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ORIGINAL**FILED**
SAN MATEO COUNTY**FEB - 9 2004**

Clerk of the Superior Court
 By Margie Matm
 DEPUTY CLERK

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
 FOR THE COUNTY OF STANISLAUS**

THE PEOPLE OF THE STATE OF
 CALIFORNIA,

Plaintiff,

vs.

SCOTT LEE PETERSON,

Defendant.

Case No. ~~1056770~~ **55500-A**

REPLY TO OPPOSITION TO
 MOTION TO EXCLUDE
 TESTIMONY OF HYPNOTIZED
 WITNESS KRISTEN DEMPEWOLF

Trial Date: February 9, 2004

Defendant Scott Lee Peterson ("Mr. Peterson") hereby replies to the People's
 Opposition to Motion to Exclude Testimony of Hypnotized Witness Kristen Dempewolf.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The use of hypnosis by law enforcement has been roundly discouraged by the California Supreme Court, the legislature, the Society for Clinical and Experimental Hypnosis, and the International Society of Hypnosis. (See October 7, 2003 Motion to Exclude Testimony of Hypnotized Witness Kristen Dempewolf at 4-7.) Indeed, the legislature has found that testimony by individuals who have undergone hypnosis is so suspect that the proponent of the testimony must prove 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." (See Evidence Code section 795, subdivision (a)(4).) The proponent of the testimony must also demonstrate strict compliance with all of the requirements set forth in Section 795.

Given that this is a death penalty case in which there is a "compelling need for ensuring reliability in determining whether death is the appropriate punishment,"^{1/} this Court must exclude Ms. Dempewolf's testimony (if there is even a hint of irregularity in the hypnotic procedure.)

II.

THE PEOPLE FAILED TO COMPLY WITH EVIDENCE CODE SECTION 795

The parties agree that Evidence Code section 795 governs the admissibility of Ms. Dempewolf's testimony. (See Opposition at 2:10-13.) However, the parties strongly disagree on what constitutes compliance with the very strict requirements of Section 795.

For example:

^{1/}See *Dustin v. Superior Court* (5th Dist. 2002) 99 Cal App 4th 1211, 1212-1213.

1 **A. Section 795, subdivision (a)(2).**

2 Subdivision (a)(2) requires that "the substance of the prehypnotic memory was
3 preserved in written, audiotape, or videotape form prior to the hypnosis." Given that the
4 reliability of hypnotically enhanced testimony is exceptionally suspect, it may be inferred
5 that the record of the prehypnotic memory must itself be reliable. Such is not the case
6 here.

7 The only so called "record" of Ms. Dempewolf's prehypnotic memory consists of
8 two uncorroborated police reports.^{2/} Furthermore, the two police reports were made by
9 two different detectives based on two telephone conversations that could have been with
10 any female identifying herself as Kristen Dempewolf. At a minimum, prior to the
11 hypnotic interview, the People should have either had Ms. Dempewolf read the reports
12 and attest to the accuracy of the police reports, or they should have had her sign a written
13 statement in which she related her full prehypnosis recollection of the events.

14 In any case, given the courts', legislature's, and hypnosis community's universal
15 criticism of law enforcement's use of hypnosis, such a flimsy record fails to constitute
16 compliance with subdivision (a)(2) - - particularly in a death penalty case.

17
18 **B. Section 795, subdivision (a)(3)(A).**

19 Subdivision (a)(3) requires that "[a] written record was made prior to hypnosis
20 documenting the subject's description of the event, and information which was provided
21 to the hypnotist concerning the subject matter of the hypnosis." The People fail to
22 comply with both prongs of this subdivision.

23
24
25 ^{2/}Mr. Peterson notes that the People contend the prehypnotic "interview" conducted by Dr.
26 Pennington constituted a record of Ms. Dempewolf's prehypnotic memory. In fact, Dr. Pennington's
27 "interview" failed to document Mr. Dempewolf's prehypnotic memory in any meaningful manner.
28 On the other hand, the "interview" did disclose that prior to undergoing hypnosis, Ms. Dempewolf
could not recall the date of the incidents that were purportedly the object of law enforcement's
interest. This fact is notable because a review of the hypnotic interview demonstrates that Dr.
Pennington questioned Ms. Dempewolf in a manner that required her to answer

1 First, as set forth above, the two uncorroborated police reports fail to properly
2 document Ms. Dempewolf's prehypnotic memory. Second, the People claim "Dr. Dale
3 Pennington, the one who hypnotized [Ms. Dempewolf], was briefed on [the two] police
4 reports," and, "Detective Stough's report dated January 19, 2003, indicated that Dr.
5 Pennington was briefed on the reports by Detective Stough (Bates Nos. 2096 - 2100)."
6 (See Opposition at 3:26-27 and 4:7-9.)

7 In actuality, the Stough report states only that, "I gave Dr. PENNINGTON a brief
8 on the burglary and on the reports of the suspicious van on or about the 24th of December
9 2002 in front of 516 Covenia." (Bates No. 2096.) The Stough report conspicuously fails
10 to identify which reports, who made the reports, the identity of the witnesses involved in
11 the reports, and any meaningful description of the content of the reports. Simply put, the
12 "written record" provides no guidance as to the nature of information provided to Dr.
13 Pennington prior to the hypnotic interview of Ms. Dempewolf.^{3/} As such, the People have
14 failed to comply with subdivision a(3)(A).

15
16 **C. Subdivision (a)(3)(B).**

17 Subdivision (a)(3)(B) requires that the prehypnosis interview be videotape
18 recorded. As set forth in Mr. Peterson's moving papers, it appears that the videotape
19 begins at some point following the commencement of the prehypnosis interview, thus
20 failing to comply with this subdivision's requirements.

21
22 **D. Subdivision (a)(3)(D).**

23 Subdivision (a)(3)(D) requires that:
24

25 ^{3/}Interestingly, immediately following the language quoted above, the Stough report indicates
26 that "after the briefing Det. BANKS took the Dr. to the scene so he could view that area." (Bates
27 No. 2096.) The defense cannot imagine any innocent reason Dr. Pennington would need to
28 personally view the area if the People's intention was to elicit Ms. Dempewolf's true recollection.
Indeed, having viewed the scene himself, it is quite plausible that Dr. Pennington could have
unwittingly (or intentionally) provided cues to Ms. Dempewolf that would have helped her recall the

1 [t]he hypnosis was performed by a licensed medical doctor,
2 psychologist, licensed clinical social worker, or a licensed
3 marriage and family therapist experienced in the use of
4 hypnosis and independent of and not in the presence of law
5 enforcement, the prosecution, or the defense.

6 Although Dr. Pennington may arguably have been qualified to conduct the
7 hypnosis, he certainly was not "independent" of law enforcement for the following
8 reasons: (1) the only purported record of Ms. Dempewolf's prehypnotic recollection was
9 in the form of an oral communication by a detective during which the detective "briefed"
10 Dr. Pennington on unidentified "reports" that were drafted by other detectives - - thus Dr.
11 Pennington's sole source of information was law enforcement's own subjective and
12 uncorroborated "reports"; (2) for reasons unknown, Dr. Pennington was taken by a
13 detective to the area in question prior to the hypnotic interview of Ms. Dempewolf; (3)
14 Dr. Pennington's curriculum vitae (See Opposition) reveals that in addition to teaching
15 POST-approved courses, he has served as, *inter alia*, Deputy Sheriff I (three years) as
16 well as a Reserve Deputy Sheriff (13 years).^{4/}

17
18 **E. Subdivision (a)(4).**

19 The People request an Evidence Code section 402 hearing in connection with Ms.
20 Dempewolf. Since the People have failed to comply with several of the mandatory
21

22 ⁴Dr. Pennington's C.V. is noteworthy as well in that (1) it fails to disclose Dr. Pennington's
23 position as Director of Continuing Education for the Behavior Analysis Training Institute (See
24 Exhibit 1.); and (2) it lists a 26-year employment tenure as director of "Dale Pennington Associates"
25 an entity that could not be identified via WESTLAW search of California fictitious business names
26 or via a search of the California Secretary of State's business search portal. (See Exhibit 2) The
27 troubling aspect of the apparent nonexistence of a record of "Dale Pennington Associates" being
28 registered to do business in California is that the People proclaim Dr. Pennington's independence
from law enforcement by stating that "[i]n the instant case, Dr. Pennington conducted the hypnosis
sessions as an agent of Dale Pennington Associates." (Opposition at 5:18-20.) The People's attempt
to style Dr. Pennington as being independent by claiming he is the director/agent of an apparently
unregistered business entity should be frowned upon and held Dr. Pennington's independence

1 requirements set forth in Section 795, the request must be denied.

2
3 **III.**

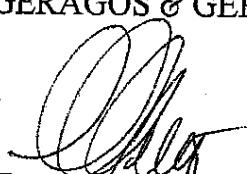
4 **CONCLUSION**

5 WHEREFORE, Mr. Peterson respectfully requests that the Court grant the relief
6 requested in his October 7, 2003 motion.

7
8 Dated: February 9, 2004

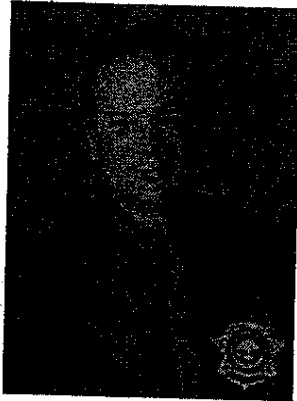
Respectfully submitted,
GERAGOS & GERAGOS

9
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12 By:


MARK J. GERAGOS
Attorney for Defendant
SCOTT LEE PETERSON

Meet The Staff

Nick Flint

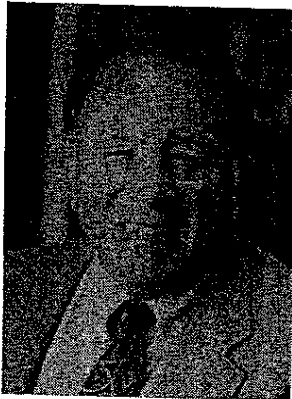


Founder and President of the Behavior Analysis Training Institute, Inc. He is a 23 year veteran of law enforcement, serving as an investigator and Chief Polygraph Examiner with the Sonoma County Sheriff's Department in California. He also worked 3 years for the Sacramento Police Department before coming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

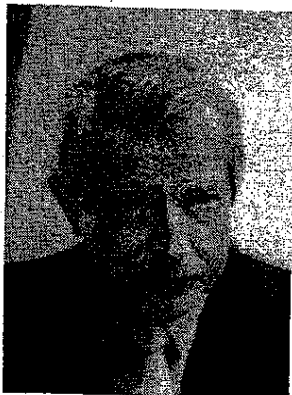
At BATI, Mr. Flint is currently responsible for Research and Development, quality control of investigative functions, and oversees quality control of all instructional services. In his spare time he loses golf balls.

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

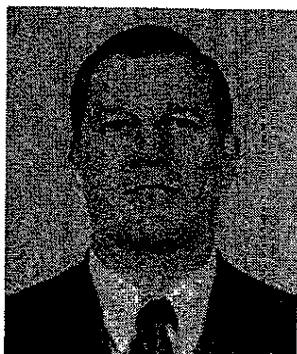


Director of Continuing Education for the Behavior Analysis Training Institute. Dr. Pennington holds a Ph.D. in clinical psychology and has taught both clinical and non-clinical communication skills for the past twenty-five years. Author of numerous articles, he is on staff of the Santa Rosa Regional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

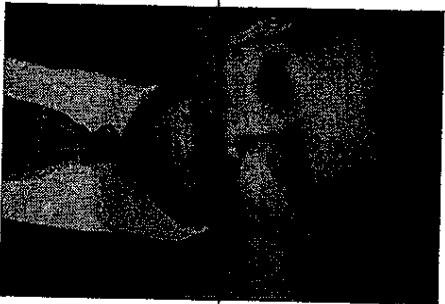


Professor of Criminal Justice at Santa Rosa Junior College. He teaches Legal Update classes in ***P.O.S.T.*** Advanced Officer courses for agencies in six counties. Mr. Hill also provides instructional support in matters of Case Law and Constitutional Law as they pertain to interviews and interrogations.

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

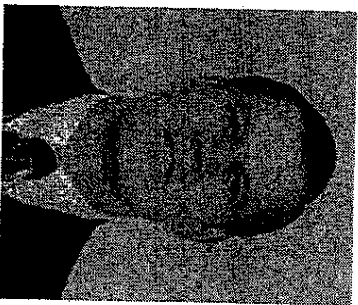
Though he lives across the street from a golf clubhouse, he doesn't play golf!!!

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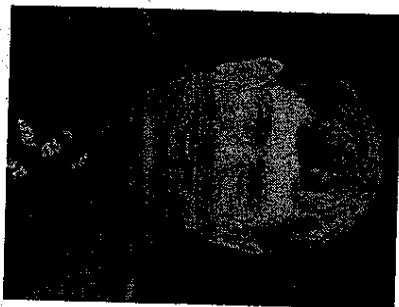
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<input type="checkbox"/> 2.	SO. CALIF LAWN & GARDENING	PENNINGTON, BRIAN DALE	FILLMORE	CA
<input type="checkbox"/> 3.	SOUTHERN CALIFORNIA LANDSCAPE AND TREE SERVICE	PENNINGTON, BRIAN DALE	VENTURA	CA
<input type="checkbox"/> 4.	SOUTHERN CALIFORNIA LANDSCAPE AND TREE SERVICE	PENNINGTON, BRIAN DALE	VENTURA	CA

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<input type="checkbox"/>	Rank	Business Name	Owner Name	City	ST
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<input type="checkbox"/>	2.	A GRAIN OF EARNESTY	PENNINGTON ROBERT	SAN DIEGO	CA
<input type="checkbox"/>	3.	ANVIL METALSMITHING	PENNINGTON ROBERT W	ORANGE	CA
<input type="checkbox"/>	4.	APPRAISAL TYPING SERV	PENNINGTON N ROBERT CARL	HOLLYWOOD	CA
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<input type="checkbox"/>	8.	FIRST CLASS SECURITY STAFFING	MR ROBERT PENNINGTON	SANTA ROSA	CA
<input type="checkbox"/>	9.	L & B FOOD SERVICE	PENNINGTON ROBERT A	SANTA ANA	CA
<input type="checkbox"/>	10.	L & B FOOD SERVICE	PENNINGTON ROBERT	SANTA ANA	CA
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<input type="checkbox"/>	15.	ROBERTS PLUMBING & CO	PENNINGTON ROBERT RYAN	VISALIA	CA
<input type="checkbox"/>	16.	ROBERTS ROOTER SERVICE	PENNINGTON ROBERT RYAN	VISALIA	CA

■ 17. ROBERTS ROOTER
SVC

MR ROBERT VISALIA
PENNINGTON

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 350 S. Grand Avenue, 39th Floor, Los Angeles, California 90071.

On execution date set forth below, I served the following

DOCUMENTS OR DOCUMENTS DESCRIBED AS:

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

 placing a true copy thereof enclosed in sealed envelopes with postage thereon fully prepaid, to the attorneys and their perspective addresses listed below, in the United States Mail at Los Angeles, California.

 transmitting by facsimile transmission the above document to the attorneys listed below at their receiving facsimile telephone numbers. The sending facsimile machine I used, with telephone number (213) 625-1600, complied with C.R.C. Rule 2003(3). The transmission was reported as complete and without error.


 X personally delivering the document(s) listed above to the party or parties listed below, or to their respective agents or employees.

PARTIES:

**Rick Disatso, DDA
David P. Harris, DDA
(SERVED IN COURT)**

Executed on February 9, 2004, at Los Angeles, California.

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



MARK J. GERAGOS