

1 MS. OTT: Okay.

2 **DAVID SPIEGEL, Ph.D.,**

3 having been first duly sworn, testified as follows:

4 **DIRECT EXAMINATION - 705 HEARING**

5 **BY MS. OTT:**

6 Q. Okay. Can you tell the Court your educational  
7 background?

8 A. Yes. I got -- received my bachelor's degree from  
9 Yale College, my MD from Harvard Medical School. I did my  
10 residency and fellowship training in psychiatry and community  
11 mental health at Harvard.

12 Q. And when did you complete that?

13 A. In 1974.

14 Q. And following the completion of your degrees, how  
15 were you employed?

16 A. I worked for a year for San Mateo County doing  
17 mental health work in California. I joined the faculty at  
18 Stanford in 1975. For the first five years, I was the staff  
19 psychiatrist at the Palo Alto Veterans Administration  
20 Hospital and an assistant professor at Stanford.

21 And since then, I've risen up through the  
22 ranks. At Stanford, I now run the center on stress and  
23 health. I'm a -- I have an endowed chair on Wilson professor  
24 of psychiatry, an associate chair of psychiatry at Stanford.  
25 I run a center for integrated medicine as well.

1 Q. Now, does your position at Stanford involve teaching  
2 and research?

3 A. Yes. I'm a full-time faculty member professor. I  
4 mostly do research about 70 percent of my time. I do  
5 teaching in the laboratory, largely teaching postdoctoral  
6 fellows. I teach medical students as well, and I see  
7 patients about 30 percent of the time.

8 Q. And do you teach a course in hypnosis?

9 A. I do.

10 Q. And are you presently teaching that?

11 A. I am.

12 Q. Do you also have a clinical practice?

13 A. Well, my clinical practice is part of my work at  
14 Stanford. We're not allowed to have a private practice, but  
15 I see many patients at Stanford.

16 Q. And can you tell the Court about some of the  
17 professional organizations that you're a member of?

18 A. I'm a member of the National Academy of Medicine,  
19 which is an elected honor that comes to about 2,000  
20 physicians in the United States.

21 I'm past president of The Society for Clinical  
22 and Experimental Hypnosis. I'm a fellow of the American  
23 Society of Clinical Hypnosis. I'm a distinguished life  
24 fellow of the American Psychiatric Association. I'm a fellow  
25 of the American College of Neuropsychopharmacology. And I'm

1 past president of the American College of Psychiatrists.

2 Q. And have you published any articles?

3 A. I have. I've published about 370 articles in  
4 scientific journals and about 150 book chapters. About 110  
5 of those, the articles and chapters, involve specifically  
6 hypnosis.

7 Q. And have you served on any editorial boards?

8 A. I have. I'm the medical or associate editor of the  
9 International Journal For Clinical And Experimental Hypnosis,  
10 and I am an associate editor of the American Journal of  
11 Clinical Hypnosis as well.

12 Q. Have you received any awards for your scholarly or  
13 professional activities?

14 A. I have. I've received about 30 of them. I got the  
15 Hilgard award from the International Society of Hypnosis for  
16 my research. I received about ten awards in hypnosis from  
17 the Society for Clinical and Experimental Hypnosis, The  
18 American Society for Clinical Hypnosis and Division 30, which  
19 is the hypnosis division of the American Psychological  
20 Association.

21 Q. And can you describe for the Court the type of  
22 research that you have been involved in?

23 A. I've done research recently on neuroimaging of  
24 hypnosis. So we do functional magnetic resonance imaging of  
25 people who are different -- have different levels of

1 hypnotizability and also study what happens in the brain when  
2 people go into and go out of the hypnotic state. So we  
3 understand a good deal more now about brain activity in  
4 relation to hypnosis.

5 I've also done randomized clinical trials for  
6 both -- in acute medical procedures and for people, like,  
7 with cancer who have chronic pain, looking at and  
8 demonstrating significant effects of hypnosis in reducing  
9 pain and anxiety.

10 Those are some of the studies. We are  
11 currently doing a study funded by the National Institutes of  
12 Health looking at ways of stimulating the brain using  
13 transcranial magnetic stimulation to enhance hypnotic  
14 responsiveness for problems like pain.

15 I estimate that, between my research work and  
16 my clinical activity, I've personally used hypnosis with  
17 about 7,000 people over my career.

18 Q. And were you also a member of the DSM-5 work group  
19 on anxiety, obsessive compulsive disorder, posttraumatic  
20 stress disorder, and dissociative disorder?

21 A. Yes, I was.

22 Q. And what did that entail?

23 A. Well, the -- th DSM is the -- it's called the Bible  
24 of psychiatry. It's the -- the diagnostic and statistical  
25 manual by which we define different mental disorders. And so

1 a great deal of work goes into the preparation of these lists  
2 of criteria for mental disorders. And so for both the  
3 previous edition, the DSM-4 and the DSM-5, I was particularly  
4 involved in writing the diagnostic criteria for dissociative  
5 disorders.

6 MS. OTT: May I approach?

7 THE COURT: You may.

8 Q. (BY MS. OTT) I'd like to show you what's been  
9 marked as State's Writ Exhibit 7. Do you recognize that?

10 A. It looks a lot like my CV only lighter, I think.

11 Q. Okay. And is this your current CV?

12 A. Well, it looks -- the date -- it says October 26,  
13 2016, so it may have been slightly updated, but it's pretty  
14 much correct.

15 MS. OTT: The State offers State's Writ  
16 Exhibit 7.

17 (State's Writ Exhibit No. 7 offered.)

18 MS. LEPINGWELL: No objection.

19 THE COURT: All right. State's Writ Exhibit  
20 Number 7 is admitted.

21 (State's Writ Exhibit No. 7 admitted.)

22 Q. (BY MS. OTT) So for the purposes of this hearing,  
23 would you give us a summary of the opinions that you're  
24 planning on offering today?

25 A. Certainly. My opinions involve our understanding of

1 hypnosis. And I have great regard for Dr. Lynn, some areas  
2 of disagreement with what he's written and what he has  
3 testified about. So I would say there is much truth in what  
4 he says, but there are some things that I don't agree with.

5 So part of it would be clarifying my knowledge  
6 about the definition of hypnosis, the risks and potential  
7 benefits of using it in the forensic setting.

8 So part of it, the first part, has to do with  
9 what's true. The second part has to do with what's new. I  
10 will render opinions that basically all of the things that  
11 Dr. Lynn has testified are things that have been known for a  
12 long time regarding the supposed tape recorder view of  
13 memory, suggestibility effects, both in and out of hypnosis.

14 And, in particular, I think an important issue  
15 for this case is the extent to which hypnosis adds to the  
16 risk significantly that we all know about from the way in  
17 which people are interrogated and factors that can influence  
18 eyewitness identification.

19 So my second area of discussion would be around  
20 the issue of what's new. Was this information available in  
21 1999 at the trial? And my opinion will be that it was.

22 The third has to do with, would it have  
23 affected the case in question. The Court's problem here is  
24 to decide whether it's appropriate to accept this eyewitness  
25 testimony, given what she went through. And so I will render

1 opinions about the likelihood that this hypnotic experience  
2 she had would have colored her -- the content of her  
3 testimony or her conviction about it.

4 MS. OTT: For the purposes of this 705 hearing,  
5 we'll pass the witness.

6 MS. LEPINGWELL: One moment, please,  
7 Your Honor.

8 **CROSS-EXAMINATION - 705 HEARING**

9 **BY MS. LEPINGWELL:**

10 Q. Good afternoon, Dr. Spiegel.

11 A. Good afternoon.

12 Q. I'm just going to step back a little bit and talk  
13 about your experience and what you have told us so far today.

14 You said that you've been involved in -- I'm  
15 sorry -- 110 of your articles and book chapters involved  
16 hypnosis, correct --

17 A. Correct.

18 Q. -- if I stated that correctly?

19 And can you just tell us how many of those  
20 involve hypnosis and memory?

21 A. A few of them, not many.

22 Q. When you say a "few," like a handful?

23 A. Yes.

24 Q. Okay. And do you know when the last time was that  
25 you -- if you recall, the last time was that you had a book

1 chapter or article published on hypnosis and memory?

2 A. I'd have to look. I have a book chapter in 2001,  
3 Dissociation and Trauma, which involves issues of memory and  
4 hypnosis as well. I should -- I should be going from the  
5 end. Because, I take it, you're looking for more recent  
6 ones; is that correct?

7 Q. Yes, the -- the more recent the better.

8 A. In 2014, Memory and Personal Identity.

9 Q. And what -- and what was that? Let me just stop you  
10 right there. What was the premise of that?

11 A. It had to do with the issue of the fragmentation of  
12 memory and dissociation and how you can do that in a  
13 controlled way with hypnosis and that traumatic experience  
14 induces the fragmentation of memory and identity because of  
15 the discontinuity and experience from before and after the  
16 trauma.

17 Q. Okay. So if I can just summarize that in a more  
18 basic, lay-term way. It's about trauma and dissociation. Is  
19 that like a very basic summary?

20 A. Well, it was at an international symposium on trauma  
21 and memory, and it had to do with hypnosis, as well as trauma  
22 and their effects on memory and identity.

23 Q. Okay. And when you talk about trauma, you mean like  
24 a traumatic event, such as being the victim of a rape, a  
25 sexual assault, a terrorist attack, something like that?



1           A.    Yes.  But it can also be a threat of -- of physical  
2 injury as well as the actual experience of it, so you can  
3 witness it or experience the threat as well.

4           Q.    Sure.  Like if somebody were to hold, like, a gun to  
5 your face but not actually assault you, that sort of thing?

6           A.    Or you witness them attacking somebody else.

7           Q.    Okay.  And you mentioned that about 70 percent of  
8 your work is dedicated to research and teaching, correct?

9           A.    That's correct.

10          Q.    And if I understand correctly, your research, you  
11 said, more recently focuses on neuroimaging of the brain to  
12 determine or to -- to -- to see different levels of  
13 hypnotizability.  Is that accurate?

14          A.    Well, not quite.  But it's what -- which regions of  
15 the brain are involved, both when -- in people who are highly  
16 hypnotizable and those who are not and, also, what happens  
17 when people go into a state of hypnosis.

18          Q.    Okay.  So you look at, like, blood flow in the brain  
19 and which areas of the brain --

20          A.    Correct.

21          Q.    -- and which areas of the brain?  Okay.

22                         And your research, if I understand it  
23 correctly, from your resume, also has focused on helping  
24 people cope with stress, correct?

25          A.    Yes.

1 Q. And specifically helping people with cancer cope  
2 with -- with the stress and -- and the pain that they're  
3 going through?

4 A. Yes. And we use hypnosis as one of the  
5 techniques --

6 Q. And --

7 A. -- to help with that.

8 Q. And how to provide emotional support to women with  
9 breast cancer?

10 A. Yes.

11 Q. Is that accurate?

12 A. That's correct.

13 Q. And like you said previously, you study how people  
14 respond to acute traumatic situations?

15 A. That's correct.

16 Q. Now, you mention that you've used hypnosis about  
17 7,000 times?

18 A. That's correct.

19 Q. And to be clear, that's specifically in the clinical  
20 setting, correct?

21 A. No, clinical and research.

22 Q. Clinical --

23 A. The majority is clinical, but about a third, I would  
24 guess, are research subjects that I've used hypnosis with.

25 Q. Okay. But -- and so that would be on patients --

1 patients or on research subjects?

2 A. Right.

3 Q. Okay. And -- and the reason that I was making that  
4 distinction is -- to be clear for the record, is that that's  
5 not in the forensic setting, correct?

6 A. That's right.

7 Q. About how many times would you say you've conducted  
8 hypnosis in the forensic setting?

9 A. Well, I've been involved in about 80 cases, some --  
10 a number of which involve the use of hypnosis. And in those  
11 cases, I've either evaluated the use of hypnosis or tested  
12 hypnotizability and, I would say, in about five or six cases  
13 have done the forensic investigation of hypnosis.

14 Q. Okay. So you've conducted the forensic hypnosis  
15 yourself in about five to six of those cases?

16 A. Right.

17 Q. Did you test the hypnotizability of Ms. Barganier?

18 A. No.

19 Q. How many empirical studies have you conducted on the  
20 effects of hypnosis on -- and memory?

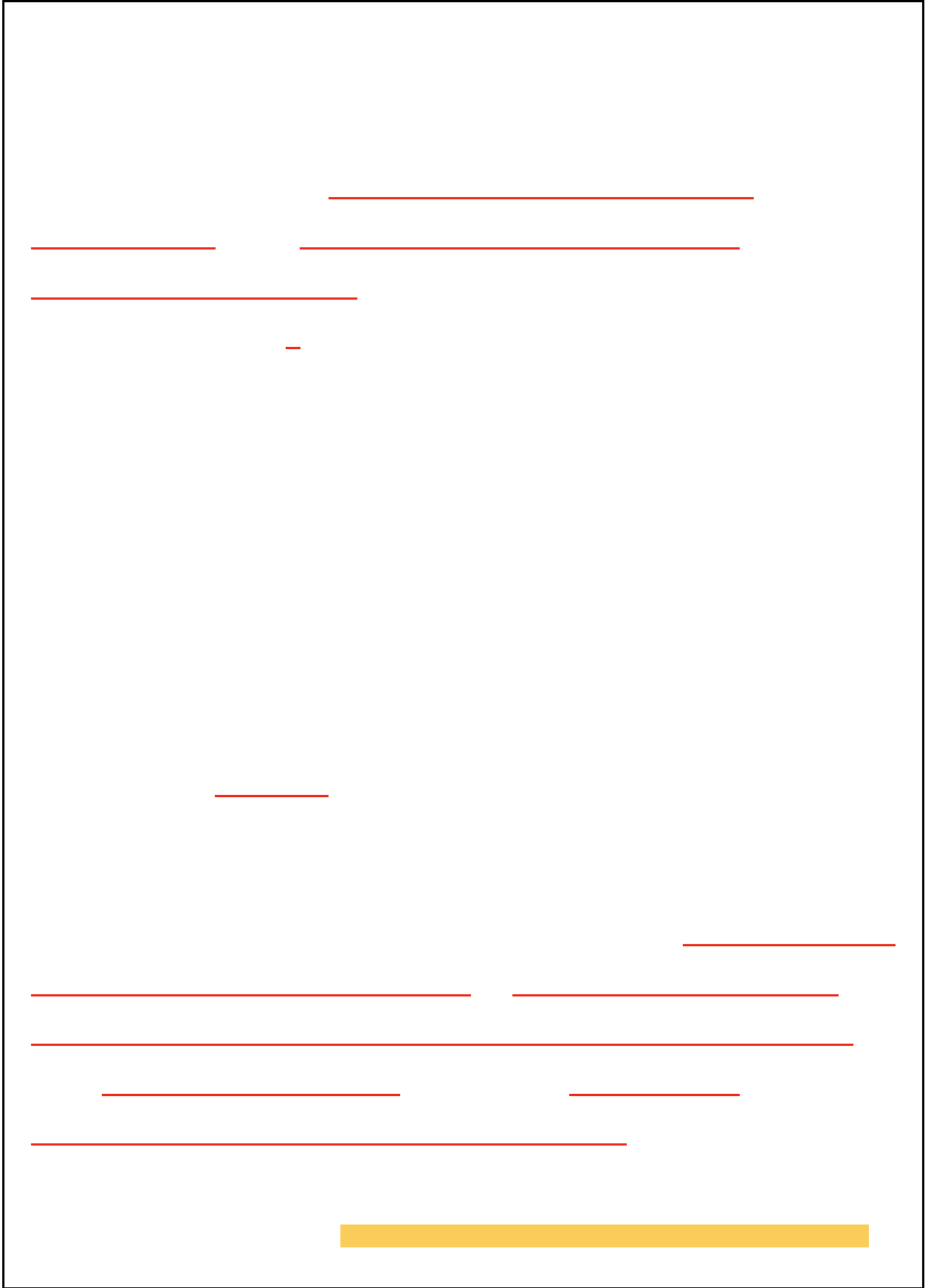
21 A. Hypnosis and memory, I -- I don't know. Not many.

22 Q. Again, less than a handful?

23 A. Yes.

24 Q. When did you conduct those studies?

25 A. It's been a while ago. I don't know. I can look it



1 attention with reduced peripheral awareness and an openness  
2 to suggestion, and that's an agreed-upon definition. I was  
3 involved in writing it along with a number of colleagues.

4 And I think the problem with Dr. Lynn's  
5 definition is that it tends to imply that people just enter  
6 an imagined world in hypnosis and all they're doing is making  
7 up things, imagining things rather than experiencing them.

8 And so some of the issues he raises about  
9 vulnerability to suggestion are important issues, but I think  
10 it is not a comprehensive and it's not a currently accepted  
11 definition of what hypnosis is.

12 Secondly, I think he overestimates the dangers  
13 of suggestion, confabulation, and some of his own work  
14 suggests that. He has a paper published in 2015 in  
15 Consciousness and Cognition. It's a very good paper. Like  
16 any good scientist, he publishes information that doesn't  
17 necessarily support his particular hypothesis.

18 And in this study, they had two kinds of  
19 movies, and so it's particularly salient to this Court  
20 because we're talking about the hypnotic movie theater  
21 approach. One was an emotionally compelling movie. One was  
22 kind of boring. And the idea was to see whether memory was  
23 different in emotionally arousing versus boring movies.

24 And one of the conditions was to hypnotize  
25 people and see if you could get them to provide less accurate

1 information. And the study showed, quite clearly, that  
2 hypnosis had zero effect on providing inaccurate information.  
3 So it contradicts what Dr. Lynn has been saying about the  
4 likelihood that just using hypnosis would, in fact, produce  
5 incorrect information.

6           There's another very old paper of his in 1991  
7 in the Journal of Personality and Social Psychology where he  
8 tried -- he tried to insert an incorrect experience, a  
9 telephone ringing, and had a real experience, pens, pencils  
10 dropping out of a jar. And he found that the expectation of  
11 the subjects, how they were prepared, whether or not they  
12 thought hypnosis would improve memory, had absolutely no  
13 effect on their rate of accepting. In fact, none of them  
14 ultimately accepted the -- the false suggestion that a phone  
15 had rung when it had not.

16           So these studies of his demonstrate that there  
17 are real limits to how much the hypnotic experience can or  
18 will contaminate memory or cause people to produce false  
19 information.

20           One of the other problems that I had with many  
21 of his studies -- and Dr. Lynn addressed this -- is that  
22 they're often done in the college university setting with  
23 non- -- with relatively trivial issues. It's not like  
24 somebody's life is on the line about whether they're going to  
25 go to jail or not.

1           There was one study that he mentioned, the  
2 Sloan study, that we discussed in writing the AMA report in  
3 1985, which did attempt to actually study effects of hypnosis  
4 in a real-life criminal setting, which was an admirable  
5 thing.

6           The problem is that the statistics used for it  
7 were just wrong, and so they overestimated the effect that  
8 they saw. It was not as significant as they thought it was.  
9 As far as I can tell, that paper has never been published in  
10 a journal. It was a dissertation.

11           So I disagree with him about what the studies  
12 show, and I particularly disagree about the difference  
13 between the problems that we know about with memory, in  
14 general, with eyewitness recollection, in general, and the  
15 problems that can occur with hypnosis.

16           I would also testify that I -- I think the  
17 kinds of problems that we are concerned about, in general,  
18 about memory are things we have known for a very long time.

19           So I brought with me a book written by Larry  
20 Squire, who is one of the world's authorities on the  
21 neurobiology of memory. In 1987, he discusses the issue of  
22 hypnosis. He discusses one of the earlier studies that  
23 Elizabeth Loftus published about how psychologists tend to  
24 think that memory -- like, memory is a video recording  
25 technique. And that was all known, published in a highly

1 respected book from Oxford University Press in 1987.

2 So this -- this isn't new. These concerns  
3 about hypnosis are not new and could easily have been  
4 presented forcefully by someone like Dr. Lynn or Dr. Lynn  
5 himself in 1999. Nothing has happened since then that really  
6 changes the picture.

7 **And, in fact, Dr. Lynn's very good study in**  
8 **2015, if anything, undermines the belief that hypnosis will**  
9 **automatically get people to produce false information.**

10 MS. LEPINGWELL: We have nothing further,  
11 Your Honor.

12 THE COURT: State?

13 MS. OTT: May I proceed, Judge?

14 THE COURT: You may proceed.

15 (Sotto voce discussion amongst counsel.)

16 **DAVID SPIEGEL, Ph.D.,**

17 having been previously sworn, testified as follows:

18 **DIRECT EXAMINATION**

19 **BY MS. OTT:**

20 Q. Okay. Have you provided expert testimony before?

21 A. I have.

22 Q. About how many times?

23 A. About 20 times.

24 Q. And were those cases civil cases or criminal  
25 cases?



1 A. About half of each.

2 Q. And we've already touched on it a little bit, but  
3 what is your professional experience using hypnosis?

4 A. I've been using hypnosis professionally for about  
5 45 years. I've used it clinically to treat problems, like  
6 pain, posttraumatic stress disorder, dissociative disorders,  
7 like dissociative identity disorder, psychosomatic disorders  
8 of various kinds, like what are called nonepileptic seizures  
9 where patients apparently have a seizure but don't have a  
10 seizure, focus in their brain, and we can teach them to  
11 control it with hypnosis, so many psychosomatic problems as  
12 well. And smoking control is another one that we use it for  
13 a good deal.

14 Q. And what opinion do you have concerning the use of  
15 hypnosis in a forensic context?

16 A. I think it has its place. I think it should be a  
17 last resort, not a first resort. I think some of the  
18 problems that came up occurred because hypnosis was starting  
19 to be used in place of good police work, sort of a first-step  
20 rather than a last-step.

21 But I think there are times when it can help  
22 people, particularly in stressful or traumatic situations,  
23 where they've experienced or witnessed a traumatic event that  
24 they may have difficulty recalling events, and hypnosis can  
25 be helpful in doing it.

1                   And probably the best known example is the  
2 Chowchilla school bus kidnapping. This was a terrible event  
3 that happened in California about 40 years ago. A school bus  
4 full of children was highjacked, was buried underground. And  
5 they got out after a couple of days, but the bus driver could  
6 not recall anything very useful about the car that overtook  
7 the bus.

8                   He was hypnotized, and he was able to visualize  
9 all the letters and numbers of the license plate, in the  
10 wrong order, but close enough that they actually got the --  
11 got the car, got the guys. And they were arrested and  
12 convicted of the kidnapping.

13                   So when you need some additional information  
14 that you can't get by the usual methods, particularly if it  
15 involves a particularly traumatic or stressful event,  
16 hypnosis can be helpful.

17           Q.    Now, before we talk about hypnosis in specific  
18 terms, I want to talk a little bit about memory. Is it  
19 important to understand how memory works before we can  
20 understand the use of hypnosis to refresh memory?

21           A.    Yes, it is.

22           Q.    Does memory work like a video recorder?

23           A.    No. Mine certainly doesn't.

24           Q.    Is memory reconstructive?

25           A.    Yes. It is definitely reconstructive.

1 Q. What does that mean?

2 A. Well, what it means is that we store and retrieve  
3 memories as a network of associations that actually involve  
4 changing synapse, so there's a phenomenon called long-term  
5 potentiation that actually builds connections between  
6 neurons. Neurons that fire together wire together. And so  
7 we actually shape the networks of the neurons in parts of the  
8 brain that recall things by firing in relation to certain  
9 experiences.

10 Now, if we kept adding them in all the time,  
11 our -- our brains would outgrow our head, so we actually have  
12 to keep pruning them as well. And so it's a constant process  
13 of creating new neuronal connections and pruning them and  
14 reshaping them.

15 And so when we recall something, we do it  
16 because of a network of connections. And one example that's  
17 sort of easy to get is, that if you've gone back to your, you  
18 know, 30th high school reunion, you know, you're walking down  
19 that hallway, the lockers look a little smaller than you  
20 remembered them and all that, and you start thinking about  
21 things that you just hadn't thought about in 30 years. You  
22 remember people. You remember things you did, and it isn't  
23 that they're gone forever and you hadn't thought about them  
24 since. So the context, the physical context, actually helps  
25 stimulate the memories, and so you reconstruct them.

1           In the same way Dr. Lynn referred to an issue  
2 of remembering what you had for breakfast, you know, today or  
3 a week ago or a month ago. Hopefully, we all remember what  
4 we had or didn't have for breakfast this morning. A week ago  
5 you might have an actual episodic memory of it. But more  
6 likely, you think, well, on a work day before I get work, I  
7 usually have X. And so you start creating algorithms that  
8 help you figure out what it probably was, and it's  
9 probabilistic.

10           So memory is reconstructed based on this  
11 network of associations and information that is really stored  
12 but it isn't stored in pristine form. It's stored so that it  
13 has to be reconstructed.

14           And if I can use the videotape analogy, which  
15 is a bad one, you've got to have the equipment to translate  
16 whatever signals are stored on the tape to make it  
17 meaningful. And in a sense, that's what the brain has to do.  
18 It has to reconstruct what information is stored to make it  
19 meaningful.

20           Q.    And what factors can affect the accuracy of memory  
21 in general?

22           A.    Well, some of it can be just how clearly you  
23 perceive the information in the first place. So there are  
24 times when we perceive something very clearly. I have a  
25 clear image looking at you, and I could probably recollect

1 that pretty -- pretty well.

2 Some of it has to do with how long you  
3 experienced it, with what the emotional situation was, with  
4 whether there were competing factors for your attention when  
5 you were recording that information and then the process of  
6 recollecting it, too.

7 The -- the interesting thing is that memory  
8 does not just simply decay over time. It actually sometimes  
9 gets better. So repeated recall efforts can actually improve  
10 correct recollection of memory. And one of the problems in a  
11 lot of the research that's gone on is that they have not  
12 controlled for the number of recall trials. The more you try  
13 to recall, the more correct new information you will bring  
14 up. You may also bring up incorrect information, and you may  
15 set the standard for what counts as a memory differently if  
16 you're really being pushed to remember things.

17 But your first effort to recall information,  
18 including eyewitness -- witnessing a crime, for example, will  
19 not be your best recollection. It gets more accurate as you  
20 try and create other networks of association. And that's why  
21 the police often ask people many, many times about the same  
22 event, may walk them through the place where the crime  
23 occurred. And these are good ways of triggering associations  
24 to improve total recollection.

25 Q. And we have previously heard some testimony about

1 confabulation. What is confabulation?

2 A. **Confabulation** is -- is basically making it up.  
3 It's -- it's either because you -- you want to or you're not  
4 aware of it or you're being pressured to provide information  
5 that you fill in the gaps with information that really is not  
6 a memory. It's just a guess or a mistaken belief about what  
7 might have happened. So it's the -- the bad side of  
8 attempting to retrieve memory. Sometimes you will make stuff  
9 up rather than report an accurate memory.

10 Q. And does confabulation occur with or without  
11 hypnosis?

12 A. It certainly does.

13 Q. Does the passage of time affect memory?

14 A. Yes, it can. It can in a number of ways. It is  
15 true, as Dr. Lynn said, that sometimes over long periods of  
16 time memory can decay, but it's a little more complicated  
17 than that. Because after a while, certain memories we have  
18 actually get stored in different parts of the brain. So  
19 episodic memory is stored in the medial part of the temporal  
20 lobe. It's this part of the brain where if I ask you, you  
21 know, what did you do at your last birthday, you'll have an  
22 image of the scene, and you'll remember who you're with. And  
23 that's the temporal lobes doing their work.

24 But over time, you learn certain patterns that  
25 are stored in different parts of the brain. So knowing your

1 geography of your home town, for example, you don't have to  
2 have an episodic memory. You just know where to go. You get  
3 that feeling that you do. And, in fact, even people who are  
4 getting dementia, who are losing the ability to store and  
5 retrieve new information, can walk around their town and  
6 won't get lost. But if you take them to a new place, as, you  
7 know, many retired people do, they go somewhere else, then  
8 they can't remember it. So it's a complicated issue. So  
9 memory doesn't always decay with time. Sometimes it does.

10 Q. Is there a difference between memory of traumatic  
11 events versus memory of neutral events?

12 A. Yes. Obviously, memory of traumatic events comes  
13 with an emotional cost as well. So, often, the part of what  
14 is associated to the memories of trauma are the feelings, the  
15 sense of fear, helplessness and horror that can occur during  
16 a traumatic event or other emotions that may come with it.

17 And up to a certain point, that may stimulate  
18 an increase in -- in recollection, but after a certain point,  
19 too much arousal can actually lead to an inhibition of  
20 recollection. And this has been shown by memory researchers,  
21 Larry Squire and others have shown this. Linda Meyer  
22 Williams did a study. And, here, I do disagree with Dr. Lynn  
23 about the idea that trauma and emotional arousal always  
24 increases recollection. It doesn't.

25 Linda Meyer Williams went and got hospital

1 records of 150 women who had been brought to the hospital for  
2 treatment of sexual or physical abuse and, 15 years later,  
3 went out and interviewed them and said, oh, by the way, were  
4 you ever taken to the hospital? Did you have any bad events?  
5 38 percent of them could not remember having been brought to  
6 the hospital, and another 14 percent said there was a time in  
7 my life when I couldn't remember it. And so we know it  
8 happened. We know they did not remember it.

9 So it is the case that sometimes excessive  
10 trauma leads to an inhibition of recollection we think, in  
11 part, for emotion regulation. That's what some of our  
12 research has been about, is that people find it so painful to  
13 think about these things that they just act and pretend as  
14 though they weren't happening, and this is related to the  
15 fact that people may dissociate during trauma.

16 So most rape victims experience the rape as if  
17 they were floating above their body feeling sorry for the  
18 person being assaulted beneath them. That's the way our  
19 brain helps us to handle overwhelmingly stressful events, and  
20 that can affect our memories of them as well.

21 Q. Now, I want to talk specifically about hypnosis.  
22 You mentioned earlier the APA definition. Is that the  
23 definition that you -- that you prefer?

24 A. Yes.

25 Q. Okay. Now, can hypnosis make someone do something



1 that they don't want to do?

2 A. The -- in general, it is the case that hyp- -- that  
3 people who are hypnotizable and hypnotized are less likely to  
4 critically judge and evaluate what they're -- what they're  
5 doing.

6 And that's why, you know, neither Dr. Lynn nor  
7 I are thrilled about stage hypnotists. They give the field  
8 kind of a bad name. But, you know, they will -- they'll --  
9 they'll sift out the highly hypnotizable people in the  
10 audience. They never just start with the first person. They  
11 get a bunch up, see who is starting to respond, and then  
12 they'll get the football coach dancing like a ballerina and  
13 making a fool of himself.

14 So can it happen that people will suspend their  
15 critical judgment, just not think about it?

16 You know, we've all had that

17 it-seemed-like-a-good-idea-at-the-time experience in life.

18 And highly hypnotizable people in hypnosis are less likely to  
19 critically judge and evaluate what they're doing. It doesn't  
20 mean that they could not refuse to do something. It means  
21 that they're less likely to.

22 Q. Does hypnosis make people tell the truth?

23 A. No. It -- it's not a truth serum. And, you know,  
24 part of the direction -- you know, if suggestion works at  
25 all, it works, depending in part, on what the person inducing

1 the hypnosis is trying to get the person to do. And if  
2 you're trying to get them to tell the truth, it might help  
3 some. If you're trying to get them to lie or dissemble, it  
4 might get them to do that.

5 Q. What is hypnotizability?

6 A. One of the interesting things about hypnosis is that  
7 hypnotizability, which is simply the ability to have these  
8 hypnotic experiences -- as Dr. Lynn mentioned, we have  
9 developed a scale. There are a number of other scales in  
10 which you give a series of hypnotic instructions and ask the  
11 person to see -- to respond to them.

12 So if someone is hypnotized in -- in this  
13 test -- we use the hypnotic induction profile -- I tell them  
14 their hand will feel light and buoyant, like a balloon. And  
15 they'll let it float upwards, and even if I pull it down, it  
16 will flow right back up to the upright position. And people  
17 who are hypnotizable will sort of watch their hand go up.  
18 Now, we can all raise our hands, but they experience it  
19 differently. They feel less control over their hand. It's  
20 as if the hand decided to go up. And they'll feel  
21 different -- a difference in how voluntarily the hypnotized  
22 hand works compared to the others. And then I'll give them a  
23 signal to cut off their response.

24 So some people can respond to that, understand  
25 it, get it and do it, and other people simply can't. And

1 it's as stable a trait in adult life as IQ.

2 Q. So not everyone is hypnotizable?

3 A. Not everyone, no.

4 Q. Now, when someone is under hypnosis, are there  
5 different levels of hypnosis?

6 A. Well, there, I -- I think that -- we used to talk a  
7 lot about different levels, how deeply hypnotized you were.  
8 I think that was just a lack of understanding of  
9 hypnotizability, basically.

10 So someone who is very hypnotizable may have a  
11 profound experience. They may lose track of time. They may  
12 have markedly altered perception. They can control or  
13 eliminate pain, for example, where someone who is less  
14 hypnotizable can't do it, but I don't think of it as  
15 deepening them. The -- it takes the same amount of time.  
16 It's just that people who are highly hypnotizable can get  
17 there more profoundly and quicker.

18 Q. Is hypnosis commonly used in the clinical setting  
19 today?

20 A. It is commonly used. It's not as commonly as I  
21 would like, but it is commonly used for treating pain and  
22 anxiety, stress and other problems.

23 Q. And has hypnosis been used by law enforcement during  
24 investigations?

25 A. Yes, it has.

1 Q. And to your knowledge, is it still being used?

2 A. I think much less, but I think it is still being  
3 used, yes.

4 Q. What effect does hypnosis have on memory  
5 generally?

6 A. Well, hypnosis, per se, doesn't have any -- you  
7 know, just hypnotizing someone will not necessarily change  
8 their memory one way or the other. It can be helpful to  
9 people, particularly in traumatic events.

10 And I've had patients who -- I mean, we had one  
11 woman recently who wandered into the emergency room at  
12 Stanford, not remembering who she was or why she was there.  
13 And it turned out she lived in Palo Alto and had seen  
14 somebody who reminded her of her sexually-abusive father.  
15 And she was afraid he'd come to get her, and so she lost  
16 memory for her entire identity.

17 Within a few hypnosis sessions, I was able to  
18 help her restore her memory of her identity with confirmation  
19 from her mother that her memory was returning. So there are  
20 times when you can use it to restore major memory deficits.

21 Q. What benefit or value would there be in using  
22 hypnosis in a forensic context?

23 A. Well, this was actually a good example because  
24 Mrs. Barganier said she was scared about what she saw. You  
25 know, she wakes up in the morning. She's looking at the

1 neighbor's house. Her kids are at home. Her husband is  
2 home. And she sees this odd-looking car there and these two  
3 guys. One of them was drinking a beer or, I think, both of  
4 them were sipping a beer at 6-something in the morning.

5 And -- and she was worried that there was  
6 something bad happening to the neighbor, but then she decided  
7 that, you know, they looked like they knew what they were  
8 doing and didn't seem to be in a hurry to go into the house.  
9 So she decided not to do anything further but remembered  
10 the -- an eye contact from one of the men and was frightened  
11 by it.

12 And so she asked for the hypnosis, not to  
13 improve her memory but simply to help her deal with the  
14 anxiety that would come up with trying to remember. And  
15 emotion and memory are linked, and so it was a perfectly  
16 reasonable request to just say, try and help me handle the  
17 anxiety I have while I'm trying to think about what I saw.

18 Q. Are there risks of using hypnosis in a forensic  
19 context?

20 A. Yes, there are. And Dr. Lynn outlined them very  
21 well. There's risks. In the Zani hearing, the risks that  
22 were mentioned are real risks. There are dangers if you can  
23 push someone to confabulate, to make things up. You can do  
24 do that in other ways too, but you can do it with hypnosis.

25 The clearest finding in the research literature

1 is not that hypnosis gets people to make up more false  
2 information than ordinarily people would, but that they may  
3 become artificially confident of their beliefs.

4 So the concern the courts have had,  
5 understandably, is having a witness who is hardened to  
6 cross-examination, who is so convinced that what they  
7 recalled is right that you can't shake them. Now, I think  
8 that's an extreme that may have happened sometime. I think  
9 it's -- it's been overexaggerated, but it is an  
10 understandable concern.

11 So one of the risks is to artificially convince  
12 people that hypnosis is truth serum and because they've  
13 recalled it in hypnosis it must be true.

14 Q. So we've heard a lot about the risks associated with  
15 hypnosis. Is that one of the reasons why corroboration would  
16 be necessary in a case where hypnosis was used in a forensic  
17 setting?

18 A. I -- absolutely. Anytime I use hypnosis with a  
19 patient or in a forensic setting, I say the fact that you say  
20 something in hypnosis doesn't mean it's true, and the fact  
21 that you don't recall something doesn't mean it isn't true.  
22 It does not add to the truth value, and corroboration is  
23 extremely important.

24 And I think one of the reasons we've had a  
25 problem with hypnosis is that when you're a clinician

1 treating someone with hypnosis, your concern is not primarily  
2 the Court's concern of the truth, the absolute **truth value** of  
3 what the person is reporting but the kind of emotional  
4 meaning of what they're telling you, and you work with that.

5 If it gets into the legal setting, then  
6 **corroboration is essential** because the fact that someone says  
7 it, it certainly has no more truth value than an ordinary  
8 recollection would be. And there are these concerns that  
9 someone may have pushed the person to recall things that they  
10 may not recall.

11 Q. Do you think it's disingenuous for an expert to  
12 testify in a court of law and refuse to acknowledge  
13 corroborating evidence?

14 MS. LEPINGWELL: Objection. Relevance.

15 THE COURT: Overruled.

16 MS. LEPINGWELL: It's also a  
17 mischaracterization of the evidence.

18 THE COURT: Overruled.

19 A. I do think that -- let me put it this way: For  
20 myself, as an expert in hypnosis, evaluating situations like  
21 this, corroboration is one of the absolute necessities. And  
22 I, in evaluating cases, look at the -- whatever corroborating  
23 evidence is there **in reaching an overall decision**.

24 So particularly since its one of the nine or  
25 ten, whichever they are, criteria of Zani, I think it is very

1 important to look at the corroborating information and decide  
2 whether it makes it more or less likely that the hypnotic --  
3 the -- the testimony that emerged after some hypnosis  
4 ceremony is likely to be accurate.

5 Q. What about when leading questions are used? What  
6 effect can those have on a witness's memory?

7 A. Well, leading questions can have an effect on  
8 anybody's memory, with or without hypnosis. So, you know,  
9 the most famous experiments have been done by, you know,  
10 Elizabeth Loftus, whom Dr. Lynn has referred to multiple  
11 times.

12 And she does things like, she'll show a  
13 videotape of a car accident, and there'll be a yield sign  
14 there. And she'll -- one of the debriefing questions to some  
15 people who viewed it is, did you see a stop sign. And others  
16 will get a slightly different question, did you see the stop  
17 sign. And just changing the article will get about  
18 20 percent of the people to say, yes, I saw the stop sign  
19 when, in fact, there was there was no stop sign. There was a  
20 yield sign.

21 So the way in which you ask questions can, in  
22 fact, influence the answer because you may be conveying an  
23 expectation that a certain kind of answer is right and  
24 another kind isn't.

25 I would add, though, that that, in itself,



1 tells us something about the reconstructive nature of memory  
2 and the fact that you can insert that information, you can  
3 also suppress good information. And so memory can be  
4 suppressed. Real memory events can be suppressed, and memory  
5 can be stimulated that is not correct.

6 Q. Now, if a person is under hypnosis is asked a  
7 leading question or a suggestive question, does that  
8 automatically mean that the witness is going to generate a  
9 false memory?

10 A. No, it doesn't.

11 Q. Now, I want to ask you a couple of questions about  
12 the memory retrieval technique that was used in this case,  
13 the movie theater technique.

14 A. Yes.

15 Q. What -- what exactly is that technique?

16 A. Well, very often in hypnosis, we use visualization.  
17 That's one way of getting people to kind of interact with  
18 their thoughts. So every day when I see patients, I have  
19 them imagine a movie screen, a TV screen or a piece of clear  
20 blue sky and picture either something that will help them  
21 relax or picture something that's a problem for them and --  
22 and how to deal with it on an imaginary screen.

23 So I had a woman who had been through an  
24 attempted rape, and I had her picture the assault. She was  
25 trying to better recall the face of the assailant. And I had

1 her picture him on one side, and she was very upset. She  
2 said, you know, he doesn't just want to rape me. He wants to  
3 kill me. If he gets me upstairs, he's going to kill me. So  
4 it was worse than she thought. But on the other side, I  
5 said, picture what you did to protect yourself. And she  
6 said, I -- you know what? He's surprised. He didn't think  
7 I'd fight him that hard. Now, she wound up with a basilar  
8 skull fracture, but she realized that she probably saved her  
9 life.

10 So the screen techniques are a very useful way  
11 in hypnosis of getting people to interact with their  
12 emotions. There's a colleague of mine at Stanford, John  
13 Barry, who's written papers about this, using the screen to  
14 help people with these nonepileptic seizures to control the  
15 seizures. So using screens is very common, clinically, with  
16 hypnosis.

17 Now, the movie theater technique used here, I  
18 think, was an attempt to put her in a position where she  
19 could try to access memories she had of what she saw from her  
20 house window but without being so frightened by the look she  
21 got from this guy and what the implications could have been  
22 for -- that she found out later for her neighbor, but also  
23 for her own family and for herself.

24 So he was saying, you're safe in a movie  
25 theater. And -- and Dr. Lynn was very worried and didn't

1 like the term "documentary." I actually think it was a good  
2 term because there's a difference between and movie and a  
3 documentary. You know, movies are things that are made up.  
4 Documentaries are films of real events. And I think what he  
5 was saying is, try and get your best recollection of the real  
6 event, of what really happened.

7           So if there is a power to suggestion, I think  
8 the use of the word "documentary" was a suggestion to her,  
9 just try and remember as clearly as possible what actually  
10 happened, what you actually saw. And it did succeed, as she  
11 reported, in helping reduce her anxiety. She did not feel as  
12 frightened.

13           And I do that every day with hypnosis. I get  
14 people to face things that are stressing them but keep their  
15 body comfortable so that you dissociate the mental stress  
16 from the physiological stress.

17           Q. And is that one of the reasons this method would be  
18 used in a forensic setting?

19           A. Yes, it would. Because often witnesses or victims  
20 are terribly upset and they have trouble just remaining calm  
21 and focused enough to do their best at recalling what they  
22 saw.

23           Q. Now, we have heard some discussion about imagination  
24 inflation. What is that?

25           A. Well, it's the idea that the more you imagine

1 something the more it starts to seem real. If you start  
2 thinking about it, you may be substituting real memories for  
3 the imagined memories, and the more you believe it and the  
4 more you talk about it, the more you start to think that its  
5 the real thing. And you pay more and more attention to it,  
6 so that can happen sometimes.

7 Q. But does the use of imagination, such as imagining  
8 self -- oneself in a theater or visualizing letters over  
9 someone's head, does that always lead to the creation of  
10 false memories?

11 A. No, it doesn't. I mean, imagining yourself being in  
12 a theater doesn't tell you anything about the movie you're  
13 about to see. You see lots of different movies in the same  
14 theater. So the theater image is one where you say you're  
15 safe and comfortable. You're going to observe an event, but  
16 it doesn't automatically contaminate the memory of the event  
17 itself.

18 Q. Is that true even when hypnosis is added to the  
19 mix?

20 A. Yes.

21 Q. Now, is it fair to say that there's a disagreement  
22 within the scientific community as to whether hypnosis can be  
23 used to refresh memory?

24 A. Yes.

25 Q. Is that a new controversy?

1 A. No. It's a very old controversy.

2 Q. How long has that controversy existed?

3 A. As long as I've been in the field, which is a good a  
4 45 years.

5 MS. OTT: May I approach?

6 THE COURT: You may.

7 Q. (BY MS. OTT) I'm showing you what's -- what has  
8 been marked as State's Writ Exhibit 8. Do you recognize  
9 that?

10 A. I do, indeed.

11 Q. And would you tell the Court what that is.

12 A. This is entitled The Scientific Status Of Refreshing  
13 Recollection By The Use Of Hypnosis. It was written by  
14 the -- a subworking group of the Council on Scientific  
15 Affairs of the American Medical Association and published in  
16 the journal of the American Medical Association in 1985.

17 I was a member of the panel that -- that worked  
18 on this particular document, and it was designed to evaluate  
19 the evidence, pro and con, on the effects of hypnosis in --  
20 on -- on memory, basically.

21 MS. OTT: The State offers State's Writ  
22 Exhibit 8.

23 (State's Writ Exhibit No. 8 offered.)

24 MS. LEPINGWELL: No objection.

25 THE COURT: All right. State's Writ Exhibit

1 Number 8 is admitted.

2 (State's Writ Exhibit No. 8 admitted.)

3 Q. (BY MS. OTT) And what findings came out of that  
4 panel?

5 A. It basically found that for certain kinds of non --  
6 what are called nonsense information, information that has no  
7 intrinsic logic, hypnosis added nothing at all to your  
8 ability to retrieve information. It had some effect for  
9 memory of meaningful and complex material, more like what  
10 would occur in a -- in a crime scene, for example.

11 And, basically, it also noted that part of what  
12 confounded our understanding of what effect hypnosis has on  
13 memory is that rarely do these studies control for the amount  
14 of retrieval. So the more information you retrieve, the more  
15 correct, but the more incorrect information you'll get. And  
16 most studies that studied hypnosis didn't control for how  
17 much was produced. So they'd say there's more incorrect  
18 information because the people in the hypnosis condition  
19 provided twice as much information, so there would be more  
20 incorrect, but the ratio was not necessarily any different.

21 So it suggested that there can be complications  
22 with hypnotically refreshed memory, not unlike the things  
23 that are in the Zani hearing. And it suggested that caution  
24 should be used when hypnosis is used in the forensic setting,  
25 that's it's no -- sometimes useful new information can -- can

1 be brought up. Sometimes false information, or  
2 confabulation, can occur. So it should be used with caution.

3 Q. And just to make sure. I can't remember if I asked.  
4 That was from 1985; is that correct?

5 A. That's correct.

6 Q. Okay. Now, there have been new scientific studies  
7 on hypnosis and memory since Ms. Flores's trial in 1999,  
8 correct?

9 A. Yes, there have.

10 Q. Are these newer studies consistent with what was  
11 already known about hypnosis and memory?

12 A. Basically, yes. I mentioned Dr. Lynn's study. It's  
13 a very good study, and that particular study in 2015 showed  
14 no effect of hypnosis on false -- on producing incorrect  
15 information. But, in general, the new studies on hypnosis  
16 and memory have not fundamentally changed what we knew back  
17 then about it.

18 Q. And so that would be consistent with what we knew  
19 prior to 1999?

20 A. That's correct.

21 Q. Okay. Now, one of the Defense experts testified  
22 last week that scientists like replication. Is it fair to  
23 say that many of the newer studies are replications of the  
24 earlier studies?

25 A. Yes. There hasn't been anything dramatically new or

1 different from what we've had before.

2 Q. And so the disagreement that existed in the  
3 scientific community in the 1980s and the 1990s as to whether  
4 hypnosis can be used to refresh memory, is that still the  
5 disagreement today?

6 A. That's correct.

7 Q. And are you aware that hypnotically refreshed  
8 testimony is admissible in 22 states and all the federal  
9 courts?

10 A. Yes.

11 Q. Now, many of the courts that allow admission of  
12 hypnosis use some sort of totality of the circumstances test,  
13 correct?

14 A. Yes.

15 Q. Okay. Why, in your opinion, is a case-by-case  
16 evaluation better than a per se exclusion on --

17 MS. LEPINGWELL: Objection. Relevance. It  
18 calls -- it calls for a legal conclusion, Your Honor.

19 THE COURT: All right. Response?

20 MS. OTT: I'm asking him why, as a hypnosis  
21 expert, evaluating each case would have merit rather than  
22 just excluding it.

23 THE COURT: I'll overrule that objection.

24 THE WITNESS: I'm sorry?

25 THE COURT: You may -- you may answer.



1 THE WITNESS: Thank you, Your Honor.

2 A. This issue came up, particularly, in the state of  
3 California with People v. Shirley where, for a while, it was  
4 a particularly egregious misuse of hypnosis in which somebody  
5 involved in the case hypnotized a witness with a pretty shaky  
6 story the night before she went on the stand, and her whole  
7 story changed. And so it was a beautiful example of the  
8 worst possible way to misuse hypnosis in the course of a  
9 trial. So the exclusion of that witness would have made  
10 perfect sense, but then the Court went on to a per se  
11 exclusion.

12 And I think the problem there is you take a  
13 continuum phenomenon and you make it a categorical one. So I  
14 think it is wise, and I thought the judge's opinion in the --  
15 in the original trial case was excellent. It was very  
16 balanced. He said to the -- to the jury, if you believe that  
17 her testimony was contaminated by the hypnotic experience,  
18 you should not take it into account, and if you don't, you  
19 should, which makes perfect sense to me. It's -- it's a more  
20 or less, not an all or none.

21 And I thought that the idea that any witness or  
22 victim who had been subjected to a hypnotic ceremony, whether  
23 or not it actually had any effect was forbidden from  
24 testifying just seemed unfair to me. It just -- you know,  
25 there are a lot of other reasons why people might alter their

1 testimony. Somebody might threaten them or their family. If  
2 we allow them to testify, the judge and jury takes that into  
3 account.

4 And so I think the phenomena, which are  
5 continuum phenomena, how much influence, how was the pers- --  
6 how did the person experience the hypnosis, did they produce  
7 new information, or is it useful information to evaluate and  
8 I think is a reasonable way to deal with the understandable  
9 concerns the courts have about hypnosis.

10 And I think simply saying that because some  
11 ceremony happening -- happened this person may not testify is  
12 just inconsistent with the actual psychological realities of  
13 the experience.

14 Q. (BY MS. OTT) Now, I would like to direct your  
15 attention to this case in particular. In preparation for  
16 your testimony today, I asked you to review some materials,  
17 correct, a video, a report prepared by Farmers Branch police,  
18 the trial testimony of Mrs. Barganier, the testimony from the  
19 Zani hearing, Dr. Lynn's affidavit, part of the response  
20 filed in this case, and some witness statements, and the Zani  
21 case. Does that sound correct?

22 A. It does.

23 Q. Okay. Now, after reviewing the hypnosis video, is  
24 it fair to say that you would have done some things a little  
25 differently from how Officer Serna did?

1 A. Yes.

2 Q. Did you see anything particularly fatal in the  
3 session?

4 A. No. I thought his -- his initial debriefing, which  
5 Dr. Lynn pointed out, should occur but, perhaps, could have  
6 been more detailed. It could have been more detailed.

7 I -- I didn't think -- you know, I -- I  
8 disagree with Dr. Lynn about the setting. You know, if I was  
9 worried about some guy murdering my neighbor and potentially  
10 murdering me, the safest place I'd be in is the police  
11 station. I mean, that's where I would want to be.

12 MS. LEPINGWELL: Objection to -- to this being  
13 about his subjective preference, Your Honor.

14 THE COURT: Overruled.

15 A. And so I -- I didn't think -- it is true that the  
16 the -- the standard in California, for example, would be not  
17 to have it in a police station, to have it in an independent  
18 professional's office. And, in general, I think that's  
19 probably better, that you don't feel that you're under  
20 pressure to produce information, but I didn't think in this  
21 case that was that bad.

22 Having a second person in the room is not ideal  
23 but her eyes were closed, and he said nothing. And I think  
24 he probably could not have influenced it. I typically  
25 will have -- if there are people that have the right to

1 witness it, I'll have them look through a one-way mirror  
2 rather than be in the room.

3 I thought, in general, the way he conducted the  
4 questioning was reasonable. He did not insert information  
5 except the three possible facial shapes, which I don't think  
6 reduces the field of possibility all that much. But he -- he  
7 was not -- I mean, I've seen situations where people doing  
8 hypnosis insert very specific questions that clearly are  
9 driving the witness in one direction or another. He didn't  
10 do that. So I didn't think it was an ideal use of hypnosis,  
11 but I didn't think it was terrible either.

12 Q. (BY MS. OTT) Now, did Officer Serna assess Mrs.  
13 Barganier's hypnotizability in this case?

14 A. No. He gave her some instruction, I think, about  
15 her fingers being stuck together. I'm not sure he ever  
16 actually tested it. He certainly did not give her the cutoff  
17 to end it. And so that would have been useful if he had --  
18 actually -- so he -- you can do this with someone who is  
19 rather hypnotizable, say, your fing- -- put your fingers  
20 together, and now you'll notice that they've been glued  
21 together, and you can't pull them apart. The more you try,  
22 the harder it will be. And for people who are hypnotizable,  
23 they'll experience that. They'll say, I can't pull my  
24 fingers apart, and then you give a cutoff signal and suddenly  
25 they can.

1                   It would have been useful if he'd followed  
2 through on that and actually allowed us to evaluate how she  
3 responded, but he didn't complete the sequence. So he did  
4 not measure hypnotizability.

5                   And, certainly, I -- from that point of view,  
6 I'm not sure whether, in fact, she is hypnotizable. She  
7 might well be. But it's conceivable that she went through  
8 this, but it wasn't hypnosis because she isn't hypnotizable.  
9 We just don't know.

10           Q.    Is there at least some evidence in the video that  
11 she may not have been hypnotizable?

12           A.    Well, it -- it didn't seem like such a profound  
13 experience to her. And, you know, nothing new -- you know,  
14 nothing new came up except for her noting eye color, brown,  
15 which was consistent with what she said before, dark.

16                   So, certainly, there was no dramatic flurry of  
17 new production. She didn't say, oh, my God. I can see it  
18 now and, you know, I see all these other things about him.

19                   There was no big dramatic increase in her  
20 production, which either could have been a real hypnotic  
21 recollection, or it could have been something she was  
22 confabulating. Neither of those things happened.

23           Q.    And do you recall Officer Serna asking her what  
24 level of hypnosis she achieved at the end of the session?

25           A.    Yes. And I think she said medium, something like

1 that. And, you know, Dr. Lynn is right. People have some  
2 idea, but they don't always. Sometimes people are very  
3 hypnotizable, and they don't remember what happened, and they  
4 say nothing happened, when, in fact, they've been talking to  
5 you for 15 minutes very emotionally about something. So her  
6 self-report is not unreasonable, but I wouldn't take it as  
7 resolving the issue.

8 Q. Now, to address confabulation as it applies to this  
9 case. Were there some times that you noticed Mrs. Barganier  
10 had the opportunity to confabulate but did not? If I'm -- if  
11 I'm wording that question --

12 A. Yeah.

13 Q. -- in the proper manner.

14 A. Well, certainly, she could have. He was open-ended  
15 enough that -- that if she had wanted to provide more  
16 details, she certainly could have, and she didn't. In fact,  
17 in a number of cases, she said, no, I can't see.

18 So as I understand it, her house was next door  
19 to the house where this happened. So she was sort of on one  
20 side of the car, and if she were going to confabulate, she  
21 would have had as clear an image of the passenger as she  
22 would have of the driver. But the passenger was farther away  
23 from her and on the other side of the car, which she  
24 commented on. That would be an occasion to confabulate. You  
25 could say, oh, now, I see him now, and I can see. But she

1 was noting limitations to what she could have seen at the  
2 time, which I took it as her not confabulating.

3 Q. And does this also show that Mrs. Barganier was not  
4 in a state where she was just willing to supply every detail  
5 to Police Officer Serna? I believe this would go towards her  
6 critical defenses.

7 A. Yes. I think she was evaluating what she was  
8 saying, and saying I -- when -- when she says, I can't see  
9 something, she's not confabulating. She's evaluating her  
10 ability to perceive something.

11 That's a kind of nonhypnotic, nonsuggestible,  
12 nonsuspension of evaluation or critical judgment kind of  
13 position that you see less of in people who are very  
14 hypnotizable. But whether she was or she wasn't very  
15 hypnotizable, she was using her critical judgment in saying,  
16 you know, I just can't see it.

17 Q. And how important is it to know what Ms. Barganier's  
18 beliefs and expectations about hypnosis were?

19 A. Well, I think that's important too. And Dr. Lynn  
20 and others have published a good deal on how the effect of  
21 expectation can influence what the nature of the hypnotic  
22 experience is. Although, in his early paper, it didn't turn  
23 out to matter very much. But it matters, and I would say  
24 that her expectation was not that it was truth serum, not  
25 that it was going to make her remember anything more, but

1 just that it would make her more comfortable while she made  
2 the effort to remember what she could about what happened.

3 So, in that sense, her expectation from the  
4 point of view of the Court's concern about her potentially  
5 confabulating was about as good as you could get. All she  
6 wanted was some relaxation while she did it, and she got  
7 that.

8 Q. And so it would be important to know whether  
9 Mrs. Barganier believed that she could refresh her memory  
10 using the hypnosis?

11 A. Yes.

12 Q. And we heard -- if we heard testimony from her that  
13 she did not believe hypnosis would help her remember more,  
14 how would that affect your opinion in this case?

15 MS. LEPINGWELL: Objection.  
16 Mischaracterization.

17 THE COURT: I think the question was if we had  
18 heard evidence?

19 MS. OTT: Yes.

20 MS. LEPINGWELL: Okay. Sorry.

21 THE COURT: Okay. All right. You may answer.

22 THE WITNESS: Yes.

23 A. So as a hypothetical, if she had heard evidence that  
24 hypnosis would not necessarily help her improve her memory,  
25 that would be helpful. It would protect against her feeling



1 that she has to just provide more information regardless of  
2 how true it is, or what we're calling release the -- lower  
3 the response criterion, saying, I'd better just produce  
4 something whether I really think it's true or not. She was  
5 not in that mode.

6 Q. (BY MS. OTT) And, in your opinion, are the risks  
7 associated with hypnotically refreshed testimony any greater  
8 than the risks associated with general eyewitness  
9 testimony?

10 A. Well, it depends on the kinds of issues that we've  
11 just been talking about. So I would say there is a continuum  
12 of those sorts of concerns, and they happen even in people  
13 who aren't hypnotizable and aren't hypnotized.

14 In the worst-case scenario, a very hypnotizable  
15 person being coerced into providing more information, no  
16 matter what -- you know, we know you can force people through  
17 all kinds of techniques to sign false confessions and things  
18 that aren't true. So in the worst-case scenario, hypnosis  
19 would add an edge to that. But it is a continuum from  
20 hypnosis on down to ordinary coercion of people to say things  
21 they don't believe.

22 Q. And can memory retrieval be triggered by different  
23 things, like sight, sound, touch, smell?

24 A. Yes, absolutely. All of those things provide a  
25 context that triggers recollection.

1 Q. Is that like what you were describing earlier about  
2 going back to your high school after 30 years?

3 A. That's correct. Yes.

4 Q. Is it possible that Mrs. Barganier walked into the  
5 court 13 months later, after the offense, and something about  
6 seeing Mr. Flores in person triggered the retrieval of her  
7 memory from that day?

8 A. It certainly is possible. I think it's a likely  
9 explanation for it.

10 Q. And completely independent from the hypnosis?

11 A. Yes. I don't -- my opinion is that it had nothing  
12 to do with the hypnosis, that it was the first time that she  
13 had had a face-to-face confrontation with him since that time  
14 13 months ago, and the -- the totality of her experience of  
15 him is what led to her identification.

16 Q. Is it significant that she did not pick anyone out  
17 of a photo line-up after the hypnosis session?

18 A. Yes, it is in two ways. She mentioned that the -- a  
19 police officer at the time of the ID said --

20 MS. LEPINGWELL: Judge, I'm sorry. I would  
21 just object to this line of testimony as he wasn't offered as  
22 an expert as to eyewitness identification.

23 THE COURT: Overruled. You can answer that.

24 A. So she recalled that a police officer said, if  
25 you're not absolutely certain, don't select anyone. And so

1 she was using her judgment, restraining herself from making  
2 an identification, whether she could or she couldn't. But  
3 there's a difference between seeing -- what I gather was an  
4 older picture of a person, from seeing them face-to-face at  
5 about the same distance he might have been when she saw the  
6 car across from her house.

7 So I think it showed that she was using  
8 judgment. She was evaluating her ability to make a decision.  
9 And the time when you would worry about hypnosis  
10 influencing somebody would have been the time immediately  
11 after the hypnosis session, when she's looking at the lineup,  
12 and she did not ID anybody then.

13 If she were falsely confident about her newly  
14 refreshed hypnotic recollection, I think it's likely that  
15 right after the hypnosis she would have said, yes, that's  
16 him, but she didn't.

17 Q. (BY MS. OTT) So would a suggestion that you might  
18 remember more or will remember more, would that last for 13  
19 months?

20 A. I think it's highly unlikely. There have -- there  
21 was a study that Martin Orne, who we talked about before, did  
22 in which they hypnotized a bunch of subjects, gave them  
23 postcards and said, mail one a day.

24 And they wanted to see how long the hypnotic  
25 instruction would last, and there were two kind of

1 interesting findings. One was it didn't last very long. It  
2 was like 24 days on average before people just stopped doing  
3 it. But the interesting thing was that just telling people  
4 to do it had as much of an effect as a hypnotic suggestion  
5 that they should to it. So there was nothing special about  
6 hypnosis in getting them to do it.

7 Q. Now, you mentioned at the start of the 705 hearing  
8 that there were three areas you planned to cover. Have we  
9 covered all of the areas that you --

10 A. If my memory serves, yes. I think the -- the three  
11 areas were some areas of disagreement with Dr. Lynn's  
12 testimony, which I think I have covered.

13 The second was, what's new? There's nothing  
14 that new about the research on either memory, eyewitness  
15 identification or hypnosis.

16 And the third was, did any of these things  
17 likely happen in this particular case? And I don't think  
18 they did. So I think I've covered those areas.

19 Q. Now, in your opinion, could Dr. Lynn have testified  
20 in 1999 to everything he testified to today with the  
21 exception of references to the post-1999 articles?

22 A. Yes, I think so. He was in pretty good shape back  
23 then. I think he could have.

24 MS. OTT: Pass the witness.

25 MS. LEPINGWELL: Judge, may we have just a very

1 brief recess, like 5 minutes?

2 THE COURT: Just 5 minutes.

3 MS. LEPINGWELL: Thank you.

4 (Court in recess, 3:25 - 3:30 p.m.)

5 (Open court, applicant present.)

6 THE COURT: All right. Back on the record.

7 Is everyone ready to proceed?

8 MS. LEPINGWELL: Yes, Your Honor. Thank you.

9 THE COURT: Proceed, Counsel.

10 **CROSS-EXAMINATION**

11 **BY MS. LEPINGWELL:**

12 Q. Good afternoon, again, Dr. Spiegel.

13 A. Good afternoon. I just want to start by talking  
14 about the things that you reviewed because it wasn't quite  
15 clear to me as the State asked the question.

16 So it's my understanding that you received some  
17 witness statements in this case, correct?

18 A. I think so, yes.

19 Q. And -- and to be very clear, those weren't witnesses  
20 to the crime, correct, those witness statements?

21 A. Yes.

22 Q. That's a yes, they were not?

23 A. That they were not witnesses --

24 Q. Okay.

25 A. -- to the crime.

1 Q. They were statements given by people that were in  
2 custody, in police custody subsequent to the crime. Were you  
3 informed of that?

4 A. I don't think they all were. I think -- maybe they  
5 were, but I -- that's not my memory.

6 Q. The statements of Myra Wait, does that ring a bell?

7 A. Yes. Yes. That was a girlfriend, I think.

8 Q. Yeah. The statement of Catarino Flores, the  
9 father?

10 A. The father, was he in custody?

11 Q. He was arrested in relation to this is my  
12 understanding. And -- and the statement of Richard Childs?

13 A. Yes. He was certainly in custody.

14 Q. Correct. And none of these -- were you aware that  
15 none of these people testified at trial?

16 A. I -- I don't recall.

17 Q. Okay. And you said that you were provided with a  
18 police report; is that accurate?

19 A. Yes. I think -- yes.

20 Q. Do you have that with you, because the State doesn't  
21 seem to know which report that was?

22 A. I'd have to look on my -- I don't have the paper.  
23 It will -- it will take, like, a few minutes for me to -- do  
24 you want to --

25 Q. Do you want to multitask?

1 A. All right. Yeah. I can multitask.

2 Q. I won't ask you anything too hard yet.

3 A. Okay. Thanks.

4 Q. But you had mentioned that you read the transcript  
5 from the Zani hearing, right?

6 A. Yes.

7 Q. Did they provide you with all of the transcripts,  
8 meaning Dr. Mount's testimony?

9 A. I don't recall. I --

10 Q. Sure.

11 A. -- don't think --

12 Q. You can take time to pull that up.

13 A. Yes. Thank you.

14 Q. Take your time.

15 A. Let's see what I have here. Zani hearing.  
16 Dr. Lynn's affidavit. Myra Wait's statement. Flores.  
17 There was -- there was a statement by Officer Serna.

18 Q. Uh-huh. That would be the prehypnotic -- the  
19 posthypnotic statement and prehypnotic --

20 A. Right.

21 Q. -- data?

22 A. And there was something about the -- there was a  
23 police report about what they found in the house, the  
24 gunshots and the hole in the wall and all that.

25 Q. Okay. So they gave you the police report --

1 A. Yeah.

2 Q. -- specifically that indicated what evidence was  
3 found in the house?

4 A. Yes.

5 Q. Okay. Now, with regards to -- and -- and is that --  
6 are those the only police documents that you received?

7 A. I'd say -- well, unless you consider the hypnotist  
8 document. He was a police officer, so Serna -- Officer  
9 Serna, so I had his -- his document --

10 Q. Okay.

11 A. -- which was his sort of summary of what -- what he  
12 did.

13 Q. Okay. Did the Prosecution show you something called  
14 investigative notes that was written by a Lieutenant  
15 Porter?

16 A. It does not ring a bell.

17 Q. Okay. And did they show you any of the composite  
18 sketches that were created by Ms. Barganier in this case?

19 A. I remember seeing one.

20 Q. Okay. Do you recall which date that was created  
21 on?

22 A. No, I don't.

23 Q. And with regards to the hearing testimony that --  
24 the trial testimony that the Prosecution gave you, do you  
25 mind checking to see if you got that testimony of



1 Dr. Mount?

2 A. I don't see it here, but let me look one other  
3 place, please. I'm sorry. If I may take just another  
4 minute?

5 Q. And you know what? Actually, Dr. Spiegel, I was  
6 just provided with a list of what the State provided to you.  
7 And to be clear, for the record, it does look like you  
8 received all of the transcripts from the Zani hearing.

9 A. Yes. I think I did, yes.

10 Q. Okay. So having read the transcript from the Zani  
11 hearing, and I believe you were also provided with a copy of  
12 the people's opposition to -- or motion to dismiss our  
13 application?

14 A. Yes.

15 Q. You're aware that the scientific method that was  
16 employed at the time of Mr. Flores's trial with Ms. Barganier  
17 is what is at issue here, not hypnosis in general?

18 A. Yes. It's what issues about the use of hypnosis  
19 could have been raised at the trial. Is that what you mean?

20 Q. Well, it's about the scientific method that was  
21 employed -- the -- the type of hypnosis and method of  
22 hypnosis that was employed at this trial.

23 A. All right. Well, the scientific method, now, I  
24 think of research when you say that.

25 Q. Sure.

1           A.    So -- so you're saying just what the method was that  
2 was employed?

3           Q.    Correct.

4           A.    Yes.  Okay.

5           Q.    Okay.  And the science that was relied on by the  
6 State at that time --

7           A.    Yes.

8           Q.    -- through -- which would mean through the testimony  
9 of Dr. Mount, their expert.

10          A.    Yeah -- well, but I think -- I think -- this may be  
11 a legal issue, but I think the issue is that Dr. Mount was  
12 called upon to present the scientific evidence.  But whatever  
13 his limitations or advantages were, I think I'm supposed to  
14 evaluate what scientific evidence was available at the time  
15 whether or not Dr. Mount actually adequately presented it.

16          Q.    But with regards to that specific method that was  
17 employed in this case?

18          A.    Yes.

19          Q.    So I just want to turn our attention to talk about  
20 memory and how it works, and you touched on this a little bit  
21 on direct.

22          A.    Right.

23          Q.    You agree that, as you've already stated, memory  
24 does not work like a video recorder, correct?

25          A.    That's correct.

1 Q. And it's a naive idea to think that a person can  
2 just play a memory back and see what happened originally,  
3 right?

4 A. Right.

5 Q. And because that's not the way memory storage works,  
6 as you were talking about?

7 A. Right.

8 Q. And that's not the way memory retrieval works,  
9 right?

10 A. Right.

11 Q. Because memory is influenced by subsequent  
12 experiences?

13 A. It can be.

14 Q. And it can be influenced by a person's  
15 expectations?

16 A. Yes.

17 Q. And it can be influenced by a person's associations  
18 or the nature of associations?

19 A. Well, associations can either influence what the  
20 memory is or how -- or how well you get to it.

21 Q. Okay. So just so we all understand, that means that  
22 memory is influenced by subsequent life experiences and  
23 expectations?

24 A. Well, if you say it is, it can be.

25 Q. Well, you had mentioned though that memory is also

1 influenced -- like, we don't have space in our brain to keep  
2 all of our memories intact, right?

3 A. Right.

4 Q. And so as we experience things, memories fade,  
5 right, because our brain can't possibly contain all of that  
6 information?

7 A. Well, aspects of memories fade. As I mentioned,  
8 there are multiple memory storage systems in the brain. And  
9 so sometimes what happens is your memory, for example, of how  
10 to ride a bicycle is retained, even though you don't remember  
11 the episode where your father tried to keep you upright on  
12 the bicycle when you were 6 years old. So they may be  
13 transformed. They may fade or they may just change, and we  
14 have different storage and retrieval mechanisms for different  
15 kinds of memories.

16 Q. Right. And let's be clear that that kind of memory  
17 is a memory about how to do something, like rote memory is  
18 different than a memory associated with an event.

19 A. Well, it's somewhat different, but not entirely.  
20 So, for example, I know of situations where a woman who was  
21 raped in an elevator can't remember anything about the rape  
22 but can't go near an elevator, so she has a kind of  
23 procedural memory even though she's having difficulty  
24 accessing the episodic memory.

25 Q. It's an associative memory?

1 A. Well --

2 Q. An association with the original?

3 A. Yeah. It's in association with the original even  
4 though she doesn't consciously remember the original.

5 Q. Okay. So let's talk about what influences the  
6 accuracy of memory. You'd agree that a critical factor for  
7 the accuracy of memory is the original encoding of the  
8 memory, correct?

9 A. Yes.

10 Q. And you did discuss that a little bit on direct with  
11 Ms. Ott. But what that means is what -- by encoding, is what  
12 happened at the time that the memory was encoded and  
13 originally stored, right?

14 A. Right. So storage is a related but different part  
15 of it, but you're right.

16 Q. Okay. So, for instance, if a person is distracted  
17 at the time of the event that the memory is being encoded,  
18 that would damage the material that's encoded, right?

19 A. It could well, yes.

20 Q. And another example would be something like weapon  
21 focus, where if you are focused on a specific thing during  
22 event -- an event, that might be what gets most encoded, not  
23 the surrounding circumstances, correct?

24 A. That's right. So you might give a beautiful  
25 description of the gun and virtually none of the assailant.

1 That's right.

2 Q. And in a situation like that, with distraction or  
3 some other intervening circumstance, the memory may not be  
4 stored at all, correct, as to the --

5 A. That's -- that's an extreme. If -- if they had some  
6 kind of experience of acquiring the information, I wouldn't  
7 say it wouldn't automatically not be stored at all. It might  
8 not be stored as well as if they were fully attending to  
9 it.

10 Q. Sure. And -- and that was an artic- -- an  
11 inarticulate question on my -- on my part.

12 So going back to the example of the weapon  
13 focus, if the person is focused on the weapon throughout the  
14 entire event, they may not have at all encoded the face of  
15 the perpetrator, correct?

16 A. That's the example with Loftus's work, yes.

17 Q. Right. And so in that situation, the face of the  
18 perpetrator, that memory would not have been stored at all if  
19 they're focusing on the gun?

20 A. Well, but, again, you're -- you know, you're taking  
21 what are continuum experiences and making them categorical.  
22 So it's possible it was not stored at all or just not stored  
23 very well.

24 Q. Okay.

25 A. And then, often, they'll tell you, well, I -- you

1 know, they'll give, you know, I think he had a beard or he  
2 didn't have a beard, but I don't remember anything else. So  
3 it might be stored more poorly, but I wouldn't agree that  
4 it's not stored at all.

5 Q. Okay. But you do agree that distraction at the time  
6 of the memory could damage the material as it's encoded?

7 A. Yes.

8 Q. And a memory must be encoded in order for it to be  
9 retrieved, right?

10 A. Right.

11 Q. So for --

12 A. Well, encoded and stored, right.

13 Q. Encoded and stored. So, for example, you can't  
14 retrieve a memory through hypnosis if you never had the  
15 memory in the first place, right?

16 A. That's right.

17 Q. There are also outside factors that can affect the  
18 accuracy of memory retrieval, right, such as pressure?

19 A. Pressure, yes.

20 Q. Meaning, pressure to report a memory?

21 A. Yes.

22 Q. So pressure to report a memory can degrade what we  
23 call response bias, correct?

24 A. Right.

25 Q. And just so we all understand --

1           A.    Well, it -- it -- it could, but it doesn't  
2 necessarily. That is, I -- we need to keep in mind that a  
3 witness can be pressured and refuse to accept the pressure.  
4 They may say, I know you want me to give you more  
5 information, but I don't have it.

6           Q.    Sure.

7           A.    Others could yield to the pressure.

8           Q.    Well, Dr. Spiegel, just to be clear, unlike Ms. Ott,  
9 I'm not going to ask you always, and I'm not going to ask you  
10 to qualify everything as always happening. I'm asking you  
11 could it happen.

12          A.    All right.

13          Q.    Okay.

14          A.    Well, in the previous question, you didn't use the  
15 word "could".

16          Q.    Okay. Well, I said can. But, you know --

17          A.    All right.

18          Q.    -- semantics. So response bias -- so we're all on  
19 the same the page -- is a person's willingness to report a  
20 thought or memory or a fantasy as a fact, right?

21          A.    That's correct.

22          Q.    And a person will lower their response bias if  
23 they're pressured to give an answer, right?

24          A.    Well, they'll -- they'll alter their response  
25 criterion. So if they're doing that, then they may say,



1 well, I had some thought that maybe he was wearing a blue  
2 shirt. So they'll say, yeah, it was a blue shirt when  
3 it's -- you know, it's a possibility. And sometimes that  
4 helps memory. Sometimes you don't have that clear a picture  
5 but what you think might be the case could actually be the  
6 case.

7           So, particularly, early in the investigation of  
8 a case, the police actually want all of the stuff that  
9 somebody will not wind up testifying about because it's  
10 probably not random. It may not all be correct, but it may  
11 be useful information.

12       Q.    Okay. But when pressured, a person is more likely  
13 to combine some guesses with their recollection to come up  
14 with memory, right?

15       A.    Well, they might, but they might not. It's more  
16 likely, and if there's no pressure. But it doesn't  
17 mean just -- even if there is pressure, it doesn't mean it  
18 will happen.

19       Q.    Okay.

20       A.    Some people will just say, no. Sorry. I don't  
21 remember.

22       Q.    The question is that, when pressured, a person is  
23 more likely to combine some guesses with their recollection  
24 to come up with a memory than when they're not pressured,  
25 correct?

1           A.    Yes.  But it -- there's sort of two parts to the  
2 equation.  One is the person doing the pressuring, and the  
3 other is the person being pressured.

4                        And so there are some people who, despite a  
5 whole hell of a lot of pressure, simply will not change their  
6 response criterion, and there are others who with very little  
7 pressure might.

8           Q.    So pressure to retrieve memories may cause a person  
9 to report as memories things that might not actually be  
10 memories, correct?  May.

11          A.    May, yeah.  It -- it's possible, yes.

12          Q.    And they -- pressured to retrieve memories can cause  
13 a person to report as memories things that might just be  
14 probabilities, right?

15          A.    That's possible.  But, again, that's how memory  
16 works, you know.

17          Q.    And pressure to retrieve memories can cause a person  
18 to report as memories things that might not be true at all?

19          A.    It's possible.  But I -- I just want to be clear.  
20 We're talking about a hypothetical here, right?  This is  
21 not -- you're not getting me to opine about what actually  
22 happened in this case at this point?

23          Q.    No.  I'm talking about memory in general.

24          A.    Fine.

25          Q.    Okay.  And as you said on direct, over extended

1 periods of time, memories tend to degrade, right?

2 A. Well, not always. Sometimes they -- they can be  
3 actually more intense if you do things that would tend to  
4 trigger them again. So if you go back to the same place,  
5 like going back to your old high school, or if you think  
6 about it or you talk about it with people, you may start to  
7 reconstruct them in a way that makes them more vivid, not  
8 less.

9 Q. Well, as we talked about, as time passes, new  
10 memories are laid down, right?

11 A. Yeah. But that -- you know, our brain is big  
12 enough. We store a fair amount of memory over a lifetime,  
13 and it -- you know, it isn't like, you know, the storage room  
14 in your garage where, you know, you put one more piece of  
15 furniture and there's no room for anything else. The brain  
16 doesn't work like that.

17 Q. Now, Dr. Spiegel, you recall testifying in State v.  
18 Moore, correct?

19 A. I -- I certainly do.

20 Q. And when you were asked in State v. Moore about  
21 whether memory degrades over time, you said that it does  
22 degrade over time, right?

23 A. Yeah, I -- I don't know if I said it does. I said  
24 it can and often does with --

25 Q. Because it tends to, right?

1 A. I may have.

2 Q. And you said that as time passes new memories are  
3 laid down, right?

4 A. I don't know. I think -- why don't you -- if you've  
5 got what I said --

6 Q. Sure.

7 A. -- please, let me see it, and I'll see if I agree.

8 MS. LEPINGWELL: I'll mark this as Appellant's  
9 Exhibit 62. May I approach, Your Honor?

10 THE COURT: You may.

11 Q. (By Ms. Lepingwell) And I'm going to draw your  
12 attention to the bottom of page 15 here.

13 A. Uh-huh. All right.

14 Q. And so you were asked the following question and you  
15 gave the following answer on page 15, line 21.

16 Question: Has it been shown that the passage  
17 of time affects the accuracy of memory?

18 Answer: Yes. It's well known that over  
19 extended periods of time memories do tend to degrade. So  
20 while you can recall correct information, as time passes and  
21 new networks of associations, new memories are laid down.  
22 Gradually memory of events does begin to fade.

23 A. No.

24 Q. That's what you said, correct?

25 A. Right. But it was in the context of what I had said

1 earlier, both in this trial and here, which is that actually  
2 memories increase, particularly shortly after an event, when  
3 repeated recall efforts will lead to increased correct  
4 recollection of what happened.

5 Q. And you -- I -- I was going to get to that, and I  
6 will touch -- come back to it later, but you're aware that  
7 there are studies involving memory and cognition that show  
8 that memory actually begins to degrade very quickly after the  
9 event, correct?

10 A. I don't know -- I don't know what you're referring  
11 to.

12 Q. So you're not familiar with any of these Innocence  
13 Project studies on eyewitness identification and how memory  
14 degrades starting immediately after the events that --

15 A. Well, the Innocence Project is not a  
16 research operation. It's a very valuable thing to try and  
17 help people who have been wrongly convicted, but that's not  
18 research.

19 Q. Okay. Well, cited by the Innocence Project  
20 studies -- cited by --

21 A. Well, I don't know what studies you're talking  
22 about, but you'd have to ask me to talk about them, and I  
23 would.

24 Q. Okay. So my -- the question is -- is, then you're  
25 not familiar with studies that show that memory begins to

1 degrade immediately after the event and that it degrades  
2 mostly within the first few hours?

3 A. No.

4 Q. So let's turn to the topic of hypnosis. Now, you  
5 were talking earlier about hypnotizability. And just to be  
6 clear, you -- you believe, I mean, you've stated that  
7 three-quarters of the population is at least somewhat  
8 hypnotizable, right?

9 A. Right.

10 Q. And that 10 percent --

11 A. The adult -- the adult population.

12 Q. Of the adult population. And that 10 percent of the  
13 population is highly hypnotizable --

14 A. Right.

15 Q. -- correct?

16 So let's talk a little bit about highly  
17 hypnotizable people. You believe that highly hypnotizable  
18 people can experience aspects of hypnosis spontaneously,  
19 right?

20 A. Right. Well, most people can.

21 Q. So -- and -- and what you mean by that is that  
22 people can slip subconsciously or spontaneously in and out of  
23 hypnotic states, right?

24 A. That's correct.

25 Q. So the problem with people that are highly

1 hypnotizable is not going into hypnosis, but it's actually  
2 spontaneously, unwillingly slipping into hypnosis?

3 A. That can happen, right.

4 Q. And, in fact -- and -- and you believe that that  
5 happens when people -- highly hypnotizable people, or other  
6 people, while, for instance, they're skiing or --

7 A. Yes.

8 Q. -- or playing football?

9 A. Watching movies, reading a good novel, yes.

10 Q. So people that have that ability tend to use it  
11 frequently?

12 A. Right.

13 Q. And slipping into -- strike that.

14 And, according to you, in order to know the  
15 degree of someone's hypnotizability, you have to first perform  
16 a test on them, right?

17 A. Right.

18 Q. Otherwise, you're left to rely on the person's  
19 subjective perception of how hypnotized they are?

20 A. Pretty much or observe their behavior if they're in  
21 some kind of hypnotic experience and try and make an  
22 inference about it.

23 Q. Now, you spoke on direct a little bit about the  
24 definition of hypnosis.

25 A. Uh-huh.

1 Q. And you have your own definition of hypnosis,  
2 right?

3 A. Yes, which is a whole lot like the one that is the  
4 official position of the -- of Division 30.

5 Q. Sure. And I just want to go over that. I'm -- I'm  
6 not --

7 A. Sure.

8 Q. -- challenging it. Your definition of hypnosis is  
9 that there are three elements of hypnosis, correct?

10 A. Right.

11 Q. Absorption, dissociation and suggestion, correct?

12 A. Suggestibility, yes.

13 Q. Suggestibility. And the idea is -- with regards to  
14 suggestibility, is that when hypnosis is induced, the subject  
15 becomes increasingly responsive to the suggestions of the  
16 hypnotist?

17 A. Well, they're less likely to critically judge and  
18 evaluate the suggestions of the hypnotist or the context in  
19 which it's occurring or who the person is or what their  
20 motivation is in asking you to do what they're doing.

21 So the -- the three elements actually kind of  
22 interact in the sense that you're reducing the context or  
23 conflict detector that says, well, you know, should I really  
24 do this or should I think about what the consequences are.  
25 So you're narrowing your focus of attention on just what the



1 person is asking you to do, not what it means if you do it.

2 Q. Uh-huh.

3 A. And you are disassociating, or putting outside of  
4 conscious awareness, those sorts of considerations at the  
5 same time which makes you more open to input from someone  
6 else.

7 Q. And makes you more suggestible?

8 A. Yes.

9 Q. And what that means is that the subject becomes more  
10 responsive to both explicit and implicit suggestions,  
11 right?

12 A. Yes.

13 Q. And that's because during the process of hypnosis,  
14 the subject, as you said, is invited to suspend critical  
15 judgment?

16 A. Yes.

17 Q. And to accept rather than question the sugges- --  
18 the suggestions that are given to them, right?

19 A. That's right.

20 Q. Such that hypnosis causes the subject to experience  
21 heightened responsiveness to social cues, right?

22 A. Yeah. You're quoting something I wrote. It's very  
23 good.

24 Q. Well, I just want to make sure I got your words  
25 right.

1 A. Yeah.

2 Q. So a hypnotized person is vulnerable to both overt  
3 and subtle suggestions specifically regarding the content of  
4 their memory?

5 A. Right.

6 Q. Meaning that the manner in which a question is  
7 framed can influence the response a hypnotized subject will  
8 give to the question, right?

9 A. Again, it's can. It's a possibility, yes.

10 Q. Okay. And the manner in which a question is framed  
11 can even produce a response when there is actually no memory,  
12 right?

13 A. That can happen, yes.

14 Q. Which is why a hypnotist should, as we were talking  
15 about, avoid questions that are leading, for instance?

16 A. Yes.

17 Q. And why they should avoid questions about specifics  
18 when questioning a victim or a witness?

19 A. Well, you can question about specifics. You should  
20 not state or suggest the specifics. You set the scene and  
21 ask them what's happened. You don't sort of say, you know,  
22 how tall was the fat man when he did X or something like  
23 that.

24 Q. Well, in this State's Writ 8, the Scientific Status  
25 of Refreshing Recollection by the Use of Hypnosis, the panel

1 that you worked on had a set of recommendations, right?

2 A. Yes.

3 Q. And one of the recommendations in that is to avoid  
4 questions about specifics when questioning a victim or a  
5 witness?

6 A. Well, no. I don't think -- if you can point to the  
7 specific phrase.

8 Q. Sure.

9 A. There's nothing wrong with asking about specifics as  
10 long as you don't suggest them.

11 Q. Well, so at the -- the second column, the second  
12 point --

13 A. Which -- which page are we at?

14 Q. I'm sorry. The last page, 1923.

15 A. Uh-huh. Okay.

16 Q. The second column, the second --

17 A. Second point.

18 Q. -- point. And I'll go -- the second question  
19 starting with, regardless. It states: Regardless of the  
20 specific procedure used to focus the --

21 A. Yes.

22 Q. -- the subject's attention in hypnosis on the events  
23 to be remembered, the hypnotist should elicit at least one  
24 free narrative recall first and avoid any questions about  
25 specifics.

1           A.    Well -- all right.  So the operative word there is  
2 "first."  So, yes, initially, you set the stage and ask them  
3 about it.  And you can then follow up with specific  
4 questions, but that's not where you start.

5           Q.    Okay.  But the point is, is that every word matters  
6 when you're speaking with a subject under hypnosis, right?

7           A.    Yeah.  But let me see.  And on the next column, it  
8 says: After obtaining unpressured free recall in hypnosis,  
9 it may be necessary to ask more specific but nonleading  
10 questions.

11          Q.    Okay.

12          A.    So --

13          Q.    Sure.  And so -- but the idea is -- we know with  
14 regards to nonleading questions and the fact that somebody  
15 that is subject to hypnosis is more suggestible, is that you  
16 should be careful.  I mean, that every word matters, like,  
17 word choice matters, right?

18          A.    Yes.

19          Q.    So let's talk about some of the potential outcomes  
20 when using hypnosis to refresh recollection.

21                   First, hypnosis can produce memories that  
22 aren't substantially different from nonhypnotic memories,  
23 right?

24          A.    Yes.

25          Q.    Hypnosis can also yield memories that are more

1 inaccurate than nonhypnotic memories, right?

2 A. Well, I should say that the research literature does  
3 not support that conclusion, that the research literature  
4 says that the relative accuracy of hypnotically produced  
5 memories when you control for the amount of overall  
6 productivity is no better but no worse than just regular  
7 recall.

8 Q. Okay. But the question was: Is -- hypnosis can  
9 yield memories that are more inac- -- more inaccurate --

10 A. Well.

11 Q. -- than nonhypnotic memories?

12 A. Well, we've got to be careful what we're talking  
13 about here. Anything is possible, right? But if you're  
14 asking me what the scientific literature says is likely to  
15 happen, the answer is that that's not true. Hypnosis is not  
16 likely to produce any greater proportion of inaccurate  
17 memories than any other interrogation technique.

18 Q. Well, let's actually turn back to State's Writ 8,  
19 this Scientific Status of Refreshing Recollection.

20 A. Sure.

21 Q. And let's look at page 1921, where there's a subject  
22 there called -- or paragraph that starts, Efficacy Of  
23 Hypnosis To Refresh Memory.

24 A. Right.

25 Q. And what's stated there is, review of the scientific

1 literature indicates that when hypnosis is used to refresh  
2 recollection, one of the following outcomes occurs:

3 One, hypnosis produces recollections that are  
4 not substantially different from nonhypnotic recollections,  
5 which is what we just talked about.

6 Two, it yields recollections that are more  
7 inaccurate than nonhypnotic memory, which is what I was just  
8 asking about.

9 Or, most frequently, three, it results in more  
10 information being reported, but these recollections contain  
11 both accurate and inaccurate details, right?

12 A. Right.

13 Q. So those are the possible outcomes when using  
14 hypnosis to refresh recollection?

15 A. Right. But that's different from the question you  
16 asked me. Those are all possible. But overall, the use of  
17 hypnosis does not result in a higher proportion of inaccurate  
18 recollection than other retrieval techniques. So it can  
19 happen in other retrieval techniques. It can happen with  
20 hypnosis, but higher proportion of inaccurate recollection is  
21 not a characteristic of hypnosis.

22 Q. Dr. Spiegel, we're speaking specifically about  
23 hypnosis right now and the possible outcomes of using  
24 hypnosis to refresh recollection.

25 And so the question was whether it could yield

1 information, whether -- and -- and what you stated here in  
2 this paper is that it can yield memories that are more  
3 inaccurate than nonhypnotic memories, right?

4 A. Than nonhypnotic memories. It -- it can. In any  
5 given case, someone who is either hypnotized or who is not  
6 hypnotized can yield inaccurate memories, but the likelihood  
7 of it happening when someone is hypnotized is no different  
8 than it is when someone is not hypnotized.

9 Q. But you're not taking -- you're not disagreeing with  
10 the position that you take in this paper that I just read out  
11 of?

12 A. Well, but there, it's saying one of three things can  
13 happen.

14 Q. Uh-huh.

15 A. It doesn't say which is more likely to happen.

16 Q. That wasn't my question.

17 A. Those things can happen. Okay. I just want to make  
18 it clear that it's no more likely with hypnosis than it is  
19 without hypnosis.

20 Q. Right. In fact, what this says is -- the study  
21 says, is that: Most frequently hypnosis results in more  
22 information being reported, but these recollections contain  
23 both accurate and inaccurate details.

24 A. That's fine. That's true.

25 Q. So, in general, hypnosis doesn't increase the

1 accuracy of recollection for general information you're  
2 asking people to report?

3 A. Right.

4 Q. Now, we talked a little bit about -- or you talked a  
5 little bit about confabulation on direct. And could you just  
6 give us your definition of confabulation?

7 A. Well, confabulation is filling in the blanks. It's  
8 basically providing information that is not correct when  
9 you're being asked to provide information about something you  
10 should know something about.

11 Q. So it's essentially coming up with a story that is  
12 false, and I'm not saying inadvertently, but --

13 A. Right, not necessarily.

14 Q. Okay.

15 A. Sometimes people think it's right, and it isn't.

16 Q. And so -- and confabulation is one of the possible  
17 risks of hypnosis?

18 A. Yes.

19 Q. So it's possible for hypnotized subjects to come up  
20 with stories that are false, right?

21 A. Yes.

22 Q. It's also easier to confabulate in a situation where  
23 the subject doesn't have a real memory to push aside, like  
24 it -- the memory was never encoded in the first place, right?

25 A. That's possible. Is it easier? Yeah, I guess it's



1 possible, but it can happen either way.

2 Q. For instance, if you never actually got a good look  
3 at somebody's face?

4 A. It's possible.

5 Q. Now, another effect of hypnosis is that the  
6 subject's confidence about their recollection tends to  
7 increase, right?

8 A. That's correct.

9 Q. And that occurs even though hypnosis doesn't change  
10 the accuracy of the memory, right?

11 A. Right.

12 Q. So people who have been hypnotized tend to think  
13 that what they're reporting is more accurate even though the  
14 actual rate of accuracy of memory may not have increased at  
15 all?

16 A. That's correct.

17 Q. That's one of the problems of hypnosis, right?

18 A. Potential problems, yes.

19 Q. Potential problems. So the sub- -- so the potential  
20 problem is that the subject can become more confident than  
21 they should be of their recollection that may actually be a  
22 fantasy?

23 A. Yeah. Or, again, somewhere in between. It may --  
24 you know, the -- the alternative may not be a total fantasy  
25 or inaccurate memory but, you know, a somewhat enhanced

1 memory that they are more confident about.

2 Q. Right. And that can happen even if misleading  
3 questions aren't used by the hypnotist, right?

4 A. It can happen, yes.

5 Q. So to summarize what we've discussed about hypnosis  
6 so far, hypnosis can increase inaccurate responses to leading  
7 questions, right?

8 A. Well, no. That -- that's -- that's not a jaundiced  
9 summary. What I'm saying, it can increase both inaccurate  
10 and accurate recollections, and the proportion is not  
11 different from that of general retrieval efforts.

12 Q. So hypnosis can -- I'm not saying always, but it can  
13 increase inaccurate responses to leading questions?

14 A. No. It does not change the accuracy rate.  
15 You're -- I know what you're trying to do, but I don't agree  
16 with it.

17 Q. Well, it can -- okay. So let me rephrase the  
18 question or add something to that. It can increase the  
19 accurate -- increase inaccurate responses to leading  
20 questions without a change in confidence. Do you agree with  
21 that?

22 A. It can increase inaccurate responses to leading  
23 questions --

24 Q. Without a change in confidence.

25 A. Yeah, that could happen. Yes.

1 Q. It can increase the subject's confidence in their  
2 memories without affecting the accuracy?

3 A. Yes.

4 Q. Or it can increase errors while also falsely  
5 increasing confidence, right?

6 A. It could happen.

7 Q. You agree that the statement "I'm one hundred  
8 percent certain" is an indication of confidence, right?

9 A. I'm a hundred percent certain of that, yes.

10 Q. So before we talk about the facts of this case, I  
11 want to talk about something that you -- you mentioned on  
12 direct. And, specifically, it's the idea -- let me just make  
13 sure I don't misquote you. The idea that memory sometimes  
14 gets better with time, and that -- and if -- if I understood  
15 it correctly, sometimes it gets better with time because of  
16 repeated recall; is that right?

17 A. Yes. Repeated recall efforts, yes.

18 Q. And is that the same as the concept of hypermnnesia?

19 A. Yes.

20 Q. Okay. And so you were -- you took issue -- well,  
21 let me strike that because I don't want to misquote you.

22 Have you done any recall studies?

23 A. Not in a long time, no.

24 Q. Okay. Are you aware with -- with the more recent  
25 studies on the accuracy of repeated questioning and repeated

1 attempts to recall, such as Lampinen's 2003 study in the  
2 Applied Cognitive Psychology Journal?

3 A. I don't know that study, no.

4 Q. Are you aware of the Thomas, Bulevich and Loftus  
5 study from 2003 in memory and cognition that found that the  
6 proportion of false memories increased with repeated  
7 imagination?

8 A. Well, I'd have to look at that. I know a lot of  
9 Loftus's work. I -- she tends to inject misdirecting  
10 information which would then contaminate the repeated recall  
11 effort. So I don't know what -- the specific design of that  
12 study. But, in general that is what her studies do, and she  
13 overplays the implications of that.

14 Q. What about Henkel's study from 2004 called erroneous  
15 memories arising from repeated attempts to remember in the  
16 Journal of Memory and Language? Are you familiar with that?

17 A. No.

18 Q. And what about McDermott's study from 2006 in Memory  
19 and Cognition called paradoxal effects of testing, repeated  
20 retrieval attempts enhance the likelihood of later accurate  
21 and false recall?

22 A. Yeah. Well, that's what I was saying that -- that  
23 as you produce more information, some will be true and some  
24 will be false. And none of these studies, it sounds like,  
25 have anything to do with hypnosis.

1 Q. Well, but you were talking earlier about repeated  
2 recall, right? I mean, you talked about that on direct?

3 A. Yeah. Repeated recall is a legitimate discussion  
4 for us. I'm just pointing out that it has nothing to do with  
5 hypnosis.

6 Q. So let's turn to the facts of this case. It wasn't  
7 quite clear to me, and maybe just because I misunderstood,  
8 whether you believed that Ms. Barganier was not hypnotized or  
9 low hypnotizable. Could you clarify your position on that?

10 A. Well, I can't know for sure. She seemed to  
11 demonstrate some, but not a lot of hypnotic phenomena, and it  
12 wasn't formally tested. So I'm guessing. I would have to  
13 guess that she may have had some kind of hypnotic response.  
14 It certainly was not intensive, dramatic, and we just don't  
15 know. So I'd say it's possible, but I don't know.

16 Q. Okay. So let's just go through some of the things  
17 that would indicate that she was or that it might have  
18 actually had an impact on her. So she reported it being,  
19 like, feeling medium, right, that it was a medium experience  
20 for her?

21 A. Right. But she has -- as was pointed out, she  
22 has -- she has nothing to compare it with.

23 Q. Right. But she had asked for the hypnosis to be  
24 conducted?

25 A. Yes, which doesn't say anything about her

1 hypnotizabilty.

2 Q. No, it doesn't.

3 A. I see people every day who ask for hypnosis and  
4 aren't hypnotizable.

5 Q. It indicates a -- it indicates a knowledge of what  
6 hypnosis can do for you, though?

7 A. Well, some knowledge, yeah.

8 Q. And she seemed pretty confident in her feeling of  
9 medium when she was asked?

10 A. I don't know if she was confident or not.

11 Q. Well, she didn't hesitate in responding, right?

12 A. Well, I can't tell from her written transcript  
13 whether she did or she didn't.

14 Q. Did you see the --

15 A. Oh. This was on the video, you mean --

16 Q. Yes.

17 A. -- when he asked her at the end?

18 Q. Yes.

19 A. Yeah. Yeah. No, she didn't hesitate.

20 Q. Okay. And she was speaking in the present tense  
21 while she was being asked to recall a past event, correct?

22 A. Right.

23 Q. And that's a sign of being under hypnosis?

24 A. That can be, although I've been involved in cases  
25 where people sometimes do that even when they're not, when

1 nobody thinks they could possibly be hypnotized. So it -- it  
2 can be an indication. That's a reasonable thing to point  
3 out, but it doesn't prove it.

4 Q. Well, and in Moore you testified that the witness  
5 there was not hypnotized because she was speaking in the past  
6 tense?

7 A. Yes. As I said, it's one indication, but I've seen  
8 circumstances where that doesn't give you the whole story.

9 Q. And you saw that -- on the video, that in the  
10 posthypnotic interview, Ms. Barganier was cheerful?

11 A. Yes.

12 Q. So that indicates she had an emotional reaction to  
13 the process, right?

14 A. Right.

15 Q. And it indicates that she was reliving this event?

16 A. No. Reliving -- it could be, but it could also be  
17 that she's thinking about it and having the emotions that you  
18 would understand, her neighbor was dead, she felt threatened,  
19 and you could cry about that without being hypnotized.

20 Q. Okay. So -- but let's just be clear. She had an  
21 emotional reaction in this case?

22 A. Yes.

23 Q. And as you testified in Moore, a lack of emotion on  
24 the part of the victim there showed that they were not having  
25 a response to the hypnosis?

1           A.    I -- I don't recall testifying to that in Moore. I  
2 may have, but...

3           Q.    So, in Moore, you were asked, on page 65, line 18 --  
4 and this was on cross-examination --

5           A.    Uh-huh.

6           Q.    -- so it might not be the clearest question. But  
7 the question is: You're not sure what she was, and you base  
8 upon that fact that there was -- and she used -- spoke in the  
9 past tense at times?

10                    Answer: Yes. Through most of it, she spoke in  
11 the past tense. She maintained historical perspective. She  
12 didn't seem to respond very strongly emotionally to the  
13 memories.

14                    And that's what you based your opinion on.  
15 Those -- those factors are what you based your opinion on in  
16 Moore that the victim there was not hypnotized, right?

17           A.    Let me see. Yeah. Well, I was -- let's see. Yeah.  
18 So part of it was also that she wasn't apparently having  
19 somatic sensations. This was a situation of a woman being  
20 raped.

21           Q.    Uh-huh.

22           A.    And so it was also that she was not having the  
23 somatic sensations of being raped, which people do when they  
24 relive it. So that -- that -- I got into that on the next  
25 page.



1 Q. Okay. So but -- so but the things that you  
2 considered in that case to show that she wasn't -- at least  
3 some of the things that you considered in that case to show  
4 that she wasn't hypnotized were that she was speaking in the  
5 past tense and she wasn't having an emotional reaction.

6 A. And a physical reaction.

7 Q. And a physical reaction. But in this case, we see  
8 that Ms. Barganier is having an emotional reaction, right?  
9 She's tearful?

10 A. Yes.

11 Q. And she's speaking in the present tense, correct?

12 A. Some of the time.

13 Q. Yeah. And after the hypnosis, for the first time,  
14 she claims now that she is scared, correct?

15 A. No. She asked for the hypnosis because she was  
16 scared.

17 Q. Well, what are you basing that on?

18 A. She -- because she wanted help controlling her  
19 anxiety about the memory. That's why she requested the  
20 hypnotic experience, and --

21 Q. Dr. Spiegel --

22 A. -- that was before the hypnosis.

23 Q. -- what in the record are you basing that on?

24 A. I'd have to look through it, but there was somewhere  
25 where she said that what she wanted from the hypnosis was to

1 help her anxiety matter, and we've discussed this and agreed  
2 to it.

3 Q. Okay. So she had -- she -- she asked -- she had  
4 indicated that creating a composite made her feel anxious,  
5 right?

6 A. That may be.

7 Q. That the process of going through making a composite  
8 made her anxious, correct?

9 A. Yes. That may be, yeah.

10 Q. And then after this, when she -- in the  
11 posthypnosis, she claims to be scared, right?

12 A. Yes.

13 Q. She says that?

14 A. Yes.

15 Q. Okay. And that, again, would indicate that she's  
16 sort of relived this event in her mind?

17 A. Well, she remembered it, but you just pointed out  
18 that she was scared when she did the composite, which nobody  
19 is claiming was a hypnotic experience.

20 Q. Well, I actually claim that she was anxious from  
21 doing the composite.

22 A. And the difference being -- anxiety is just scared  
23 about a lot of things. Fear is scared of something in  
24 particular.

25 Q. Okay.

1 A. So she was --

2 Q. But there is a distinction.

3 A. I don't think so.

4 Q. Well, we can agree to disagree.

5 A. All right.

6 Q. She nodded her head, yes, when she was asked by  
7 Officer Serna at the end if she saw all that she described,  
8 right?

9 A. I don't remember, but she may well have.

10 Q. And that, again, would indicate that she was  
11 reliving this memory?

12 A. Well, was picturing it, anyway. I don't know about  
13 reliving it.

14 Q. Now, you said on direct that there wasn't really  
15 much -- there wasn't really much that she added or there  
16 didn't seem to be -- this didn't seem to be a significant  
17 event, right? I don't want to misquote you, which is why I'm  
18 looking through my notes here, so if you want to correct me  
19 on that.

20 A. Could you restate the question? I'm having -- I  
21 want to make sure.

22 Q. Sure. I believe you stated on direct something  
23 along the lines of how she did not recall much more through  
24 this process?

25 A. Oh. Yes, that there was not much, that the only new

1 piece of information she came up with was brown eye color.

2 Q. Okay. And the -- if I'm -- this is based on my  
3 understanding on what you've reviewed. You were not shown  
4 the initial description that she gave on the date of the  
5 offense, right?

6 A. I don't remember. There was a long police report,  
7 and it may have been in it. I don't recall. I did read a  
8 description that she gave, particularly about eyes. He had  
9 nice eyes or something.

10 Q. I just want to be totally clear, Dr. Spiegel, and  
11 I'm not trying to be **facetious** here, but the list that the  
12 State gave me of the items that you looked at does not  
13 indicate that you looked at any police report.

14 A. I -- I -- well, I don't know, but I don't -- I do  
15 recall reading a description.

16 Q. Oh. Maybe it's in the -- it's in the hypnosis  
17 report written by Officer Serna. Is that --

18 A. Well, I certainly read that, and -- and I -- and I  
19 saw what she said before. But I recall reading -- she --  
20 maybe it was her deposition or her testimony that I read.

21 MS. LEPINGWELL: May I approach, Your Honor?

22 THE COURT: You may.

23 Q. (BY MS. LEPINGWELL) Office- -- Dr. Spiegel, I'm  
24 approaching you with what's already been marked as  
25 Appellant's Exhibit 10.

1 A. Uh-huh.

2 Q. Can you please tell me, have you been shown this  
3 document before?

4 A. No. I don't think I saw this one. I think I was  
5 recalling her testimony.

6 Q. Okay.

7 A. Because I did read her testimony about it.

8 Q. And if you will, just read the last paragraph on --  
9 the first page and the first paragraph -- or the only  
10 paragraph on the second page to yourself.

11 A. Okay.

12 Q. And -- and so you were not shown this, right?

13 A. No. That's right.

14 Q. And in this, this Applicant's Exhibit 10, indicates  
15 that Ms. Barganier originally described the Volkswagen Bug as  
16 being yellow, correct?

17 A. Right.

18 Q. And so if you recall, during the hypnotic session,  
19 she talks about there being waves, and she waves her hand  
20 even on the Volkswagen Bug, if you recall from the video?

21 A. Oh. From the video, not from this?

22 Q. Yes.

23 A. Yeah. Yeah. Uh-huh.

24 Q. And she talks about the Volkswagen Bug being purple  
25 and having a pink top, right?

1 A. Yes.

2 Q. And then she also adds that the driver of the car --  
3 oh. Well, just let me back up.

4 She states in this, what I've shown you here,  
5 that the driver of the car had long brown hair, correct?

6 A. Yes.

7 Q. And then, in the hypnotic session, she says the  
8 driver of the car had blonde hair. Do you remember that?

9 A. I think so, yes.

10 Q. And, here, she mentions nothing about the color of  
11 the driver's eyes, right?

12 A. That's correct.

13 Q. But she adds during the hypnotic session that he has  
14 blue eyes?

15 A. Yes.

16 Q. She also adds, when asked about the shape of his  
17 face, that he has an ovalish face, right?

18 A. I -- I think so. I don't --

19 Q. In the hypnotic session?

20 A. I don't remember. She may have.

21 Q. Okay. And you have no reason to doubt that,  
22 right?

23 A. No.

24 Q. And in the hypnotic session -- so sorry. I'm  
25 flipping to the second page of this here, Ms. Barganier

1 describes the passenger as a white male, right, with dark  
2 hair -- darker hair than the driver, almost black, right?

3 A. Yes.

4 Q. She doesn't mention anything about the passenger's  
5 eyes?

6 A. Right, but we don't know that this is a complete  
7 examination of her memories at the time.

8 Q. Sure. I mean, but we're talking about information  
9 that's different or added, right?

10 A. Well, but we don't know that it was added. It might  
11 be that if the police officer interviewing her had asked her  
12 for more information, she would have told him that then.

13 Q. Well, Dr. Spiegel, I mean, you talk about the  
14 importance of corroborating evidence, right?

15 A. Right.

16 Q. So there's also something important about  
17 contradictory evidence, right?

18 A. Right. And I'm saying this could be, but we also  
19 don't know that this is her complete recollection.

20 Q. Okay. Well, if Ms. Barganier testified that this is  
21 what she told office- -- Lieutenant Porter when she met him  
22 that day, you have no reason to doubt that, that this is  
23 complete, right?

24 A. No. But if she testified, this was -- this was my  
25 complete recollection of the event, that would be different.

1 Q. Okay. Well, let's -- let's move on. Another thing  
2 that Ms. Barganier added was that the driver's -- the  
3 passenger's eyes were brown, right, and she did not say that  
4 in the prehypnotic interview?

5 A. Dark. Somewhere she said they were dark. I don't  
6 remember where.

7 Q. And you actually stated on direct that she said she  
8 made eye contact with the passenger, right, and that that  
9 made her fearful?

10 A. Yes.

11 Q. Okay.

12 A. Or that he made eye contact with her, yes.

13 Q. And you watched the video, right?

14 A. Yes.

15 Q. And, actually, maybe what I'll do right now is draw  
16 that up so we can hear exactly what she said in the  
17 prehypnosis statement.

18 (Video clip played.)

19 Q. (BY MS. LEPINGWELL) Okay. So you testified on  
20 direct about Ms. Barganier saying that she and the passenger  
21 locked eyes?

22 A. I didn't use the phrase "locked eyes," but I did  
23 think that they were looking at each other.

24 Q. That they were looking at each other, and -- and  
25 that is what she testified to at trial, right?



1 A. Uh-huh. Yes.

2 Q. But that's not what she said in this prehypnosis  
3 interview?

4 A. Apparently, that's right.

5 Q. So that's another thing that changed after the  
6 hypnosis?

7 A. But not much. I mean, looking -- he was looking in  
8 her direction. She said that they didn't lock eyes. It's  
9 different, but it's not that different.

10 Q. Well, but the importance of that difference, though,  
11 you'd agree, Dr. Spiegel, is that she also, afterwards,  
12 **claimed to be scared**, and so that -- she made it sound as  
13 though that locking of the eyes was a scary event when she  
14 testified at trial, right?

15 A. **No. She was scared because whoever that was**  
16 **murdered her neighbor and her dog, and that would scare**  
17 **anybody. And -- and she had reason to think that he could ID**  
18 **her.**

19 Q. And that -- but that all came up at the trial,  
20 right, that's not in any of the other information that you've  
21 received, the trial and the posthypnotic interview, right?

22 **A. But the explanation she gave for why she requested**  
23 **the hypnosis was that she was scared and she wanted someone**  
24 **to help her anxiety.**

25 Q. Well, let's be tot- -- like, I -- I -- I don't mean

1 to mince words, but it's im- -- it's important to be very  
2 clear about this, especially if you're basing your opinions  
3 on it. She said that making a composite, and I'm not -- I'm  
4 sorry if the people didn't give you this information. But  
5 she said that making a composite made her anxious and that  
6 she wanted to be relaxed in order to create a second  
7 composite. She did not say that she was scared of the  
8 passenger of the car, right?

9 A. Well, what else do you think she would be anxious  
10 about? Come on.

11 Q. I mean, I -- I don't know her psychology. Do you?  
12 Have you -- have you spoken with her?

13 A. No. I have not spoken with her, but the only thing  
14 than makes sense is that thinking about the guy who did this,  
15 that she thought did it, made her anxious. And it made her  
16 anxious, in part, because he murdered her neighbor, and she'd  
17 think he could murder her or her kids.

18 Q. I mean, that's -- that's a hypothesis, that  
19 you're --

20 A. That's right.

21 Q. -- coming up with, right? Okay. Just --

22 A. But -- but I -- I can't imagine that the sketch  
23 artist was so unpleasant that she got anxious being around  
24 him.

25 Q. Well -- well, it's clear that you don't know the

1 facts of the composite. They didn't share that with you  
2 either.

3 A. No. That's -- that's not right.

4 Q. So let's just go back to that, the beginning of that  
5 session. So we agree that Officer Serna never assessed  
6 Ms. Barganier's hypnotizability, right?

7 A. Right.

8 Q. And if Ms. Barganier had, for argument's sake,  
9 actually been highly hypnotizable, that would have been  
10 important for him to know?

11 A. It would have been useful, yes.

12 Q. Because that would have made her more sensitive to  
13 suggestion?

14 A. Yes.

15 Q. Now, we just watched the beginning of the session,  
16 and Officer Serna conducts what is -- what I'll call, for  
17 lack of a better term, a prehypnosis interview, right?

18 Q. And that consisted of one question, and that  
19 question was: So tell me what it is that you remember about  
20 the incident that day, offhand, things that you can remember  
21 now, right?

22 A. Yes.

23 Q. That was the extent of the prehypnosis interview?

24 A. Right.

25 Q. So he didn't ask her for any detailed prehypnosis

1 recollection of the event?

2 A. Well, he -- you know, he did the first step, as what  
3 is described in this AMA report of asking an open-ended  
4 question, and he didn't pursue it any further. But it was  
5 the right way to start.

6 Q. Well, he didn't ask her if she thought it would even  
7 be possible for her to provide a more detailed description  
8 about the passenger?

9 A. I don't -- I don't understand that question. Why  
10 would he say that?

11 Q. Well, I get to ask the questions, Dr. Spiegel. So  
12 the question is -- to be clear, is: Before he put her under  
13 hypnosis to ask her questions about what she saw  
14 specifically, what she saw of these two -- of this driver and  
15 this passenger of the car, he didn't ask her any questions to  
16 determine whether it was possible for her to actually see the  
17 faces of the driver and the passenger of the car, right?

18 A. Well, that would be rather confrontational. I --  
19 you know, that would be implying that it wasn't possible.  
20 He -- I -- Dr. Lynn and I agree that he could have asked her  
21 more in advance. It was not the ideal prehypnosis  
22 interrogation, but it wasn't terrible. And he didn't inject  
23 any information.

24 The premise of doing it is that she might have  
25 seen something. So if I ask a patient that I'm -- and I do

1 the same thing. I do a prehypnosis recollection of it. If I  
2 say, is it really possible for you to see the person, I'm  
3 suggesting to them that maybe it isn't. And why are we even  
4 sitting here? So I wouldn't do that.

5 Q. Well, he didn't ask her what the lighting was like  
6 at that hour, right?

7 A. No, he didn't. But, again, that would be the kind  
8 of skeptical question that you raised about when sunrise was,  
9 later on, to challenge her credibility. I wouldn't do  
10 that.

11 Q. Now, in Moore, you were specifically asked a -- sort  
12 of a similar -- well, you were specifically asked whether  
13 Dr. Babcock's method of proceeding to produce -- well, I'll  
14 draw your attention to page 47. These questions are worded  
15 very poorly.

16 A. Okay.

17 Q. So you were asked to review the transcripts of  
18 Dr. Babcock, and that was the hypnotist in that case,  
19 correct?

20 A. Yes.

21 Q. And in -- the question that you were asked, starting  
22 at line 18, is: In the course of your reviewing those  
23 transcripts, have you come to any opinion as to how likely it  
24 was with Dr. Babcock's -- Babcock's method of proceeding to  
25 produce an unreliable recollection?

1                   And the answer was yes.

2                   Then the question, at 23: And what is that  
3 opinion?

4                   And your answer was: That it's unlikely that  
5 he did that.

6                   Line 25, question: And could you give the  
7 Court your reasons, continuing on to page 48, for your  
8 opinion?

9                   And your answer was: Yes. Basically,  
10 Dr. Babcock was aware of and followed the Hurd guidelines  
11 which I think are reasonable and sensible ways to proceed.  
12 So he debriefed her about her prehypnosis recollection of the  
13 crime, including asking her in some detail whether she  
14 thought it would be possible for her to have actually seen  
15 the assailant because she wore contact lenses and didn't have  
16 her contact lenses in when he assaulted her at night and  
17 whether there was enough light in the room.

18                  A. Uh-huh.

19                  Q. So, in Moore, you indicated that it was appropriate  
20 for Dr. Babcock to ask -- to ascertain in detail whether it  
21 was even possible for the victim to see her assailant before  
22 conducting the hypnotic recollection, correct?

23                  A. Yes. And the reason was that, in that case, he woke  
24 her from sleep and assaulted her. And I didn't know what her  
25 vision was like. Some people can't see much of anything if

1 they don't have their contact lenses in --

2 Q. Okay.

3 A. -- and some can. And so I had more reason to be  
4 concerned about whether she could possibly see anything in  
5 the combination of being woken in a dark room with no contact  
6 lenses. And -- and in this case, where she was looking out  
7 the window and saw something.

8 Q. Were you informed that in this case evidence was  
9 introduced at trial that the sun did not rise until 45  
10 minutes after Ms. Barganier looked outside her window?

11 A. Yes, I was. But, you know, there's ambient light  
12 even before sunrise.

13 Q. Were you informed or shown photographs that indicate  
14 there were no streetlights on that block?

15 A. I gathered there were no streetlights.

16 Q. Okay. And you saw in her testimony or -- strike  
17 that.

18 You read that -- were you informed that she had  
19 indicated that she was on a very strict schedule that  
20 morning?

21 A. No.

22 Q. So you weren't informed that she had said, in her  
23 testimony, that she was on a strict schedule to get the kids  
24 ready and her husband ready to leave the house and to go to  
25 school?

1           A.    I knew she was doing that.  I don't recall the  
2 phrase "strict schedule."  It was their usual morning  
3 routine.

4           Q.    And were you informed that she had said that she  
5 wasn't focused on what was going on outside the window?

6           A.    No.

7           Q.    And Officer Serna made no determination if it was  
8 even possible for her to see what she was trying to retrieve  
9 under the hypnosis, right?

10          A.    I don't understand that question.

11          Q.    So you would agree --

12          A.    Who -- who are we talking about doing what?

13          Q.    We're -- we're -- we're going back.  I apologize.  
14 We're going back to the prehypnosis interview.

15                    You would agree that through that one question  
16 that he asked her, Officer Serna did not make any  
17 determination if it was even possible for Ms. Barganier to  
18 see what she was trying to retrieve through hypnosis?  He's  
19 just assuming that she saw these passengers -- the  
20 passenger's face, right?

21          A.    Well, when she gave the statement to the police,  
22 they were not skeptical about whether she could have seen  
23 what she saw.  I think there's a difference between someone  
24 being awakened in a dark room without their contact lenses in  
25 and a woman looking out the window in early dawn and



1 reporting something that nobody had challenged until then.

2 Q. Well, first off, it's your -- what you're -- what  
3 you're testifying to is specul- -- purely speculation, right,  
4 what she was able -- what she was able to see when she looked  
5 out that window because nobody actually asked her in this  
6 interview about what she was able to -- whether she was able  
7 to see what she was claiming she saw, right?

8 A. Yes, nobody challenged it. But they didn't seem to  
9 have a reason to challenge it. And I -- I -- it seems  
10 implausible to me that she would have reported what she did  
11 if she couldn't see anything. The degree with which she  
12 could see something is another issue. But -- and nobody  
13 contests the fact that there was a yellow Volkswagen Bug in  
14 the driveway and that two men got out of it and did something  
15 horrible.

16 Q. Well, actually, it wasn't yellow, right? And that's  
17 the whole point.

18 A. Well, part of it was yellow and purple and pink.

19 Q. No. No. She -- she only -- it was pink and purple,  
20 but she originally claimed it was yellow.

21 A. Yeah. But there was a car there, and there were two  
22 guys there.

23 Q. Okay. So I just want to -- want to go through a  
24 little bit more of the -- the technique used here before we  
25 talk about the rest of the corroborating evidence because I

1 do want to get to that since you were asked to look at it.

2 So right after Ms. Barganier tells Officer  
3 Serna what she remembers in this prehypnotic interview, he  
4 tells her that her memory works like a documentary, right?  
5 And I can --

6 A. No. I don't -- I don't --

7 Q. I can actually --

8 A. I mean, I'd like to see the quote.

9 Q. Sure.

10 A. Let's see the section. He used the term  
11 "documentary" for sure, but I don't recall her saying that  
12 her memory works like a documentary.

13 (Video clip played.)

14 A. Yeah. So he didn't say your memory works like a  
15 documentary. He said, you're going to be seeing a film.  
16 This is the way you will try to remember.

17 Q. (BY MS. LEPINGWELL) Okay.

18 A. That's different.

19 Q. And he said to her, you're going to be seeing a film  
20 of the events that occurred on that day, on that morning,  
21 right?

22 A. Right.

23 Q. And that implies, though, that what she sees is an  
24 accurate -- saying it's a documentary implies that what she  
25 sees is an accurate recollection?

1           A.    I take it differently. I take it as he's saying, do  
2 your best to see what happened --

3           Q.    Well, those --

4           A.    -- what actually happened.

5           Q.    Those aren't his words, though, right?

6           A.    No. No.

7           Q.    He says, you're going to see a documentary, and  
8 you're going to be seeing a film of the events that occurred  
9 that day, right?

10          A.    No. I don't remember the words "film of the events"  
11 but --

12          Q.    Okay. Would you like me to play it again?

13          A.    Yeah. Sure.

14                                (Video clip played.)

15          A.    Okay. So he's not saying your memory works like a  
16 film. He's saying you're going to be experiencing what you  
17 saw as a documentary or as a film.

18          Q.    (BY MS. LEPINGWELL) Uh-huh. And, well, you were  
19 saying on direct that the distinction between saying a  
20 documentary and a film is that a film could be false,  
21 imagined events, and a documentary is true events?

22          A.    Right. And he's saying that this film is a  
23 documentary.

24          Q.    Nonetheless, he implies, though, that her memory is  
25 accurate, right, by saying it's a documentary?

1 A. No. He's saying, do -- you're -- this is the way  
2 I'm going to help you to try and remember what happened.

3 Q. Okay.

4 A. He's not saying that her memory is a film or a  
5 documentary. He's saying this is the way we're going to try  
6 and go at it.

7 Q. He did say, you will see -- or you're going to see a  
8 documentary; you're going to see a film. Now, there's  
9 nothing that -- that -- that's essentially promising to her  
10 that she's going to -- that those things are going to happen,  
11 right?

12 A. He's not saying -- he's not telling her what memory  
13 is like. He's not saying your memory is a video recorder.  
14 He's saying this effort to -- to get your memory of what  
15 happened will be like looking at a documentary.

16 Q. Okay. But that wasn't my question. My question  
17 is -- is: He says to her, you're going to see a documentary;  
18 you're going to see a film, which is essentially promising to  
19 her that what she is going to see will be accurate, right?

20 A. No.

21 Q. Okay. So you're familiar with the video recorder  
22 technique of hypnosis, right?

23 A. Yes.

24 Q. And you've actually written on the topic of the  
25 videotape recorder technique, right?

1 A. Yes.

2 Q. And what you've written is that this approach to  
3 hypnosis can have the effect of encouraging the subject to  
4 confabulate?

5 A. Yes.

6 Q. And that this approach to hypnosis, specifically,  
7 the video recorder technique, can have the effect of  
8 encouraging the subject to develop a false sense of certainty  
9 about the truth of their memory, right?

10 A. Right.

11 Q. The problem with using a visual memory task with  
12 hypnosis, such as the videotape recorder, is that it leads to  
13 a greater likelihood of confident errors, right?

14 A. It may.

15 Q. You would agree that the videotape recorder  
16 technique is a visual memory task, right?

17 A. It is, but a specific kind that implies that it is  
18 the true unfurling of your memories the way they are  
19 stored.

20 Q. Which is not how memory is stored?

21 A. Right. That's right.

22 Q. And an individual doesn't need to be in a magic  
23 theater in order to go into hypnosis, right? I mean, we  
24 talked about --

25 A. Right.

1 Q. -- there are many different ways. And you don't use  
2 the movie theater technique?

3 A. I use a screen technique. I don't use a movie  
4 theater.

5 Q. And the distinction -- well, one thing about the --  
6 the movie theater technique that makes it distinct is that  
7 you can pause and fast forward and rewind your memories,  
8 right?

9 A. About which? The -- the videotape --

10 Q. Yeah.

11 A. -- technique? Yes.

12 Q. I want to review some of the things Officer Serna  
13 said to Ms. Barganier during and after the hypnosis session.  
14 And I'm going to play this so that we don't have to rely on  
15 what my recollection is.

16 (Video clip played.)

17 Q. (BY MS. LEPINGWELL) Now, in this clip here, Officer  
18 Serna, suggests to Ms. Barganier that she actually witnessed  
19 something important, right?

20 A. Yes. He says it, yeah.

21 Q. Yeah. And he's suggesting to her that -- that she  
22 can remember what she saw, correct?

23 A. He's suggesting to her that this is a way. He  
24 doesn't say that. That's -- those are not his words.

25 Q. Okay.

1 A. He says, you witnessed something very important.

2 Q. But he does suggest that it's a -- it's a  
3 significant day, right?

4 A. Well, it is.

5 Q. And it's an im- -- it's a very important day?

6 A. Right.

7 Q. In which she -- she witnessed something very  
8 important?

9 A. Right.

10 Q. And that's pressuring her to recall what it was that  
11 she witnessed, correct?

12 A. No. I mean, she's -- she's there because she wants  
13 to recall what's important. She asked for this situation.

14 Q. Well, the -- the whole -- this whole process is --  
15 you wouldn't say that this is any -- this isn't press- --  
16 this doesn't create some form of pressure on her to  
17 remember?

18 A. I think part of the -- it's not -- she -- she wants  
19 to remember, and she's anxious about what happened. And she  
20 knows it's important, and she requested it. It's not like  
21 they dragged her off the street and put her in a room and  
22 made her do it.

23 Q. But it's implicit to this whole act of doing this  
24 sort of forensic hypnosis session, like a -- there was an  
25 amount of pressure implicit in this whole act of doing this

1 sort of forensic session, right?

2 A. No. It depends on how you do it.

3 Q. So you're saying -- are you saying that it's not --  
4 the pressure isn't implicit because Ms. Barganier asked for  
5 the hypnosis?

6 A. Yes.

7 MS. OTT: Objection. Asked and answered.

8 THE COURT: I'll sustain that objection. Ask  
9 your next question. Ask your next question. You've already  
10 made your point. Go ahead and ask your question.

11 MS. LEPINGWELL: Okay.

12 Q. (BY MS. LEPINGWELL) Do you feel that the reason  
13 that there was no pressure in this situation is because  
14 Ms. Barganier asked for the hypnosis?

15 A. Yeah. That's the primary reason, yes.

16 Q. Okay. Now, that is completely the opposite of how  
17 you testified about the hypnosis session in Moore, right?

18 A. Well, I don't know. I don't remember, but it was a  
19 different situation.

20 Q. Well, in State v. Moore, the victim asked to be  
21 hypnotized, right?

22 A. I don't recall.

23 Q. Okay.

24 A. That was 11 years ago.

25 Q. Well, let's refresh your recollection about what you



1 testified to. So page 53, starting at line 10: Did this  
2 manner of questioning -- and he was referring to the  
3 hypnotic -- the forensic hypnotic session -- in your opinion  
4 placed pressure upon Marlena Agua (phonetic spelling) to come  
5 up with answers?

6 Answer: Well, I would say that certainly, you  
7 know, implicit in the whole act of doing this, there's a  
8 certain amount of pressure. Although it's interesting that  
9 the hypnotic interrogation was actually requested by Marlena  
10 Agua, not by the police, so -- but she clearly viewed it as  
11 one way to try to help herself come up with new information  
12 about the assault. So the very context, but that's true  
13 then, you know, if you just sit in the -- down in the police  
14 station and report, you know, and go through the account --  
15 again, the account -- go through again, the accounts of the  
16 crime, that's -- there's pressure on you to come up with new  
17 information. So there was a certain amount of pressure,  
18 sure.

19 A. Well, you know, I think -- there's -- what she --  
20 there's pressure. Some of it comes from her. It came from  
21 her, as it does in this case. I added at the end there was a  
22 certain amount of pressure, but he was also able to take no  
23 for an answer. So she was able to say, no, I can't see  
24 anything more.

25 And time and again, they'll go over it again

1 and again and again, in essence, pressuring the person to  
2 come up with something whether or not it's a memory. And he  
3 didn't do that.

4 So, yes, he could have applied more pressure.  
5 There is some pressure in the context, but some of the  
6 pressure that I was referring to in that case and in this is  
7 that she desperately wanted to be able to identify who had  
8 raped her. And -- and -- in this this case, Mrs. Barganier  
9 wanted to know who committed the murder.

10 So, yes, there was pressure, but it wasn't all  
11 from the context because they both initiated the context. It  
12 was from themselves. Here's my chance. I want to try and  
13 get more information.

14 Q. And Ms. Barganier indicated a desire to be helpful  
15 by providing more information, right?

16 A. Yes.

17 Q. In fact, she said, did I do okay, right?

18 A. Right.

19 Q. So you --

20 MS. LEPINGWELL: Just one moment, please,  
21 Judge. I'm wrapping up here.

22 Q. (BY MS. LEPINGWELL) Now, on direct you -- you  
23 talked a little bit about the people that conducted the  
24 hypno- -- this hypnotic session. And there were two people  
25 in the room, right?

1 A. Yes.

2 Q. One of which --

3 A. Well, three people with her.

4 Q. Well, aside from Ms. Barganier. I apologize. And  
5 one of them was a -- was a police officer, the hypnotist who  
6 had worked the crime scene. You are aware of that?

7 A. Yes.

8 Q. And the second person in the room was the second  
9 investigator on the case, correct?

10 A. I gathered, yes. I don't remember.

11 Q. Were -- were you informed of that?

12 A. I think so.

13 Q. Okay. And you agree that ideally only the subject  
14 and the -- and the hypnotist should be present in the room?

15 A. Yes.

16 Q. And, in fact, you've -- you've stated, even  
17 recently, that the person conducting a hypnosis should be a  
18 professional, right?

19 A. Right.

20 Q. And by a "professional," you mean a psychologist or  
21 a psychiatrist, correct?

22 A. That's correct.

23 Q. Not a police officer?

24 A. Yes.

25 Q. And so you've also indicated that ideally only the

1 subject and a trained professional would be present in the  
2 hypnotic session?

3 A. Yes.

4 Q. And you've said that exceptions may be necessary to  
5 allow for law enforcement officials not familiar with the  
6 details of the case, such as a forensic expert or a police  
7 artist, right?

8 A. Yes.

9 Q. And that's because of the risk of inadvertent cues,  
10 right?

11 A. Right.

12 Q. And as you indicated on direct, you're familiar with  
13 the case of Zani, right --

14 A. I am.

15 Q. -- the reason we're here?

16 And Zani says that all contacts between the  
17 hypnotist and the subjects should be recorded, right?

18 A. Yes.

19 Q. But you agree that you can't tell if someone is  
20 influenced just by looking at the video session, right?

21 A. Well, you have some information, but it may not be  
22 complete.

23 Q. Right. So even a good video recording of a hypnotic  
24 session can't document all possible influences on a  
25 hypnotized person?

1           A.    Well, it -- you know, as was the case here, if  
2           they've got their eyes closed through most of it, that cuts  
3           out visual cues. You can hear the sound. There can be other  
4           cues, but it -- it gets easier to assess.

5           Q.    There's always a possibility of subtle cues,  
6           right --

7           A.    Well --

8           Q.    -- that aren't captured on a video?

9           A.    It's -- it's possible, but it becomes implausible if  
10          there's no way they could convey that.

11          Q.    Are you aware -- you aware that Ms. Barganier  
12          created a composite of the passenger of the vehicle after  
13          this hypnotic session?

14          A.    I don't recall. I was probably told that.

15                    MS. LEPINGWELL: May I approach, Your Honor?

16                    THE COURT: You may.

17          Q.    (BY MS. LEPINGWELL) I'm showing you what's been  
18          marked as Applicant Exhibit 28.

19          A.    Okay. Thank you.

20          Q.    Have you been shown that composite there that was  
21          created on February 4th?

22          A.    I don't think so.

23          Q.    Now, that's the composite that Ms. Barganier created  
24          following this hypnotic session, and you weren't shown that,  
25          right?

1 A. I answered that. I don't think so.

2 Q. Okay. And you would agree that that is -- strike  
3 that.

4 You would agree that a -- an accurate composite  
5 sketch would be corroborating evidence of a -- of a memory,  
6 correct?

7 A. Well, you mean that it was a match with the person  
8 who was found guilty of the crime?

9 Q. Right.

10 A. Yes. Yes, if by other evidence they were found  
11 guilty, sure.

12 Q. Were you informed that Ms. Barganier was shown a  
13 photograph of Mr. Charles immediately following this hypnotic  
14 session?

15 A. Yes.

16 Q. And she was not able to identify Mr. Flores?

17 A. Yes, she was not. The officer administering it  
18 said, if you're not sure, don't identify somebody. And that  
19 proves to me that she was not so convinced by her hypnotic  
20 experience that she must be right about everything, that she  
21 would just say, yes, that's him.

22 Q. And you were -- were you informed that she testified  
23 that she saw multiple photos of him in the news after this  
24 hypnotic session before she identified him in court?

25 A. I -- I recall her denying that, but I don't -- I

1 don't know for sure.

2 Q. Okay. So you're not sure whether she was -- she saw  
3 other images of Mr. Flores before she testified?

4 A. I recall reading a denial about it.

5 Q. Okay. Now, we've talked a lot about State v. Moore  
6 this afternoon. And that case held by the --

7 MS. OTT: Objection. Relevance.

8 Q. (BY MS. LEPINGWELL) -- New Jersey Supreme Court --

9 THE COURT: I'll allow it. Go ahead.

10 Q. (BY MS. LEPINGWELL) -- that hypnosis should be, per  
11 se -- hypnotically induced testimony should be per se  
12 excludable in New Jersey, correct?

13 A. I think that was the conclusion. I profoundly  
14 disagreed with it.

15 Q. Yeah. And in that case, the court rejected your  
16 expert opinion and accepted Dr. Lynn's expert opinion,  
17 correct?

18 A. That's correct.

19 MS. LEPINGWELL: No further questions.

20 MS. OTT: Just one more question.

21 THE COURT: Sure.

22 **REDIRECT EXAMINATION**

23 **BY MS. OTT:**

24 Q. Now, all the concerns that Dr. Lynn testified about  
25 that can happen as a result of hypnosis, is there evidence

1 that they did happen in this case?

2 A. No. I don't think there is.

3 MS. OTT: Nothing further.

4 THE COURT: All right. May this witness be  
5 excused?

6 MS. LEPINGWELL: Yes.

7 THE COURT: All right. Thank you, Doctor.

8 MS. OTT: The State rests.

9 THE COURT: All right. Defense?

10 MS. SWEEN: Your Honor, can we have five  
11 minutes to decide whether or not we want to call a rebuttal  
12 witness?

13 THE COURT: 5 minutes.

14 MS. SWEEN: Thank you, Your Honor.

15 THE COURT: We're in recess.

16 (Court in recess, 4:55 - 5:00 p.m.)

17 (Open court, applicant present.)

18 THE COURT: All right. Back on the record.

19 Ms. Sween, rebuttal?

20 MS. SWEEN: Thank you, Your Honor.

21 **STEVEN JAY LYNN, Ph.D.,**

22 having been previously sworn, testified as follows:

23 **DIRECT EXAMINATION**

24 **BY MS. SWEEN:**

25 Q. Dr. Lynn, I just have, essentially, two questions on



1 rebuttal.

2 A. Uh-huh.

3 Q. You heard the testimony of Dr. Spiegel, correct?

4 A. I did.

5 Q. Did it surprise you that he conceded to the  
6 existence of the confidence inflation in the wake of  
7 hypnosis?

8 A. It did somewhat. He certainly endorsed that.

9 Q. And why is that a surprise?

10 A. Well, it's -- it's a surprise because generally he  
11 has been a proponent of the use of hypnosis in both forensic  
12 situations and clinical situations for the purposes of memory  
13 recovery.

14 Q. And to be clear, much of Dr. Spiegel's experience is  
15 working in the clinical setting with people who have  
16 sustained trauma; is that --

17 A. Yes. I believe he only has two or three research  
18 studies, maybe -- maybe one or two on hypnosis and memory,  
19 specifically.

20 Q. And would it surprise you that Dr. Spiegel testified  
21 that there was nothing new in the field of hypnosis and  
22 memory since 1999? Maybe he's not keeping up.

23 A. I was rather shocked because I have a folder here  
24 with 14 -- 15 studies most published in excellent journals  
25 that I believe they would not have excepted if there were

1 nothing new in the studies.

2 And I must say that I found these interesting  
3 and interesting because there was novel information and not  
4 necessarily always consistent with my viewpoint but important  
5 information that sheds light on the phenomena we are  
6 addressing today.

7 So I have these for the Court, and I believe we  
8 have copies of each article.

9 Q. And are those studies actually on the document that  
10 we admitted as Applicant 60 during your direct examination?

11 A. I couldn't tell you, but I would take your word for  
12 it if you said, yes.

13 MS. SWEEN: Pass the witness.

14 THE COURT: State?

15 MS. OTT: Nothing from the State.

16 THE COURT: All right. Thank you, Doctor.

17 THE WITNESS: And thank you.

18 THE COURT: You may step down.

19 All right. Ms. Sween?

20 MS. SWEEN: The Defense rests.

21 THE COURT: All right. Both sides close?

22 MS. SWEEN: Close.

23 THE WITNESS: Is this good-bye?

24 THE COURT: Good-bye, Doctor.

25 All right. We had a brief conference where we

1 discussed proposed findings of fact and conclusion of law. I  
2 believe the -- should we proceed on -- should the court's  
3 record be available by October 31, we agreed -- both sides  
4 agreed that they could have the findings of fact and  
5 conclusions of law by December 1st.

6 And I believe the Applicant would like an  
7 opportunity to be heard for argument, so the Court is  
8 allowing argument to be held on Monday, December 4th.

9 Is that correct?

10 MS. SWEEN: Thank you, Your Honor, that's my  
11 memory.

12 THE COURT: Anything else from either -- State?  
13 From either side?

14 MS. LAMBERT: No, Your Honor.

15 MS. SWEEN: No.

16 THE COURT: All right. So then we're in  
17 recess. Thank you both.

18 (Proceedings concluded 5:10 p.m.)  
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**C E R T I F I C A T E**

1 THE STATE OF TEXAS )

2 COUNTY OF DALLAS )

3  
4 I, Velma R. Loza, Official Court Reporter in and for the  
5 195th Judicial District Court of Dallas County, State of  
6 Texas, do hereby certify that the above and foregoing  
7 contains a true and correct transcription of all portions of  
8 evidence and other proceedings requested in writing by  
9 counsel for the parties to be included in the Reporter's  
10 Record in the above-styled and numbered cause, all of which  
11 occurred in open court or in chambers and were reported by  
12 me.

13 I further certify that this transcription of the  
14 proceedings truly and correctly reflects the exhibits, if  
15 any, offered by the respective parties.

16 I further certify that the total cost for the  
17 preparation of this Reporter's Record is \$ and will be paid  
18 on behalf of the 195th Judicial District Court.

19 GIVEN UNDER MY HAND AND SEAL OF OFFICE ON THIS THE 22ND  
20 DAY OF NOVEMBER, 2017.

21 /s/ Velma R. Loza

22 \_\_\_\_\_  
23 VELMA R. LOZA, CSR #5811  
24 Official Court Reporter  
25 195th Judicial District Court  
velma.loza@dallascounty.org  
133 N. Riverfront Blvd.  
Dallas, Texas 75207  
Certification Expires 12/31/17

**D I S C L O S U R E**

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Note: Supreme Court Rule Adopted and Promulgated in  
Conformity with Chapter 52 of the Government Code, V.T.C.A.

Please be advised that pursuant to Supreme Court  
Rule IV, B.4. with regards to disclosure, I, to the best of  
my knowledge, have no existing or past financial, business,  
professional, family or social relationships with any of the  
parties or their attorneys which might reasonably create an  
appearance of partiality, except as follows:

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/s/ Velma R. Loza

\_\_\_\_\_  
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