

1 JAMES C. BRAZELTON  
District Attorney  
2 Stanislaus County  
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3 Modesto, California  
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4 Attorney for Plaintiff  
5  
6

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COUNTY OF STANISLAUS

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7 STANISLAUS COUNTY SUPERIOR COURT  
8 STATE OF CALIFORNIA  
9 -----o0o-----

10 D.A. No. 1056770 )  
THE PEOPLE OF THE STATE OF CALIFORNIA ) No. 1056770  
11 )  
Plaintiff, )  
12 ) OPPOSITION TO MOTION  
vs. ) TO EXCLUDE WITNESS  
13 )  
SCOTT LEE PETERSON, ) Trial: 1-26-2004  
14 )  
Defendant. )  
15 -----o0o-----  
16

17 The People oppose Defendant's motion to exclude witness'  
18 testimony. This opposition is based on the points and authorities  
19 provided herein and any evidence that may be presented at the  
20 hearing of the motion.

21 STATEMENT OF THE CASE

22 Prior to the Preliminary Hearing in the instant case, on  
23 October 7, 2003, Defendant filed a Motion to Exclude Testimony of  
24 Hypnotized Witness Kristen Dempewolf on the grounds that the People  
25 had not complied with the requirements of Evidence Code §795.

26 On October 15, 2003, the People filed a response to  
27 Defendant's motion for witness exclusion stating that they would  
28 not introduce evidence from Kristen Dempewolf at the preliminary

1 hearing. The People expressly reserved the right to litigate the  
2 issue at a later date, as they intend to introduce testimony from  
3 Ms. Dempewolf at the jury trial.

4 The People oppose Defendant's motion to exclude the testimony  
5 of this witness.

6 POINTS AND AUTHORITIES

7 I

8 **THE WITNESSES' PREHYPNOTIC MEMORIES WERE**  
9 **RELIABLY PRESERVED AS REQUIRED BY STATUTE.**

10 The People concur with Defendant that Evidence Code §795 sets  
11 forth the conditions by which testimony of a witness who has  
12 previously undergone hypnosis may be admissible in a criminal  
13 proceeding. Defendant alleges that Ms. Dempewolf's prehypnotic  
14 memory was not preserved in accordance with Evidence Code §795.  
15 The People disagree.

16 One of the conditions to permit testimony of a witness who was  
17 previously hypnotized is addressed in Evidence Code §795(a)(2),  
18 which states that the testimony is admissible if

19 "(t)he substance of the prehypnotic memory was  
20 preserved in written, audiotape, or videotape  
form prior to the hypnosis."

21 In the case at bar, Ms. Dempewolf's prehypnotic memory was  
22 preserved in written form in accordance with this statute. Ms.  
23 Dempewolf's prehypnotic memory was preserved in (1) a two page  
24 police report by Modesto Police Department Detective Schmierer,  
25 dated January 9, 2003, wherein the detective recorded detailed  
26 information provided by Ms. Dempewolf from a phone conversation  
27 with her on that same date (Bates Nos. 15869 - 15870); and (2) a  
28 three page police report (and a one page attachment) by Modesto

1 Police Department Detective Rick House, dated January 16, 2003,  
2 wherein the detective recorded detailed information provided by Ms.  
3 Dempewolf from a phone conversation with her on January 13, 2003  
4 (Bates Nos. 2324 - 2327). Additionally, Ms. Dempewolf's  
5 prehypnotic memory was preserved in videotape form on January 17,  
6 2003, the date that she was interviewed prior to undergoing  
7 hypnosis with Dr. Dale Pennington.

8 Contrary to Defendant's claims, there is ample record of Ms.  
9 Dempewolf's prehypnotic memory. The People have complied with  
10 Evidence Code §795(a)(2).

## 11 II

### 12 THE HYPNOSIS OF THE WITNESSES WAS CONDUCTED IN 13 COMPLETE ACCORDANCE WITH EVIDENCE CODE §795.

14 Evidence Code §795(a)(3) states that testimony from a witness  
15 who has previously undergone hypnosis may be admissible in a  
16 criminal proceeding if the hypnosis was conducted in accordance  
17 with four procedures.

#### 18 A. Evidence Code §795(a)(3)(A)

19 The required procedure in Evidence Code §795(a)(3)(A) is that

20 (a) written record was made prior to hypnosis  
21 documenting the subject's description of the  
22 event, and information which was provided to  
the hypnotist concerning the subject matter of  
the hypnosis.

23 In the instant case, a written record of the witness'  
24 descriptions was made prior to her hypnosis. As mentioned above,  
25 two police reports recorded and documented the witness' prehypnotic  
26 memory of the events that she witnessed. Dr. Dale Pennington, the  
27 one who hypnotized her, was briefed on these police reports.

28 Despite Defendant's claim, the People have previously

1 discovered all police reports to him. Defendant himself refers to  
2 these reports in his own motion (see Defendant's Notice of Motion  
3 and Motion to Exclude Testimony of Hypnotized Witness Kristen  
4 Dempewolf, p. 9, lines 1 - 7). Nothing in Dr. Pennington's  
5 hypnosis session with the witness addressed matters outside the  
6 scope of what was documented in the referenced police reports.  
7 Additionally, Modesto Police Department Detective Stough's report  
8 dated January 19, 2003, indicates that Dr. Pennington was briefed  
9 on the reports by Detective Stough (Bates Nos. 2096 - 2100).

10 The People have complied with Evidence Code §795(a)(3)(A).

11 **B. Evidence Code §795(a)(3)(B)**

12 The required procedure in Evidence Code §795(a)(3)(B) is that  
13 (t)he subject gave informed consent to the  
14 hypnosis.

15 In the instant case, Ms. Dempewolf gave informed consent to  
16 the hypnosis. Her consent is documented on videotape prior to her  
17 hypnosis and is also demonstrated by her voluntary choice to keep  
18 an appointment to be hypnotized.

19 The People have complied with Evidence Code §795(a)(3)(B).

20 **C. Evidence Code §795(a)(3)(C)**

21 The required procedure in Evidence Code §795(a)(3)(C) is that  
22 (t)he hypnosis session, including the pre- and  
23 post- hypnosis interviews, was videotape  
recorded for subsequent review.

24 In the instant case, the hypnosis session, the pre-hypnosis  
25 interview, and the post-hypnosis interview of Ms. Dempewolf were  
26 videotape recorded and are available for subsequent review.  
27 Defendant appears to disagree with Dr. Pennington's pre-hypnosis  
28 interview of Ms. Dempewolf, however, nowhere does the statute state

1 | how a pre-hypnosis interview must be conducted. Ms. Dempewolf's  
2 | prehypnotic memory was thoroughly preserved in written form as  
3 | demonstrated above.

4 | The People have complied with Evidence Code §795(a)(3)(C).

5 | **D. Evidence Code §795(a)(3)(D)**

6 | The required procedure in Evidence Code §795(a)(3)(D) is that

7 | (t)he hypnosis was performed by a licensed  
8 | medical doctor, psychologist, licensed  
9 | clinical social worker, or a licensed marriage  
10 | and family therapist experienced in the use of  
11 | hypnosis, and independent of and not in the  
12 | presence of law enforcement, the prosecution,  
13 | or the defense.

14 | Dr. Dale Pennington has his doctorate in psychology. Dr.  
15 | Pennington logged 3,000 hours in his pre- and post- doctoral  
16 | internships in theoretical and applied hypnosis and currently  
17 | prepares and presents classes in clinical, medical and forensic  
18 | hypnosis as the director of Dale Pennington Associates (see  
19 | attached curriculum vitae of Dr. Pennington). While Dr. Pennington  
20 | indeed prepares and presents POST-approved classes, he is  
21 | independent of law enforcement. In the instant case, Dr.  
22 | Pennington conducted the hypnosis sessions as an agent of Dale  
23 | Pennington Associates. Also, the hypnosis sessions were conducted  
24 | outside of the presence of law enforcement.

25 | The People have complied with Evidence Code §795(a)(3)(D).

26 | **III**

27 | **EVIDENCE CODE §795(a)(4).**

28 | As required by Evidence Code §795(a)(4), the People request a  
29 | hearing pursuant to Evidence Code §402 to present clear and  
30 | convincing evidence that the hypnosis did not so affect the witness  
31 | as to render her prehypnosis recollection unreliable nor impair her

1 ability to be cross-examined concerning her prehypnosis  
2 recollection.

3 CONCLUSION

4 Based on the above facts and law, the People respectfully  
5 request that Defendant's motion to exclude the witness be denied.

6 Dated this 21<sup>st</sup> day of January, 2004, at Modesto,  
7 California.

8 Respectfully submitted,

9 JAMES C. BRAZELTON  
District Attorney

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12 By   
RICK DISTASO  
Deputy District Attorney

13 RD/jba

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(ROBERT) DALE PENNINGTON  
517 Debra Ct.  
Santa Rosa, California 95404

EDUCATION

- 1958 B.A. with highest honors (Physics), University of California, Santa Barbara.  
1978 M.A. (Psychology), Antioch University, San Francisco.  
1991 Ph.D. (Clinical Psychology), The Professional School of Psychology, San Francisco.

EMPLOYMENT

1985-Now Instructor (Adjunct)  
SANTA ROSA JUNIOR COLLEGE

Prepares and gives classes in POST-approved academy in stress management, crisis intervention, handling the mentally ill, medical and psychological rights of inmates, interpersonal communications, victimology, subordinate counseling and suicide prevention.

1978-Now Director  
DALE PENNINGTON ASSOCIATES

Creates and presents accredited CEU classes in clinical and medical hypnosis for psychologists, nurses, and marriage & family therapists. Also prepares and presents POST-approved classes in forensic hypnosis, psychophysiology, interviewing techniques, behavior analysis, forensic statement analysis and cognitive interviewing. Additionally creates and presents seminars and workshops for industrial and business groups in stress management, productivity, communication skills, supervision, and motivation.

1991-94 Principal Psychologist (Psychologist III)  
NEVADA DEPARTMENT OF PRISONS - ELY STATE PRISON

Managed inpatient/outpatient mental health programs in 1,000 inmate maximum security prison. Supervised professional staff in assessment, treatment planning and delivery of psychological services. Designed and conducted in-house training for custodial and mental health staff. Set up policies and procedures and initiated federally mandated ECU program. Managed crisis unit, forced medication panel, and sex offender panel.

1983-95 Director of Continuing Education  
MILTON ERICKSON INSTITUTE OF SANTA ROSA

Responsible for creation, marketing and presentation of graduate level programs for health care professionals. Instructor in clinical hypnotherapy. Primary activity, however, was providing individual and group psychotherapy to wide variety of clinic patients ranging from chronic depressives to developmentally disabled. Also worked with medical in-patients, primarily for pain, sleeplessness, anxiety, and accelerated healing.

1988-91

Deputy Sheriff I  
SONOMA COUNTY SHERIFF'S DEPARTMENT

Assigned to court security as bailiff/security officer. Responsible for movement of in-custody defendants (and witnesses) from jail to courtroom, control of these individuals during court, and return to jail custody. Also worked as custodial officer in the jail in both direct supervision and special housing units, as well as in transportation of inmates between facilities.

RELATED EXPERIENCE

Pre- and post doctoral internships in theoretical and applied hypnosis (3,000 hours). Member of developmental team which created innovative hypnotic treatment for childhood asthma. Invited presenter in advanced hypnosis techniques to International Society of Investigative and Forensic Hypnosis. Invited speaker in hypnosis to University of San Francisco classes for marriage and family therapists. Reserve deputy sheriff 13 years.

RECENT PUBLICATIONS

"Police Stress" (continuing column) in FIT COP, Santa Rosa, California. (1989-1990).

"Subjective assessment of allergy relief following group hypnosis and self-hypnosis". Co-author with Madrid, Rostel and Murphy. American Journal of Clinical Hypnosis (1996).

"Events associated with maternal-infant bonding deficits and severity of pediatric asthma". Doctoral dissertation. San Francisco, California. (1991).

"Maternal-Infant Bonding and Asthma". Co-author with Madrid. Journal of Prenatal and Perinatal Psychology and Health (2000).



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AFFIDAVIT OF SERVICE BY FAX

STATE OF CALIFORNIA )  
( ss.  
COUNTY OF STANISLAUS )

I, the undersigned, say:

I was at the time of service of the attached OPPOSITION TO MOTION TO EXCLUDE WITNESS the age of eighteen years. I served by fax a copy of the above-entitled document(s) on the 21<sup>st</sup> day of January, 2004, delivering a copy thereof to the office(s) of:

Mark Geragos  
Attorney for Defendant  
Fax No. (213)625-1600

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21<sup>st</sup> day of January, 2004, at Modesto, California.

*D. Hill*

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dmh