questions about the law. All questions regarding complaints filed in Superior Court should be directed to the Court Clerk in your County.

Very truly yours,

JOHN L. MOLINELLI
BERGEN COUNTY PROSECUTOR

By: Frank Puccio
Frank Puccio
Executive Assistant Prosecutor

H/FP 13/OPRA/KELLINGER 2/RESPONSE



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Appendix Amicus Curiae James Kellinger

This is a basic analysis of a falling body, as it relates to Jody Scharf, who fell 120 ft. and a horizontal distance of 52 ft. It concludes that she left the cliff with a horizontal velocity of 19 feet per second. It neglects air resistance, which does not become a large force until the body's speed becomes significant.

The vertical fall is analyzed separately. Falling bodies near the surface of the earth obey the kinematics equations of motion. A plethora of authoritative works all agree in every aspect.¹

$$x = \frac{at^2}{2} \tag{1}$$

Acceleration due to gravity is 32 ft. per second/second

$$a = 32 \frac{ft}{sec^2} \tag{1.1}$$

Vertical distance traveled was 120 ft.

$$x = 120 ft. \tag{1.2}$$

So,

$$120 = 16t^2 \tag{2}$$

$$7.5 = t^2 \tag{2.1}$$

$$\sqrt{7.5} = t \tag{2.2}$$

$$2.74 = t \tag{2.3}$$

So, the time of flight is 2.74 seconds.

¹ Corben, H.C., Stehle, Philip; Classical Mechanics, 2nd edition, Dover Publications Inc. New York, 1950

The horizontal distance is traversed in the same time.

$$\frac{(52)ft}{(2.74)sec} = 19 ft / sec \quad (3)$$

In terms of miles per hour: $19 ft/sec$ is equal to $13 mi/hr$

$$19 \frac{ft}{sec} * 3600 \frac{sec}{hour} = 68400 \frac{ft}{hour} \quad \frac{68400 \frac{ft}{hour}}{5280 \frac{ft}{mile}} = 12.95 \quad \text{So } 19 \frac{ft}{sec} \cong 13 \frac{mi}{hr} \quad (4)$$

The analysis shows the body must have left the cliff at slightly less than $19 ft/sec$.

To put that in perspective, Bob Hayes set the World Record for the 100-yard dash in 1963 at 9.1 seconds. That would be:

$$\frac{(300)ft}{(9.1)sec} = 32.97 ft./sec \quad (5)$$

