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FILED

03 OCT -7 PM 12:02

CLERK OF THE SUPERIOR COURT
COUNTY OF STANISLAUS

BY [Signature] DEPUTY

FILED BY FAX

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF STANISLAUS

14 THE PEOPLE OF THE STATE OF CALIFORNIA,

15 Plaintiff,

16 vs.

18 SCOTT LEE PETERSON,

19 Defendant.

Case No. 1056770

NOTICE OF MOTION AND
MOTION TO EXCLUDE
TESTIMONY OF HYPNOTIZED
WITNESS KRISTEN DEMPEWOLF

[Evidence Code Sections 402 and 795]

DATE: October 20, 2003

TIME: 8:30 a.m.

PLACE: Dept 2

21 TO: STANISLAUS COUNTY DISTRICT ATTORNEY; and

22 TO: CLERK OF THE ABOVE-ENTITLED COURT:

23 PLEASE TAKE NOTICE that on October 20, 2003 at the hour of 8:30 a.m., or as
24 soon thereafter as counsel can be heard, Defendant Scott Lee Peterson ("Mr. Peterson"),
25 through counsel Mark J. Geragos and Kirk McAllister, will move this Court for an order
26 excluding the testimony of the prosecution's proposed witness Kristen Dempewolf ("Ms.
27 Dempewolf").

28 The Motion will be based upon the grounds that the prosecution has cannot

ms 10-7-03

1 establish compliance with the strict requirements of Evidence Code section 795 and
2 cannot demonstrate by clear and convincing evidence that Ms. Dempewolf's testimony is
3 not inadmissible.

4 The Motion will be based on this Notice, the attached memorandum of points and
5 authorities, the pleadings and records on file herein, and upon such other and further
6 argument as may be presented to the Court at the hearing of this matter.

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8 Dated: October 6, 2003

Respectfully submitted,

GERAGOS & GERAGOS

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By: 

MARK J. GERAGOS
Attorney for Defendant
SCOTT LEE PETERSON

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MOTION

Scott Lee Peterson, by and through counsel, hereby moves the Court for an order(s) imposing one or more of the following:

1. Prohibiting the prosecution from introducing any testimony by Kristen Dempewolf; or,
2. Setting an in camera hearing during which the Court may review the relevant discovery; and,
3. Granting whatever other relief the Court may deem necessary and appropriate to further the ends of justice.

Dated: October 6, 2003

Respectfully submitted,
GERAGOS & GERAGOS

By: 

 MARK J. GERAGOS
 Attorney for Defendant
 SCOTT LEE PETERSON

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 The strict requirements to be met by a proponent of testimony by a witness who
5 has undergone hypnosis are clearly set forth in Evidence Code section 795.^{1/} Section 795
6 was enacted by the legislature following the California Supreme Court's ruling in *People*
7 *v. Shirley* (1982) 31 Cal.3d 18, in which the Supreme Court found that a witness may not
8 be permitted to testify after he or she has undergone hypnosis for the purpose of restoring
9

10 _____
11 'Section 795 provides:

12 (a) The testimony of a witness is not inadmissible in a criminal
13 proceeding by reason of the fact the witness has previously undergone
14 hypnosis for the purpose of recalling events which are the subject of
15 the witness' testimony, if all of the following conditions are met: (1)
16 The testimony is limited to those matters which the witness recalled
17 and related prior to the hypnosis. (2) The substance of the
18 prehypnotic memory was preserved in written, audiotape, or
19 videotape form prior to the hypnosis. (3) The hypnosis was
20 conducted in accordance with all of the following procedures: (A) A
21 written record was made prior to hypnosis documenting the subject's
22 description of the event, and information which was provided to the
23 hypnotist concerning the subject matter of the hypnosis. (B) The
24 subject gave informed consent to the hypnosis. (C) The hypnosis
25 session, including the pre-and post-hypnosis interviews, was
26 videotape recorded for subsequent review. (D) The hypnosis was
27 performed by a licensed medical doctor, psychologist, licensed
28 clinical social worker, or a licensed marriage and family therapist
experienced in the use of hypnosis and independent of and not in the
presence of law enforcement, the prosecution, or the defense. (4)
Prior to the admission of the testimony, the court holds a hearing
pursuant to Section 402 of the Evidence Code at which the proponent
of the evidence proves by clear and convincing evidence that the
hypnosis did not so affect the witness as to render the witness'
prehypnosis recollection unreliable or to substantially impair the
ability to cross-examine the witness concerning the witness'
prehypnosis recollection. At the hearing, each shall have the right to
present expert testimony and to cross-examine witnesses.

(b) Nothing in this section shall be construed to limit the ability of a
party to attack the credibility of a witness who has undergone
hypnosis, or to limit other legal grounds to admit or exclude the
testimony of that witness.

1 his or her memory of the events in issue. (See *People v. Shirley, supra*, 31 Cal.3d at 22-
2 23, 66-67.) The *Shirley* court conducted a comprehensive examination of both the
3 findings of courts in other states regarding hypnosis and the professional literature on
4 hypnosis. The Court noted that studies have found, inter alia, that:

5 Hypnosis is by its nature a process of suggestion, and one of
6 its primary effects is that the person hypnotized becomes
7 extremely receptive to suggestions that he perceives as
8 emanating from the hypnotist. The effect is intensified by
9 another characteristic of the hypnotic state, to wit, that the
10 attention of the subject is wholly focused on and directed by
11 the hypnotist.

12 (See *People v. Shirley, supra*, 31 Cal.3d at 63-64.)

13 The person under hypnosis experiences a compelling desire to
14 please the hypnotist by reacting positively to these
15 suggestions, and hence to produce the particular responses he
16 believes are expected of him.

17 (See *People v. Shirley, supra*, 31 Cal.3d at 64.)

18 During the hypnotic session, neither the subject nor the
19 hypnotist can distinguish between true memories and
20 pseudomemories of various kinds in the reported recall; and
21 when the subjects repeats that recall in the waking state (e.g.,
22 in a trial), neither an expert witness nor a lay observer (e.g.,
23 the judge or jury) can make a similar distinction. In each
24 instance, if the claimed memory is not or cannot be verified
25 by wholly independent means, no one can reliably tell
26 whether it is an accurate recollection or mere confabulation.

27 (See *People v. Shirley, supra*, 31 Cal.3d at 65.)

28 [A] witness who is uncertain of his recollections before being

1 hypnotized will become convinced by that process that the
2 story he told under hypnosis is true and correct in every
3 respect.

4 (See *People v. Shirley, supra*, 31 Cal.3d at 65.)

5 [R]epresentative groups within [the scientific] community are
6 on record as expressly opposing this technique for many of
7 the foregoing reasons, particularly when it is employed by law
8 enforcement hypnotists.

9 (See *People v. Shirley, supra*, 31 Cal.3d at 66.)

10 [I]n October 1978 the Society for Clinical and Experimental
11 Hypnosis adopted a resolution reading in part: 'The Society
12 for Clinical and Experimental Hypnosis views with alarm the
13 tendency for police officers with minimal training in hypnosis
14 and without a broad professional background in the healing
15 arts employing hypnosis to presumably facilitate recall of
16 witnesses or victims privy to the occurrence of some crime.
17 Because we recognize that hypnotically aided recall may
18 produce either accurate memories or may facilitate the
19 creation of pseudo memories, or fantasies that are accepted as
20 real by subject and hypnotist alike, we are deeply troubled by
21 the utilization of this technique among the police. It must be
22 emphasized that there is no known way of distinguishing with
23 certainty between actual recall and pseudo memories except
24 by independent verification. Police officers typically have
25 had limited technical training and lack the broad
26 understanding of psychology and psychopathology. Their
27 orientation is to obtain the information needed to solve a
28 crime rather than a concern focusing on protecting the health

1 of the subject who was either witness to, or victim of, a crime.
2 Finally, police officers understandably have strong views as to
3 who is likely to be guilty of a crime and may easily
4 inadvertently bias the hypnotized subject's memories even
5 without themselves being aware of their actions." (27
6 Internat. J. Clinical & Experimental Hypnosis (1979) 452. [¶]
7 In August 1979 an identical resolution was adopted by the
8 International Society of Hypnosis. (*Id.* at p. 453.)
9 (See *People v. Shirley*, *supra*, 31 Cal.3d at 66, fn. 52.)

10 From the above excerpts, it is abundantly clear that not only have courts viewed
11 hypnosis with extreme skepticism, the hypnosis community itself has condemned law
12 enforcement's use of this technique. The legislature recognized this critical fact when it
13 enacted Evidence Code section 795 and required that any hypnosis of a potential witness
14 must be performed "independent of and not in the presence of law enforcement [or] the
15 prosecution." (See Evidence Code section 795, subdivision (a)(3)(D).) This requirement
16 was clearly intended to add some degree of reliability to the questionable validity of
17 testimony from a witness who has undergone hypnosis. Certainly any deviation from the
18 strict requirements of Section 795 cannot be tolerated in a capital case such as the instant
19 matter.

20 Notwithstanding the statutory and decisional bar to the admission of the evidence,
21 the prosecution has recruited a purported hypnotist who is described on the Behavior
22 Analysis Training Institute ("BATI") website² as:

23 Dale Pennington - - Director of Continuing Education for the
24 Behavior Analysis Training Institute. Dr. Pennington holds a
25 Ph.D. in clinical psychology and has taught both clinical and
26 non-clinical communication skills for the past twenty-five
27 years. Author of numerous articles, he is on staff of the Santa

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²<www.liedetection.com>

1 Rosa Regional Criminal Justice Training Center and is a
2 member of the BATI instructional staff. In his spare time he
3 does therapy for those who have lost their golf balls.

4 (See Exhibit 1.)

5 Despite Dr. Pennington's laudable moonlighting pursuits, there simply is no
6 indication (nor has the prosecution provided any discovery to indicate) that Dr.
7 Pennington is "experienced in the use of hypnosis" as required by Section 795(a)(3)(D).
8 Additionally, Dr. Pennington's business, BATI, was founded and is run by a 23 year
9 veteran of law enforcement who serves as an investigator and Chief Polygraph Examiner
10 with the Sonoma County Sheriff's Department. (See Exhibit 1.) Most troubling,
11 however, is Dr. Pennington's position as a trainer of law enforcement at the Santa Rosa
12 Regional Criminal Justice Training Center, a fact that is clearly in violation of the Section
13 795(a)(3)(D) requirement that the hypnotist be independent of law enforcement and/or the
14 prosecution. Simply put, the prosecution's use of an unqualified hypnotist directly
15 involved in California law enforcement was clearly in violation of Section 795, rendering
16 the use of testimony by hypnotised witness Kristen Dempewolf impermissible.

17 However, even should this Court determine that the use of Dr. Pennington does not
18 warrant exclusion in its own right, Mr. Peterson will briefly address the other
19 requirements of Section 795 with which the prosecution has not and cannot comply.

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II.

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THE SUBSTANCE OF MS. DEMPEWOLF'S PREHYPNOTIC MEMORY

23

WAS NOT RELIABLY PRESERVED AS REQUIRED BY STATUTE

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As noted above, Evidence Code section 795(a)(2) permits testimony of a
26 hypnotized witness only if "[t]he substance of the prehypnotic memory was preserved in
27 written, audiotape, or videotape from prior to the hypnosis." The only discovery provided
28 to the defense that purports to set forth Ms. Dempewolf's prehypnotic memory are: (1)
the notes of an unidentified individual who apparently was answering the Modesto Police

1 Department's tip line (Bates No. 4843); (2) a January 9, 2003 report by Detective
2 Schmierer that purports to set forth the contents of a January 9, 2003 telephone
3 conversation Ms. Dempewolf had with Detective Schmierer (Bates Nos. 4841 - 4842); (3)
4 a January 16, 2003 report by Detective Rick House in which Detective House purports to
5 set forth the contents of a January 13, 2003 telephone conversation he had with Ms.
6 Dempewolf (Bates Nos. 2324 - 2327); (4) a 1-paragraph 7-line description by Detective
7 Stough of Ms. Dempewolf's pre-hypnosis interview with Dr. Pennington; and, (5) the
8 videotape of the minimal pre-hypnotic interview conducted by Dr. Pennington.

9 With the exception of the videotape described in (5) above, there is absolutely
10 nothing to corroborate the accounts given by law enforcement as to what Ms. Dempewolf
11 stated in her prehypnotic recollections of what she did or did not see. Given the grave
12 concerns that have been universally expressed by courts, legislatures, and the hypnosis
13 community itself, the prosecution should have, at a minimum, had Ms. Dempewolf attest
14 to the accuracy of the various reports of her statements. For the reasons discussed by the
15 Supreme Court in *Shirley*, Ms. Dempewolf's prehypnotic recollection can never be
16 determined since there is no reliable manner in which to assure that Ms. Dempewolf's
17 memory has not been permanently altered by law enforcement's hypnosis of her.

18 Since Ms. Dempewolf's prehypnotic memory was not properly preserved this
19 Court should find that her testimony is inadmissible.

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III.

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THE HYPNOSIS WAS NOT CONDUCTED IN ACCORDANCE WITH THE PROCEDURES SET FORTH IN EVIDENCE CODE SECTIONS

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795(a)(3)(A), 795(a)(3)(C), AND 795(a)(3)(D)

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A. Section 795(3)(A).

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Subdivision (a)(3)(A) requires that a written record be made prior to hypnosis.

27

This record must document the subject's description of the event and information which
28 was provided to the hypnotist concerning the subject matter of the hypnosis. (See

1 Evidence Code section 795(a)(3)(A).) In this case, the prosecution has not provided Mr.
2 Peterson with any record of the materials provided to Dr. Pennington prior to the
3 hypnosis. However, a review of the videotaped hypnosis session reveals that Dr.
4 Pennington had been provided a significant amount of information concerning the subject
5 matter of the hypnosis and that he in fact was apparently following an agenda provided by
6 the prosecution whereby he was to "convince" Kristen Dempewolf as to information that
7 she was unsure of prior to the hypnosis. Indeed, Dr. Pennington can be seen reviewing a
8 document as he guides Ms. Dempewolf through a series of questions.

9 Since no written record was made of what information was provided to Dr.
10 Pennington, the hypnosis was not conducted in accordance with Section 795(a)(3)(A) and
11 Ms. Dempewolf's testimony must be excluded.

12

13 **B. Section 795(a)(3)(C).**

14 Subdivision (a)(3)(C) requires that the hypnosis session, including the pre-and
15 post-hypnosis interviews, be videotape recorded for subsequent review. (See Evidence
16 Code section 795(a)(3)(C).) Although there is a videotape of the majority of the hypnosis
17 session, the tape appears to begin at some point following the commencement of the pre-
18 hypnosis interview. Additionally, the "prehypnosis interview" conducted by Dr.
19 Pennington was grossly deficient in that it failed to accurately document Ms.
20 Dempewolf's prehypnotic recollection. As such, the hypnosis failed to meet the
21 requirement of subdivision (a)(3)(C) and Ms. Dempewolf's testimony should be
22 excluded.

23

24 **C. Section 795(a)(3)(D).**

25 As noted above in the Introduction, Dr. Pennington appears to be involved with
26 California law enforcement in violation of subdivision (a)(3)(D). Additionally, the
27 prosecution has provided no evidence that Dr. Pennington is "experienced in the use of
28 hypnosis" as the subdivision requires. In fact, during the pre-hypnotic interview of Ms.

1 Dempewolf, Dr. Pennington states that his doctoral dissertation was in the area of
 2 maternal-infant bonding. There is no indication that Dr. Pennington was independent of
 3 law enforcement or qualified to conduct the hypnosis. As such, the hypnosis failed to
 4 comply with subdivision (a)(3)(D) and Ms. Dempewolf's testimony must be excluded.

5
6 V.

7 **CONCLUSION**

8 In light of the foregoing, Mr. Peterson respectfully requests that the Court grant the
 9 relief requested.

10
11 Dated: October 6, 2003

Respectfully submitted,
GERAGOS & GERAGOS

12
13 By:



 14 MARK J. GERAGOS
 15 Attorney for Defendant
 16 SCOTT LEE PETERSON

EXHIBIT 1

Meet The Staff

Nick Flint



Founder and President of the Behavior Analysis Training Institute, Inc. He is a 23 year veteran of law enforcement, serving as an investigator and Chief Polygraph Examiner with the Sonoma County Sheriff's Department in California. He also worked 3 years for the Sacramento Police Department before coming to Sonoma County.

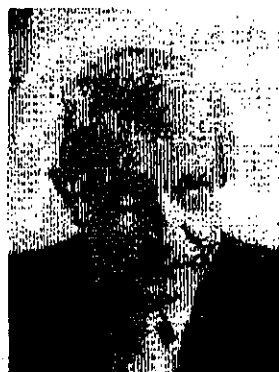
Mr. Flint is the creator of BATI's innovative and highly rated "Interview and Interrogation Techniques" course which has now been presented to over 11,000 California criminal justice professionals. He is also recognized as a "Subject Matter Expert" by the California Commission of Peace Officer Standards and Training. He is also a Master's candidate at the California State University at Sonoma in the field of Psychology with a concentration in Forensic Psycholinguistics.

At BATI, Mr. Flint is currently responsible for Research and Development, quality control of investigative functions, and oversees quality control of all instructional services. In his spare time he loses golf balls.



Bill Edmunds

Vice President, Forensic Programs Coordinator, and Chief Statement Analyst for the Behavior Analysis Training Institute, Inc. He retired as a Lieutenant from the El Cerrito Police Department after 28 years of law enforcement experience which included the supervision of the investigations bureau for several years. His academic experience includes six years teaching at Los Medanos College and eleven years as adjunct faculty at Santa Rosa Community College. He holds a California Community College Instructor Credential. In his spare time he searches for lost golf balls.



Dale Pennington

Director of Continuing Education for the Behavior Analysis Training Institute. Dr. Pennington holds a Ph.D. in clinical psychology and has taught both clinical and non-clinical communication skills for the past twenty-five years. Author of numerous articles, he is on staff of the Santa Rosa Regional Criminal Justice Training Center and is a member of the BATI instructional staff. In his spare time he does therapy for those who have lost their golf balls.

Ed Hudson

District Attorney Investigator and staff instructor for the Behavior Analysis Training Institute. Mr. Hudson has over ten years of Law Enforcement experience in both California and Virginia. Specializing in the investigation of Child Abuse and Sexual Assault, he is a Certified Child Interview Specialist and is Chairman of the Sonoma County Child Abuse Prevention Council. In his spare time Mr. Hudson sells golf balls.

Howard Bailey



30 year veteran of Law Enforcement. He retired as the Chief Polygraph Examiner of the San Francisco Police Department. During his tenure with the S.F.P.D. he conducted investigations while assigned to the Divisions of ***Vice, Special Investigations, Robbery, Homicide*** and the ***Polygraph Section***.

Mr. Bailey's training as a polygraph examiner was initiated with basic studies at Spokane, Washington. These were followed by advanced studies at what is now the Department of Defense Polygraph Institute (formerly U.S.A.M.P.S.) and by graduate studies sponsored and coordinated by the F.B.I.

Mr. Bailey has extensive teaching experience. He has been a consultant to numerous municipal, state and federal agencies. He has authored a number of technical techniques, all of which were designed to seek and obtain Truth.

Raymond Hill



Professor of Criminal Justice at Santa Rosa Junior College. He teaches Legal Update classes in P.O.S.T. Advanced Officer courses for agencies in six counties. Mr. Hill also provides instructional support in matters of Case Law and Constitutional Law as they pertain to interviews and interrogations.

Mr. Hill holds undergraduate and post-graduate degrees in Criminal Justice, Public Administration, and Education.

Though he lives across the street from a golf clubhouse, he doesn't play golf!!!

DOCUMENT TWO

MOTION IN LIMINE TO EXCLUDE MITOCHONDRIAL DNA EVIDENCE

DOCUMENT ONE

**MOTION TO EXCLUDE TESTIMONY OF HYPNOTIZED WITNESS
KRISTEN DEMPEWOLF**