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Brief of Amicus Curiae

By the Texas Department of Public Safety

in

Zani vs. Texas

758 S.W.2d 233 (Tex. Crim. App 1988)

NO. 1211-84

IN THE

COURT OF CRIMINAL APPEALS OF TEXAS

ROBERT ZANI, Appellant

VS.

THE STATE OF TEXAS, Appellee

From the Court of Appeals for the
Sixth Supreme Judicial District of Texas

**BRIEF OF AMICUS CURIAE
IN OPPOSITION TO
APPELLANT'S PETITION FOR DISCRETIONARY REVIEW**

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW the Texas Department of Public Safety, as Amicus Curiae, and, with leave of this Honorable Court, files this its Brief of Amicus Curiae in Opposition to Appellant's Petition for Discretionary Review, and in support thereof would respectfully show the Court as follows:

STATEMENT OF AMICUS CURIAE

The challenge made by Appellant to the admissibility of Hypnotically enhanced testimony presents a legal issue of first impression for this Honorable Court. The resolution of this issue is likely to determine whether, and to what extent, if any, Amicus Curiae will be permitted to continue the use of hypnosis as an investigative tool.

Amicus Curiae has adopted self-imposed guidelines and procedures for the use of investigative hypnosis by a limited number of DPS employees. (1)

The hypnotic interview at issue in the case sub judice was conducted by an investigative hypnotist trained and authorized under these guidelines, which were subsequently complied with in this cause.

HYPNOTICALLY ENHANCED TESTIMONY IS NOT INHERENTLY UNRELIABLE

Those courts excluding hypnotically enhanced testimony as "inherently unreliable" have relied upon the test enunciated in *Frye v. United States*, 293 F.2d 1013 (D.C.Cir.1923). The Frye rule requires general acceptance by a consensus of the scientific community to establish the reliability of a new scientific method or procedure.

Amicus Curiae respectfully submits that the Frye rule is inapposite to hypnotically enhanced testimony. Hypnosis is vastly different from a polygraph, breathalyzer, or similar instrumentation utilized to quantitatively measure or record physiological reactions and characteristics in order to obtain a result subject to interpretation by a scientific expert. Conversely, hypnosis is utilized to enhance, through deep relaxation, an individual's present recollection of his perception of past events.

Moreover, dogmatic application of the Frye rule to hypnotically enhanced testimony completely ignores the fact that human memory itself fails to satisfy the "generally accepted as reliable" standard. The same problems of veracity, confabulation, fantasy, and suggestibility exist for non hypnotic memory recall as for that enhanced by hypnosis. (2)

As Dr. Martin Reiser, the leading advocate of the use of investigative hypnosis by police,

has testified:

"(A) person is no more or less suggestible under hypnosis than the person would be out of hypnosis.....(T)he use of hypnosis does not invariably result in confabulation, but only produces a recollection of what is already in the mind of the person hypnotized.....(T)here is no greater propensity to confabulate (sic) in my experience by witnesses and victims of major crimes in hypnosis than there is by other eyewitnesses without hypnosis."..

"There's less likelihood of influencing the subject in hypnosis than there is in a routine non hypnotic interview, essentially because the witness' eyes are closed and therefore 60 percent, approximately, of input that a person gets, which is through the visual senses, is blocked off because of closed eyes. So body language doesn't matter when the person's eyes are closed, and so on, so if anything there is less likelihood of influencing the person, assuming that the interview is conducted in a correct, neutral, nonleading fashion.....

"..All hypnosis is an interview technique that hopefully in some three-quarters will enhance memory by allowing the person to relax more. It is not a truth-detection instrument. No one who knows anything about hypnosis claims that it gets at the truth at all. A person can lie, can make up things, can distort, can do all of those things under hypnosis if he or she is motivated to do that." State v. Brown, 337 N.W.2d 138, 145 (N.D.1985)

The audio recording of the hypnotic interview of Jerry Mogoyne, Jr., conducted by Ranger Carl Weathers in the case at bar supports Dr. Reiser's conclusions. For example, despite being asked repeatedly to describe the eyes of the "man behind the counter" the witness Mogoyne refused to confabulate and provide information unknown to him concerning the color or other description of the eyes of the person he described. This is a clear indication that Mogoyne was exercising critical judgment in matters of recall rather than seeking to "fill in the gaps" or to please the hypnotist by providing information not within his ability to recall.

The leading advocate of the per se inadmissibility approach to hypnotically enhanced testimony is Dr. Bernard L. Diamond, who concludes that the memory of a prospective witness subjected to hypnosis is so contaminated that the witness is thereafter rendered incompetent to testify. (3) The application of Dr. Diamond's theory would render the victim of a crime, who has been hypnotized for memory enhancement, incompetent to testify to the very fact that the crime was committed. Such a result is clearly contrary to the due administration of justice and is analogous to "throwing the baby out with the bath water."

Dr. Diamond's thesis is rebutted by the comments of Dr. David B. Cheek published in the INTERNATIONAL JOURNAL OF INVESTIGATIVE HYPNOSIS, Issue 13, July 1981.
(4)

The per se inadmissibility rule regarding hypnotically enhanced testimony is exemplified by the California Supreme Court in *People v. Shirley*, 641 P.2d 775 (1982). (5)

As Appellant has observed in his brief, numerous state courts have adopted Dr. Diamond's philosophy. However, federal courts in Texas have failed to embrace the per se inadmissibility approach to hypnotically enhanced testimony. *United States v. Harrelson*, 754 F.2d 1153 (5th Cir.1985); *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984); *Connolly v. Farmer*, 484 F.2d 456 (5th Cir. 1973); *United States v. Charles*, 561 F.Supp.694 (S.D. Tex. 1983).

Neither has such an extreme position as the per se exclusion of hypnotically enhanced testimony been adopted by the Texas trial and appellate courts below.

Zani v. State, 679 S.W.2d 144 (Tex.App.-Texarkana 1984, pet. granted);

Vester v. State, 684 S.W.2d 715 (Tex.App.-Amarillo 1984, pet. granted);

Walters v. State, 680 S.W.2d 60 (Tex.App.-Amarillo 1984).

It is respectfully submitted that this Honorable Court should likewise reject the per se inadmissibility approach to hypnotically enhanced testimony.

THE USE OF INVESTIGATIVE HYPNOSIS SHOULD NOT BE LIMITED TO MENTAL HEALTH PROFESSIONALS

A review of the contemporary professional literature, both legal and medical, concerning hypnosis reveals an almost universal agreement among the commentators of the value of hypnosis for law enforcement purposes to develop investigative leads which may be independently corroborated. One of the favorite examples cited for this proposition by the commentators is the infamous Chowchilla kidnapping case, (6) where hypnosis was successfully utilized to determine all but one digit of the license plate number of the van used by the kidnappers. This vital information obtained through hypnosis ultimately resulted in the apprehension and conviction of the perpetrators of this heinous crime.

While most commentators, including Dr. Diamond, (7) are cognizant of the value of hypnosis for investigative purposes, there exists an extreme divergence of opinion regarding the use by police of hypnosis for forensic purposes.

It is ironic that many of the "horror stories" related by opponents of police hypnotists, to exemplify the misuse and abuse of hypnosis, involve hypnotic sessions conducted by mental health professionals. (8)

Dr. Martin T. Orne and his colleagues readily admit that "(a) psychiatrist or psychologist skilled in clinical uses of hypnosis may lack experience with forensic interviewing

techniques." (9)

In 1979 the International Society of Hypnosis (ISH) whose membership is restricted to physicians, psychologists, dentists, and clinical social workers, adopted a resolution stating, inter alia, that ISH "is strongly opposed to the training of police officers as hypnotechnicians and the use of hypnosis by the police officer." (10) Not surprisingly, an overwhelming majority of ISH Members responding to the ballot (92.8%) voted to ratify the resolution. (11)

One of the dissenters, Dr. Herbert Spiegel, expressed his disapproval of the ISH Resolution in a letter to the president of ISH published in the AMERICAN JOURNAL OF CLINICAL HYPNOSIS, Vol. 23, No.2, Oct. 1980. (12) The comments of Dr. Spiegel are worth of consideration by this Honorable Court.

Since 1972 Dr. Reiser, founder of the "Law Enforcement Hypnosis Institute" in Los Angeles, California, has been responsible for the training of more than 1,000 law enforcement officers, and it is estimated that more than 5,000 law enforcement officers have received such training nationwide. (13)

It is submitted that Dr. Reiser's findings, based upon his years of practical experience in investigative hypnosis involving witnesses and crime victims in actual cases merits greater consideration than that of the so-called experts in clinical and therapeutic hypnosis, whose research regarding forensic hypnosis has been conducted using students and other volunteers under simulated conditions in the sterile environment of a research laboratory.

Dr. Diamond, for example, has testified that the last individual he personally hypnotized in a criminal case was the assassin of Robert Kennedy, Sirhan Sirhan, in 1968. (14)

This Honorable Court has had many years of collective judicial Experience reviewing records of criminal proceedings wherein mental health professionals provided subjective "expert" opinion testimony regarding such controversial medico-legal issues as incompetency and insanity. Since different "experts" are able to reach divergent opinions on the competency or sanity of the same individual, one can only surmise whether such opinions might be influenced by which party to the litigation retained the professional services of the witness. Just as those mental health professionals can often not agree on the mental status of an individual, it is not surprising that they would likewise not agree on issues involving so controversial a subject as hypnosis.

In the case at bar, Dr. Richard Garver testified as an expert witness on behalf of Appellant and expressed his opinion that the State's expert witness, was not a qualified forensic hypnotist. (15) It should be noted that this same expert witness was employed by the defense to conduct the hypnosis of Linda May Burnett. In *Burnett v. State*, 642 S.W.2d 765, a majority of this Honorable Court observed that the expert witness had

"followed substantially the accepted practice" in conducting the hypnosis in that case. Supra at 769.

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Conversely, Dr. Richard Garver participated with the FBI *hypno-coordinator* in conducting the hypnotic interview of Ranger Jackson in U.S. v Valdez, supra, wherein the Fifth Circuit concluded that "the procedures employed during the hypnotic session were unduly suggestive." 722 F.2d at 1203 (emphasis added).

One method employed to assess the reliability of hypnotically enhanced testimony involves the use of procedural safeguards, such as those first suggested by Dr. Orne in an amicus brief filed with the U.S. Supreme Court in Quaglino v. California, NO. 77-1288, cert. denied, 99 U.S. 599 (1978). This approach has been adopted by the New Jersey Supreme Court in State v. Hurd, 432 A.2d 86 (1981).

While in general agreement of the need for procedural guidelines, Amicus Curiae believes that the guidelines advocated by Dr. Orne are unduly restrictive in limiting the use of investigative hypnosis to mental health professionals.

For the reasons previously stated, it is respectfully submitted that investigative hypnosis may be properly utilized by a trained law enforcement hypnotist under guidelines similar to those adopted by Amicus Curiae. (16)

WHEREFORE, PREMISES CONSIDERED, Amicus Curiae prays that this Honorable Court will uphold the admissibility of hypnotically enhanced testimony in Texas courts, and that the use of investigative hypnosis not be limited to mental health professionals.

Respectfully,

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ATTORNEY FOR AMICUS CURIAE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been served by depositing the same in the United States Mail, postage prepaid, on this the 23 day of August, 1985, addressed as follows:

Attorney for the defendant

Texas Criminal Defense Lawyers Association

District Attorney

BIBLIOGRAPHY

(1)

See Attachment "A", (DPS policies and procedures) which was originally adopted on July 30, 1980, and amended effective January 18, 1984, to, inter alia, expand the prohibition against use of hypnosis for therapeutic purposes, including weight reduction and smoking, by DPS personnel trained and authorized to utilize investigative hypnosis.

(2)

See generally Reiser, HANDBOOK OF INVESTIGATIVE HYPNOSIS (1980).

(3)

See generally Diamond, Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness, 68 CALIF. L. REV.313 (1980).

(4)

See Attachment "B" (International Journal of Investigative Hypnosis, issue 13, July 1981).

(5)

It is interesting to note that federal courts in California have repeatedly rejected the per se inadmissibility approach to hypnotically enhanced testimony in both civil and criminal cases. See, e.g., United States v. Awkard, 597 F.2d 667 (9th Cir.), cert. denied, 444 U.S.885 (1979); United States v. Adams, 581 F.2d 193 (9th Cir. 1978), cert. denied, 439 U.S. 1007 (1978); Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974).

(6)

People v. Woods, et al., No. 63187 ABNC (Alameda Co. Cal., December 15, 1977) as reported in INTERNATIONAL JOURNAL OF CLINICAL AND EXPERIMENTAL HYPNOSIS, Vol. XXVII, No. 4, 358, 367-368 (1979).

(7)

Supra, n. 3, 332.

(8)

See, e.g., Leyra v. Denno, 347 U.S.556 (1954); Emmett v. Ricketts, 397 F.Supp.1025 (D.C.Ga.1975); Creamer v. State, 205 S.E.2d 240 (Ga. 1974); Wisconsin v. White, No. J-3665 (Cir.Ct., Branch 10, Milwaukee Co., Wis., March 27, 1979);

In Re Milligan, No. J-17617 (Super.Ct.Cal., Monterey Co., June 29, 1978); See generally Worthington, The Use in Court of Hypnotically Enhanced Testimony, INTERNATIONAL JOURNAL OF CLINICAL AND EXPERIMENTAL HYPNOSIS, Vol. XXVII, No. 4, 402-416 (1979); Orne, The Use and Misuses of Hypnosis in Court, INTERNATIONAL JOURNAL OF CLINICAL AND EXPERIMENTAL HYPNOSIS, supra, 311-341.

(9)

Orne, Soskis, Dinges, Orne and Tonry, Hypnotically Refreshed Testimony: Enhanced Memory or Tampering with Evidence?, ISSUES AND PRACTICES IN CRIMINAL JUSTICE, National Institute of Criminal Justice, January 1985, 44.

(10)

Reproduced in INTERNATIONAL JOURNAL OF CLINICAL AND EXPERIMENTAL HYPNOSIS, supra, n. 8 at 453.

(11)

Orne, et al, supra, n. 9.

(12)

See Attachment "C". (Letter from Dr. Herbert Spiegel to ISH President re resolution - American Journal of Clinical Hypnosis,

Vol. 23, No. 2, Oct. 1980).

(13)

Orne, et al., n. 9.

(14)

Deposition of Dr. Diamond in Brown v. State, supra.

(15)

R. 1221.

(16)

Cf. Spiegel, Hypnosis and Evidence: Help or Hindrance, FORENSIC PSYCHOLOGY AND PSYCHIATRY, Annals of the New York Academy of Sciences, Vol. 347 (1980)

(See Attachment "D").

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NOTE: Admissibility of hypnotically refreshed recall was upheld by the Texas Court of Criminal Appeals provided specific factors (procedural safeguards) are followed and the four prong dangers are considered.

The four prong dangers and the 10 procedural safeguards are listed in the article

**“The Profile Of A Forensic Hypnosis Interview”
on this webpage**