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Panel Discussion

PANEL DISCUSSION

Hon. George C. Pratt:

As to our formal presentations, we have reached the end. Before we take a few minutes for questions from the audience, let me go to you, Barry, as our visiting professor. Have you anything additional that you would like to add, any comments, questions?

Professor Barry C. Scheck:

Yes. Just along the same lines that you raised the repressed memory cases. Incidentally, it is the same experts, Dr. Elizabeth Loftus, Dr. Martin Orne. Another fascinating subset of these problems has to do with child sexual abuse cases. What I would recommend to your attention are the recently published studies of a Dr. Stephen Ceci that were in the New England Journal of Medicine. You might have seen it; I know they had it on 20/20[1] because a lot of them were videotapes. These are fascinating studies. What Dr. Ceci stated about many of the child sexual abuse cases is that there has been this assumption among experts that children do not lie.[2] Frankly, as a father, it always struck me as incredible that people will take this view. What Dr. Ceci did is interview a child ten consecutive times and he would have the videotape going as the child was interviewed. You would see that on the third interview, talking about a plane trip, the child would all of a sudden start talking about some incredible event that occurred on the plane trip, and then by the tenth interview, he would have all these incredibly elaborate details about how the

1. *See 20/20: From the Mouths of Babes* (ABC television broadcast, Oct. 22, 1993).

2. Dr. Ceci stated in the broadcast that "[t]he problem is that from a research standpoint we are now discovering that if you put kids who were not abused through the same kind of highly leading, repetitive interview, some of those children will also disclose events that seem credible but, in fact, are not borne in actuality." *Id.*

stewardess came over. It was what was said that made it sound very real.[3]

However, the one that really brought it home to me was the videotape he showed of a child being interviewed about a pediatric examination. A pediatrician examines the child, just a normal physical checkup, and then by the third interview, the child, being interviewed with anatomical dolls, talks about how the pediatrician stuck a stick up the child's anus.[4] You saw a videotape of the examination of the child, so you know that that did not happen, and then you see the series of interviews.[5] So, it is very startling stuff that has changed the way a lot of these child sexual abuse case interviews are going, and I think a lot of it has to do with the nature of human memory, its plasticity, what we know about retrieval mechanisms, confabulations, suggestibility, and I think that these repressed memory cases, the hypnosis cases and some of these cases are all of kind.

Hon. George C. Pratt:

I suspect, also, that what we are learning in these areas are going to require us to re-examine a lot of other areas of the law of evidence as to what our assumptions have been and how reliable they are. Debbie Bartel, you told me you had something particular you wanted to mention here.

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3. Dr. Ceci gave an example of some of the questioning.

> They say to the child, "We want you to tell us what Kelly did." The kid says, "I don't remember." [They say to the child,] "Oh yes, you do. You remember." [The child replies,] "No, I don't remember." [They say,] "You do so. We know you remember." At this point the child starts crying, "I want to get out of here." [They say,] "You're not going anywhere [un]til [sic] you tell us what we know you know."

Id.

4. *Id.*

5. *Id.*

Professor Deborah Staville Bartel:

I wanted to comment on something that Barry said earlier. I am used to having the last say. Barry was a defense attorney and I was a prosecutor. I always got the rebuttal summation.

Barry was troubled about notice requirements being violated resulting in the preclusion of possibly potent evidence demonstrating the innocence of a defendant, and that such preclusion might occur even if the defendant had not himself engaged in the tactical decision to violate the notice requirements in the hope of gaining a tactical advantage.[6] I am not so troubled about wrongful convictions resulting, and the reason that I am not is, first of all, courts have the power to construe the term defendant to require that the defendant be complicitous in the tactical decision. The decision in *Taylor v. Illinois*[7] reads that the defendant's tactical decision not to comply with the notice requirements was deliberate.[8] Barry seemed less troubled if the defendant had himself been complicitous. Whether the defendant had or had not been complicitous, if he makes the deliberate decision to avoid the notice requirements resulting in preclusion of potent evidence demonstrating innocence, whether he does that with the assistance of his lawyer or whether the lawyer does it alone, the question to be asked is whether a conviction should result based on a trial record that had precluded that evidence? I think the defendant would have a very good claim for ineffective assistance of counsel and a reversal of conviction. He ought to be able to satisfy both problems of the ineffective assistance claims if counsel's performance was so deficient that it is outside what is ordinary in the community and there is prejudice to the extent that there is a reasonable likelihood that, but for counsel's deficient performance, the outcome might have been different. For that reason, I think notice requirements, coupled with the possibility of preclusion sanctions, are powerful tools for courts

6. *See* Barry C. Scheck, *Expert Testimony*, 11 TOURO L. REV. 107 (1994).

7. 484 U.S. 400 (1988).

8. The court in *Taylor* stated that "the inference that [the defendant] was deliberately seeking a tactical advantage is inescapable." *Id.* at 417.

to use to get defendants to comply with the court's rules. I am not that concerned about possibly erroneous convictions. Is there a surrebuttal?

Professor Barry C. Scheck:

I rely on the Brennan decision.[9] What else can I tell you? Actually, my concern is, and I what think is really terrible about this decision, is that we do not do enough to sanction lawyers.[10] I mean, that is really where the sanction should be. If the defense lawyer is purposely violating those rules for a strategic advantage, sanction the person, get him out of the courts. If a prosecutor is purposely withholding exculpatory evidence or violating these rules, we do not do enough to sanction them either. We do not even put their names on decisions sometimes. Not nearly enough is done about that, frankly, in terms of these sanctions. But, look, there was *Taylor*. He did not have an ineffectiveness claim. So, it is troubling.

Hon. George C. Pratt:

Questions. Yes, sir?

Audience Member:

Professor Shaw, if we cannot define hypnosis, then how do we know that somebody is under hypnosis? I never was convinced whether somebody really is or is not, so I am not really sure

9. *See generally id.* at 419-38 (Brennan, J., dissenting). Justice Brennan in his dissent stated that "absent evidence of the defendant's personal involvement in a discovery violation, the Compulsory Process Clause *per se* bars discovery sanctions that exclude criminal defense evidence." *Id.* at 419 (Brennan, J., dissenting).

10. Justice Brennan would agree. He stated in his dissent that "[i]n the absence of any evidence that a defendant played any part in an attorney's willful discovery violation, directly sanctioning the attorney is not only fairer but *more* effective in deterring violations than excluding defense evidence." *Id.* at 433 (Brennan, J., dissenting).

myself. The other thing is an auxiliary question. Not knowing what it is, how can one be helped if he or she uses it in therapy?

Professor Gary Shaw:

It is not that we do not know what hypnosis is. I can give you a quick working definition of hypnosis. Hypnosis is a state of heightened suggestibility and suspension of disbelief.[11] It is a working definition, and psychologists rely on that working definition. How it works, the means by which the suspension of disbelief takes place and the hypersuggestibility takes place, and confabulation takes place, the confabulation takes place because of the suspension of disbelief. We know what happens during hypnosis. We do not necessarily know the mechanisms by which those things occur. There is a legitimate question. You do raise an interesting question, though. How do we know when somebody is under hypnosis? There have been cases in which the issue has arisen whether the person was really under hypnosis, or whether the person was lying when he or she said they were under hypnosis and trying to fabricate positive evidence on their own behalf.[12] There have also been cases where the court refuses to find that the subject has been hypnotized, usually occurring

11. *See* Rock v. Arkansas, 483 U.S. 44 (1987). The Court in *Rock* stated that "[h]ypnosis has been described as 'involv[ing] the focusing of attention; increased responsiveness to suggestions; suspension of disbelief with a lowering of critical judgment; potential for altering perception, motor control, or memory in response to suggestions; and the subjective experience of responding involuntarily.'" *Id.* at 59 n.17 (quoting Council on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 JAMA 1918, 1919 (1985)); *see also* BLACK'S LAW DICTIONARY 742 (6th ed. 1990) (defining hypnosis as "[a] state of heightened concentration with diminished awareness of peripheral events").

12. *See* State v. Alley, 776 S.W.2d 506 (Tenn. 1989), *cert. denied*, 493 U.S. 1036 (1990). The Supreme Court of Tennessee affirmed the trial court's decision to exclude videotapes of the defendant's hypnotic and sodium amytal interviews from the jury's consideration because he found them to be "sensational," the defendant to be "untruthful," and the tapes to be "unreliable." *Id.* at 515.

where the hypnosis had been videotaped.[13] There are, however, means in which you look at it and certain factors that you can look at to try and determine whether the subject was hypnotized.[14] So, it is not, I should not say that it is completely clear-cut, but in most instances psychologists or psychotherapists who are trained in hypnosis have a pretty good idea of when the person has entered that state of hypersuggestibility and suspension of disbelief. It is not an issue that arises frequently. Does that answer your question?

Audience Member:

How are they helped under therapy with it? Are they really helped?

Professor Gary Shaw:

It has been accepted by the American Medical Association and a number of other societies as indeed leading to therapy.[15] As to how it does that, I am not sufficiently expert to be able to explain it to you in a short period of time.

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13. *See generally id.*; *see also* Barnes v. Henderson, 725 F. Supp. 442 (E.D.N.Y. 1989), *aff'd*, 923 F.2d 843 (2d Cir. 1990), *cert. denied*, 499 U.S. 925 (1991). Tapes of hypnosis session were admitted into evidence, "thus permitting the jury to assess the witness's credibility." *Id.* at 148.

14. Generally, the "potential unreliability" of statements produced during hypnosis are reduced by observing safeguards. "New York has perhaps gone the farthest in delineating these precautions." People v. Lucas, 107 Misc. 2d 231, 235, 435 N.Y.S.2d 461, 464. (Sup. Ct. N.Y. County 1980). These precautions include requirements that hypnosis should be "administered by a mental health expert trained in hypnosis," that "the entire hypnotic session should be videotaped," and that "evidence corroborative of or contradictory to statements made during trance should be considered." *Id.* at 235-36, 435 N.Y.S.2d at 464.

15. *See generally* Council on Scientific Affairs, *supra* note 11, at 1918 ("'The use of hypnosis by appropriately trained physicians or psychologists has been recognized as a valid therapeutic modality by the American Medical Association since 1958.'"); Jack Martin, *Hypnosis Gains Legitimacy, Respect, in Diverse Clinical Specialties*, 249 JAMA 319 (1983) (noting that in 1958 the American Medical Association determined hypnosis "has a recognized place in medicine").

Professor Barry C. Scheck:

I think it actually arose at the end of the first world war; it was the indicated treatment for trauma.[16]

Professor Gary Shaw:

For what we would call battle fatigue.

Professor Barry C. Scheck:

Because you went through some trauma and you cannot remember it.

Professor Gary Shaw:

The reliving of it seems to have therapeutic benefits, as well.

Hon. George C. Pratt:

Other questions? Yes, sir?

Audience Member:

I have a question about the *Daubert*[17] test. I think I am directing my comment to you, Professor Scheck. I briefly studied it in evidence last semester so I am a little unclear about it. My understanding was that the *Daubert* test was supposed to expand what is admissible. I am wondering, when the judge is making this determination, because now we are asking for his input, is he not going to rely on what is just accepted in the community of

16. *See, e.g.*, Gary M. Shaw, *The Admissibility of Hypnotically Enhanced Testimony in Criminal Trials*, 75 MARQ. L. REV. 1, 7 (1991) (stating that "hypnosis was also used to a limited extent for the treatment of combat fatigue in World Wars I and II"); William G. Traynor, Comment, *The Admissibility of Hypnotically Influenced Testimony*, 55 TENN. L. REV. 785, 790 (stating that during World War I "doctors found hypnosis useful for treating traumatic war neuroses").

17. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993).

science and thereby bring us back to *Frye*?[18] I mean, if we are asking the judge to really determine what is scientific and what is not, and he is going to rely on the scientific community, he is going to probably go with what is reasonably accepted in that community anyway. So, are we back to *Frye*?

Professor Barry C. Scheck:

When I made that remark about spin control to Judge Pratt,[19] I guess what I was really saying is that your visceral reaction is correct; that is to say, generally that people might think that *Frye* stated that scientific evidence is not admissible unless it is generally accepted by the experts in the pertinent field.[20] So, in theory, that would mean that you really have to wait a long time before something is generally accepted. There are big debates. Does that mean a consensus, or what is a consensus? Does it mean a majority? The Sixth Circuit recently stated that general acceptance does not even require a majority.[21] That is because they did not have a majority, and the court wanted the evidence in, so the Sixth Circuit said it does not require a majority. The court did not cite anything, nobody has found that case yet, so it stands for that proposition now. But yes, your general reaction is that people think *Daubert* must mean that more things are going to come in. In fact, it may mean that in certain instances. It may mean that when you have new science that seems very reliable because it is the product of beautiful experiments and it is very solid, and the best people in the field are behind it. It may not be

18. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

19. *See* Gary M. Shaw, *Trances, Trials, and Tribulations*, 11 TOURO L. REV. 145 (1994).

20. *Frye*, 293 F. at 1014.

21. *See* U.S. v. Bonds, 12 F.3d 540 (6th Cir. 1993). The court stated that none of the theories or procedures used as scientific evidence "may have the backing of the majority of scientists, yet the theory or procedure can still be generally accepted." *Id.* at 562. To determine what scientific evidence should be excluded, the Sixth Circuit determined, "[o]nly when a theory or procedure does not have the acceptance of most of the pertinent scientific community, and in fact a substantial part of the scientific community disfavors the principle or procedure, will it not be generally accepted." *Id.*

as widely published as it need be, but people feel it is very good and for certain purposes it would be accepted.

On the other hand, you are going to have a lot of science or a lot of expert testimony now that is "generally accepted"; that is, it has been coming in for years, that has no scientific basis, that by the rigidity of *Frye* is kept in. So that is really what I was addressing my remarks to. The other thing that *Daubert* does that I should have pointed out is that *Frye*, in theory, discusses novel scientific evidence. One clear thing the court did in *Daubert* is state that it is not going to restrict itself to novel scientific evidence.[22] By the terms of Rule 702,[23] we are talking about technical scientific, any kind of evidence of that nature is up for grabs. It does not have to be "novel."

Professor Gary Shaw:

Can I add just one thing, and that is, I agree with much of what Barry has said. I would simply add the question which may have arisen, and one I intended to get to; is New York likely to follow *Daubert*? In *People v. Wesley*[24] that just came down March 29, the court rejected it.[25] The New York Court of Appeals, in a footnote, stated that *Daubert* is not applicable here, we continue

22. *See generally* Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993). The Supreme Court acknowledged the respondent's argument that "abandonment of 'general acceptance' as the exclusive requirement for admission will result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions." *Id.* at 2798. The Court cited "vigorous cross examination, presentation of contrary evidence, careful instruction on the burden of proof," and the ability of the trial court to direct a judgment in the case that the "scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true," as "appropriate safeguards." *Id.*

23. FED. R. EVID. 702. Rule 702 states that: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.*

24. 83 N.Y.2d 417, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994).

25. *Id.* at 4234 n.2, 633 N.E.2d at 454 n.2, 611 N.Y.S.2d at 100 n.2.

to apply *Frye*. *Daubert* does not apply because it is a matter of statutory construction pursuant to Rule 702 and it has no place in our analysis in *Wesley* dealing with the DNA.[26] So, it appears that for the foreseeable future the New York Court of Appeals is going to go with *Frye* and is not accepting *Daubert*.

Hon. George C. Pratt:

Yes, sir?

Audience Member:

As far as New York is concerned, would you say there is a per se rule against admissibility of hypnosis, or has the New York Court of Appeals in any trends, ever held it to be admissible?

Professor Gary Shaw:

The *Rock*[27] issue that I raised has not been discussed explicitly by the New York Court of Appeals. The New York Court of Appeals did say in another instance that hypnotically-enhanced testimony is inadmissible for impeachment purposes. That is a case called *People v. Hults*.[28] The court expressly stated that it is sufficiently unreliable, that it is not even admissible for impeachment purposes, let alone substantive reasons.[29] Now, the interesting question, and one I want to track, is this *Santana*[30]

26. *Id.* (stating that with respect to the New York courts "*Daubert* . . . is not applicable here") (citation omitted).

27. Rock v. Arkansas, 483 U.S. 44, 62 (1987) ("Arkansas' *per se* rule excluding all posthypnosis testimony infringes impermissibly on the right of a defendant to testify on his own behalf.").

28. People v. Hults, 76 N.Y.2d 190, 556 N.E.2d 1077, 557 N.Y.S.2d 270 (1990) (stating that defendant in sodomy case was precluded from using complainant's hypnotic statements to impeach her testimony).

29. *Id.* at 192, 556 N.E.2d at 1078, 557 N.Y.S.2d at 271 (stating that it is established that hypnosis is not admissible as evidence-in-chief because of its inherent unreliability, and holding that such statements are, as a general rule, also inadmissible for impeachment purposes).

30. People v. Santana, 159 Misc. 2d 301, 604 N.Y.S.2d 1016 (Sup. Ct. Queens County 1993).

case, because I think that *Santana* is actually inconsistent with *Hults*. But that is a much longer discussion. For the moment, the New York Court of Appeals has not taken that. I do not know where it stands right now.

Audience Member:

Has there been any level court in New York that has admitted hypnosis evidence?

Professor Gary Shaw:

No, they are bound by the New York Court of Appeals in *Hughes*,[31] and I have not seen any court that said we are going to disregard what the New York Court of Appeals said.

Hon. George C. Pratt:

Was there a question back here? No. All right, I want to thank you all for your attention, and particularly to Deborah for planning this whole program. It is concluded.

31. People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983), *cert. denied*, 492 U.S. 908 (1989).