



E46 Drake vs. Portuondo: Notorious Case of Prosecutorial Misconduct, Charlatan Expert, and Forensic Fraud

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After attending this presentation attendees will have a better understanding of the legal and ethical obligations, and consequences, of abusing expert witness testimony.

The presentation will enable the forensic science community to comprehend the impact of scientific evidence, its integrated ethical issues and how it can affect the outcome of judicial proceedings.

The prosecutor has a duty to seek justice, not merely convict. To attain this objective, the prosecution often relies upon expert witness testimony. The expert witness' existence is created and perpetuated by the legal system. The Rules of Evidence codified consulting and testimonial evidence. An expert does not testify in court without being properly qualified to do so. A summary of Federal Rule 702 - 706 is that a qualified expert may give his or her opinion to help the court understand evidence or to establish a fact in issue. States have similar rules. These evidentiary requirements apply to all experts including those who work full time for a government agency.

Use of expert witness testimony is a path through which a party can present their theory of the case to the trier of fact. Expert witness testimony is the most persuasive of all witnesses'. This presentation will briefly review general types of ethical violations through expert witnesses in the second federal habeas corpus case of *Robie J. Drake v.*

L.A. Portuondo, 553 F.3d 230 (2nd Cir. 2009)(Drake II).

Drake II addresses brazen prosecutorial misconduct, medical quackery – “picquerism, fraudulent use of a charlatan expert witness, perjured testimony, and distortion of facts to obtain two murder convictions. The principal parties are Peter L. Broderick, Sr. (Prosecutor) and Richard D. Walter (expert witness).

Broderick failed to exercise due diligence in investigating Walter's credentials and testimony. He used false evidence, employed misleading questions, while essentially vouching for the credibility and truthfulness of his expert witness, and wrongfully bolstered Walter's testimony especially in summation arguments. The trial was carefully orchestrated.

Walter grossly exaggerated most of his qualifications and outright lied about others. He created blatantly bogus and prejudicial testimony on “picquerism” to provide motive. “Picquerism, is a fictional syndrome of sexual dysfunction or criminal profile whereby the perpetrator realizes sexual satisfaction from penetrating a victim by sniper activity or by stab or bite wounds ... it is a derivative misspelling of the French verb piquer, which means, among other things, to stick or poke ... and is medically speaking, nonsense ... quackery”².

The jury relied upon Walter's sensationalistic and pseudo-scientific explanations of picquerism to convict Drake of the double murders. Drake received two consecutive prison terms of 25 years to life.

The impartiality of forensic science is used to convict the guilty and protect or exonerate the innocent. An expert witness' testimony is frequently prejudiced by ideological and personal biases. Expert witness fraud and ethical violations are not isolated random incidents. This is true of prosecution and defense witnesses in state and federal litigation. The vast majority of witnesses testify truthfully. However the appearance of “mountebanks” is too numerous to suggest that it is a remote occurrence. Personal opinions too often corrupt an expert witness's testimony.

The predominant categories of unethical conduct are negligence and deliberate dishonesty. The most common types of expert misconduct regarding unethical testimony usually involve subtle but deliberate deviations from the truth, or parts of it. There are no degrees of honesty. The ethical conduct of witnesses, especially experts, is a serious issue confronting the judicial system. The most dangerous lies are those that most resemble the truth. Unfortunately, violators of ethical conduct are seldom held accountable for their detestable conduct.

Unethical and illegal behavior is practiced by individuals who possess indicia of expertise (licenses, academic degrees, certifications in their specialty, professional memberships, etc.) and by those who fabricate or purchase their credentials. Fraud is not self-correcting. Unfortunately, violators of ethical conduct are seldom held accountable for their detestable conduct.

Walter was never disciplined or prosecuted for perjury in the *Drake* case. However, based upon the January 23, 2009 opinion by the Second

Circuit Court of Appeals, Richard D. Walter will have difficulty refuting the Court's moniker of charlatan.³

The events in the *Drake* case are a sordid and reprehensible affair.

1 Justice Blackmun, *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 595 (1993)

2 *Drake v. Portuondo*, 553 F.3d 230, 235 (2nd Dist. 2009)

3 *Drake v. Portuondo*, 553 F.3d 230, 245 (2nd Dist. 2009)

Forensic Fraud, Expert Witness, Charlatan