UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE, 82-B-2329,
Petitioner,

99-CV-0681E(Sr)

-vs-

MEMORANDUM

L.A. PORTUONDO, Superintendent,
Shawangunk Correctional Facility,
Respondent.

and

ORDER[1]

INTRODUCTION

On October 25, 1982 Petitioner Robie J. Drake ("Drake") was convicted after a jury trial in Niagara County Supreme Court of two counts of second degree murder for the deaths of Stephen Rosenthal and Amy Smith. He was sentenced to two consecutive terms of twenty years to life imprisonment. After various appeals, Drake filed a petition for a writ of habeas corpus with this Court alleging, *inter alia*, that his Fourteenth Amendment right to Due Process had been violated when the prosecution introduced — without prior notice to the defense — expert testimony that Drake's crimes were motivated by a psychological pathology known as "picquerism." Drake alleged that he should have been granted a continuance in order to better attempt to counter such evidence, that the expert committed perjury at trial and that the prosecution knew or should have known of the perjury.

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[1]This decision may be cited in whole or in any part.

BACKGROUND

By Decision and Order dated March 16, 2001 this Court adopted the Report and Recommendation of Magistrate Judge H. Kenneth Schroeder wherein he concluded that the petition should be denied. Drake appealed to the United States Court of Appeals for the Second Circuit which held, in a decision issued on January 31, 2003, that the testimony of the prosecution's expert witness was false in some respects and could be considered perjurious. *See Drake* v. *Portuondo*, 321 F.3d 338 (2d Cir. 2003). The Second Circuit remanded the action to this Court for further development of the record and for a determination as to whether the prosecution knew or should have known that the expert witness had perjured himself at trial.

This Court scheduled an evidentiary hearing for June 27, 2003 which was subsequently adjourned in order to allow Drake's newly-appointed counsel an opportunity to familiarize himself with the case and to prepare for the hearing. Thereafter, the parties determined to take the depositions of the relevant witnesses prior to any hearing. The parties deposed the prosecutor Peter Broderick, now a Niagara County Court Judge, and Richard Walter, the expert witness. After completing that discovery, rather than reschedule the evidentiary hearing, the Court granted Respondent's request to file a Motion for Summary Judgment.

On September 30, 2004 Respondent filed the Motion for Summary Judgment in which it argued that Walter did not commit perjury at trial and that, even if the Court concludes that he did commit perjury, the prosecutor neither knew nor should have known of the perjury. On June 15, 2005 Drake filed a response to the Motion. The Court received Respondent's reply on June 21, 2005 and oral argument on the Motion was heard on June 24, 2005.

DISCUSSION

"[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Naupe* v. *Illinois*, 360 U.S. 264, 269 (1959) (citations omitted). Such holds true even if the false evidence or false testimony relates only to the credibility of a witness. *Ibid*.

If the prosecution knew or should have known that its case included perjured testimony, then the conviction must be set aside if there is any reasonable likelihood that the false statement could have affected the judgment of the jury. *See United States* v. *Agurs*, 427 U.S. 97, 103-04 (1976) (citing *Giglio* v. *United States*, 405 U.S. 150, 154 (1972)). If the prosecution was unaware, however, relief should be granted only if "the testimony was material and 'the court is left with a firm belief that but for the perjured testimony, the defendant most likely would not have been convicted.'" *Ortega* v. *Duncan*, 333 F.3d 102, 108

(2d Cir. 2003) (quoting *United States* v. *Wallach*, 935 F.2d 445, 456 (2d Cir. 1991)). Such an inquiry entails a determination as to "whether the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness." *United States* v. *Stofsky*, 527 F.2d 237, 246 (2d Cir. 1975).

A. Walter's Trial Testimony

Drake asserts that Walter committed perjury at trial by testifying falsely concerning his qualifications as an expert and concerning his prior work experience. Specifically, Drake challenges Walter's statements as to his work history with the Los Angeles County Medical Examiner's Office[2], his licensure as a psychologist, his prior scholarly publications, his teaching experience and his prior testimony as an expert witness. In its January 31, 2003 decision, the Second Circuit concluded that Walter had testified falsely. The Court stated:

> "He claimed extensive experience in the field of psychological profiling, including work on 5000 to 7500 cases over several years in the Los Angeles County Medical Examiner's Office, an adjunct professorship at Northern Michigan University; more than four years as a prison psychologist with the Michigan Department of Corrections; and expert testimony given at hundreds of criminal trials in Los Angeles and Michigan."

Drake, 321 F.3d at 342.

[2] In portions of the record, this entity is also referred to as the Los Angeles County Coroner's Office.

Ordinarily, in light of such a statement by the Second Circuit, Walter's perjury would be presumed. However, Respondent urges the Court to review Walter's trial testimony because it asserts that much of Walter's testimony was true and that — even if portions of Walter's testimony were factually incorrect — Walter did not intentionally testify falsely and thus the incorrect testimony does not constitute perjury under the law. Respondent's argument misses the point that a conviction knowingly based on *false evidence*, even that which does not rise to the level of perjury, is subject to reversal. *See Thomas* v. *Kuhlman*, 255 F. Supp.2d 99, 108 (E.D.N.Y. 2003) (citing *United States* v. *Boyd*, 55 F.3d 239, 243 (7th Cir. 1995)). On the other hand, perjury is defined as "false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory." *United States* v. *Dunnigan*, 507 U.S. 87, 94 (1993). Because Respondent argues, in part, that Walter's trial testimony was not false, the Court will examine each of the challenged areas of Walter's trial testimony in turn.

1. Licensure

Drake takes issue with Walter's characterization of his occupation at the time of the trial as a "prison psychologist" for the Michigan Department of Corrections. Drake asserts that such statement is false because, under Michigan law, a psychologist must possess a Ph. D. Drake contends that, as Walter had

obtained only a Master's Degree, his license was only that of a "limited psychologist."

Walter testified at trial that he held a Master's Degree only and that he was a "prison psychologist." Trans. at 783.[3] On cross-examination Walter confirmed that he did not possess a Ph. D. Trans. at 805. At his deposition in this case, Walter defended his use of the title "prison psychologist." Walter stated that, in Michigan, one with a Master's Degree may receive a limited license in psychology. Walter Dep. at 80. Ordinarily, one with a limited license must work under the direction of a fully licensed psychologist. *Id*. at 80-81. Walter testified, however, that the Michigan Attorney General in a 1979 Opinion stated that there is no requirement for such supervision when the limited psychologist works for a governmental entity or non-profit organization. *Ibid*. Based on that same Opinion, Walter testified that limited psychologists are permitted to use the title "psychologist" within such settings. Walter Dep. at 80-81.

This Court cannot conclude that Walter misrepresented his qualifications when he testified at trial that he held only a Master's Degree and clearly stated that he did not possess a Ph. D.; nor can the Court conclude that Walter testified

[3] References to "Trans." are to the Trial Transcript.

falsely when he characterized his then-current occupation as that of "prison psychologist."[4]

2. Publications

Drake next asserts that Walter testified falsely concerning his prior publications. At trial, Walter was asked if he had *written* any papers. He responded "Yes." Trans. at 784. At his deposition, Walter reiterated — albeit with some confusion as to the relevant dates — that he had written a paper prior to the Drake trial, but that it was presented and published *after* the trial. He stated:

> "Q: Okay. Prior to October 19th of 1982, had you published anything in the Journal of the American Academy of Forensic Sciences?
> "A: No."

Walter Dep. at 34.

> "Q: You said you delivered an address concerning the topic [of the paper] but hadn't actually written the paper yet?
> "A: I had not published the paper. I had written it not published it.
> "Q: Okay. And you believe that you delivered it at a January meeting, did you say?
> "A: No, February.

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[4] The Michigan Department of Corrections recently listed an available position for a "psychologist." Linked to that listing is a copy of the Civil Service job description. That description states that an applicant for the position of "psychologist" must possess a Master's Degree in Psychology. *See* www.michigan.gov/documents/Psychologist_12904_7.pdf. The job description states that "[e]mployees in this job complete or oversee a variety of professional assignments to provide psychological treatment to residents of state facilities and community-based programs. Positions in this class are located in mental health facilities, prisons, youth residential facilities, and veterans hospitals." *Ibid*.

"Q: February meeting?
"A: Yes.
"Q: Which would have been when, what year, if the testimony you gave in the trial - -
"A: In '81.
"Q: - - was in 1982 October?
"A: Oh, it would have been '82 then."

Walter Dep. at 42-43.

The Court concludes that Walter did not testify falsely at trial when he testified only that he had written a paper prior to his testimony. As Walter never testified at trial that said paper was published, any inconsistency in his deposition testimony regarding the dates of the presentation and publication of that paper is irrelevant.[5]

3. Teaching Experience

Drake also asserts that Walter testified falsely that he was an "adjunct lecturer" at Northern Michigan University. Drake argues that the term "adjunct lecturer" is an academic title that Drake was not entitled to use and that left a false impression with the jury.

At trial, Walter was asked "Do you teach at all?" Trans. at 784. In response, he stated "I'm adjunct lecturer at Northern Michigan University." *Ibid*.

[5] Exhibit 3 to Drake's Memorandum in Opposition to this Motion is a copy of an article entitled "Anger biting" which was published in the September 1985 issue of the *American Journal of Forensic Medicine and Pathology*. The publication contains a notation that the paper was first presented to the Odontology Section of the American Academy of Forensic Sciences in February 1983.

At his deposition, however, he elaborated on the nature of his relationship with that institution — to wit, he had lectured as a guest of a professor at Northern Michigan University. Walter Dep. at 68-71.

Walter defended his use of the term "adjunct" as factually correct within its ordinary meaning because he meant adjunct with a lowercase a, not a capital A. Walter Dep. at 68, 72. Although he wished he had used the term "guest," Walter disputed that the jury could have been misled by his testimony at trial. He stated:

> "Inasmuch as its [*sic*] part of the english lexicon, I don't apologize for using the word in its proper context. Whether [the jury] choose [*sic*] to understand it or not is a misfortune of their's, not mine. I prefer to — I would have preferred to have said guest. I used the word adjunct."

Walter Dep. at 75.

While this Court is dismayed at the cavalier attitude displayed by Walter, it cannot conclude that Walter's use of the term "adjunct" rendered his testimony false as a matter of definition. The word adjunct is defined as "a person associated with or assisting another in some duty or service." Webster's Third New International Dictionary 27 (1965). In the context in which the question was asked, however, Walter's response was — at best — misleading.[6]

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[6] Neither party addressed the significance, if any, of Walter's use of the present tense. Walter stated, "I'm adjunct lecturer ***." No evidence was adduced as to whether — at the time of trial — Walter continued to lecture as a guest at that institution. His response, (continued...)

4. Experience as an Expert Witness

Drake further argues that Walter's trial testimony was false with respect to his prior experience testifying as an expert witness. The Second Circuit agreed, noting that Walter claimed to have testified in "hundreds of criminal trials in Los Angeles and Michigan." *Drake*, 321 F.3d at 342. The Court must first note that the Second Circuit's characterization of Walter's trial testimony is incorrect. Walter never claimed to have testified at hundreds of trials. Rather, he claimed to have been qualified in one or two jurisdictions. Walter was never asked how many times he had been so qualified.

> "Q: Have you ever been qualified to testify as an expert witness in any criminal court?
> "A: Yes.
> "Q: And in what states and jurisdictions, if you would please.
> "A: In California, Los Angeles County and in Pasadena."

Trans. at 785. Notwithstanding the fact that Walter did not claim to have testified hundreds of times, there is no doubt that even his actual — more limited — trial testimony was factually incorrect and thus, false.

At his deposition, Walter reiterated his prior experience as an expert witness. He could recall testifying only in two prior cases, one murder case and the "Mazda" case. When questioned about the substance of his prior expert testimony, however, Walter revealed that he testified in the murder case in his

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[6](...continued)
however, left the impression that his affiliation with that institution was ongoing.

capacity of the custodian of the evidence — a chain of custody matter — not as a psychological expert. Walter Dep. at 87-88. Walter defended his characterization of his testimony as "expert" because he believed that such testimony was in fact expert testimony. *Ibid*. The second matter in which Walter could recall testifying prior to the Drake trial was the "Mazda" case — a civil, not a criminal, case. Thus, his testimony in that case was not relevant to the prosecutor's question at trial which specified qualification as an expert in any *criminal* court.

Although Drake has demonstrated that Walter's testimony at trial was factually incorrect, and thus false, he has not shown that Walter gave such false testimony intentionally. However, as discussed above, the relevant issue is whether Walter's trial testimony concerning his qualifications was false. Accordingly, the Court concludes that portions of Walter's testimony concerning his past qualification as an expert witness were false.

5. Los Angeles County Medical Examiner's Office

Finally, the area of most concern is Walter's trial testimony relative to his work experience in the Los Angeles County Medical Examiner's Office. At the beginning of his testimony on direct examination on this topic, Walter testified that he was:

> "a student professional worker at the time, while I was taking an academic course work in criminal justice. While I was there I

> consulted with the prosecutors, the police agencies and various investigative agencies. I related to and the pathologists related to moding cause of death and profiling for possible leads."

Trans. at 788-89. Walter testified that, in his position, he had personal involvement in 5,000 to 7,500 cases. Trans. at 789-790. He testified that, in some cases, he would view the decedent's body, confer with pathologists and others, discuss the case with police and investigators and develop a "profile." Trans. at 791. He testified that the purpose of a profile:

> "was not only to help the pathologists and the investigating agencies figure out what happened, but also then towards leads in resolving the case, whether it was a completed case or understanding the motive behind what occurred. And sometimes that's very complex, so they would take the aid of the profile."

Trans. at 791.

What is problematic about Walter's testimony is that, while he may have engaged in such tasks as he described at trial, he was not employed to engage in those tasks. In fact, his employment was for the purpose of working in and maintaining the toxicology laboratory. There is no evidence to suggest that Walter engaged in profiling activities at the behest of the Medical Examiner's Office. To the contrary, there is evidence in the record to suggest that, when the Medical Examiner's Office required profiling, it was conducted by the Medical Examiner himself.[7] An affidavit submitted by Dr. Ernest Griesemer, who worked

[7] Attached as an exhibit to Drake's Objections to the Report and Recommendation issued (continued...)

with Walter at the Medical Examiner's Office, indicates that Walter's primary responsibility was to maintain the laboratories at the Medical Examiner's Office. *See* Drake's Opp'n Mem. at Ex. 6.

In an effort to demonstrate that Walter was more than a mere student assistant, Respondent points to another letter written by Dr. Griesemer to the Ethics Committee of the American Academy of Forensic Sciences in October 1995. *See* Resp't's Summ. J. Mot. at Ex. A. Griesemer's letter states in part:

> "Richard Walter worked in the Forensic Sciences Laboratories of the Department of Coroner, Los Angeles County, Los Angeles, California for two and a half years from 1/76 to 8/78. He was employed as a Student Professional Worker and worked with Forensic Sciences, Toxicology and Histopathology Laboratories and their storage.
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> * * * * *
>
> "While he was working here, I noted that Mr. Walter would read through as many of these report and review items as he could and he was continually discussing cases with Coroner's staff members,

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[7](...continued)
by Magistrate Judge Schroeder is a sworn statement from Dr. Ronald Taylor who from 1973 to 1981 was the Director of the Forensic Science Laboratory for the Los Angeles County Medical Examiner's Office. The statement is in the form of Taylor's answers to written interrogatories. A portion of the statement contains the following questions and answers:

> "Q: In the course of your employment with the Medical Examiner's Office, did you and/or the [Forensic Science Laboratory] ever prepare psychological profiles, or utilize psychological modeling, or otherwise employ behavioral science to create a composite of a suspect in a criminal case?
> "A: No, but the Medical Examiner himself did.
> "Q: If the answer to the above was yes, please explain[.]
> "A: In certain high profile cases, the medical examiner — Dr. Noguchi [sic]— would have a psychological profile drawn of a yet to be identified murderer. To my knowledge, he never used his own staff."

Statement of Dr. Ronald Taylor, attached to Drake's Objections to the Report and Recommendation.

> detectives, and insurance investigators. I always had the feeling he was striving to search out the facts and achieve a more complete understanding of underlying circumstances and individual causes of death for specific Coroner's cases.
>
> "*Mr. Walter also attended the periodic case reviews and scientific discussions including Psychological Profiles held by the Coroner.* He also attended the scientific departmental discussions in meetings of both the Toxicology Section and the Forensic Investigations Section of the Coroner's Department. He sought and was sought after for one-on-one discussions with pathologists working on specific cases and presented materials in some of the meetings. He discussed evidence and case details with Toxicologists and with Forensic Science Investigators in the Department."

Ibid. (emphasis added).[8] While the letter sheds some light on Walter's activities during his employment with the Medical Examiner's Office, it confirms that activities such as seeking out pathologists for one-on-one consultation and discussing cases with detectives and other investigators were not the activities for which Walter was compensated. Indeed, Griesemer's statement that he "always had the feeling [Walter] was striving to search out the facts and achieve a more complete understanding of underlying circumstances and individual causes of death ***" contrasts markedly with Walter's own sworn testimony that he developed profiles in order to "not only help the pathologists and the

[8] Although the statements in the letter were not made under oath, it is appropriate for the Court to consider the contents of the letter because it is accompanied by Griesemer's affidavit affirming that the statements were true when the letter was written in October 1995 and remain true to present.

investigating agencies figure out what happened, but also then towards leads in resolving the case ***." Trans. at 791.

Griesemer's letter indicates that Walter *attended* psychological profiles, not that he developed such profiles or that he was expected to develop such profiles in the course of his duties. What is clear is that Walter engaged in the tasks he described at trial only informally and on his own initiative and that he was not employed by the Medical Examiner's Office to do so. Thus, his trial testimony was false.

Furthermore, the Court cannot conclude that Walter was confused or misled by the prosecutor's question at trial. The prosecutor asked simply, "What did you do for the Medical Examiner's Office?" The natural response to such question is a description of the work one is paid to perform. From all indications, if Walter had performed only those tasks he described at Drake's trial, he would not have been performing the job he was apparently hired to do. Despite all evidence — including Walter's own deposition testimony — demonstrating that one of Walter's primary responsibilities was working in and maintaining the laboratories, at the Drake trial Walter did not even mention any work in the laboratories. Thus, the Court cannot conclude that Walter's false testimony in this regard could have been caused by confusion or mistake. Accordingly, for purposes of this motion, the Court will presume that Walter committed perjury

with respect to his testimony concerning his work experience in the Medical Examiner's Office.[9] The Court therefore turns to the issue of whether the prosecution knew or should have known of the perjury.

B. The Prosecutor's Knowledge

The relevant inquiry is whether the prosecution knew or should have known that Walter testified falsely at trial. Drake asserts that

> "the pertinent and material facts show that the prosecutor attempted to insulate himself from [Walter's false testimony] by playing deaf and dumb, demonstrating at a minimum that he should have known of the deception being practiced, and by his conduct probably allowed, permitted and used the false information to his advantage to secure [Drake's] conviction. This latter view supports the claim that the prosecutor was actually aware of the deception."

Drake's Opp'n Mem. at 2. Essentially, Drake argues that Walter's claimed credentials should have raised red flags with the prosecution and, had those red flags been heeded, the prosecution would have been aware of Walter's perjury at trial. In order to evaluate Drake's argument, the Court must consider the information possessed by the prosecution at the time of the trial.

Peter Broderick's Deposition

Peter Broderick, now a Niagara County Court Judge, was the District Attorney for Niagara County at the time of the Drake trial and he prosecuted the

[9] The testimony clearly was false. However, the Court declines to hold that Walter committed perjury.

case himself. He was deposed by counsel in this case on August 21 and November 26, 2003.[10]

Broderick testified that, shortly before the commencement of the Drake trial, he was informed by the Niagara County Medical Examiner's Office that swabs taken from the female victim did not contain evidence of semen as originally thought. Broderick discussed this development with Dr. Lowell Levine, the prosecution's expert forensic odontologist. Aug. Dep. at 15. Levine suggested that Broderick contact Walter. Aug. Dep. at 14-15. Levine told Broderick that Walter was a member of the American Academy of Forensic Sciences. Aug. Dep. at 38; Nov. Dep. at 8. Levine also told Broderick that Walter worked within the Michigan prison system and that Walter's responsibility was to debrief serious sex offenders and their families, religious advisors and probation officers in order to determine "what made them tick" and what led them to commit their crimes. Aug. Dep. at 38-39. As best Broderick could recall, his conversation with Levine was the first time he had heard of Walter. Aug. Dep. at 14-15.

Through an examination of telephone records, Broderick agreed that he was in contact with Walter by October 7, 1982. Aug. Dep. at 36-37. Their initial conversation consisted of Broderick giving Walter some of the basic facts in the

[10] The transcripts of those depositions were independently paginated. Therefore the Court will refer to the August 21 deposition as "Aug. Dep." and to the November 26 deposition as "Nov. Dep."

case. Aug. Dep. at 43; Nov. Dep. at 4. According to Broderick, during his initial contact with Walter, he:

> "gave him a thumbnail sketch of the evidence in the case, the type of crime that was involved, and [the] fact that – I know we discussed the bite mark question. and I can't remember exactly what I told him in terms of details. I gave him, say, a basic idea of what the case was about."

Aug. Dep. at 38. In response, Walter said that he needed some time before he could give Broderick his opinion. Aug. Dep. at 44; Nov. Dep. at 4. Either later the same day or the following day, Walter called Broderick back and said that he believed picquerism was involved. Aug. Dep. at 44; Nov. Dep. at 4. Walter then explained picquerism to Broderick and sent Broderick a couple of books that discussed it. Aug. Dep. at 44. Broderick did not reach out to any other mental health professional for additional information about picquerism. Nov. Dep. at 5.

Broderick did not ask Walter anything about his qualifications during their initial conversation. Aug. Dep. at 38; Nov. Dep. at 7. Nor did Broderick ask Walter for a curriculum vitae ("CV"). Nov. Dep. at 15. Broderick normally did not request an expert's CV at the time he retained the expert. Nov. Dep. at 15. Broderick would simply ask the expert to discuss his or her credentials during an interview. Nov. Dep. at 15.

Broderick first recalled discussing Walter's qualifications upon Walter's arrival in Buffalo the night before he was to testify at the trial.[11] He stated:

> "I would have to say that's correct. I have no recollection of discussing his curriculum vitae in any of the previous conversations. I'm not saying it didn't happen. I'm saying I don't recall."

Nov. Dep. at 17. Broderick did not question Walter about his credentials until he had picked Walter up from the airport. Aug. Dep. at 43. Broderick recalled that most of the information he had elicited from Walter concerning his qualifications would be contained in the handwritten notes Broderick made, (Aug. Dep. at 40-41), during a discussion on the morning of Walter's testimony. Nov. Dep. at 15. Walter told Broderick that he had a Bachelor's of Arts degree from Michigan State and a Master's degree in psychology. Nov. Dep. at 15. Broderick believed that a reference in his notes to Northern Michigan University pertained to some kind of teaching or instructing, not to Walter's education. Nov. Dep. at 16.

Broderick could not recall an occasion as a prosecutor, prior to the Drake trial, when he had utilized a mental health professional as a witness except possibly in rebuttal. Nov. Dep. at 5. He did not do any research as to what qualifications would be necessary in order to call oneself a psychologist. Nov. Dep. at 5-6. Broderick assumed that, at the time of trial, he would have known that generally one must have some college education and a license to hold oneself

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[11] Drake's trial began on October 19 and Walter testified on October 22, 1982.

out as a psychologist. Nov. Dep. at 6. Broderick stated that he did not know at the time of trial, nor did he know at the time of his deposition, whether in the State of New York, one must have a Ph. D. in order to call himself a psychologist. Nov. Dep. at 7.

Based on the notes of his conversation with Walter on the morning of Walter's testimony, Broderick concluded that he must have asked Walter if he had written or published any papers, but could not recall Walter's answer. Nov. Dep. at 17-18. Because the topic "papers" was crossed out in his notes, Broderick agreed that a fair assumption would be that Walter had denied writing or publishing any papers, but Broderick had no independent recollection of Walter's answer in that regard. Nov. Dep. at 17-18. With respect to Walter's prior testimonial experience as an expert witness, initially Broderick could not recall asking Walter in his pre-testimony interview if Walter had any such experience, but Broderick also stated that it would have been a standard question for him to ask. Aug. Dep. at 40. Broderick's notes revealed that he had discussed Walter's prior expert testimony, but the notes were ambiguous as to in how many jurisdictions Walter had been so qualified. Nov. Dep. at 18-21.

"Q: The next topic is qualifications in California I think?
"A: Yes.
"Q: And you have two jurisdictions. Is that two jurisdictions or two juries?

"A: It looks like J-U-R-S, but I don't know what that means. It probably - - yes, I would have to say probably qualified in two jurisdictions in California to testify."

Nov. Dep. at 18. Broderick further testified that he had no recollection of inquiring of Walter as to the specific subject matter of his testimony on those prior occasions.

"Q: When you prepared him to testify in this case, did you inquire of him as to what area he had been qualified to testify in?
"A: I have no recollection of that.
"Q: Would it have been important to you to know that he testified as a witness on a chain of custody of a piece of evidence that had come into a lab, rather than to testify as to psychological matters.
"A: Well, obviously, yes.
"Q: Did you inquire of him when you prepared him as to what it was he testified about?
"A: I have no recollection of asking that question."

Nov. Dep. at 19.

At the time of the deposition, Broderick recalled that Walter had told him that he had worked on upwards of 10,000 cases for the Los Angeles Medical Examiner's Office and that "he did profiling for unsolved or uncharged crimes. He would give the police officers an idea of who they were looking for." Aug. Dep. at 41. Broderick did not ask Walter for any references from the Los Angeles Medical Examiner's Office to verify Walter's experience. Aug. Dep. at 41-42. At his deposition, counsel for Drake obtained an admission from Broderick that a

claim to have conducted 10,000 criminal profiles seems extraordinary. Aug. Dep. at 42.

In response to some general questions at his deposition as to why he did not confirm Walter's qualifications, Broderick stated that he believed Walter to be qualified based on his conversations and interview.

> "Q: Why did you reach out to this unknown person, Mr. Walter, in Marquette, Michigan to assist you in presenting this case to this jury rather than finding someone local?
> "A: Find someone local?
> "Q: Yes.
> "A: I never even thought to look locally because Levine told me this is the person you should call.
> "Q: Did you ever school yourself in this area after you got the books from Mr. Walter by asking someone local as to the benefits of this diagnosis?
> "A: Well, as you can see in the dates, I had about two weeks and I was preparing for a murder trial. I took no time. I made no effort to reach out to anybody. In my mind it was not a huge part of the case. I had people who caught this defendant in the act of putting a naked girl in the trunk of a car and all I needed was some reasonable explanation for why this thing happened and when I lost the sperm evidence a couple of weeks before the trial, I was just looking for someone to give an explanation to the jury as to why this happened. Not that I needed to, but I think juries are always interested in knowing why.
> "Q: Certainly you're aware, and you charge it all the time, that the prosecution need not prove motive?
> "A: Correct."

Nov. Dep. at 26. Broderick conceded that he did no objective verification of Walter's stated credentials.

"Q: Let me ask it this way: Other than talking to the man and getting him referred to you by Dr. Levine, did you make one phone call to anybody to checkup on this guy?
"A: No.
"Q: Did you write a letter to anyone?
"A: No. I never met him until the night before he testified.
"Q: I understand. Did you have anybody on your staff either write or send a letter to anyone to see about his qualifications?
"A: No, I didn't. I didn't make any decision about presenting his testimony until I met him and talked to him. It was probably that night, Thursday night, that I decided that he knew what he was talking about and had the qualifications to testify as an expert. At least I could present him to the court.
"Q: So would it be a fair statement then that before he actually showed up on the scene and you saw him in person and talked to him you weren't sure whether you were going to use him or not?
"A: That's correct.
"Q: So he sold you on his credentials and his capability to talk reasonably about this topic?
"A: Right, and the book."

Nov. dep. at 30-32. On cross-examination, Broderick further clarified that the procedure he used to vet Walter was the same as that he used with respect to other expert witnesses.

"Q: I have a few questions. You talked earlier about experts. During the course of your years as an assistant district attorney and then a district attorney, had you tried cases where you used experts?
"A: Yes.
"Q: Cases where you used doctors?
"A: Yes.

* * * * *

"Q: And did you meet with the doctors and the medical - - did you meet with the doctors and with the accident reconstruction experts prior to putting them on?
"A: Yes.

"Q: And would you ask the doctors if you hadn't used them before some basic questions about their qualifications?
"A: I used the same technique with those people as I did with Walter.

* * * * *

"Q: So would it be fair to say that in our case it would be true that you were following the same guidelines that you used as a district attorney and as an assistant district attorney?
"A: Yes.
"Q: And when you would ask a medical doctor if he had been qualified in another court to testify as an expert, did you ever ask him whether it was as an expert as a medical doctor as opposed to say, a plumber or did you assume that based on the reason for his testimony that the two of you were talking about the same thing, namely that he was an expert qualified as a medical doctor?
"A: That's correct.

* * * * *

"Q: Now, let's turn to our case.
"A: I never questioned a doctor about his education or background or previous testimony, as a psychiatrist or a chemist or anybody else. I sat them down and determined from their testimony that this is what they were going to say and I presented it to the court.
"Q: Well, along that vain [sic] then, had you ever in any of the times you used an expert made a checkup call to checkup on the qualifications that the expert had told you that he had?
"A: Only in a couple of occasions and that was with respect to defense experts.
"Q: Okay, so none of the experts that you had called on your own that you had met with did you ever make a checkup call, correct?
"A: Correct. Not to my recollection today. I don't recall ever having done that."

Nov. Dep. at 32-35.

Broderick stated that he reached his conclusions as to whether Walter was qualified to testify as an expert based on his discussions with Walter upon his

arrival in Buffalo. Aug. Dep. at 43. Broderick testified that once Walter arrived in Buffalo, Walter explained other characteristics of picquerists — characteristics displayed by Drake — which led Broderick to more confidently conclude that Walter was qualified to provide expert testimony at trial. Nov. Dep. 27-28.

> "A: Well, that didn't concern me. All I wanted to do was have him give his explanation and let the jury hear it. I made no idea of how to present it better or - - I never thought about that. He had given me facts about this case that he couldn't have known as I drove him from the airport to the hotel on Thursday night.
>
> "He was giving me an explanation of the type of people and how they conduct this type of syndrome and he was telling me things about Robie Drake that existed in my case that he couldn't have known. That was one of the things that told me that he knew what he was talking about.
>
> "Principally, that often times in individuals who engage in this kind of conduct are so exhausted at the conclusion - - this was just an aside that he was telling me as we drove, that they fall asleep because of the exhaustion. In this case - - and that was one of the aspects I never really thought about.
>
> "Detective Giles had testified that he was in fact asleep when he arrived in the back of the police car and I frankly had not given it any thought. I didn't believe it. I thought it was probably being feigned having been caught in the act and when Walter said that to me it like rang a bell. I said apparently this is what happened in this case."

Nov. Dep. at 27-28. Broderick also recalled Walter mentioning a likelihood that the picquerist subscribes to "soldier of fortune" and "commando"-type

publications and that the picquerist may have a history of "Peeping Tom" offenses. Nov. Dep. at 35-38. Broderick's confidence in Walter's opinions was bolstered by these revelations because, at the time of his arrest, Drake had a "significant number" of commando-type publications in his room and Drake also had either a prior charge or conviction for "Peeping Tom" activity. Nov. Dep. 35-37.[12]

When interviewing Walter, Broderick wrote down that Walter had worked on 5,000 to 7,500 cases in Los Angeles. Broderick had no reaction to those numbers but just wrote them down because that's what Walter told him was his experience. Nov. Dep. at 38-39. Broderick had no idea of the size of the Los Angeles Medical Examiner's Office's caseload. Nov. Dep. at 39. Broderick could not recall Walter telling him that he worked for the Medical Examiner's Office as a "student professional worker." Nov. Dep. at 39-40.

Broderick testified that he was more impressed by Walter's work for the Michigan Department of Corrections than his work for the Medical Examiner's Office.

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[12]Broderick also recalled, however, that he probably told Walter during their initial conversation that Drake was wearing camouflage clothing at the time of his arrest and that he had been carrying bandoliers of ammunition and two guns. Nov. Dep. at 37. Broderick maintained that he never told Walter that Drake had commando-type publications, that he had a prior history of "Peeping Tom" conduct or that Drake had fallen asleep in the police car on the way to the police station. *Id*. at 37-38.

> "A: That's correct. I think it should be clear that I didn't think too much about that part of his experience. I was more interested in his experience in the Michigan Department of Corrections; debriefing the worst of the Michigan sexual criminals and their families and their counselors and their ministers in an effort to try to find out what makes people do the things they are convicted of. That to me in and of itself with his educational background would have qualified him to testify in this case or in any case about sexual deprivation."

Nov. Dep. at 40-41.[13]

Knowledge of the Prosecution

In light of the information adduced at Broderick's deposition, Drake contends that Broderick "permitted [Walter] to expand his role to its zenith," "took him at face value, didn't care much for his background, didn't inquire as a good trial lawyer would and should do and permitted the witness to run amok," and that "a bell should have rung in the prosecutor's head telling him that this witness was a fraud,"and "[Broderick's] lack of interest in the qualifications of his witness suggests that 'don't ask, don't tell' was the watchword of the day." Drake's Opp'n Mem. at 16-17, 23. Essentially, Drake argues that the prosecutor

[13] This Court is confused, however, as to how Broderick came to believe that Walter "debrief[ed] the worst of the Michigan sexual criminals" when there is no mention of that activity in Walter's trial testimony or his deposition testimony. At trial, Walter described his then-current position with the Michigan Department of Corrections as one of recommending treatments and programs for mentally ill inmates and as an advisor to the parole board. Trans. at 786. Certainly interviews with the inmates would be part of those functions, but there is no indication that Walter did so in an effort to figure out the individual as opposed to an effort to recommend appropriate treatment or to advise the parole board's determination as to whether a particular inmate should be released.

either knew that Walter's credentials were exaggerated and deliberately chose not to verify them or should have known that Walter was exaggerating and would have known had he taken steps to verify them.

In *United States* v. *Wallach,* 935 F.2d 445 (2d Cir. 1991), the district court had concluded that the government should have been aware of its witness's perjury. Therein, the government's chief witness, Guariglia, was a compulsive gambler who represented on direct examination at trial that he had ceased gambling in 1998 and had not gambled up to and including the time of trial. *Id.* at 455. On cross-examination, defense counsel elicited testimony that the witness had signed gambling markers at the Tropicana in Atlantic City, New Jersey in September and October of 1998 — after he had allegedly ceased gambling. *Id*. at 455-56. Once such information was revealed, the prosecution conferred with the witness and investigated his explanation that he had cashed in the markers but had not gambled. The prosecution verified the witness's story with others who were allegedly present on those occasions, but was not able to verify with the Tropicana that the witness had not gambled. Despite not being able to verify his explanation in its entirety, the prosecution — in order to rehabilitate the witness — had him explain his actions to the jury on redirect. *Id*. at 457. That explanation was later proven to be false and, during the trial, the prosecution was made aware of "powerful evidence" that Guariglia was lying.

Id. at 456-57. In concluding that the government should have known of the perjury, the court stated:

> "In light of Guariglia's acknowledged history of compulsive gambling, we believe that given the inconsistencies in his statements the government should have been on notice that Guariglia was perjuring himself. Yet, instead of proceeding with great caution, the government set out on its redirect examination to rehabilitate Guariglia and have elicited his rather dubious explanation of what had happened. Defendants placed before the government and the court powerful evidence that Guariglia was lying. *** We fear that given the importance of Guariglia's testimony to the case, the prosecutors may have consciously avoided recognizing the obvious – that is, that Guariglia was not telling the truth."

Wallach, at 457.[14]

In *Turner* v. *Schriver*, 327 F. Supp.2d 174 (E.D.N.Y. 2004), Clarke, who was the alleged victim of the crime and the crucial prosecution witness, testified falsely that he did not have a criminal record. *Id*. at 178. Prior to trial, the defense had requested that the prosecution provide a copy of all criminal records of all prosecution witnesses. *Id*. at 184. The prosecution had failed to verify whether Clarke had a criminal record and instead relied on Clarke's representation that he had no record. *Id.* at 182. In concluding that the prosecution should have known of Clarke's perjury, the court stressed that, had the prosecution made even

[14] The Court also stated that a new trial would be warranted under the circumstances even assuming that the prosecution was unaware of the false testimony. *Wallach*, at 458.

a perfunctory effort[15] to satisfy its obligation under *Brady* v. *Maryland*, 371 U.S. 812 (1962), the prosecution would have known that Clarke was lying at the trial. *Turner*, 327 F. Supp.2d at 186-187.

In the instant case, however, with the exception of Walter's testimony concerning his prior publications, Drake fails to point to any concrete example of information that might have alerted Broderick to the possibility that Walter was exaggerating his qualifications. Walter and Broderick discussed Walter's qualifications on the morning prior to Walter's trial testimony. Broderick took notes of that conversation on which the topic "papers" is crossed out. *See* Drake's Opp'n Mem. at Ex. 2. Drake argues that such a crossed-out notation indicates that Broderick had asked Walter if he had written or published any papers and that Walter had responded in the negative. Accordingly, the argument continues, Broderick knew or should have known that Walter testified falsely at trial when he was asked if he had written any papers and answered "yes."

At deposition, Broderick agreed such an interpretation would be a "fair assumption" but could not say that that was what had occurred.

> "Q: Now, going down the page on Exhibit 14, you have a topic, papers. Do you see what this is?

[15] "The information requested was readily available to the prosecution had it made the most modest effort." *Turner*, at 185.

"A: That would have been dissertations or papers he had written or published.
"Q: And then you crossed it out. Does that mean that you inquired of him whether he had been published in some fashion and he indicated that he had not?
"A: I think that's a fair assumption, but I can't tell you right now."

Nov. Dep. at 17-18. As has been shown, however, Walter was asked at trial whether he had *written* any papers prior to the date of his testimony. He was not asked whether or not he had published any such papers. Drake has not provided any evidence demonstrating that Walter's testimony in response to the question actually posed was false. Thus, even if his trial response was inconsistent with his earlier representation to Broderick, Drake cannot show that Broderick knowingly elicited false testimony because Drake cannot show that the trial testimony was false. Assuming for purposes of this analysis that Walter's trial testimony was inconsistent with the response he had given Broderick during their morning conversation, at most, Broderick might have been prompted to seek clarification from Walter regarding that inconsistency. It does not indicate that Broderick should have considered that Walter exaggerated his other qualifications.

Drake also makes much of Broderick's admission that 10,000 seems like an "extraordinary" number of profiles for Walter to have worked on at the Medical

Examiner's Office.[16] *See* Aug. Dep. at 42. That hardly seems the point, however, when Drake has shown that Walter testified falsely about the duties he was employed to perform, not the number of cases on which he had worked. Drake points to no evidence suggesting that Broderick knew — or should have suspected — that Walter's official duties were not those he had described at trial. There is no evidence to suggest that Walter ever gave any indication that his work for the Medical Examiner's Office involved *anything other than* psychological work.

Moreover, even assuming that Drake is correct and that, in light of the "extraordinary" number of cases in which Walter claimed to have involvement, Broderick should have verified Walter's credentials, that such verification would have prevented or uncovered Walter's falsehoods is mere speculation. Unlike the perfunctory computerized criminal records check which would have revealed the perjury in *Turner*, Walter's exaggeration would only have been discovered upon a thorough investigation of Walter's employment history with the Los Angeles County Medical Examiner's Office.

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[16]Walter did not testify at trial to having profiled 10,000 cases. He stated that "approximately 40,000 cases" arose while he was employed by the Medical Examiner's Office, that he had "anything to do" with between 7,500 and 10,000 of those cases and that he "had personal involvement with at least *** five thousand to seventy-five hundred" cases. Trans. at 789-790.

Drake faults the prosecution for taking Walter at "face value" and for not "inquir[ing] as a good trial lawyer would and should do." Those faults can also be attributed to the defense. While the defense does risk making the expert's credentials seem more impressive by a lengthy interrogation as to the substance of an expert's prior publications and testimony, the defense could have sought a *voir dire* of Walter outside the presence of the jury[17]. Both the prosecution and the defense *assumed* that Walter's prior expert testimony concerned psychological matters. While that might have been a natural assumption in light of the reason for which Walter's testimony was offered in this case, the defense also should have been interested in whether Walter had previously testified concerning "picquerism" specifically.

Finally, Broderick emphasized that Walter's qualifications, his knowledge of characteristics of picquerists that corresponded to evidence in the case of which Walter was unaware and the referral by Dr. Levine — a well-respected expert forensic odontologist —, all contributed to Broderick's confidence in Walter.

[17] While the Court recognizes that the trial court was concerned about time constraints, it would not have been unreasonable for defense counsel to have sought a brief *voir dire* or latitude on cross-examination to obtain a better picture of Walter's qualifications, particularly in light of the fact that there is no mention of defense counsel having been provided with Walter's CV.

Based on all of the above, the Court cannot conclude that the prosecution knew or should have known that Walter had testified falsely at trial.

C. Effect on the Jury

In light of the Court's conclusion that there is no evidence that the prosecution knew or should have known of Walter's false testimony, the Court now turns to the effect, if any, on the jury's verdict. As discussed earlier, if the prosecution neither knew nor should have known of the false testimony, relief must be granted if the Court is left with the firm conviction that, but for the false testimony, Drake would likely have not been convicted. *Wallach*, at 456.

In making this inquiry, the Second Circuit has instructed that courts are to consider "whether the jury probably would have altered its verdict if it had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness." *Stofsky*, at 246. Furthermore, even when the prosecution was aware of the perjury, a new trial is not warranted when independent evidence supported the conviction. *United States* v. *Wong*, 78 F.3d 73, 82 (2d Cir. 1996).

The Court cannot conclude that — even if Walter had been confronted at trial with his exaggerations and the jury had determined that he was a charlatan — the jury would have altered its verdict. It is undisputed that the sole issue for

the jury was whether Drake acted with the requisite intent. Broderick's purpose in offering Walter's testimony was to provide the jury with "some reasonable explanation as to why this happened"— in other words, to explain Drake's motive. Nov. Dep. at 26. While Walter's testimony was the only evidence as to possible motive, it was not the only evidence from which the jury could have found that Drake fired his gun into the victims' car with the requisite intent.

At trial, the prosecution introduced Drake's statement that he thought the car was abandoned as well as evidence that he had told an officer that he could not see inside the car because the windows were "fogged up." Trans. at 278. Drake expressed his intention to destroy the car by shooting it, (Trans. at 275) but the physical evidence indicated that all 19 shots were fired into the front of the car — specifically into the front passenger-side window and door — (Trans. at 69, 268, 1027) and that Rosenthal was struck in the head and chest with 14 bullets and Smith was struck in the head with 2 bullets. Trans. at 484, 488-89. Furthermore, upon his opening the car door and reportedly hearing Rosenthal moaning, Drake stabbed him twice. Trans. at 247. Edward Allen Cusatis, one of Drake's fellow inmates, testified that Drake told him that he meant to kill Rosenthal when he stabbed him. Trans. at 723-24. Finally, Theresa Weslowski, a student at the same high school as that attended by Drake and the victims,

testified that she had once heard Drake and Rosenthal exchange swear words at school. Trans. at 558.

Although this evidence does not explain what motivated Drake to commit such an act, its strength is sufficient to demonstrate that Drake intended to commit the act, such that this Court is not left with the firm conviction that the jury would not have convicted Drake had it known of the falsity of Walter's testimony.

Accordingly, Respondent's Motion for Summary Judgment is granted, the Petition is dismissed and the Clerk of the Court is directed to take all steps necessary to close the case.

DATED: Buffalo, N.Y.

March 16, 2006

/s/ John T. Elfvin

JOHN T. ELFVIN

S.U.S.D.J.