

Forensic Application of Hypnosis - Police Use

TESTIMONY

By Dr. Bernard Diamond

For the defense:

North Dakota v. Brown 337 N.W. 2nd 138 (1983)

Hypnotically refreshed recall used by Law Enforcement
in a criminal case ruled admissible

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QUESTIONS By Defense and Prosecuting Attorneys

Would you state your name for the record.

Dr Benard Diamond

Q:You are a medical doctor?

A: Yes.

Q:Now, Dr. Diamond, we, of course, are here because I think it will be established that you are an expert witness in the field that will be one of the issues of this case. But in order to qualify you as an expert I would like to ask you some questions about your background. So, first of all, what is your education?

A:Yes. I received a Doctor of Medicine degree from the University of California Medical School at Berkley in San Francisco in 1939, served my intern and residency in psychiatry at the Neuropsychiatric Institute of the University of Michigan at Ann Arbor - 1938-1940 and 1941-1942. I also was trained and graduated from the San Francisco Psychoanalytic Institute, completing the training in 1952.

Q:Subsequent to your education, have you been engaged in private practice anytime?

A:Yes, I was in full-time private practice of psychiatry and psychoanalysis in San Francisco from 1945 when I was released from the Army Medical Corp to 1964 and since 1964 I have done part-time forensic psychiatric consulting to the present time. But, starting in 1964 I've been on the full-time faculty at the University of California.

Q:In addition to your being on the faculty at the University of California have you been appointed to any other faculty positions during the course of your career?

A: From 1946 to 1980, I have been a Professor of Law and Criminology at the University of California in Berkeley and I was Acting Dean of the School of Criminology from 1969 to 1970 and from 1974 to 1976. The School of Criminology was closed in 1976 and I took full-time at the law school until July 1, 1980, I was retired officially from my tenure position but reappointed as a Professor of Law emeritus. Also, since 1968 I've been a clinical professor of psychiatry at the University of California medical school in San Francisco. And since, 1981 I've been employed as the interim director of the Doctor of Mental Health Program. So, now I am roughly half-time at the medical school in the Department of Psychiatry and little less than half-time at the law school at Berkeley.

Q: Have you received during the course of your career, or presently, are you certified by any boards or like organizations?

A: Yes, I was certified as a specialist in psychiatry by the American Board of Psychiatry and Neurology in 1946 and in 1979 I was certified by the American Board of Forensic Psychiatry. That was the first year that the American Board of Forensic Psychiatry gave out certifications. I was also certified as a specialist in psychoanalysis by the American Psychoanalytic Association in 1952.

Q: Are you presently a member of any professional organizations?

A: Yes, I'm a Life Fellow of the American Psychiatric Association, a Life Fellow of the American Ortho Psychiatric Association, a member of the American Psychoanalytic Association, the International Psychoanalytic Association, the American Sociological Association, the American Criminology Association, and I was a founding member of the Board of Directors of the American Board of Forensic Psychiatry.

Q: Dr. Diamond, are you or have you, during the course of your professional career, been the author of any publications dealing with law and hypnosis?

A: Yes. I've published several articles specifically on hypnosis in relationship to law.

Q: O.K. Approximately how many? Can you recall?

A: My specialty is articles of research in relationship of the behavioral sciences to the law particularly in terms of scientific evidence. Two of these papers have been specifically on the issue of hypnosis. All told, I've published approximately 50 articles on varied aspects of psychiatry and the law, criminal behavior, evidence, and the like.

Q: Finally, Doctor, during the course of your career have you received any awards to distinguish your professional achievements?

A: Yes, I've received a number of awards. In 1964, I received a \$10,000 prize from the University of California for the advancement of psychiatry, the Royer Award and in 1968; I received the Isaac Gray Award of the American Psychiatric Association. This is

the highest international award given to a physician or to a lawyer or judge for the advancement of psychiatry and law. In 1972, I received the gold medal award of the Mon Are Foundation for the distinction of psychiatry and in 1980 I was appointed as the first Memorial lecturer in forensic psychiatry and criminology at Yale University Medical School. I'm listed in American Men and Women in Science, who have made a, which is a high distinction in the American Association for the Advancement of Science, and I'm listed in the Who's Who in America.

Q: Thank you, doctor. As you are aware, we are out here from North Dakota because we are involved in a case in which a young woman alleges to have been kidnapped and was hypnotized in order to perhaps restore her memory concerning surround this alleged hypnosis - or the alleged kidnapping, I should say. My first question, of course, we are dealing specifically in hypnosis now and more specifically in the area of hypnosis with a witness who will be testifying in a criminal trial. And I would like to start off very generally in this area. What is hypnosis?

A: Hypnosis can be defined as an artificially induced state of altered consciousness characterized by increased suggestibility, suspension of critical judgment, and psychological-physical relaxation.

Q: Now, say that the average person is hypnotized. I believe one of the phrases that you previously referred to as heightened suggestibility. Is it possible, in your opinion, for a person, hypnotized person, to be free from hypersuggestibility?

A: No, if they are free from suggestibility they would not go into a hypnotic state. The actual induction of hypnosis depends very critically upon the individual's ability to believe things about themselves that obviously aren't so. And this hypnosis is something one is sorta talked into or allows themselves to talk themselves into.

Q: Let's continue with that thought. Let's assume for a minute that we do have a trained hypnotist who is conducting hypnotic sessions. Can that hypnotist through the exercise of his or her skill avoid the implanting of suggestions in the hypnotized person?

A: No. Because not all of the suggestions, in fact the major suggestions do not come from verbal statements of the hypnotist. The main suggestions to the individual come from his own mind in terms of what the subject believes is expected of him. So that the individual expectation or anticipation of what is supposed to happen in hypnosis is what determines what will happen. And so you could say the context and the purpose and the information about hypnosis that the individual is given or already believes, are even more important than any specific suggestions from the hypnotist.

Q: Of course, I would imagine that someone who's hypnotizing you suggests something, one of the ways you could do it would be to say, "You will think this" or "You will do this." Actually say that to the person. Are there ways that a person can communicate suggestible thought or ideas without saying anything?

A:Oh, yes. Suggestions can be given nonverbally through an attitude, an expectation, any implication of whether the hypnotist is pleased or displeased by what is being produced and statements such as "You're doing very well," the tone of voice - all of these play a very, very important role in inducing subjects to come up with whatever is believed is wanted by the hypnotic situation.

Q:Does the role of the person conducting the hypnotic session play an important part in what the hypnotized person will do under hypnosis?

A:Yes. In a way, you could describe hypnosis as artificial situation in which the subject is induced to please the hypnotist to do what is expected of them. Depending on how the subject sees the hypnotist, if they see the hypnotist as someone with law enforcement who is probing, or what have you, then they will produce thoughts or actions which they imagine or the kind they wanted.

Q:We have that person who has been hypnotized and, as you say, is in an increased state of suggestibility, when that person awakens from the state of hypnosis is that person aware of which thoughts or feelings or whatever they had before a hypnotic session in which may have been, for example, implanted consciously or subconsciously by the hypnotist?

A:No, there may be a great deal of confusion. When we try to remember something, remembering the content of the memory and remembering the source of the memory are really quite two different things. So an individual may remember very accurately the content of certain memories but may not be able to distinguish the source of those and may - quite frequently does - misunderstand a suggestion or question or something else that was provoked by the interview with an actual memory.

Q:Say that you try to tell that person that this memory was not real, that they somehow got this memory somewhere else. Will they believe you?

A:No. One of the most consistent and most profound effects of hypnosis is the suspension of critical judgment and this suspension of critical judgment last definitely even long after the hypnotic trance is all over with. So the hypnosis is a very useful device for taking a witness who is unsure and uncertain and who is very self-critical and doubtful of the validity of that memory and in a very short time under hypnosis you can alter the individual attitude towards their memory so that when they come out of hypnosis, they are now absolutely positive that beyond all doubts and uncertainties as to the correctness and truth of their memories. Scientific experiments have demonstrated over and over again that this sense of confidence and the belief in the truth and infallibility of one's memory after hypnosis has nothing whatsoever to do with whether the memory is really or not and what memories as well as were true memories.

Q:Is it rare for a person to believe that if he or she was not hypnotized when, in fact, he or she wasn't?

A:Yes, people who are hypnotized are rarely good judges of what took place. It's not at all unusual for a person to be in a very deep hypnotic trance and to have no memory at all and deny that they ever were hypnotized. It's also not unusual for a person to have no idea what a hypnotic trance was like or very deep, not able to accurately recall precisely what did take place.

Q:You said a person awakens from the hypnotic state with a very firm conviction of what they think happened. Is that always free from fantasies or what's known as confabulation?

A:No. You can hypnotize a person and a person can make up a story under their own psychological needs and none of the memory can be true and they will have the same sense of confidence and firm belief that this is a true and valid memory. In most instances, the hypnotic memories are some kind of mixture of real and fantasy - confabulated thoughts - things that did happen and things that didn't happen - and yet the individual's own sense of confidence and belief in what they have is just as firm for the false portions of the memory as for the correct portions of the memory.

Q:If, for example, we have a person who is on the stand and who has been hypnotized and is testifying as to certain facts and those facts are not true - they just simply did not happen, is that person lying?

A:Well, it's been said that hypnosis can make an honest liar out of a person. In other words, the hypnotized person who believes that what they recall is truth when, in fact, it's fantasy is not lying in the sense of consciously deceiving. They are deceiving themselves as well as others so that they can relate something that is not true and at the same time feel comfortable and even confident in their certainty that it is true. That's what we mean when we say they are honest liars.

Q:So, Doctor, you said that things that simply didn't happen could creep in and a person can be convinced that these things did happen. Where can these other things come from? What sort of events can meld themselves into the event that the person believes to be the true set of facts?

A:In the context of crime investigation, what happens is that individual has been involved in a crime in some way as the victim or the witness, and they have sort of a patchy, incomplete memory. And so, law enforcement people hypnotize the person's fill-in memory. Now, the filling in of memories will occur whether there is anything to fill in or not so the individual may very well recall actual memories under hypnosis, they also will recall memories which are borrowed from other life experiences. They fill it in from things that they've imagined, things that they've read, things that they saw on TV, things that they saw in real life - they meld together, or confuse different experiences until they get a total story that makes sense to them and is coherent and which they believe is what is expected of them. So that hypnosis is a kind of artificial way of getting a coherent, logical story which is made up in part, perhaps, of real life situations and other parts borrowed from other memories, other situations. This is particularly true when it comes

to identifying faces and persons and locations and tangible realities in a hypnotic trance they may very well borrow it from other memories and other experiences. Usually, there's some connection in what they borrow either in time or place or some kind of connection in the subject's own mind.

Q: Doctor, can they also borrow, you know, we talked about a person being hypnotized and I assume what you are saying is they can borrow from events that happened before the hypnotic session itself. Is that correct?

A: Yes.

Q: Can they also borrow from events that happened after the hypnotic session?

A: Well, yes. If the individual in hypnosis is given the suggestion or simply believes that they are expected after hypnosis to have a clear, coherent memory, then the effect of the hypnosis continues long after the hypnosis is over so the individual will continue to gather a new memory and believe them to be true if they were so instructed. We speak of this as posthypnotic of suggestion and it can occur long after the hypnotic trance is over.

Q: Changing gears for a moment - going from the hypnotized person to the hypnotist. First of all I guess my first question in this area is, can a trained hypnotist, an experienced hypnotist, or an expert in the field of hypnosis detect a simulation of hypnosis?

A: No. Experiments have been done and verified. This was done by Dr. Martin Orne of the University of Pennsylvania and it was verified elsewhere that it is possible to fake hypnosis so that a person can pretend to be hypnotized and there are no authentic, reliable signs that they are or are not. And in this very famous experiment students were trained to pretend they were hypnotized and then experienced hypnotists were sometimes given these simulated hypnotized subjects and sometimes real subjects. And even the best of them were not able to tell the difference.

Q: My next question is related to this. It is, I believe, the facts in this case will show that we have a local state crime bureau officer who is venturing into the use of hypnosis, a police officer. In your opinion, Doctor, does this individual possess the qualifications to detect the simulation of hypnosis or to be able to spot ways significant in a truly hypnotized person?

A: No. I think the most highly trained expert, researchers or clinicians have not been able to do this with consistency so I think it would be very amazing indeed if a police officer or a so-called investigative hypnotist could do this any better.

Q: Now, shifting gears again and, I guess, I will be getting to the scientific case where, I believe one of the things that will, that you, of course, seem to be the objective of the hypnotic session and, again, only speaking in general terms, this particular session was quite detailed in the events, very minute things came out during the course of this hypnotic session. Does the fact that a person can recall very detailed memories, very

specific memories during the course of a hypnotic session. Does that guarantee that what they are recalling is actually true?

A:I'm going to object to that. Is that related or just general?

Q:That's just general.

A:You can answer that question.

A:Again, the research and clinical experience in this area has demonstrated that the amount of detail, which often is very impressive to the observer, has no correlation with the validity of the memory. And this is one of the problems with hypnotically enhanced memory. Normally, we tend to judge the validity of it by the amount of details. For example, we are trying to remember what we had for breakfast a week ago and if we can remember, well, we had eggs and one of them spilled over on the toast onto the edge of the plate and got under the napkin, we remember details like that and it makes us feel that that's reliable. There's reason to believe that if hypnotically enhanced memories don't follow that pattern. But hypnosis will produce a wealth of detail and these experiments have been done where one has regressed to an earlier age and asked to recall in detail where they lived and what they did at certain ages, and then if you actually try to determine what really took place at those ages you find there are very important discrepancies. And, the experiment has also been done to progress the person to tell them that they are now in some future life situation such as a student, for example, you tell them they are now a graduate from law school and they are in practicing of the law and "I want you to describe your last courtroom case in which you told the judge and how it was," and they will relate in quick detail, very vivid detail, exactly what took, place ten years in the future. Of course, hypnosis is peculiar in that a wealth of detail does not correlate with validity and reliability, as do normal memories.

Q:As far as the richest of this detail and being able to recall very specific detail, the fact that maybe some of the detail that has been recalled may be independently corroborated. Does that mean that all the detail actually happened?

A:No. Now, it's always possible that a hypnotically enhanced memory is one hundred percent true; it's also quite possible that it's one hundred percent false. In most instances, in my experience, there's been a mixture of true facts and confabulated facts - details which are correct and details which are not correct. And, if some of the details are corroborated, then this does not give you any reason to trust the entire memory. It simply means those small portions have been corroborated and it doesn't - you're not justified in assuming that the corroboration can extend to other details and other portions of the memory.

Q:Doctor, to explore another area, now, and again I'm dealing in generalities concerning the use of hypnosis. Is it possible or even practical to make an adequate record of the hypnotic session?

A:No, it's not. And the more you have, obviously, the better off you are. It's better to have an audiotape than to have no record at all. It's better to have a videotape. But no record is really complete because there's reason to believe that the most important contamination of the hypnotic experience comes from within the individual themselves. What is the subject's expectations? What does the subject believe they are supposed to do, how are they supposed to behave? And in order to have a record of this, we would have to have a detailed videotape record of every interrogation that took place when really even before the crime to know what the individual knows about hypnosis, what they expect, what their role is, whether they have hysterical tendencies, whether they're a romantic type of person - makes up stories and all kinds of things. And none of this can be on the tape. So, actually, when we have a record of a particular hypnotic session, particularly one that begins at the beginning of the hypnosis and ends at the end of hypnosis, we've got on the tape only a very small fragment of what really has taken place.

Q:Is it possible for any expert to give an opinion as to whether or not or as to whether a particular witness whose memory has been enhanced, is reliable, and they would know?

A:No. I think it tends to be kind of a one-way matter. There are times when you if you review a record and listen to a videotape or audiotape you can say, "Well now obviously this was an improper suggestion given to this subject." But, it's one way in a sense you can't ever say that there was no suggestion taking place and that there was no contamination. So, to do a proper credibility evaluation of the hypnotic suggestion of the hypnotic experience means that an expert can come in and say, "This is what took place; and this didn't take place." And, you can't do that. I don't think anybody can really make a true evaluation.

Q:Doctor, now you talked them into the contamination and suggestibility and terms like that. Once a person has been hypnotized, is that process reversible?

A:I think not. It think in the majority of cases, the changes in the memory which have been made through hypnosis and the contaminations and alterations of the memory which have occurred tend to be permanent. Now, there can be other changes. There is influence I terms of future interrogations and future expectations. But they are all in the same direction, that is, the hypnotic session itself the individual gives what is expected of them and then they are left with the posthypnotic suggestion given overtly or implied that they are supposed to come up with more and more memories and from then on they will sort of improve on their story. So that the usual effect of hypnosis is to start progressively freeze the version which was remembered or if in the hypnosis session a full memory was not produced the individual then still continues to fill in the gaps and he gets a greater and greater sense of "This is for real."

Q:Now, Doctor, I believe that some people allege that there are certain safeguards that can guarantee that a hypnosis session or hypnosis situation will result in a valid memory. First of all, are there any safeguards which can actually guarantee, in your opinion, that a hypnotic session will produce an accurate memory?

A:No. My opinion is that no safeguards of any kind can ensure that eh hypnotic experience is genuine, that no contamination occurred, no alteration of the memory has occurred, and that the material which was produced during and after hypnosis is authentic and reliable. So, I for one feel that these so-called safeguards don't really work. I think that the safeguards actually were intended, and they were first proposed by Dr. Martin Orne at the University of Pennsylvania and have been adopted by some appellate courts particularly in New Jersey, and

Q:Excuse me, that's what's known as the Hurd position in this are, is that right?

A:Right, if you have the so-called safeguards, then is possible to make a proper evaluation of what took place in the hypnotic session and the safeguards, I don't think anyone believes that these so-called safeguards make the procedure safe. They are simply for the minimum which Dr. Orne and the New Jersey courts and other courts believe are required in order to be able to make a credibility evaluation. I have a more skeptical view because I don't really think that these or any other procedures are sufficient to sort out what is contamination and hypnotic confabulation and what is reality. I don't think, at the present time we have sufficient scientific information which allows that kind of judgment.

Q:Now, the question is, conceding that you do not subscribe to the fact that these safeguards are an adequate guarantee, what are the safeguards that are advocated by those who hold that position?

A:Well, if I can refer if I may to Dr Orne's own individual writings on this, these are the safeguards that he proposed in an affidavit I a case which was he had hoped would be considered by the Supreme Court but was not. The first one was that the hypnotist be a trained psychiatrist or psychologist who had a special training in the use of hypnosis. And my own feeling is that just because you are a psychiatrist or psychologist really doesn't make you any better than a policeman. And, again, I differ from Dr. Orne in that some of the most, some of the cases with the most flagrant suggestions and improper questioning was done by my medical colleagues, and he also said that the hypnotist should not be informed about the facts verbally but should be given a brief written statement in which one could document very carefully exactly what the hypnotist knew about the case and thus this hypnotist believes impossible bias can be evaluated. It's extremely undesirable, he says, to have the individual conducting the hypnotic session, have any involvement in the investigation of the case and he should be an independent professional not responsible to the prosecution or the investigators and I understand that the hypnotist in this case was a part of the state employed investigative team for law enforcement and could not have been considered either as a psychologist or psychiatrist or independent professional or one who is not responsible to the prosecution or the other crime investigators. The second requirement was that all contacts with the hypnotist, the psychiatrist, or psychologist be videotaped from the moment they meet until the entire interaction is complete. In this case, the tape recording begins sometime after they meet probably only very shortly after - a very critical period is the initial discussions of what took place; what was the subject told about the hypnosis before he was hypnotized. And, there is reason to

believe that there were discussions from peace officers before the hypnosis to what the purpose of the hypnosis was, to increase the memory, and I the first six minutes of the tape the hypnotist is talking to the subject and, apparently, he had not yet properly connected up the microphones so that one can hear the patient's few responses. But there is six minutes of conversation, which I found totally indecipherable from the hypnotist. So, the hypnotist is saying as great many things to the patient and we essentially have no record of what was specifically said. So the tape is deficient in that respect and also there are really two hypnotic sessions.

Q:I guess we're out of time. I will get to the specifics of this case and then I guess I wish you would I guess talk in generalities.

A:All right.

Q:I'm just interested in the safeguards proposed by Dr. Orne, in general. Of course, you don't agree with them and just for a matter of record if you can state what they are for me.

A:The next one is that, prior to the induction of hypnosis there be a brief evaluation of the patient to be carried out in which the psychiatrist or psychologist should then list a detailed description of the facts as a witness or victim remembers them before the hypnosis. This is to kind of get on the record precisely what is known not by a previous case interrogation but what could come up in the hypnotic situation before the hypnosis takes place. And, then, when the hypnotic session is initiated, the psychologist or psychiatrist should strive to avoid adding any new elements to the witness's memory or constrain him by reminding him of his wakening memory. The next requirement is that no one other than the hypnotist be in the room. The experiments, again, have shown that other people's presence in the room have a very powerful influence on what is expected by the patient or subject and, will affect what he comes up with. And, then, the final requirement is that all of the interaction which I think is meant by the questioning and statements that attempt to recall that are done by anybody before the hypnosis and after hypnosis be similarly recorded so that one can make very precise comparison between what actually was added by the hypnotic session, what was new in hypnosis, and what was changed before, during, and after the hypnosis session.

Q:So, Doctor, again to make sure there's no mistake here, you personally in your opinion do not agree with the fact that the safeguards as a rule guarantee an accurate memory as a result of hypnosis?

A:Well, no I don't agree. I don't think anybody thinks that these will guarantee certainly, Dr. Orne who's brought them up, believes that they will guarantee that the hypnotic session was valid. But what these safeguards are, is to me that these are the minimum which have to be done in order to be able then to determine whether it is a valid session or not. Now, my position differs from Dr. Orne in this and I have to say that even if you do all these things you still can't determine whether it's a valid memory or not.

Q:Is this dealing in generalities, again, before we get to the specifics of this case? I just

have a couple of more questions, Doctor. My first question is, is there any difference between hypnosis for, say, investigator police purposes and hypnosis for, say, clinical or medical purposes?

A: Well, hypnosis is used in a large variety of contexts and I think different persons who have used it in different contexts have made claims that the hypnosis that they use of an investigative purpose is somehow a different phenomena than hypnosis used for clinical purposes or research purposes or theatrical purposes. That is not true, in my opinion, and I don't think, again, the scientific knowledge about hypnosis support that idea. Hypnosis is a same phenomena with the same elements of suggestibility no matter what the context of it is used. The results can differ in that the common denominator of all types of hypnosis is the willingness or the effort that the subject makes to do what is expected. So when you use hypnosis in a Law Vegas theatrical show where you hypnotize the audience, people act and behave the way they think they are supposed to in a show. When you use it for clinical purposes, people come up with what we call a catharsis or flooding of old memories which may or may not be true. When you use it for investigative purposes and the person anticipates that this is for the purposes of enhancing their memory then they will enhance their memory even if it requires them to make up the whole story.

Q: Finally, Doctor, I guess and again we are dealing with the generalities, based upon your training and your experience, what is your opinion concerning the effect of hypnosis upon a potential witness in a criminal trial?

A: Yes. It is my belief that once you hypnotize a prospective witness in any trial, criminal or civil, that the probability of having altered the memory of the individual has distorted both the content of the memory and the individual's attitude and sense of confidence and belief and the truth of memory that the probability that there has been significant contamination is so high that you have rendered, in my opinion, an individual useless as a source of evidence and such an individual again, in my opinion, should not be allowed to testify.

Q: Not to testify at all?

A: At all.

Q: I don't know if it will be shown to the jury or not, but we had done the first part of this deposition dealing basically in terms of generalities in use of hypnosis in criminal cases. I now propose to ask Dr. Diamond specific questions concerning the use of hypnosis in this particular case and I believe that Mr. Olson does have an objection to that.

Q: Dr. Diamond, you have been provided with facts in this case, have you not?

A: Yes. I am.

Q: I guess without even reading new evidence I'll ask another leading question. What

have you received from me concerning this case?

A: Well, I've read an extensive brief in support of a motion to suppress the evidence as a witness - the evidence of the witness in this case. And in this brief the facts of the case as they were - or the alleged facts - are described in detail and as part of the brief are extensive police reports.

Q: Just for the record, I believe that the police reports themselves are not part of the briefs but they were sent out with the briefs.

A: I have no way of determining which are police reports or what Dr. Diamond received.

Q: O.K. In addition, Dr. Diamond, have you had an opportunity to review the videotape of hypnotic sessions before the crime with the alleged victim in this case?

A: Yes. I have listened to and viewed two videotapes, two sessions of hypnosis. One follows quickly upon the other and were dated June 4, 1982.

Q: I believe we'll start with the hypnotic session itself. First of all, Dr. Diamond, in general was there anything, in your opinion, that struck you as being unusual or unique about the entire hypnotic session itself?

A: Yes, as a matter of fact this session is quite unique and quite different than any other I've seen in the investigative situation and has been much more the kind of hypnotic reaction that I'm used to and have seen many times in clinical situations. Usually, in a hypnotic investigative hypnosis crime the subject is placed into a trance and then demonstrates that they are in a trance by sort of acting almost as if they were asleep - there are very marked changes in the tone of voice and sort of dragging out, a change in the tempo, and they respond rather briefly to whatever questions are answered from them - kind of pull out the answers. This tape is very unusual, in that the instant the subject is supposedly hypnotized - and I have no reason to believe that she was not - instant the subject is inducted into hypnosis and is cued or told repeatedly to imagine that she is a newspaper reporter and is observing the events of the crime rather than participating in it, the subject sort of takes off and spontaneously and without further questioning by the hypnotist, goes into a very long narrative which is very animated and shows, I think, little of the characteristic enhancement qualities that we expect from investigative hypnosis but is there to say more kind of I associate it with the clinical recall of highly conflictive hysterical, neurotic, or other emotional problem situation.

Q: Rather than a straight classic investigative hypnosis situation?

A: Yes.

Q: Doctor, we talked again, when we were dealing in the generalities of the use of hypnosis there was the discussion about the ways that a person under hypnosis can be suggested to - the suggestibility of that individual. From your review of the tape were you

able to view any specific instances of suggestibility or suggestions of the hypnotist?

A: Well, it's customary in hypnotic experience of this kind for the hypnotist to make some effort to determine what is the depth of the hypnosis. What is the individual's response to suggestions that are given to them. And one of these is the so-called arm levitation that in which you instruct the individual that their right arm has become lighter and doesn't have any weight and is rising by itself. The individual, normally, their arm will gradually go up and they'll keep it there in a relaxed position until they are instructed to let it down. Quite early in this hypnotic session this is done with this subject and the subject's arm very quickly, almost immediately, sort of floats up in the air and waves all around as if it's totally out of control. You could say this is a highly exaggerated response to this suggestion which is done and it doesn't necessarily mean that the individual was any deeper in the hypnotic session but it does indicate the subject's willingness to do what is asked of her and go far beyond it.

Q: In other words, a more extremely suggestible person?

A: More.

Q: Very, very suggestible?

A: A highly suggestible person and when the individual is asked to imagine and the instruction to imagine (that word imagine is given some five times over again at the beginning of the hypnotic state by the hypnotist) and is told "You will be able to tell about it - meaning the events of the crime - objectively," the subject really takes off and gives a very long, detailed narrative which as it says is very, very detailed, very animated, and very realistic and very impressive in terms of what comes out and accompanied by a lot of emotions. The subject is also hypnotized actually twice. They are awakened at the end of the first trance and at the end of the first trance they are given posthypnotic suggestions that they will very easily be hypnotized again. A half an hour later she is then asked to be hypnotized again and she almost instantly responds to this, which is, I think, somewhat unusual for a person's first experience with hypnosis. Normally it takes a great deal of training to develop this ability to go instantly into a hypnotic trance. And the hypnotist uses a test which, again, my experience is frequently done by investigative hypnotists to try to judge the depth of the hypnosis by a measuring scale. They are told, "Imagine a scale from 1 to 36 on the yardstick and 1 is not hypnotized at all and 36 is the deepest possible hypnotic trance." And, that number that pops into their minds is alleged improperly to be an index of the depth of hypnosis. The number that this woman comes up with is 32; meaning that she herself believes that she is nearly in the deepest possible trance that can be achieved. And, again, I think this is a measure not of the depth of the trance as her ability to be talked into, to be suggestive and to believe anything that is expected of her.

Q: Doctor, in addition to the, again, suggestions or suggestiveness of the alleged victim in this case, were you able from the tape to detect any significant posthypnotic suggestions that were given to her?

A: Yes. The hypnotist in this case gives the subject specific instructions about how they are supposed to do, what they are supposed to do and remember after they awaken from the hypnotic trance. These are known as posthypnotic suggestions because all they are given in the hypnotic state, the effect is supposed to take place after they come out of the hypnotic suggestive state and we know that this occurs just this way. After the first hypnotic state the individual is given suggestions about how to be hypnotized the second time. And the second hypnotic state towards the end the subject is given specific instructions about what they are supposed to remember afterwards. In the third place, the subject is told that she had done very well and in other words the fact of such instruction is to say, what you remember is what we wanted to hear. And then, at the very end he says, (and I quote) "You're going to feel ever better now. You'll feel pretty good about this now. Your memory will be refreshed and you may even remember more details later on. And when you do you will have a desire to get hold of Bill Yett (the investigative police officer) and let him know and a desire to want to cooperate on your own as you have done now.

Q: What is the effect of that suggestion?

A: These, of course, are commands given to the individual in a very susceptible state, addressed really to her unconscious mind, to tell her what it is she's supposed to do after she awakens from the hypnosis. And in a susceptible person this command will be followed. And, furthermore, he tells her (and I quote) "And you won't be upset about this anymore." Now, the effect of commands about "You'll feel good and you won't be upset," is to remove all doubts, uncertainties, all anxieties, all hesitations, all sense of guilt and responsibility for anything and to be able clearly and coherently relate with what happened as if it were a true story.

Q: Let me interject for a minute, Doctor, from your view of this tape would you then expect, in your opinion, that Lean Easton would be able to relate this incident now very calmly, clearly, more positively?

A: Yes, my expectation would be that after this hypnotic experience the witness would have no difficulty in knowing for certain what she believed her memory to be and to be absolutely confident in the correctness of her memory and all doubts and uncertainties and hesitation and conflicts and contradictions would have been eliminated from the story. So, in my opinion, to have a hypnotic session of this kind is really to improperly - and I think even illegally - coach the witness into making up a story which will fit the needs of a particular case.

Q: There's a couple of other points about this particular hypnotic session, first of all, Doctor, you saw the videotape, the record that was made of this hypnotic session. Don you feel about it an accurate or a sufficient record can be made of the hypnotic session?

A: No. The tape doesn't begin at the very beginning - although it appears to begin soon afterwards. But for six minutes you can see the hypnotist talking to the subject and get

occasional word of what the subject is saying but you cannot decipher what the hypnotist is saying, then there is some kind of readjustment of the microphones and then it becomes audible. And then the tape is turned off during the half hour intermission.

Q:Between the two attorneys?

A:So, we do not know what went on during that time and then the tape ends very abruptly when the subject is awakened. She is awakened by the 1, 2, 3, 4, 5 method and when that happens the tape stops and we know nothing about what was said or interchanged between the hypnotist afterwards or what took place in any way or what reassurance or further posthypnotic suggestions were given. Furthermore, this camera focuses entirely on the hypnotist and we don't see any other people in the room.

Q:Excuse me, you don't see the hypnotist?

A:We don't see the hypnotist and we don't see any other people in the room.

Q:You meant the camera focuses entirely on the witness.

A:On the witness. And one of the purposes of videotaping rather than audiotaping is to make the hypnotist visible so that we can detect whether the hypnotist is giving nonverbal signals - intentionally or often inadvertently to the subject. We know that whether the hypnotists leans forward in kind of an eager anticipation or whether he withdraws, or whether he gestures this way or that way - all these play an important part in determining the subject's response. And the whole idea of the videotaping was to give a total and complete picture of the interchange between the subject and that's all we see. As far as I'm concerned, it's not even as good as if you had an audiotape.

Q:Previously, when we were discussing in general terms and you were discussing Dr. Orne's so-called safeguards which of course I guess you don't call them safeguards and you don't agree with them, but just dealing with them for a minute, assuming that position for a minute how many of them were satisfied in this case?

A:I don't think that any of them were satisfied in this case. I don't think that the hypnotist was a trained psychologist or psychiatrist. I don't think the videotaped record is complete at all. We have no written briefing or record of the briefing that the hypnotist had before the hypnotic session. There was no prehypnotic evaluation of the subject; no attempt was apparently made to determine whether this girl is vulnerable to hypnosis or whether she should not be hypnotized because of psychological problems, or if she's hysterical or what. The record is very incomplete. I've been told, by you, that there was a police officer (Yett) present in the room during the this time. There is talk between the subject or you get a snatch of the talk that seems to imply that officer Yett will ask questions. There is not evidence that he did during the hypnotic session but I think, I was given to believe, that he was present during all or most of the session. This violates the Orne safeguards after the hypnotic sessions were over.

Q:It's hard to believe that facts in this case will show that between the time of the alleged incident and the time of the hypnotic session, the alleged victim, Lean Easton, saw the defendant, Joseph Brown, on perhaps two occasions and perhaps may have been informed as he was the object of police investigation.

A:I'm going to object to that statement, I don't think that's proper to suggest that he may have been informed ---

Q:She did have an opportunity to see him on perhaps one or two occasions. In your opinion, does that event have significance as to the effect of the hypnotic session on her?

A:Yes, it's very critical. When a person is asked to make an identification under hypnosis in which they are to remember a face or description of an individual and they have not been able to do that before the hypnosis, what is recovered in hypnosis is not necessarily the genuine memory of the event of the alleged card. What is recovered is a genuine human being you might say, but this picture, this image, can be an image which is plucked out of some other experience, some other memory, it can be a picture in the newspaper, it can be a fleeting glance of somebody they saw, almost always is the memory which is recovered has some kind of connection with the crime as these memories are not selected out of random out of the basket of memory they are associated either in time or in contact, so it's very critical that this one is going to attempt to recover the memory of a face, the image, a person through hypnosis or through any other means that is connected with a criminal offense, that there not has been an intervening contact so that the individual has not seen that person in some other related contact such as a lineup or photo identification or presence in a police court or what have you. This has been verified over and over and over again that individuals who do make these identifications will pluck out an image description of a person that has some casual connection with the event, mistaking the defense lawyer for the defendant or some police officer or a picture in the newspaper and normally people will do this without hypnosis, but individuals are hopefully able to correct their memory in the waking state and so they know that there is some doubt as to whether his is the real memory. May be a true face or it may be the face of somebody they saw somewhere else. They lose the ability to recognize that this is subjects to doubt.

Q:Would the fact that the purpose for hypnosis is for investigative purposes, in other words, police investigation, would that add the effect?

A:Yes, that builds in the effect because that gives the expectations. The individual is frequently told before being hypnotized that the purpose of the hypnosis is to refresh, to produce memory. It's usually used on witnesses who have trouble remembering and even if they're not told, it should be obvious to them that they can't remember the subject before hypnosis and they're hypnotized that they're expected to remember something under hypnosis and a cooperative, susceptible subject will remember something and come out with whatever evidence is needed regardless it's true, false, or confabulated.

Q:Would the fact that the witness or the person to be hypnotized have immediately or

suspect that there is some proof where the suspect was in doubt?

A: Investigative hypnosis is done to clarify the memories of a crime, of the event, in which the individual is either the witness or the victim or both and the fact that one is doing it for that purpose creates the expectation and this is why my opinion is inevitable that the procedure distorts the memories.

Q: Would there again be any time during your experience and your training and your education - what in your opinion - what are the effects of the hypnotic session performed upon Lean Easton in this case?

A: Miss Easton, in this case, under hypnosis was induced to give a complete coherent story of what took place and I think that there is a definite probability that this story was created and produced in response to hypnosis and it may or may not have any significant relationship to the events of the real world. It is neither possible nor proper for me to allocate how much of this story is real and how much is simply the imagination of a susceptible, suggestible person. I have no way of knowing, and it could either be totally true or it could be totally false. I think the probabilities are very strong. It is a mixture of fact and fantasy, and what things are fact and what are fantasy is beyond my ability to determine.

Q: In your opinion, Doctor, does this hypnotic experience irrevocably taint the testimony of Lean Easton?

A: Yes, it does because I believe that it has removed, or destroyed, the subject herself's (the witness's herself's) ability to evaluate her own thoughts. So, I think that having undergone this hypnotic experience, the witness herself is not able to make a judgment as to what is truth and what is fantasy here. And, because I think it has seriously altered her own perception of her memory and in all likelihood, has induced a false sense of belief and confidence in her own memory, I think that is not likely to be possible through any means which is normally available through the legal process to be able, shall we say, decontaminate this memory. In other words, I don't think that the usual methods of direct-and-cross-examination here can in any way solve the problem of the hypnotic contamination.

Q: As a result of this contamination, in your opinion, should Lean Easton be allowed to testify?

A: Now, it is my opinion - which I've expressed repeatedly in my writings and other testimony - that once a prospective witness has been hypnotized in the course of a criminal investigation that the probabilities of irrevocable contamination, both in content of the memories and the subject's sense of belief and confidence in their memory have been so irrevocably altered that this subject has been rendered incompetent as a truthful witness. They are no longer able to respond to the oaths to tell the truth, the whole truth, and nothing but the truth as the witnesses are required and are therefore incompetent as witnesses and their testimony should not be admitted.

Q:I just have one brief area to explore before I conclude my parts of the examination. You are quite learned in the field that we've been discussing today. Could you tell me first of all there is a position taken by the courts, some of the courts, that they will follow what's known as the Frye rule. Could you briefly explain what is the Frye rule?

A:Yes. The Frye rule was set forth many years ago by an appellate court in the District of Columbia and that is that expert testimony or any kind of testimony regarding such as scientific instruments, scientific evidence of any sort should not be admissible unless there is a reasonable consensus or agreement among the scientific community that such evidence is reliable and has a sound scientific basis.

Q:Doctor, based on your training and especially your experience in this field, is there a consensus in the scientific community that the use of hypnosis will produce scientifically reliable results?

A:No. Not for the enhancement of memory. I think there is a consensus that hypnosis can be a very useful clinical tool for recovering emotionally tinged and conflicted memories which are otherwise lost where the recovery is what is desired of the individual's perception of what took place rather than any truth. But, I think that there is almost a ten to one agreement among the scientific community that hypnosis is not an instrument that in any way produces memories which are objectively and factually valid. In other words, it's a truth-telling device, and only a very few specialists in hypnosis in terms of clinical, or research, the scientific community feel that it is proper to use for the purpose of determining facts or for the so-called enhancement of memory for witnesses. There are a large group of what I would regard not as scientists in hypnosis but as hypnotechnicians who've learned the technique of hypnotism and who believe differently. So that even taking those individuals into consideration and even if one accepts the hypnotechnician as having scientific expertise in this area, the community is very sharply divided and does not meet.

Q:Thank you. I believe that's all I have for the direct part of the examination.

My name is John Wilson, Bailey County state's attorney. We are beginning to begin cross-examination of Dr. Diamond

Q:Dr. Diamond, you gave a list of qualifications which is very impressive. You stated that you wrote two articles on hypnosis. Is that correct?

A:Yes.

Q:Am I assuming one was a law review article ---?

A:One is law review and the other one is now in publication.

Q:That has not been released yet?

A:No. Not at this time.

Q:So, Doctor, at this point in time you've written one article - that is a law review article in 1980?

A:That's been published, yes.

Q:You stated that you attended medical school and obviously, I suppose, took some advanced training as well?

A:Yes.

Q:what kind of courses have you had relating specifically to hypnosis?

A:Well, I've had three years of post-graduate training in psychiatry as a psychiatric resident. And in the course of that residency, I was specifically trained in the technique of hypnotherapy and in the use of hypnosis for investigation of medically related therapeutic problems. Following my residence I was in the military service as a psychiatrist for just short of five years and it was then we were confronted in the service for the need for very quick and rapid treatment of many, many soldiers of combat. It was my responsibility in the Army to organize both training programs and also either the assistant chief or chief of services in the Army General Hospital, and so I used hypnosis very extensively.

Q:Dr. Diamond, I asked the question, what courses have you taken?

A:In post-graduate medical work you don't take courses. There's no such thing as a course. There's a training in your residency and your experience.

Q:So, you are saying mostly experience dictates what kind.

A:No, I'm not saying that. Post-graduate medical training consists of direct contact with doctors on a, you might say, an actual case basis. It's not organized.

Q:Working on a case-by-case basis with an instructor in hypnosis that you mentioned?

A:Right.

Q:And I suppose that led to your experience in the Army and subsequent to that in clinical and therapeutic use of hypnosis, is that correct?

A:Yes, I used it in military and in private practice as well.

Q:When's the last time you used hypnosis?

A:The last case I personally hypnotized anyone was in 1978.

Q:Have you ever taught hypnosis subsequent to the Army reference that you made?

A:Yes, in the military and also as a clinical professor I taught a technique of hypnotherapy to numbers of residents.

Q:Is that recent years past?

A:I've done that since up to, roughly, three or four years ago.

Q:But is hasn't been since 1968 that you've ever practiced clinical hypnosis or anything?

A:No, I have not myself done clinical hypnosis since that date. The reason being is since 1968 I don't have a private therapeutic practice - I've been full-time teaching and in research at the university and the only practice I've had during this period is to quite a few consultative articles.

Q:So the only background that you have as being an expert on the use of hypnosis, at least drawing from your own clinical experience, is prior to 1968, is that correct?

A:Roughly so, yes. Actually, since 1968 I've kept in very close touch with the scientific literature and the research in hypnosis.

Q:But this is literature concerning what others have said and also research that others have conducted?

A:Yes.

Q:You have not conducted any research studies in the use of hypnosis from a practical standpoint yourself?

A:Since 1968.

Q:Prior to 1968, do you have an estimate as to how many occasions you actually practiced clinical hypnosis, how many subjects that required it?

A:It would be in the hundreds of cases.

Q:Do you know what the term, spontaneous hypnosis, signifies?

A:Yes, I do.

Q:Would you explain that, please?

A:Yes. It is the belief of certain people - I think the most notable example would be Dr.

Herbert Spiegel of Columbia University - that the phenomena of hypnosis is not an unusual occurrence but is simply an everyday occurrence. That spontaneously people go in and out of the hypnotic state all the time, and the states of reverie, of daydreaming, and simply mind wandering, represent states identical (or alterations of consciousness) to hypnosis. Therefore, hypnosis is really just a more precise form of spontaneous hypnosis.

Q:Do you believe that there is such a phenomenon as spontaneous hypnosis?

A:No, I believe what Dr. Spiegel and others describe is a totally false and inaccurate description. I don't believe for an instant that the induced hypnosis with a hypnotist is in any way the same kind of alteration of consciousness that occurs in daydreams or reverie. I think there is such a phenomena of auto or self-hypnosis can be identical, or nearly identical, to actual hypnosis. But what Spiegel calls "spontaneous hypnosis" is not, in my opinion, the same as autohypnosis.

Q:What he describes, regardless of what we call it, it does exist, doesn't it? Daydreams?

A:Well, daydreaming and all different kinds of alterations of consciousness occur. Yes.

Q:Uh huh. It is, in some instances when we describe spontaneous hypnosis or daydreaming, that we do have an altered state of concentration?

A:No. I didn't - you've already stated the question wrong, you said daydreaming or spontaneous hypnosis. I don't think that there is such a thing as spontaneous hypnosis.

Q:I'm using Dr. Spiegel's own definition.

A:I can't talk in those terms. I think he's dead wrong. I think it confuses the issue in stating things that are contraindicated by his own writings. I just don't concur that this idea that hypnosis is the same as what he calls spontaneous hypnosis is true. If you want to ask me about daydreaming I can talk about. If you ask me about spontaneous hypnosis, I can tell you there's no such thing.

Q:Do you believe that there's any value in investigative hypnosis?

A:Yes, I believe there is value in investigative hypnosis. I think that sometimes clues are provided, leads come up, information comes up under hypnosis that perhaps might not otherwise be available.

Q:So you would agree then, Dr. Diamond, that investigative hypnosis can enhance memory.

A:It may, yes.

Q:It can?

A:It can. It's been known - there are instances, yes.

Q:And the value of that, of course, would be in those instances where they can discover ways and other pieces of evidence to perhaps solve a case or leads to solve a case.

A:Yes. In the investigation, you see, investigating a crime one has to deal with leads regardless of whether they are true or false. A false lead may very well turn up information which is not false. And every clue has to be followed and as a way of providing clues, investigative hypnosis and sometimes does, come up with clues that might not otherwise be available.

Q:Have you ever worked with crime victims yourself?

A:Not really in a truly legal situation. I've worked with crime victims on the therapeutic level and - but I would say categorically, no.

Q:At least from the standpoint of using investigative hypnosis?

A:I mean for investigative hypnosis. I've worked with crime victims in a therapeutic manner.

Q:You refer to a number of items concerning your opinions on various matters relating to investigative hypnosis or to hypnosis itself. I asked you before and you stated that you haven't yourself even practiced therapeutic or clinical hypnosis since 1968. The studies that you referred to, or the supporting data that you referred to, is that primarily from others' research?

A:Yes. I would say that I consolidate with the leading researchers who publish journal articles, who public material.

Q:Would it be safe to say that research was outside of the investigative hypnosis arena or outside of the police department concept that we're discussing, more related to laboratory types of experiences?

A:No. Absolutely not. I've read and a very large percentage of the existing literature in the field of investigative hypnosis. I've read very thoroughly all of the textbooks used by investigative hypnotists and I've made in my paper evaluations of these books, claims and the basis of their claims, I even in earlier years actually attended a school of investigative hypnotism and took one of these courses and graduated from such a course. One of the predecessors Dr. Reiser, William Jennings Bryan. In 1964 when I joined the faculty of the University of California, my predecessor as a professor in the School of Criminology, taught courses in polygraph and hypnosis for law enforcement. And I was asked by the university in that year to make an evaluation of the usefulness of hypnosis for law enforcement purposes and whether it was proper for the university to teach hypnosis as part of the curriculum for law enforcement persons in the School of Criminology.

Q:Excuse me, Doctor, do you recall what my question was?

A:Yes, I was explaining to you what my experience was and where I drew from my paper. At that time, in 1964, or 1964 - 1965, I made a thorough investigation of hypnosis. I used it myself, I interviewed everyone I knew who was using investigative hypnosis, reviewed all the scientific literature and I myself, came to the conclusion that it be given. I attended and graduated, or took on of the courses in investigative hypnosis, and then it was my conclusion that it was not proper to teach law enforcement people hypnosis. I recommended that I not to this, that the university not continue. And then later during this interval when I had assumed that investigative hypnosis was dead, was not being used. And then it was revived and I then, for purposes of the paper, brought all of my information and experience up to date and that was the basis for the article that you describe.

Q:Are you yourself a member of any hypnosis societies in the United States?

A:No. I am not - and I have declined membership in any of the hypnotic specialty organizations because I don't think -

Q:I didn't ask you, Doctor, what you thought of them. I asked you if you were a member.

A:No, I am not.

Q:O.K. About your opinions and, obviously relating to this case in general, as to what the memory will indicate as far as you're concerned after one has gone through the process of hypnosis. You stated that it could be all true or none of it could be true. Do you recall making that statement?

A:Yes, I did say so.