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Memorandum

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North Carolina Supreme Court Bars Hypnotically Refreshed Testimony

Benjamin B. Sendor

The North Carolina Supreme Court has held in *State v. Peoples* [311 N.C. 515, 319 S.E.2d 177 (1984)] that hypnotically refreshed testimony, testimony about the hypnotic session, and a videotape recording of the hypnotic session are inadmissible in a criminal trial. The Court thereby overruled its earlier decision in *State v. McQueen* [295 N.C. 96, 244 S.E.2d 414 (1978)]. This memorandum will discuss *Peoples* and its effects on trial testimony and law enforcement practices.

Background

The case involved the testimony of Bruce Miller, a participant in an armed robbery. Pursuant to a plea bargain, Miller testified against defendant Elmer Peoples, one of his alleged accomplices in the robbery. Before Peoples' trial, a police detective, who had received two weeks of training in hypnosis at the North Carolina Justice Academy, hypnotized Miller to help him recall details of the robbery that he had forgotten. During the hour-long hypnotic session, Miller related facts about the robbery that were consistent with his subsequent trial testimony. In a superior court trial, Peoples was convicted of armed robbery and conspiracy to commit armed robbery. The Court of Appeals affirmed the conviction, and the Supreme Court granted Peoples' petition for discretionary review.

The Court's Opinion

The Supreme Court remanded the case for a new trial. Writing for a unanimous court, Justice Exum first reviewed the history of case law concerning the admissibility of hypnotically refreshed testimony. Justice Exum found three trends among court decisions around the nation: (1) some courts have held that the fact of prior hypnosis affects the weight, not the admissibility, of testimony; (2) some courts have held that hypnotically refreshed testimony is admissible only if the hypnosis adhered to certain guidelines; and (3) some courts have ruled that such testimony is inadmissible per se.

In *State v. McQueen*, the North Carolina Supreme Court took the first position—that prior hypnosis affects the weight of testimony, not its admissibility. However, in his opinion in *Peoples*, Justice Exum reviewed scientific and legal studies of hypnosis published after the decision in *McQueen*. These studies led the Court in *Peoples* to adopt the third position, barring admissibility of hypnotically refreshed testimony.

Justice Exum explained that the basis for admitting hypnotically refreshed testimony rests on an inaccurate theory of memory. According to that theory, memory operates like a videotape machine that accurately records every perception of a witness, permanently stores perceptions in the brain at a subconscious level, and accurately replays them when the witness remembers them. Under this theory, forgetting

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is an inability to retrieve information stored in the brain, and hypnosis helps a witness recall such information. But most cognitive psychologists reject this view of memory. They generally agree that memory does not simply reproduce past perceptions; it is also a creative process that actively reconstructs such perceptions, editing, shaping, changing, and inventing details to correspond to a witness's present concerns.¹

Such reconstruction undermines the accuracy of any witness's memory. However, this inherent unreliability can be aggravated by hypnosis in ways that both significantly distort memory and seriously hamper the effectiveness of cross-examination in testing the truthfulness of memory. Two aspects of hypnosis distort the accuracy of hypnotically refreshed memory. First, hypnosis can make a person highly susceptible to suggestion by the hypnotist, likely to believe the reality of "memories" of events that never occurred. Such susceptibility is heightened by impairment of critical judgment and often the hypnotized subject's desire to please the hypnotist. Second, hypnotized subjects often "confabulate"; that is, they tend to invent details to fill in gaps in memories to make their accounts of events logical and complete.

Hypnosis can distort memory, and it can also impair the usefulness of cross-examination to prove the distortion. First, hypnosis can give a person unwarranted confidence in the truth of his refreshed memory. In addition, a hypnotized person often experiences amnesia about the hypnotic session. He remembers the content of the refreshed memory, but not that he acquired it under hypnosis. Furthermore, even the hypnotist and outside experts generally cannot determine whether refreshed memory is accurate or distorted.

The danger of distortion plainly can undermine the credibility of hypnotically refreshed testimony. But the difficulty of testing such testimony through cross-examination poses an even greater problem. Since the ability to verify testimony through cross-examination is the touchstone of admissibility, the fact that it is impossible to determine whether hypnotically refreshed testimony is true led the court

1. The currently accepted theory of memory is based on the pioneering research of British cognitive psychologist Sir Frederick C. Bartlett, published in 1932 in his book *Remembering*. As Bartlett wrote, "Remembering is not the re-excitation of innumerable fixed, lifeless and fragmentary traces. It is an imaginative reconstruction, or construction built out of the relation of our attitude towards a whole active mass of organized past reactions or experience...." *Id.* at 213. For a discussion of the studies of memory by Bartlett and other cognitive psychologists, see *People v. Shirley*, 31 Cal. 3d 18, 181 Cal. Rptr. 243, 641 P.2d 775 (1982).

to bar the admission of such testimony entirely.² As Justice Exum observed, "In short, hypnosis not only irrevocably masks whether a subject's recall induced by it is true, it also creates a barrier to the ascertainment of its truthfulness through cross-examination—that method normally relied on in the courtroom to test the truthfulness of memory."³

Some courts have permitted hypnotically refreshed testimony to be admitted if the proponent follows certain safeguards concerning the impartiality and skill of the hypnotist and the preservation of pre-hypnotic memory and of all contacts between the hypnotist and a witness. However, the North Carolina Supreme Court ruled in *Peoples* that even such safeguards would be inadequate. As Justice Exum explained, those measures would not solve the basic flaw in hypnotically refreshed testimony: the impossibility of testing its reliability through cross-examination.

Justice Exum's opinion is not clear about whether the holding is based on the Sixth Amendment right of confrontation or a more general evidentiary concern. It expressly casts the admissibility of hypnotically refreshed testimony as a Sixth Amendment issue: the difficulty of cross-examining a previously hypnotized witness would frustrate a criminal defendant's right of confrontation. However, the Court's concern throughout the opinion about the reliability of hypnotically refreshed testimony suggests that the holding rests on an even broader evidentiary foundation: the importance of preserving the integrity of a criminal trial as a truth-seeking process. This concern encompasses, but goes beyond, protection of a defendant's Sixth Amendment right of confrontation. Although the codified North Carolina Rules of Evidence were not in effect when *Peoples* was tried, it seems likely that if this case had been tried under the new

2. Justice Exum observed that some courts, in ruling that hypnotically refreshed testimony is inadmissible, have rested their decisions within the framework of a classic case about the admissibility of scientific evidence, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Although *Frye* itself concerned expert testimony and evidence obtained through scientific or mechanical tests, some courts have interpreted it broadly to govern the admissibility of any evidence developed by scientific techniques—including lay testimony aided by a scientific method, such as hypnotically refreshed testimony of a lay witness. See, e.g., *State v. Collins*, 296 Md. 670, 464 A.2d 1028 (1983); *People v. Shirley*, 31 Cal. 3d 18, 181 Cal. Rptr. 243, 641 P.2d 775 (1982). Justice Exum discussed hypnotically refreshed testimony in light of the criterion established in *Frye* for admissibility of scientific evidence: general acceptance within the relevant scientific community of the scientific method in question. Without expressly adopting the *Frye* test for North Carolina, Justice Exum pointed out that hypnosis has not yet gained general scientific acceptance as a reliable method of enhancing recollection. Moreover, he contended that hypnosis is inherently unreliable and that no conceivable scientific advances could cure its unreliability [in a subsequent case concerning the admissibility of a novel method of footprint identification, *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984), the Court explicitly rejected the *Frye* focus on acceptance of a method by the scientific community; the Court ruled instead that the key question is the reliability of the method].

3. Justice Exum also voiced concern that the scientific aura surrounding hypnosis might lead jurors to give undue credence to hypnotically refreshed testimony.

rules, the court would anchor its holding in *Peoples* in the authority granted in Rule 403 to exclude evidence for reasons of "unfair prejudice," "confusion of issues," and "misleading the jury."⁴

Significantly, the Court ruled that its decision to prohibit the admission of hypnotically refreshed testimony does not render inadmissible all testimony of a witness who was hypnotized. Such a witness may testify about facts he related before the hypnotic session, but not about facts he did not relate before he was hypnotized. The Court ruled that it was improper to admit Miller's testimony in the trial in *Peoples* because Miller's pre-hypnotic statement was not proffered at trial or contained in the record on appeal, thereby precluding the required comparison of Miller's pre-hypnotic statement and his hypnotically refreshed testimony. It also found error in admitting the hypnotist's testimony about the hypnotic session and in playing a videotape of the session before the jury. Taken together, these admissions constituted reversible error.⁵ In deciding whether to apply its decision retroactively to other cases, the Court considered the competing interests in the integrity of the truth-seeking purpose of trials and the efficient administration of justice. It struck a balance by applying the holding in *Peoples* only to cases that have not been finally determined on direct appeal as of the certification date of the *Peoples* decision (September 17, 1984). In addition, the Court barred use of *Peoples* as the basis for collaterally attacking any case that has been finally determined on direct appeal or in which the defendant did not appeal the trial judgment.

The Court cautioned investigators and attorneys who use hypnosis to preserve the pre-hypnotic statements of witnesses in writing or other appropriate forms.⁶ A party that offers testimony by a witness who was hypnotized must disclose the fact of hypnosis to the court and to opposing counsel outside the presence of the jury before the testimony is given. That party must prove that the witness related the proffered account before undergoing hypnosis.

4. See, e.g., *United States v. Valdez*, 722 F.2d 1196, 1201 (5th Cir. 1984), barring hypnotically refreshed identification testimony under identically worded Fed. R. Evid. 403.

5. After the Court decided *Peoples*, it reversed yet another conviction that was based on the use of hypnotically refreshed testimony. *State v. Flack*, 322 S.E.2d 758 (1984).

6. The Court probably contemplates recording pre-hypnotic statements through audiotapes or videotapes as suitable alternatives.

Scope of the Court's Ruling

The Court did not address two important questions about the breadth of the *Peoples* holding: whether it applies to the use of hypnotically refreshed testimony by the defense in criminal trials, and whether it applies to such use by any party in civil trials. With respect to defense use of such testimony, the Court mentioned ambiguously—without approval or criticism—the decision of the California Supreme Court in *People v. Shirley* [31 Cal. 3d 18, 181 Cal. Rptr. 243, 641 P.2d 775 (1982)], to exempt the testimony of a hypnotically refreshed defendant—but not other defense witnesses—from the general rule of inadmissibility in order to protect the right of an accused to testify in his own behalf. By basing its holding partly in the Sixth Amendment right of a defendant to confront his accusers through cross-examination, Justice Exum's opinion might seem to suggest that the *Peoples* holding applies only to testimony by prosecution witnesses. Yet elsewhere in the opinion, the Court states broadly, "We hold, therefore, that hypnotically refreshed testimony is inadmissible in *judicial proceedings*" (311 N.C. at 533, 319 S.E.2d at 188 [emphasis added]). In addition, the Court's evidentiary concern about the integrity of a trial as a proceeding for finding the truth, discussed above, indicates that the prohibition against admitting hypnotically refreshed testimony should apply to defense witnesses—including a defendant—as well as to prosecution witnesses. As an instructive analogy, consider the Court's decision to bar admission of testimony about polygraph results in *State v. Brunson* [287 N.C. 436, 215 S.E.2d 94 (1975)]. In *Brunson*, a similar concern about the reliability of evidence obtained through a scientific technique led the Court to prohibit admission of testimony about polygraph results by the defense as well as by the prosecution. Moreover, although a defendant has a Sixth Amendment right to testify in his own behalf [see *State v. Luker*, 65 N.C. App. 644, 310 S.E.2d 63 (1983)], that right is subject to reasonable procedural conditions, such as limits imposed by rules of evidence [see *United States v. Bifield*, 702 F.2d 342 (2d Cir.), cert. denied, 103 S.Ct. 2095 (1983); *Alicea v. Gagnon*, 675 F.2d 913 (7th Cir. 1982)].

As to civil cases, the Court's concern about the reliability of hypnotically refreshed testimony also suggests that the prohibition against admission of such testimony applies to civil as well as criminal trials. Another decision on polygraphs provides a helpful analogy. In *State v. Grier* [307 N.C. 628, 300 S.E.2d 351 (1983)], the Court's concern about reliability led it to prohibit testimony about polygraph results in all trials, both civil and criminal. It is likely, therefore, that the Court would deny the admission of hypnotically refreshed testimony in both civil and criminal trials.