

Cross-Examination of the Analyst in Drug Prosecutions

JAMES SHELL



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CROSS-EXAMINATION OF THE ANALYST IN DRUG PROSECUTIONS

FIRST EDITION

James Shellow



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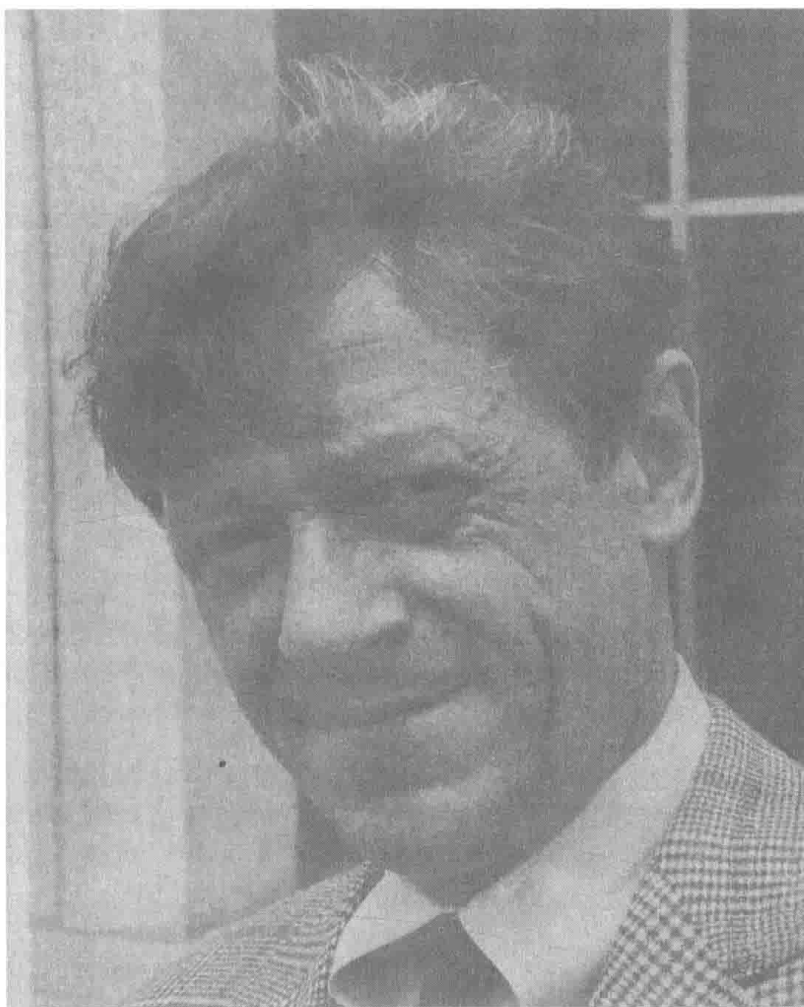
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Frank Oliver
1920 - 2006

DEDICATION

Professor Nicolas Dimitrius Cheronis was a distinguished professor at Brooklyn College and a recognized expert in microchemistry. The son of one of his colleagues was arrested and charged with a marijuana offense. Professor Cheronis attended the trial and heard the testimony of the prosecution's drug analyst. He was appalled at the analyst's methodology and in 1960 wrote a paper expressing his dismay. The paper appeared in an obscure scientific journal.* The only known direct response was in a 1961 United Nations Bulletin on Narcotics:

It is fortunate for us that the identification of marijuana has never been legally challenged. However, this situation may not last too long.

The UN was right. The situation did not last long. In 1961 I graduated from law school and started a lifetime of challenges to the testimony of prosecution analysts.

Professor Cheronis died in an automobile accident in 1962. I never met him. But I did meet another man in Chicago in 1964, and to him I dedicate this book.

The late Frank Oliver's skill and imagination have inspired criminal defense lawyers for six decades. His cross-examinations especially have been the standard toward which all who observed him at work aspire. The daring, imagination, and ingenuity of Frank's work in the federal courts of Chicago will be recalled as long as lawyers rise to defend the pitiful, the pitiless, and the damned in those courts.

* Cheronis, Tentative and Rigorous Proof in the Identification of Organic Compounds and Application of These Concepts to the Detection of the Active Principles of Marihuana, 4 MICROCHEMICAL JOURNAL 555, 558 (1960). Dr. Cheronis was the first editor of this journal.

It is not possible to overestimate the importance of his distinctive insights into the purposes and means of cross-examination. Where most lawyers never rise above the level of a competent technician, if that, Frank Oliver was an artist. Moreover, Frank's ability to explain his own cross-examinations and his patient willingness to critique the examinations of others both were unmatched, in my experience.

The author learned cross-examination from Frank Oliver. It is not that Frank taught cross-examination; it is that he provided endless occasions to learn it. The art of cross-examination was learned in trials and endless hours reviewing daily copy and listening to Frank's general critiques, specific criticisms, and occasional praise of the author's efforts in court that day. Frank, alone among those the author has ever encountered, not only invariably demonstrated his superb skills in a courtroom, but clearly and eloquently explained what he was attempting to accomplish and why he did it as he had.

Frank Oliver learned in turn from William Scott Stewart. Stewart's cross-examination excerpts in STEWART ON TRIAL STRATEGY bear an uncanny resemblance to Frank Oliver's.

The art of Stewart and Oliver can be learned, although as Frank himself insisted, it cannot be taught. Frank Oliver insisted that his students emulate the cross-examinations of Socrates in Plato's CRITO. He insisted that they start with a child's nursery rhyme, "*The House that Jack Built*," if they wished to understand in the fullness of their maturity as lawyers the incremental building of a persuasive story through cross-examination. Always he insisted that one must have the desire, the discipline, and the fearlessness to learn, rather than nurture the vain hope to be taught.

To him, and to that spirit, this book is dedicated.

FOREWORD

This fellow, Shellow, has hidden himself from international stardom long enough. He has finally come out with it, and if you miss him and this monstrous little book you will fade away a lesser lawyer.

Here's where I'm coming from: I do not do drug cases. They involve chemistry. You see, my father was a chemist. My mother was likewise. They mixed around in their respective chemistry and came up with me. I listened to chemistry talk at the dinner table and the supper table and at breakfast the next morning until one day I turned into a glowering, pimpled blob of juvenile insurrection against all that claimed to be scientific.

But then years later I met this Shellow fellow, this engaging, unpredictable, irascible trial lawyer, this walking, talking load of unquenched curiosity, this chemist, this scientist, this challenging humanoid who came laughing down from outer space and wanted to test everything, and I mean everything. Had I met him as a youngster I probably would have emulated his rejection of conventional thought and become another Louis Pasteur or something.

But Shellow is a trial lawyer who is happier still to aim his intellectual disobedience at any presented proposition, especially one offered up by those pretended scientists of the prosecution. They stand at his mercy, and those who claim to be experts in the identification of narcotics or forbidden drugs and who work for the government are fair game, one and all. Have no pity. They deserve, but do not relish, Shellow's justice.

This book is about a way to think. It is a book about rebelling against conventional theories and standard postulates. It's about thumbing one's intellectual nose at so-called scientific methodology when it is little more than subjective opinion

and guessing — and it's about having fun doing it. You could take nearly any example of the many cross-examinations Shellow sets out here and read them for the pure pleasure of it. Chemistry teachers should read this book and teach their students with his methods. He gives credit to Frank Oliver and Socrates but I say both would have tipped their hats to Shellow.

There's an honest playfulness in Shellow's cross-examinations that one rarely encounters in a courtroom, and surely that one never witnesses in some dismal, shabby chemical laboratory in places where charlatans gather and come to their unimpeachable conclusions that Exhibit A is the forbidden stuff. I have set this book on my desk, in front of me, where I can see it plainly, like one sees a ready friend in a lonely place, and when I want to work on the cross-examination of some expert — of any expert — I take it in my hands with reverence. It is Shellow speaking, poking, asking, and leading the expert over the edge where the expert will surely drop into the black abyss of the stripped-naked pretender. Oh, what fun! And what a gift, at last, to justice.

Gerry Spence
Jackson Hole, Wyoming
September 2009

THE AUTHOR

James Shellow has cross-examined prosecution drug analysts for almost fifty years. He graduated *cum laude* and Phi Beta Kappa from the University of Chicago with a major in physics and mathematics and continued in a doctoral program in cybernetics. He was the Divisional Honor Scholar and a University Research Fellow. Thereafter he was employed as a servo engineer, systems engineer, research scientist, and operations analyst. He taught university courses in instrumentation design, abnormal psychology and advanced criminal procedure and was a consultant to the Mental Health Research Institute at the University of Michigan. He was a member of the Board of Directors of the Fund for the Behavioral Sciences. He received his law degree from the Marquette University Law School and was a member of its Law Review. He was an Assistant Professor on the faculty of the Medical College of Wisconsin where he conducted a seminar in forensic science for residents in psychiatry and postdoctoral fellows in psychology. He is a certified public accountant and practiced accounting for several years. He is a former president of the National Association of Criminal Defense lawyers, currently President of the Board of Regents and member of the faculty of the National Criminal Defense College and an elected member of the American Law Institute. He is a former member of the Committee on Federal Criminal Jury Instructions for the Seventh Circuit. He is a Fellow of the American Board of Criminal Lawyers and a member of the Board of Directors, Federal Defender Services of Wisconsin. He has lectured and published extensively in the field of criminal law and is a member of the Editorial Board of *Forecite*. He practices criminal defense law in Milwaukee, Wisconsin and vacations at his home on the French Riviera.

ACKNOWLEDGEMENTS

I express gratitude to Dr. John Steele, who was the defense expert in many drug prosecutions. Unlike so many prosecution analysts, he is a scientist. He is worthy of that title and more. Dr. Steele's insightful and objective analyses convinced some prosecutors to dismiss charges or to accept reasonable plea agreements. He spent uncounted hours reacquainting me with dimly recalled principles of physics, chemistry, and botany. His lifetime of developing validation procedures was an invaluable contribution to my understanding. His knowledge and skill in computer programming was essential to the progression of the chemistry defense.

Dean Strang is a distinguished and brilliant criminal defense lawyer who practices in Madison, Wisconsin. For over a decade we practiced together at Shellow, Shellow and Glynn. He participated in many of the trials from which the concepts and techniques presented in this book evolved. Dean's moving and eloquent book, providing an historical narrative of the 1917 "anarchist" trial travesty in Milwaukee, will be published soon.

Without Dean's encouragement I would not have started writing this book. Without Dean's tireless assistance in organizing the materials and editing the numerous drafts, I would not have completed the task. His contributions and insights created a readable book rather than a dense law review article. I and those who read the book are indebted to Dean.

I also am indebted to my daughters, Jill and Robin. After years of wandering through the educational landscape and enriching it as much as it enriched them, they made their father very proud when they chose to defend the accused in criminal cases. They do that differently than I, and each does

it differently than the other, but both do it with great style and skill.

Finally, and most importantly, I acknowledge a debt that I never can repay to Gilda B. Shellow. Her unrivaled wisdom and patience, and occasionally when needed her impatience, as my wife for 55 years and law partner for 45 years, permitted me to live the life that underlies this book.

Gilda's death in 2005 has denied the reader her incomparable editorial judgment and exquisite writing skills. It also has deprived me of my best friend and most incisive but loving critic. All other flaws, in me and in this book, are mine.

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*Cross-examination is the greatest of all performing arts; like playing jazz, you prepare for 50%, the rest is pure riff.**

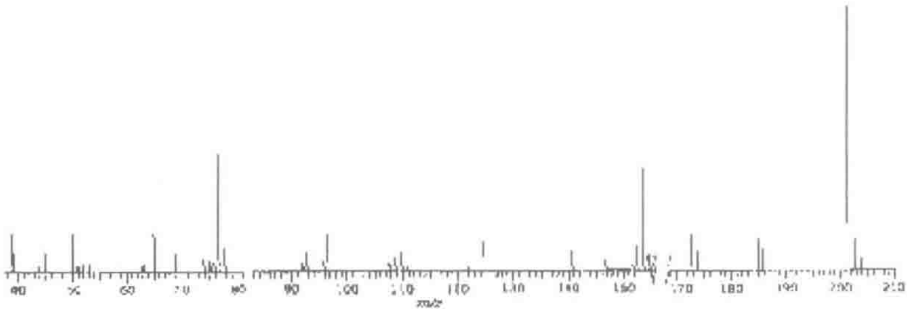
Chapter 1

INTRODUCTION

Counsel who defends a drug prosecution confronts a two witness paradigm: the agent and the forensic analyst. It is virtually impossible to shake the testimony of an experienced agent. In the absence of an acceptable plea bargain, defense counsel must attempt to impeach the analyst and construct a defense upon that impeachment. The thesis of this book is that it can be done. But this is not a “how to do it” book. It is a “how to think about doing it” book.

What follows is a distillation of the archetypal testimony that must be impeached:

* John Keker, Keker & Van Nest, San Francisco, California, Charles Garry Memorial Lecture, December 12, 1998.

Exhibit 2

Q I show you what has been marked for identification as Exhibit 2. Do you recognize it?

A Yes.

Q What is it?

A It is the mass spectrum of the substance brought to the laboratory by Agent ____ on July 12, 2009.

Q You tested that substance?

A Yes.

Q Do you have an opinion to a reasonable degree of certainty in the field of drug analysis as to the identity of that substance?

A Yes.

Q What is your opinion?

A In my opinion it is cocaine.

Q On what do you base your opinion?

A I compared its mass spectrum, Exhibit 2, with the mass spectrum of the laboratory sample of cocaine and they were the same; they matched.

The defense lawyer must be prepared to reveal the unreliability inherent in the analyst's identification of the substance or substances tested. At the outset, counsel must understand the analyst's task in broad strokes. Very generally, the analyst's task is this: *D* has been arrested and charged with a crime involving controlled substance *X*; the prosecution must prove *D* guilty; the prosecution analyst's job is to identify the questioned substance as *X*.

In completing his task, the analyst faces two principal constraints. First, he must work within the budgetary limitations of his government agency. And second, he must be able plausibly to deny, to himself and to others, the commission of perjury. He does not face a third constraint that the naive observer might assume is important: science.

In meeting these two constraints, and escaping the third, he must sound to the lay jury as if he offers scientifically valid opinions. But he need not actually do so; he need only avoid both the reality and the perception that he is an outright fraud. His only option, given the two constraints he does face and the demands of the conclusion he knows he must reach, is to present the superficial appearance of scientific authenticity, but without submitting to the rigors of applied scientific inquiry. The cross-examination excerpts which follow place the answers of the prosecution analyst in context.

Simply put, no matter how well credentialed and conversant in an established field, an expert may still testify to falsehoods. These falsehoods may involve generalities of the substantive content of the relevant field or its methodology, or as either applies to the particular facts of the case at hand. Focusing attention on the field and the witness's credentials to the exclusion of the testimony in context risks encouraging abusive expert testimony practices — the now legendary junk science.*

* R.J. Allen, Expertise and the Supreme Court: What Is the Problem? 34 SETON HALL L. REV. 1, 5 (2003).

On June 25, 2009, Justice Antonin Scalia wrote for the majority of the Supreme Court in *Melendez-Diaz v. Massachusetts*, 2009 U.S. LEXIS 4734. The issue before the Court was the reach and application of the Confrontation Clause. Massachusetts law did not require the drug analyst to testify and permitted the prosecution to prove the identity of a drug by the analyst's certificate. The defendant argued that this was trial by affidavit and denied him rights guaranteed by the Sixth Amendment. The Court agreed and reversed. Justice Scalia wrote,

Nor is it evident that what respondent calls "neutral scientific testing" is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation.... A forensic analyst responding to a request from a law enforcement official may feel pressure — or have an incentive — to alter the evidence in a manner favorable to the prosecution.... While it is true ... that an honest analyst will not alter his testimony when forced to confront the defendant, ... the same cannot be said of the fraudulent analyst.... Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony.... And, of course, the prospect of confrontation will deter fraudulent analysis in the first place. Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials.... Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.

Id. at 22-23, 24, 25.

The crime analyst cannot be understood as a scientist, therefore. He must be understood as an analyst or technician; as someone who conducts a form of analysis that is subjective

and defies description, a form of analysis that follows not a hypothesis, but rather leads to a predetermined conclusion. At its crudest, his is a confidence game.

In civil cases, lawyers and judges complain about “junk science.” But the problem in criminal drug prosecutions differs subtly. There, the prosecution and its analysts offer a faux-science of identifying junk. In this sense, prosecution analysts have been part of the problem, not part of the solution. Professor Starrs is right:

Forensic scientists have not been merely spectators to this parade of scientific hokum.*

In drug prosecutions the analyst’s opinion is critical. In most criminal prosecutions the opinions of a crime analyst matching fingerprints, paint chips, tool marks, and the like tie the defendant to the offense. In drug prosecutions the opinion of the analyst concerning the identity of the suspected drug proves an element of the crime. The jury must believe the analyst for the prosecution to secure a conviction. Defense counsel’s failure to cross-examine the prosecution analyst concedes that this element has been proven.

Impeachment is successful only when the jury feels that it is important. The importance of an impeachment is conveyed by its foundation. For this reason some of the following cross-examination excerpts include lengthy foundation questions. However, the foundation questions should not telegraph to the witness where the examiner is going. And those questions should be simple. The impeachment, when it occurs, should be obvious. While the impeachment may be recalled to the jury in summation, it should not need to be explained.

In part the art of cross-examining an analyst lies in asking apparently simple questions which do not have simple answers; or questions which may have one meaning to the jury and a different meaning to the analyst. The simplicity may be conveyed by the questioner’s use of common parlance or slang; it may be conveyed by simple hypothetical questions;

* II Richard Saferstein, *FORENSIC SCIENCE HANDBOOK*, Chapter 1, J.E. Starrs, *Mountebanks Among Forensic Scientists* at 3 (1988).