

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-130

TITLE VICKIE LORENE ROCK, Petitioner V. ARKANSAS

PLACE Washington, D. C.

DATE March 23, 1987

PAGES 1 thru 53



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 VICKIE LORENE ROCK, :

4 Petitioner :

5 v. : No. 86-130

6 ARKANSAS :

7 - - - - -x

8 Washington, D.C.

9 March 23, 1987

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 1:54 o'clock p.m.

13 APPEARANCES:

14 JAMES M. LUFFMAN, Rogers, Arkansas;

15 on behalf of Petitioner

16 J. STEVEN CLARK, Little Rock, Arkansas;

17 Attorney General of Utah

18 on behalf of Respondent

19 JAMES M. LUFFMAN, Rogers, Arkansas;

20 on behalf of Petitioner - Rebuttal

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1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: We'll hear argument
3 now in Number 86-130, Vickie Lorene Rock v. Arkansas. Mr.
4 Luffman, you may proceed whenever you're ready.

5 ORAL ARGUMENT OF

6 JAMES M. LUFFMAN

7 ON BEHALF OF PETITIONER

8 MR. LUFFMAN: Thank you Mr. Chief Justice, and
9 may it please the Court: Frank Rock died on July 2nd,
10 1983. Vickie Rock maintains that his death was caused by
11 the accidental discharge of a Saturday night special
12 pistol which fired when her husband grabbed her hand.

13 He was attempting to prevent her from leaving
14 the house to get a hamburger. The pistol was in her hand,
15 she maintains, because her husband had become suddenly
16 violent striking her and slamming her into a wall. She
17 thought it would keep him from hitting her again.

18 Vickie Rock went through the trauma of a
19 fruitless wait for the ambulance she called and watching
20 for the police while they began their investigation while
21 her husband lay dying on the floor.

22 She was taken to jail before the ambulance
23 arrived to pick up her unconscious husband and she learned
24 of his death in a jail cell.

25 The evidence is that only Frank Rock and Vickie

1 Rock were in the room when the gun discharged. Frank Rock
2 made no statement to the police before his death.

3 Almost a year later on June 25th, 1984, Vickie
4 Rock was arraigned on a charge of manslaughter in the
5 death of her husband.

6 Three months after her arraignment, Vickie Rock
7 was still unable to recall some of the detail of the
8 events that occurred between the time her husband slammed
9 her against the wall and the time she went to the
10 telephone to call for the ambulance, a matter of seconds.

11 Such amnesia is apparently not unusual for
12 persons involved in violent confrontations but in her case
13 it was not complete. She remembered a great deal of
14 detail from both before the gun discharged and after.

15 The record does not reflect what other methods
16 were used by her lawyer to attempt to refresh her
17 recollection of those violent moments. But he finally
18 employed a professional psychologist for the purpose of
19 trying to refresh her memory with the use of hypnosis.

20 After two sessions with the psychologist she was
21 able to recall much of what she knew but had forgotten.
22 The most important thing she was able to remember was that
23 she never pulled the trigger.

24 That in fact, her finger was outside the trigger
25 guard when the pistol discharged. This revelation enabled

1 her lawyer to employ an expert gunsmith, who after
2 extensive testing of the weapon was able to testify that
3 the pistol not only could but was quite likely to
4 discharge in the manner related by petitioner, something
5 that had previously been thought to be impossible.

6 As the case stood at this point a clear and
7 probably close jury question was presented. Did the gun
8 discharge by accident in defect in design, or was it fired
9 by petitioner in the course of a scuffle?

10 Believing Vickie Rock's testimony the jury could
11 have acquitted her. Disbelieving her they had almost no
12 alternative but to convict. The jury though never had the
13 opportunity to make that choice.

14 Vickie Rock's testimony about what happened in
15 those few seconds was suppressed by a pre-trial order
16 which limited her testimony about those events to what she
17 had told her psychologist prior to the first hypnotic
18 session. That order, more than any other ruling, took the
19 decision away from the jury. The jury was left with the
20 mere sign --

21 QUESTION: What was it she was proposed to
22 testify about?

23 MR. LUFFMAN: She proposed to testify that her
24 finger was not on the trigger. That --

25 QUESTION: Was she going to testify about what

1 she remembered under his hypnosis. What she said --

2 MR. LUFFMAN: She was going --

3 QUESTION: She was going to testify what her
4 answers were while she was hypnotized?

5 MR. LUFFMAN: No, sir. She was going to testify
6 about what she remembered in a waking, conscious condition
7 after two sessions with a psychologist which included
8 hypnosis.

9 QUESTION: Well didn't she make some responses
10 during hypnosis?

11 MR. LUFFMAN: Yes, she did. And did not --

12 QUESTION: And she remembered making them
13 afterwards or does she claim that those were her
14 independent recollections afterwards?

15 MR. LUFFMAN: She remembers some of what
16 occurred during the hypnosis, but most of it she did not.
17 The key point of her testimony she did not recall
18 apparently during either of the two hypnotic sessions.

19 Apparently it was after she came out of hypnosis
20 that she was able to recall that her finger was outside
21 the trigger guard and that she didn't fire the gun.

22 QUESTION: So she says that something happened
23 to me during hypnosis that made me later remember it.

24 MR. LUFFMAN: No, sir. She doesn't try to
25 explain how it is that she remembers it, but she claims

1 that she does now remember it.

2 QUESTION: But after hypnosis she remembered it,
3 whereas she didn't before?

4 MR. LUFFMAN: Yes, sir. That's correct. The
5 jury then was left with the mere scientific probability
6 that the gun could have discharged by accident but under
7 the limiting ruling with no claim by the petitioner that
8 in fact it did.

9 Clearly this ruling tipped the scale on the
10 weight of the evidence in favor of the state. What then
11 was the basis for that ruling that insured petitioner's
12 convictions?

13 A ruling in the face of the state constitutional
14 right for a defendant to testify. No record exists of the
15 hearing on which the order was based. An omission that
16 seems to escape notice prior to these proceedings, leaving
17 what is stated in the order itself as the only basis for
18 the ruling.

19 That the testimonies of matters recalled by
20 petitioner due to hypnosis would be excluded because of
21 "inherent unreliability and the effect of hypnosis in
22 eliminating any meaningful cross examination."

23 QUESTION: Mr. Luffman, --

24 QUESTION: (Inaudible).

25 QUESTION: Go ahead.

1 QUESTION: Go ahead.

2 MR. LUFFMAN: Yes, ma'am.

3 QUESTION: Do you acknowledge that Arkansas or
4 any state does have a right at trial to exclude inherently
5 unreliable testimony whether it comes from the defendant
6 or a witness called by the defendant?

7 MR. LUFFMAN: Yes, ma'am, I do so long as that
8 ruling is not extended to the point that it takes what
9 should be properly a jury question away from a jury.

10 QUESTION: Well, presumably most states take the
11 position that the trial judge may exclude altogether from
12 evidence certain types of evidence.

13 Application of the hearsay rule at times or
14 other evidence which the court determines is inherently
15 unreliable. For example at times, polygraph evidence.

16 MR. LUFFMAN: Yes, ma'am.

17 QUESTION: And that doesn't violate a
18 constitutional right because the court makes rulings like
19 that does it?

20 MR. LUFFMAN: No, not because the court makes
21 rulings by that. I think it's only when those rulings
22 interfere with what is a traditional function of the jury
23 to determine the facts.

24 QUESTION: Well but it's a traditional function
25 of the court to keep out certain types of unreliable

1 evidence. Now what if instead of a per se rule against
2 hypnotically induced testimony, what if the court examined
3 in camera or outside the presence of the jury the
4 background of particular hypnotic evidence and determined
5 that it was just unreliable.

6 And so unreliable that it shouldn't come in.
7 Does that violate anybody's constitutional rights?

8 MR. LUFFMAN: I think it could. I don't think
9 necessarily on the facts ~~stated~~ that it does, but I think
10 it could if those determinations were made in areas that
11 when the case is looked at in its entirety prevented the
12 criminal defendant in that case from presenting his
13 defense. And it --

14 QUESTION: Well it might very well if the court
15 concluded that the background was such that it was in fact
16 totally unreliable.

17 QUESTION: Supposing in this case you'd had
18 three witnesses for the defense, all of whom were going
19 to offer to testify that she had her hand outside the
20 trigger guard and on voir dire it turned out that none of
21 them were in the room at the time.

22 And the trial court says, well these people had
23 no opportunity to observe. Their testimony is utterly
24 unreliable and I'm going to exclude it. Does that violate
25 the defendant's constitutional rights?

1 MR. LUFFMAN: I don't think so, Mr. Chief
2 Justice, because I think those areas fall within the
3 traditional area of competency of a witness. In other
4 words that the witness must be characterized as having
5 been able to observe the events that he relates or the
6 hearsay rule which again, with certain exceptions, is a
7 traditional evidentiary rule in our system to keep
8 supposedly unreliable evidence out.

9 QUESTION: Well what about somebody who claims
10 to have observed it?

11 Let's assume that the defense hires a medium who
12 hurls herself back to the time and sees the murder and
13 she wants to testify that in her trance she saw your
14 client with her finger on the trigger guard and not on
15 the trigger. Could that be excluded? The witness claims to
16 have seen it. Yes, I was in a trance and I saw it. Now,
17 does the court have to leave that to the jury to decide
18 whether in fact the medium saw that or not?

19 MR. LUFFMAN: I believe that's in a different
20 category, Justice Scalia. Because the witness is not
21 physically present, or physically there, nor there in any
22 means of, by any scientific observation that we recognize
23 in human life as being there.

24 QUESTION: Well, that's what you say. I mean
25 some people believe in those things. Why can't we leave

1 that to the jury? If you get a jury that believes that
2 this person really has those powers.

3 MR. LUFFMAN: I think a judge could leave it to
4 a jury. I think he could leave it to a jury.

5 QUESTION: That's not the question. Suppose the
6 judge took it away? Would you just say that that's a
7 matter that the state can do even though in that case you
8 have a much more explicit constitutional right that is set
9 forth in so many words to call witnesses in your defense.

10 Whereas you're relying on a constitutional right
11 that doesn't really appear in the Constitution, does it?

12 MR. LUFFMAN: I -- To testify in your own
13 behalf?

14 MR. LUFFMAN: I think that the medium's
15 testimony would be held to be incompetent and I think
16 would be properly excludable.

17 QUESTION: Well I don't see much difference
18 between that and your case except you know, it's a matter
19 of argument what's reliable and what's not reliable.

20 You're acknowledging that the state has the
21 power to make a reasonable judgment about what is reliable
22 and not reliable and here they've said there's no way we
23 can be sure what she testifies to after hypnosis is,
24 there's no way she herself can be sure.

25 MR. LUFFMAN: I --

1 QUESTION: What of it is suggestion and what
2 isn't?

3 MR. LUFFMAN: I do agree that the state has the
4 right to make that decision of what is reliable and what
5 is not so long as it does not interfere with the person's
6 constitutional right to fairly present his defense.

7 And I think there would be a great argument of
8 difference between the hypothetical that you posed just
9 basically on the fact that in our case, Vickie Rock, was
10 there. She was physically present.

11 She was in the room. She undoubtedly saw and
12 felt what happened and I think it's certainly arguable
13 that the medium was not there in any realistic sense.

14 QUESTION: Mr. Luffman, was there any record of
15 the hypnosis?

16 MR. LUFFMAN: Yes, Your Honor, there was.
17 Specifically the psychologist made a tape recording of
18 both sessions with Vickie Rock and those tape recordings
19 were played at the pre-trial hearing for the trial judge.
20 The record does not reflect that again because that is the
21 portion of the record that's missing.

22 QUESTION: Were they played for the jury?

23 MR. LUFFMAN: No, sir. They were not. They
24 were played only for the trial judge prior to the hearing.

25 QUESTION: With a video tape?

1 MR. LUFFMAN: No, sir. It was an audio tape
2 only.

3 QUESTION: What's the custom with respect to
4 how you record that sort of occasion? Do you regularly
5 tape it now?

6 MR. LUFFMAN: Dr. Back's testimony was that she
7 customarily made an audio recording of such sessions.
8 There are a number of cases involving hypnosis and a
9 number of articles involving hypnosis where the strong
10 suggestion is made for the use of video tape. But it was
11 not used in this case.

12 QUESTION: (Inaudible).

13 QUESTION: Have you ever been hypnotized?

14 MR. LUFFMAN: No, Mr. Justice Blackmun, I
15 haven't.

16 QUESTION: Do you know of any instance where the
17 prosecution in Arkansas has used witnesses that have been
18 subjected to hypnotism.

19 MR. LUFFMAN: Yes, Mr. Justice Blackmun, we do.
20 We've cited one such case in our brief. Clines v State.
21 The same prosecuting attorney that was involved in this
22 case took two eye witnesses to a murder in a capital
23 murder case and had those two eyewitnesses hypnotized.

24 That hypnosis was not disclosed during the
25 course of the trial. It was only after conviction and the

1 men were awarded the death penalty that a disclosure was
2 made that two of the eyewitnesses had been hypnotized.

3 Counsel for those gentlemen filed a motion with
4 the Arkansas Supreme Court asking for a remand of that
5 case. That the case be remanded to the circuit court for
6 an evidentiary hearing on that matter.

7 That motion was dismissed by the Arkansas
8 Supreme Court without opinion. The case when it was
9 decided, and that was Clines v. State, made no mention of
10 the issue.

11 QUESTION: Are you arguing that what's sauce
12 for the goose isn't sauce for the gander in Arkansas
13 under this rule?

14 MR. LUFFMAN: It's certainly wasn't in this
15 case, Mr. Chief Justice.

16 CHIEF JUSTICE REHNQUIST: Well but you haven't
17 made that argument anywhere in your brief I don't think,
18 have you?

19 MR. LUFFMAN: Well, I attempted to, Mr. Chief
20 Justice. The case, what we were trying to argue that in
21 the context of was the fact that the proceeding as a whole
22 lacked fairness. And we've listed that, or were
23 attempting to list that as one element in the number of
24 things that argued that it lacked fairness.

25 QUESTION: Mr. Luffman, --

1 MR. LUFFMAN: I don't dispute that the Arkansas
2 Supreme Court has a right to change its mind, or to reach
3 any decision it wants to when the case is properly
4 presented to them.

5 QUESTION: Well we don't know the basis for the
6 Arkansas Supreme Court's opinion. I mean, --

7 MR. LUFFMAN: That's correct, Mr. --

8 QUESTION: We don't know that it's lawful in
9 Arkansas to allow hypnotized witnesses except for the
10 defendant himself. We don't know that. It may have been
11 dismissed because there was plenty of opportunity to raise
12 the issue earlier and it had not been presented properly.
13 Or we don't know what the reason is do we?

14 MR. LUFFMAN: That's correct, Mr. Justice
15 Scalia, that's why I noted that it was dismissed without
16 opinion.

17 QUESTION: So it really isn't a sauce for the
18 goose, sauce for the gander proposition we have in front
19 of us.

20 MR. LUFFMAN: Well except in reading of the
21 record, to read the indignation of the prosecuting
22 attorney when the prosecuting attorney objected to not
23 having been informed until the last minute before trial of
24 the --

25 QUESTION: Right.

1 MR. LUFFMAN: (Inaudible).

2 QUESTION: But you're not asking us to censor
3 the prosecutor.

4 MR. LUFFMAN: No, I'm not, Mr. Justice.

5 QUESTION: You're asking us to strike down the
6 Arkansas Law?

7 MR. LUFFMAN: No, I'm not, Mr. Justice Scalia.

8 QUESTION: (Inaudible) case that there's no,
9 that the record doesn't indicate sufficiently that her
10 testimony after hypnosis was caused by the hypnosis.

11 MR. LUFFMAN: That's correct, Mr. Justice White.
12 There is no, there is nothing --

13 QUESTION: So as the case comes to us from
14 reading the opinions and what not, that it seems assumed
15 that what she was testifying to was caused by the
16 hypnosis.

17 MR. LUFFMAN: That was the assumption. But, we
18 maintained that it was just that. It was just an
19 assumption. I would submit to the Court that there's
20 nothing in the record at all either in the --

21 QUESTION: -- Well, but the courts below thought
22 it was, didn't they? Are we supposed to decide that
23 factual issue?

24 MR. LUFFMAN: The trial court didn't go that
25 far. The trial court simply made his order saying that

1 testimony which was the result of hypnosis would not be
2 admissible.

3 QUESTION: Well he wouldn't let her testify.

4 MR. LUFFMAN: That's correct.

5 QUESTION: Which meant that he had to think that
6 this was caused by hypnosis.

7 MR. LUFFMAN: But, his step by step ruling are
8 the only indicators of what apparently the trial judge
9 thought might have been the product of hypnosis and what
10 was not.

11 But there were three qualifications that the
12 trial judge put on her testimony. Number one, that she
13 could not testify to matters which were the product of
14 hypnosis; or secondly, matters which had not been stated
15 to the psychologist, or the hypnotist prior to the
16 hypnosis; and thirdly, matters which were the product of
17 post-hypnotic suggestion.

18 In the rulings of the trial court when he
19 disallowed various pieces of testimony there was no
20 attempt made by the trial court to justify under which
21 provision of that order he was excluding the evidence.

22 QUESTION: Well the Supreme Court of Arkansas
23 on the first page of its opinion, Appendix A in your
24 petition for certiorari, says that the trial court ruled
25 testimony of matters recalled by appellant due to

1 hypnosis inadmissible because of its unreliability and
2 because of the effect of hypnosis on cross, appellant was
3 allowed to testify about things she remembered prior to
4 being subjected to hypnosis though testimony resulting
5 from post hypnotic suggestion was excluded. We believe
6 the trial court's ruling was correct.

7 Certainly the Supreme Court of Arkansas thought
8 that the trial court had ruled that testimony not affected
9 by the hypnotic suggestion could come in. Testimony that
10 was induced by the hypnotic suggestion would be kept out.

11 MR. LUFFMAN: That's a deficiency in the record,
12 Mr. Chief Justice, because the state of Arkansas, the
13 Supreme Court of Arkansas also did not have available to
14 it when it made its decision the record of that pre-trial
15 hearing on which the order was based.

16 QUESTION: But we're basically reviewing the
17 judgment of the Supreme Court of Arkansas. We don't
18 ordinarily make independent factual findings here.

19 MR. LUFFMAN: I agree, Mr. Chief Justice, and I
20 was submitting that there is no indication in the record
21 of the case of any testimony of Vickie Rock that was
22 inherently unreliable, or that can be seen from the record
23 to be unreliable.

24 QUESTION: Well, how does that advance your
25 argument?

1 MR. LUFFMAN: Because we maintain she was not
2 permitted to testify to that one important factor that was
3 virtually her only claim to a defense. That not only was
4 she not trying to fire the gun, that she was making
5 deliberate effort to see that the gun didn't fire.

6 CHIEF JUSTICE REHNQUIST: And you're saying --

7 MR. LUFFMAN: In so many --

8 CHIEF JUSTICE REHNQUIST: -- whether or not that
9 testimony was caused by hypnotically induced recollection,
10 it should have been allowed under the Constitution.

11 MR. LUFFMAN: That's correct, Mr. Chief Justice.

12 QUESTION: (Inaudible) let's get back to the
13 beginning. What's wrong with the trial court saying at
14 the beginning of a trial that no evidence as a result of
15 any intervention by a hypnotic source will be admissible
16 period.

17 MR. LUFFMAN: In this case --

18 QUESTION: Not in this case. In any case.

19 MR. LUFFMAN: If any of the parties to the trial
20 had previously undergone hypnosis and that was the basis,
21 and what was learned from that was the basis of their
22 defense, or the basis of their complaint, and was the only
23 basis, we're submitting that that is a better question for
24 a jury than for a judge.

25 QUESTION: Well, will you go back to my

1 question? The judge says apropos of nothing, good morning
2 ladies and gentlemen of the jury, I will not listen to any
3 hypnotic testimony, or testimony the result of hypnosis
4 from any witness in this trial, period. What is wrong with
5 that?

6 MR. LUFFMAN: I think it's much too broad, Mr.
7 Justice Marshall. I believe that it's so broad that it
8 eliminates cases like this where the defendant depends on
9 that particular piece of evidence virtually for her entire
10 defense and --

11 QUESTION: Why, well supposed you hook it up
12 with the exclusion when you say all witnesses shall be
13 excluded. And in addition to that I rule this, that any
14 hypnosis shall not be testified to.

15 MR. LUFFMAN: My argument again is that it's
16 just much too broad.

17 QUESTION: I think you're real argument is that
18 it applies to you.

19 MR. LUFFMAN: If it applies to a defendant whose
20 only means of saying her defense is from that testimony
21 which was the product of that, then I think it can be
22 applied in an unconstitutional way.

23 QUESTION: What --

24 QUESTION: So you're saying that you can only
25 exclude unreliable evidence except where the unreliable

1 evidence is crucial. Where the unreliable evidence will
2 determine the outcome of the trial, then you have to let
3 it in. That's a very strange rule.

4 MR. LUFFMAN: I think --

5 QUESTION: It seems to me the more unreliable it
6 is. The more important it is, the more important it would
7 be to exclude the unreliable evidence.

8 MR. LUFFMAN: There are degrees, of course, of
9 unreliability. But I think if once it's classified as
10 unreliable, I think that was true in the Chambers case,
11 hearsay evidence was kept out because it was thought to
12 be, because hearsay is generally thought to be unreliable.

13 Yet, the categorization of all of the
14 combination of rulings by the trial court were held to
15 have been applied in such a way that even though the
16 individual evidentiary rules themselves may have been
17 constitutional that the cumulative effect of them when
18 they prevented the defendant from presenting his defense
19 was to deny him due process of law and that's what we're
20 arguing for Mrs. Rock.

21 QUESTION: May I ask, Mr. Luffman, I just don't
22 remember in this case. How did the fact that your client
23 had been hypnotized come to the attention of the court?

24 MR. LUFFMAN: The prosecuting attorney was
25 advised of such by the defense counsel when they were

1 exchanging lists of witnesses.

2 QUESTION: And one of your witnesses --

3 MR. LUFFMAN: And the defense counsel listed as
4 a witness, Dr. Betty Back, who was the hypnotist.

5 QUESTION: And she, of course, did not testify
6 at the trial?

7 MR. LUFFMAN: She testified at the pre-trial
8 hearing --

9 QUESTION: At the pre-trial.

10 MR. LUFFMAN: -- not at the trial.

11 QUESTION: And the record is gone but I assume
12 she testified that she did not suggest this particular
13 recollection to the witness. Is that right?

14 MR. LUFFMAN: That's correct, sir. We would
15 submit that it is very difficult to distinguish this
16 problem from the problem of a witness who refreshes his
17 recollection by referring to notes or a written document
18 and then adopts the version of those facts for his
19 testimony.

20 He may become difficult to cross examine, but it
21 has never been suggested that a witness who so refreshes
22 his recollection not be allowed to testify.

23 QUESTION: Well the difference there is when
24 somebody refreshes his recollection that way, in such a
25 manner that he's lying, I mean he knows that he didn't

1 remember it before, the jury can observe his demeanor.

2 I gather that the really nefarious thing about
3 hypnotically induced recollection is that the witness
4 himself doesn't know that the recollection is inaccurate.

5 He doesn't know he's lying because the hypnosis
6 could of had that effect. So the jury cannot say, you
7 know, I can tell by his demeanor that this fellow is
8 lying.

9 Because he isn't lying, he really believes he's
10 telling the truth. Isn't that different from the other
11 kinds of refreshment of recollection that we allow?

12 MR. LUFFMAN: I don't think so, Mr. Justice
13 Scalia, because the cross examination and demeanor of the
14 witness is not the only way to impeach his testimony.

15 There are many other ways to do it and any
16 skilled trial attorney, I would submit, could cross
17 examine such a witness by establishing a great amount of
18 detail, some of which is undoubtedly going to be provably
19 false. There are just any number of ways for a competent
20 trial attorney to discredit witnesses.

21 And the argument that this leaves defendant not
22 subject to cross examination suggests, in effect, that
23 there is no other way to get at the truthfulness of the
24 witness's testimony and we submit that there are.

25 QUESTION: But you agree then that getting at it

1 by demeanor testimony would be ruled out in this
2 situation.

3 MR. LUFFMAN: Not necessarily. I think it could
4 be. But, I don't think that it's necessarily so that it
5 could. Thank you.

6 QUESTION: Thank you, Mr. Luffman.

7 We'll hear now from you General Clark.

8 ORAL ARGUMENT OF

9 J. STEVEN CLARK

10 ATTORNEY GENERAL OF UTAH

11 ON BEHALF OF RESPONDENT

12 GENERAL CLARK: Mr. Chief Justice, and may it
13 please the Court: I submit to this court that the issue
14 clearly here presented to you today is whether this
15 hypnotically refreshed testimony is so inherently
16 unreliable that the state of Arkansas may, consistent with
17 the United States Constitution, exclude that testimony
18 when it's offered by the defendant in a criminal case.

19 The answer to that question, I submit to this
20 Court is yes, and further that the state of Arkansas can
21 properly fashion its own rules of evidence if they do not
22 violate fundamental constitutional safeguards.

23 And the Arkansas rule does not. Although
24 hypnosis has been accepted clearly as an aid in therapy,
25 it's validity as a means of enhancing or refreshing memory

1 has been challenged repeatedly. Hypnosis creates within
2 the subject a hyper state of suggestibility, lowered
3 critical reasoning, the potential for altered memory, --

4 QUESTION: Well now, why should we take your
5 word for all of this, General Clark? I mean, you don't
6 have any degrees on the subject, I take it, and we don't
7 either.

8 GENERAL CLARK: No, Your Honor, I do not. The
9 Arkansas Supreme Court in reviewing this testimony had it
10 applied the Frye test for instance, in terms of generally
11 accepted by the scientific community as a procedure that
12 is advanced as being legitimate.

13 Said if you'd applied the Frye test under the
14 testimony submitted with the experts of Orrin and Diamond
15 and others would not have admitted this testimony because
16 it was not generally accepted by a scientific community as
17 being reliable and credible.

18 And so I submit to you in this instance that the
19 court, though not applying that rule is my contention to
20 this court, said it could have or even a lesser standard
21 and still would have excluded this testimony because of
22 its inherent unreliability.

23 QUESTION: And yet prosecutors in Arkansas have
24 used hypnotized witnesses, have they not.

25 GENERAL CLARK: Your Honor, the prosecutor, in

1 fact in the Cline case did attempt to hypnotize two
2 witnesses. One which was unable to be hypnotized.

3 The other which was hypnotized did not recall
4 anything under hypnosis other than what they had recalled
5 prior to that. The Arkansas Supreme Court however, has
6 never ruled on this issue until this case.

7 As a matter of footnote since this was raised by
8 petitioner I went back to check. In that Cline case,
9 counsel, an associate of Mr. Putman, defense counsel in
10 this instance until he died, participated in that case and
11 if the petitioner had thought that that was an improper
12 application could have raised that issue at trial and did
13 not or with the Arkansas Supreme Court.

14 And I would submit to this Court that that's
15 procedurally barred in the sense that they bring it to
16 this Court now.

17 QUESTION: But did they know about it at the
18 time of trial?

19 GENERAL CLARK: Mr. Putman's associate, a young
20 woman by the name of Priscilla Kay Pope participated in
21 the trial of Cline and Orendorf and I assume as an
22 associate in a small law firm in Arkansas, who
23 participated in this, had knowledge of it, in fact filed
24 the petition with the court prior to this decision,
25 transferred that information and could have well raised it

1 in this case, Your Honor.

2 QUESTION: Well in this case, but you're not
3 suggesting that the defendant's knew about the hypnotism
4 in the Cline case at the time of the trial (inaudible).

5 GENERAL CLARK: No, Your Honor, I'm not
6 suggesting that. Although --

7 QUESTION: In this case, the reason that you
8 learned about the hypnotism of the defendant was the
9 defense counsel listed the psychiatrist, or whatever his
10 profession is, as a witness. Is that right?

11 GENERAL CLARK: Yes, Your Honor, that is
12 correct.

13 QUESTION: Is it correct that at the hearing,
14 the record of which is lost, that that expert whoever it
15 was testified that she had not induced this particular
16 scenario of what happened about the pulling the trigger.

17 GENERAL CLARK: Your Honor, there were two
18 hypnotic trances in this. In the first trance, the Psycho
19 Psychologist, Ms. Back, Dr. Back, never mentioned the
20 question of whether the gun had been cocked.

21 In our Joint Appendix on page 95 in a second
22 hypnotic trance she indicated that she asked these series
23 of questions. Five, I believe, to be specific about the
24 gun itself and did Ms. Rock recall any of these instances.

25 One of the answers is that Ms. Rock recalled

1 putting her thumb on the hammer to cock the weapon. This
2 was a double action weapon. You had to cock it and then
3 pull the trigger to make it fire.

4 There was a great deal of, on cross examination
5 the prosecutor tried to make a big issue of the fact that
6 were these leading questions getting Ms. Rock to remember
7 a combination of fact and fiction.

8 The phenomenon called confabulation to resolve
9 herself from responsibility in this instance. Now we
10 submit to the Court that that in fact occurred. Although
11 that testimony was never given at the trial, it was
12 proffered, but she never was allowed to testify.

13 QUESTION: But it was given before the judge?

14 GENERAL CLARK: Yes, Your Honor. It was
15 proffered.

16 QUESTION: It was given. The judge heard the
17 testimony.

18 GENERAL CLARK: Yes, that's correct, Your Honor.
19 He heard the testimony.

20 QUESTION: What happened at (inaudible).

21 GENERAL CLARK: He heard the tapes. Yes, Your
22 Honor, what happened is here.

23 QUESTION: Could that have influenced the
24 judgment.

25 GENERAL CLARK: Your Honor, I think it

1 influenced the judge's decision in the sense that he felt
2 this testimony was so inherently unreliable that its
3 probative value was outweighed by its ability to mislead
4 or confuse --

5 QUESTION: Like what? Like what? What was
6 misleading?

7 GENERAL CLARK: Well in the second instance,
8 Your Honor --

9 QUESTION: It was in your opinion, it was
10 misleading.

11 GENERAL CLARK: Your Honor, I would submit it
12 was in the opinion of the trial judge and I certainly
13 concur with that.

14 QUESTION: (Inaudible).

15 GENERAL CLARK: And the Arkansas Supreme Court
16 --

17 QUESTION: I don't think you can speak for the
18 trial judge.

19 QUESTION: (Inaudible).

20 GENERAL CLARK: Yes, Your Honor.

21 QUESTION: May I ask, in your view of
22 interpreting the Arkansas Supreme Court's decision.
23 Supposing the trial judge had heard all this testimony and
24 was persuaded, and apparently not in this case, was
25 persuaded that the hypnotism did nothing but make her

1 refresh her recollection and she may well have been
2 telling the truth.

3 Would the testimony have still have been
4 inadmissible under your understanding of the Arkansas
5 Supreme Court's --

6 GENERAL CLARK: Yes, Your Honor. The Arkansas
7 Supreme Court has ruled per se that this testimony is
8 inadmissible because of its inherent --

9 QUESTION: Because it's frequently unreliable.

10 GENERAL CLARK: -- unreliable. Basically I
11 think, Your Honor, because the Arkansas Supreme Court has
12 found that when you rely upon hypnosis that a judicial
13 proceeding ceases to be a judicial proceeding because
14 you're calling on the trier of fact, in this instance, the
15 jury to reach its judgment not based on logical inference
16 from the facts and the evidence deduced, but to reach its
17 judgment simply on guess work.

18 As Justice Scalia questioned a moment ago, we
19 cannot have a, by constitutional bar, the judge comment on
20 the weight of the evidence.

21 But if they could the instruction it seems to me
22 would be something like this: this witness has been
23 hypnotized, the more convincing they sound it may be in
24 fact that they're not convincing, that they really don't
25 know what they're saying is being the separate --

1 QUESTION: Well, why wouldn't this be a matter
2 of expert testimony?

3 GENERAL CLARK: Well then --

4 QUESTION: (Inaudible) on reliability and
5 depending on what the jury, which expert the jury
6 believed.

7 GENERAL CLARK: Your Honor, the problem with
8 that simply is, is that in terms of the rules of evidence
9 that Arkansas, I submit this Court can fashion you want to
10 have a judicial proceeding that is fundamentally sound in
11 the sense that you allow that trier of fact to judge the
12 witness on their manifestations and indicia of outward
13 concern, their testimony and you don't resolve that issue
14 to a battle of experts.

15 You simply see who has the most and add them up.

16 QUESTION: In criminal trials and a lot of other
17 trials people, the courts permit the calling of
18 psychologists to talk about eyewitness testimony, its
19 reliability or its unreliability.

20 GENERAL CLARK: Certainly, Your Honor, you
21 permit expert testimony to talk about reliability, but not
22 to comment on the ultimate and the final outcome of the
23 issue at hand.

24 QUESTION: Well, I know. But that's the issue
25 here. The court said we exclude this because it's

1 inherently unreliable.

2 GENERAL CLARK: Yes, Your Honor, in the instance
3 that the phenomenon called confabulation, mixing fact and
4 fiction. I submit to this Court that what Mrs. Rock did
5 in terms of confabulation through the two hypnotic trances
6 was to find a way to escape two types of prison.

7 The actual prison which she now is facing and
8 secondly that prison in terms of her own moral guilt with
9 having been involved in the shooting of her husband.

10 She was trying because of hyper suggestibility
11 to find acceptance to relieve herself of that moral doubt
12 and guilt and to say, and respond in a positive manner to
13 the questions imposed by the hypnotist.

14 QUESTION: How do we know this? How do you know
15 it, what you've just been saying.

16 GENERAL CLARK: Your Honor, I only know this in
17 the instance that, of course I've read the proffered
18 testimony, but in the instance of the scientific comments
19 on expert, or hypnosis and its effect on an individual is
20 that the weight of scientific authority and the reason
21 that the scientific community has rejected this as a
22 generally accepted standard is that it is unreliable
23 because you lower critical judgment. People then accept;
24 they don't question. You put them in a state of hyper
25 acceptance so that they want to find an answer with a

1 combination of fact and fiction to fantasize even as much
2 to get to the desired answer and that in terms of a
3 judicial proceeding that we have no way, we, being any
4 attorney, whether it's a criminal action or a civil
5 action, of going to the core of the credibility of that
6 witness because the witness coming out of the hypnosis and
7 the post hypnotic state believes absolutely to a moral
8 certainty it's right.

9 QUESTION: Well, do these experts say that every
10 single witness coming out of a hypnotic state is this way?
11 Or do they just say there is this possibility, or this
12 potential some of them will?

13 GENERAL CLARK: Your Honor, I think the experts
14 tend to believe that what is remembered post hypnotic,
15 that person believes to a moral certainty that that is
16 accuracy.

17 That is, whether it is a combination of fact or
18 fiction is not the issue and that it could not be rebutted
19 by traditional means. If you said to a witness, did you
20 have a meeting on Friday the 18th and the witness said:
21 no.

22 You say, well I show you your diary. It says Friday
23 the 18th, scheduled meeting with. You say well at the
24 result of hypnosis and the confabulation, you say, I'm
25 sorry it was the 19th.

1 Well, I show you a letter saying the meeting was
2 scheduled for the 18th? Was in fact the meeting on the
3 18th? No it was on the 19th.

4 The letter may have said it was on the 18th, the
5 diary may say it was supposed to be on the 18th, but it
6 wasn't, it was on the 19th. Completely unshakable
7 testimony and that is inherently unreliable.

8 QUESTION: Well isn't it also true, General
9 Clark, that there are instance in which hypnotism has
10 enabled people to recollect things they have not
11 previously remembered?

12 GENERAL CLARK: Yes, Your Honor, and I think in
13 this very case it assisted Mrs. Rock in her defense. She
14 could not, in the second hypnotic trance she remembered
15 that her finger was extended along the gun.

16 She also remembered that she put her thumb on
17 the hammer to cock it. Because of that, counsel for the
18 defense went out and found a gun expert who testified that
19 in fact this gun could have discharged because of a --

20 QUESTION: So that what you're saying is that
21 although it perhaps it's highly unlikely, it is at least
22 possible that the testimony she wanted to give was the
23 truth.

24 GENERAL CLARK: Yes, Your Honor it is possible.
25 The problem for us is that the fact finder doesn't know

1 what is faction in truth and you're making them guess.
2 And that should not be the basis of judicial proceeding
3 where you simply have to try to guess when the witness
4 himself is convinced to an absolute certainty that what
5 they've testified to is --

6 QUESTION: What if you had a, say there are
7 drugs as I understand that are called truth, and I can't
8 remember the name.

9 GENERAL CLARK: Yes, Your Honor.

10 QUESTION: That presumably, or at least some
11 people think they cause a person to tell the truth. Other
12 people might think otherwise. Could a court totally
13 exclude the testimony of a witness who had taken such a
14 drug?

15 GENERAL CLARK: Those drugs are, I think, Sodium
16 Ambithal and Sodium Pentothal and others.

17 QUESTION: Right. That's right.

18 GENERAL CLARK: I think the court could exclude
19 that. In Arkansas, a court using our Uniform Rules of
20 Evidence, Section 403 which is very similar to the,
21 identical, excuse, to the federal rule to determine that
22 that information, even though with proper value and even
23 though relevant, was confusing, misleading or unduly
24 prejudicial and could exclude it.

25 I think that's within the discretion of our

1 rules of evidence that this state can apply.

2 QUESTION: But your rule as I understand this
3 case, doesn't even allow the trial judge discretion to
4 admit this testimony.

5 GENERAL CLARK: No.

6 QUESTION: Even if he was persuaded by the pre-
7 trial hearing he'd say I'm sorry, we have a flat rule
8 against.

9 GENERAL CLARK: We have a flat rule of
10 inadmissible per se. Yes, Your Honor, for that part of
11 the memory that was not proven before or --

12 QUESTION: Right.

13 GENERAL CLARK: -- shown to have been known
14 before the hypnotic trance.

15 QUESTION: How will you enforce this rule
16 against an unscrupulous defense lawyer who just doesn't
17 tell you about hypnotic sessions.

18 GENERAL CLARK: Well, Your Honor, we are going
19 to be of course, in a situation of jeopardy if defense
20 counsel just is unscrupulous and does not disclose.

21 QUESTION: Or maybe the lawyer doesn't even find
22 out about it. Maybe the defendant on his own, or her own,
23 goes to the hypnotist, just says I can't remember
24 everything, please help me.

25 GENERAL CLARK: Simply all we could do in this

1 instance, Your Honor, if it was hidden from the state, or
2 hidden from a party in this proceeding, that if some
3 point, if discovered --

4 QUESTION: Yeah.

5 GENERAL CLARK: -- raise that issue in terms of
6 appellate relief. In the instance of the Arkansas rule it
7 is clear that the Arkansas court did not say that
8 hypnotically refreshed witness could not testify.
9 That's not what the court held. It held that the witness
10 could testify but was, and did not prohibit that, only
11 could not testify to that portion of the testimony
12 hypnotically refreshed.

13 QUESTION: How does that work when you don't
14 know, when there is no record of what was recollected
15 prior to the hypnotic suggestion?

16 GENERAL CLARK: Well, Your Honor, --

17 QUESTION: Would (inaudible) the witness --

18 GENERAL CLARK: -- In this specific case and in
19 the instance of what Mrs. Rock told the hypnotist in terms
20 of the pre-hypnosis notes and there were some handwritten
21 notes in complete sentences.

22 QUESTION: Right. Never mind this case. Let's
23 assume there are no pre-hypnotic notes. I just walk into
24 a hypnotist before I made any record of what I recollected
25 beforehand.

1 GENERAL CLARK: Under the Arkansas rule, your
2 Honor, --

3 QUESTION: I wouldn't be able to testify at all.

4 GENERAL CLARK: -- (Inaudible) would not be able
5 to testify to anything that was a product of that
6 hypnosis. Yes, you're right. I don't think that's an
7 unfair or violent --

8 QUESTION: No, not to anything that was a
9 product of that hypnosis. I would not be able to testify
10 to anything.

11 GENERAL CLARK: No, Your Honor, I submit --

12 QUESTION: Isn't that right?

13 GENERAL CLARK: -- that if you could indicate to
14 evidence or this that were outside the subject of the
15 hypnosis you certainly are permissible and permitted and
16 can testify to that, Your Honor. So if it was the events
17 of how the gun was discharged, but what else happened in
18 your marriage, what was the your relationship --

19 QUESTION: Oh, sure, sure.

20 GENERAL CLARK: -- with your husband, those
21 things you could.

22 QUESTION: But once, unless I have, the burden
23 is on me to make a pre-hypnosis record of whatever the
24 hypnosis is going to cover and if I don't do that whatever
25 the subject matter of the hypnosis happens to be is

1 excluded from my testimony.

2 GENERAL CLARK: Yes, Your Honor, that is
3 correct. That is the Arkansas rule and I submit to this
4 Court that that is not unconstitutional (inaudible).

5 QUESTION: Even though, in fact, I remembered a
6 lot of that stuff before the hypnosis. Since I can't
7 prove that I did, I can't testify about it.

8 GENERAL CLARK: Yes, Your Honor.

9 QUESTION: What would you do if an unscrupulous
10 law firm assigned one of its unscrupulous juniors to study
11 hypnosis over the summer and he graduated from the
12 hypnosis school and didn't tell anybody and came back and
13 he questioned the witness? Would that witness be thrown
14 out under your (inaudible).

15 GENERAL CLARK: No, Your Honor, I don't believe
16 that witness would be thrown out for the fact that --

17 QUESTION: Why not?

18 GENERAL CLARK: -- simply the fact that one has
19 studied hypnosis, has graduated from hypnosis school as
20 your hypothetical suggests, Your Honor, does not move to
21 the decision of the Arkansas rule of evidence and that is
22 that when one --

23 QUESTION: Well how many years does he have to
24 go to qualify?

25 GENERAL CLARK: Your Honor, that's the problem

1 with this hypnosis itself. I don't know.

2 QUESTION: Well if he goes --

3 GENERAL CLARK: Comedians, dentists, lawyers,
4 anyone can do hypnosis.

5 QUESTION: -- as many years as this person did.

6 GENERAL CLARK: Your Honor?

7 QUESTION: This hypnotist.

8 GENERAL CLARK: In the instance that this
9 person, this was a trained Psycho Psychologist who had
10 advanced degrees, so had a baccaiaureate degree and an
11 advanced degree.

12 QUESTION: Uh-huh.

13 GENERAL CLARK: But hypnosis is not a method
14 that you have to have formal training to be able to apply.
15 And that's what the Arkansas court found so inherently
16 unreliable about this, Your Honor, is that if it could be
17 applied by anyone --

18 QUESTION: Well then why, well why did they have
19 a hearing?

20 GENERAL CLARK: Had a hearing, Your Honor, I
21 think in the Instance --

22 QUESTION: Had a hearing to find out of it was
23 reliable.

24 GENERAL CLARK: Yes, Your Honor.

25 QUESTION: Well how is it so Inherently

1 unreliable that you have to have a hearing to find out if
2 it is?

3 GENERAL CLARK: Well in this instance I --

4 QUESTION: It's either one or the other.

5 GENERAL CLARK: In this instance, in this Rock
6 case, Your Honor, I submit that what happened was that
7 when Mr. Putman, Defense Counsel, gave the list of his
8 witnesses which included Dr. Back, the first time --

9 QUESTION: I know that.

10 GENERAL CLARK: -- the prosecution had notice
11 they asked for a hearing to have that testimony excluded.

12 QUESTION: And if he had found that it was
13 reliable, he would of let it in.

14 GENERAL CLARK: I submit, Your Honor, yes he
15 would have, but he did not.

16 QUESTION: Well, of course he would of.

17 QUESTION: He would have been reversed by the --

18 GENERAL CLARK: He would have been reversed by
19 the Arkansas court, yes, Your Honor.

20 QUESTION: That's not certain to me. I'm not
21 certain.

22 GENERAL CLARK: I think the rule has been
23 applied by the Arkansas court is one that is applied so
24 that juries can reach verdicts on the basis of logical
25 inference and not guess work.

1 Hypnotically refreshed testimony is not akin to
2 those other methods of refreshing memory. For such
3 hypnotically enhanced or refreshed recollection does
4 blight cross examination I say to this court.

5 It does so by producing in that witness that
6 absolute, firm belief to a moral certainty that everything
7 they have recollected is absolutely fact.

8 Whether it is fact or fiction, or some fact,
9 some fiction, or a fantasized result of a combination of
10 all that. And that literally what that produces is a
11 situation where the trier of fact in any proceeding cannot
12 use the objective indicia or manifestation of the
13 credibility of a witness; that they would really have to
14 try to guess what's in that witness's mind and whether
15 that witness in fact knows what's in that witness's mind.

16 And that is not the underpinnings of what I
17 submit to this Court is the truth finding function in a
18 jury system or in any judicial process.

19 Due process of the law does not give any witness
20 a license to lie or to throw any and everything into a
21 judicial proceeding. And unlike the --

22 QUESTION: There's no pretention here that this
23 was a lie, is there?

24 GENERAL CLARK: No, Your Honor, there is no
25 contention that this was a lie, but I simply say that the

1 due process of the law does not require that you put any
2 witness on and let them deliberately lie or let them throw
3 anything that they just happen to feel might have some
4 bearing on the case in the case.

5 And that the Arkansas rule that excludes that,
6 403, on the probative value versus the potential for
7 confusion, misleading, is one that's a weighing test that
8 can be fairly applied and it's a rule that Arkansas can
9 articulate and one that is within the residual power of
10 the state to set in terms of its rules of evidence is
11 applied.

12 QUESTION: Well it seems to me that a lot of
13 what you're arguing here is great grist for a jury
14 argument.

15 GENERAL CLARK: Yes, Your Honor, it could be
16 grist for a jury argument and I submit that in fact that's
17 what Petitioner would like for us to say, except that,
18 constitutionally in Arkansas we're barred from giving
19 instruction on the weight of the evidence, the credibility
20 of the witness, and secondly, in any judicial proceeding
21 where you put counsel, a civil or criminal matter where
22 they cannot effectively cross examine a witness and put
23 them in the trier of fact that guess work, I submit that
24 you don't have a judicial proceeding at that point any
25 longer.

1 QUESTION: But, let me just ask you about that.
2 You say, here the story was that she didn't pull the
3 trigger, it was capable of just discharging from the
4 scuffle.

5 What if you had an expert witness who looked at
6 the gun and said that's just physically impossible. The
7 gun is manufactured in way it cannot go off unless you
8 pull the trigger.

9 You could cross examine her pretty effectively,
10 couldn't you? Even though she appeared to be absolutely
11 positive that this happened this way. It's possible that
12 there are times you can evidence that just shows it's a
13 lie.

14 GENERAL CLARK: Yes, Your Honor, I think the
15 answer to that is yes. (inaudible).

16 QUESTION: And this very case could of been of
17 the expert who subsequently examined the gun and come up
18 with the opposite conclusion.

19 GENERAL CLARK: But in this very case, the
20 testimony that was excluded I think was equally as
21 beneficial to the state as it was the defendant. There
22 never was any testimony entered into the record that her
23 thumb was on the hammer to cock it. That is, at least the
24 state could have used as some evidence of intent.

25 QUESTION: I presume she was prepared to

1 acknowledge that. That's what she said, she didn't pull
2 the trigger.

3 GENERAL CLARK: The problem is, Your Honor, she
4 doesn't really know. And in the instance of what actually
5 happened here, if the court made error and I submit they
6 did not, but if they did I believe it was harmless error
7 in the instance that Mrs. Rock, if you look at the Joint
8 Appendix at pages 105 and 107, the trial judge who's a
9 veteran trial judge for some twenty years faced with a
10 complicated issue, did everything possible to give her
11 latitude to give live testimony her own.

12 He didn't rely on other witnesses. He allowed
13 Mrs. Rock to testify. She said in response to questions
14 from her counsel which were these:

15 "Did you intend to kill your husband?" "No, I
16 loved him, I would not shoot him." "Did you ever point
17 the gun at him?" "No." There was ample evidence in the
18 record that it was an accident.

19 QUESTION: He's not terribly generous to let her
20 testify to that. That's certainly clearly admissible.

21 GENERAL CLARK: But she was not in the instance
22 --

23 QUESTION: You may not believe it, but --

24 GENERAL CLARK: Your Honor, disqualified as a
25 witness to participate in her own defense. And that's

1 what I'm simply saying to you is that the (inaudible).

2 QUESTION: The important part of her, what she
3 wanted to testify to was excluded and was consistent with
4 other physical evidence.

5 GENERAL CLARK: Well arguably consistent, Your
6 Honor, with other physical evidence.

7 QUESTION: (Inaudible).

8 GENERAL CLARK: The experts say it's possible
9 that, under your hypothetical it would be a different
10 situation, of course.

11 QUESTION: Mr. Attorney General, I thought that
12 this lady purported to testify, wanted to testify to what
13 she now said she independently recollects. That it's just
14 as though there had never been any hypnosis.

15 I remember this now. This is, my finger was
16 here. And if that's the case, I don't see what
17 interference there is with cross examination anymore than
18 there would be in the usual case. She says, I do remember
19 it now. I didn't use to remember it, but my memory's been
20 refreshed somehow.

21 GENERAL CLARK: Now, Your Honor --

22 QUESTION: But I remember it now and I will tell
23 you the whole story, Mr. Prosecutor.

24 GENERAL CLARK: I would submit that your
25 hypothetical is inconsistent with this case but in

1 response to your hypothetical, Your Honor --

2 QUESTION: Why is it inconsistent?

3 GENERAL CLARK: -- I don't think she
4 independently could remember that her finger was extended
5 along the side of the weapon.

6 QUESTION: I asked the counsel as to what she
7 purported to testify to and he says it's her independent
8 recollection, post hypnotic recollection.

9 GENERAL CLARK: But, her post hypnotic
10 recollection, I submit to the Court was enhanced and may
11 be the direct result of fabrication.

12 QUESTION: That may be. That may be, but she
13 claims that she now recollects it.

14 GENERAL CLARK: But she doesn't know the
15 difference I submit to this Court, Your Honor, in terms of
16 what she did know pre-hypnosis and post hypnosis. In the
17 first hypnotic trance, Your Honor, she was asked what she
18 saw.

19 She never remembered a specific at all about the
20 gun or her position of her hand on the gun. In the second
21 trance, Your Honor, after five questions from the
22 hypnotist. Five questions about the gun, the location of
23 her hand on the gun, was her thumb on the trigger? Where
24 was her finger? You have a situation where the hypnotist
25 is inducing a response.

1 QUESTION: Well, that may be, but there was no
2 testimony, she wasn't purporting to testify to what
3 she said during hypnosis. She was purporting to testify
4 to what she now remembered.

5 GENERAL CLARK: Yes, Your Honor, that's correct.
6 The point I make to this Court is that --

7 QUESTION: She didn't even remember what she
8 said during hypnosis, did she?

9 GENERAL CLARK: Your Honor, I don't think she
10 remembered all of what she said during hypnosis. I think
11 that's correct. The point I try to make to this Court is
12 that what she remembered post hypnosis she cannot separate
13 fact from fiction. That which was suggested and she
14 accepted the suggestion as a result of the hypnosis.

15 QUESTION: Well how do you know that?

16 GENERAL CLARK: I only know that, Your Honor, in
17 the sense that the process called hypnosis leads an
18 individual and it's in varying degrees, Your Honor, to
19 suggestibility, to lowered critical reasoning and
20 judgment, to a willingness to try to find acceptance to
21 respond in the affirmative acceptance answer to the
22 questions that are asked and that because of that what we
23 simply know is we don't know what Mrs. Rock really knew or
24 what she responded in trying, as I said earlier, to escape
25 from two kinds of prisons. (inaudible).

1 QUESTION: Counsel, I'll ask you the question I
2 asked of your opponent? Have you ever been hypnotized?

3 GENERAL CLARK: No, Your Honor, I have not.

4 QUESTION: You constantly refer to Ms. Back.
5 She was a doctor, was she not?

6 GENERAL CLARK: Yes, Your Honor, she was. A
7 Ph.D.

8 QUESTION: A Ph.D?

9 GENERAL CLARK: Yes, Your Honor.

10 QUESTION: So that your reference to her is not
11 an attempt to down grade her testimony.

12 GENERAL CLARK: No, Your Honor, I would
13 apologize to the Court. That was not the intent at all.
14 She was a Ph.D, Psycho Psychologist.

15 QUESTION: What is a psycho psychologist?

16 QUESTION: What she (inaudible). (Laughter).

17 QUESTION: A psychologist with a stutter or is
18 it -- (Laughter).

19 QUESTION: Was she board certified?

20 GENERAL CLARK: I would have to plead ignorant
21 to what is a psycho psychologist, Your Honor, and could
22 not find a clear definition (inaudible).

23 QUESTION: Is there a physio psychologist?

24 GENERAL CLARK: I do not know, Your Honor,
25 (inaudible).

1 QUESTION: From what college that gives a Ph.D.
2 in hypnosis?

3 GENERAL CLARK: I'm not aware of any, Your
4 Honor.

5 QUESTION: Well you said she had a Ph.D.

6 GENERAL CLARK: Her Ph.D. is in psychology not
7 in hypnosis, Your Honor.

8 QUESTION: Well many psychologists certainly are
9 capable of administering hypnosis.

10 GENERAL CLARK: Oh yes, Your Honor, that's
11 correct. There are lots of individuals --

12 QUESTION: (Inaudible).

13 GENERAL CLARK: -- including many psychologists
14 who can do that.

15 QUESTION: Some lawyers can.

16 GENERAL CLARK: Yes, Your Honor, that's correct,
17 too. In the instant case, I submit to this Court, the
18 petitioner was not denied any due process by the exclusion
19 of this hypnotically enhanced testimony.

20 Since this veteran trial judge, as I stated, did
21 show great deference and latitude to Mrs. Rock, in
22 allowing her to participate in her own defense through her
23 live testimony, this case is simply one where the Arkansas
24 court has properly applied a rule to fundamentally insure
25 in Arkansas and protect that truth finding function of the

1 jury and thereby enable the jury to make decisions
2 rationally and not based on guess work and that rule, I
3 submit does not offend any section or provision of the
4 Constitution, or any of those protected safeguards
5 afforded a criminal defendant. And for that reason, the
6 Arkansas rule and the Arkansas decision should be
7 affirmed.

8 CHIEF JUSTICE REHNQUIST: Thank you, General
9 Clark. Mr. Luffman, you have four minutes remaining.

10 REBUTTAL ARGUMENT OF

11 JAMES M. LUFFMAN

12 ON BEHALF OF PETITIONER

13 MR. LUFFMAN: Thank you, Mr. Chief Justice. I'm
14 not at all enough familiar with the process to say
15 unequivocally what hypnosis is in the sense that I can
16 testify to it from personal experience, but I know that
17 from the point of view of looking at it from the legal
18 process that I see little difference in that process and
19 the process of a lawyer going over and over and over a
20 story with the witness, which any good lawyer does, in
21 preparation for trial so he'll be able to withstand cross
22 examination.

23 I'm not even sure that I can see the difference
24 if the witness listened to his own story on tape at night
25 while he's asleep. The ultimate issue, I think, here is

1 that jury question issue and that is whether this case is
2 going to stand as the first case in recent legal history
3 where a defendant in a criminal case who was an eyewitness
4 to the alleged crime was not allowed to tell the jury what
5 happened according to her own present waking memory.

6 QUESTION: Mr. Luffman, that's not unthinkable.
7 Let me quote you from Nix v. Whiteside where we said that
8 until the latter part of the preceding century criminal
9 defendants in this country as at common law, were
10 considered to be disqualified from giving sworn testimony
11 at their own trial, by reason of their interest as a party
12 to the case.

13 So until the 1900s your client wouldn't have
14 been able to testify at all in many states. And that was
15 not considered to violate the Constitution.

16 Now, this is a close question here. Even if we
17 hold that you now have to let defendants as a matter of
18 constitutional law, although you didn't in the 1800s, even
19 though you have to let them testify, how can we go so far
20 as to say that this close call must go in one way rather
21 than another given the history of testimony by defendants?

22 MR. LUFFMAN: I think the answer is a
23 combination of two cases, first Nix v. Whiteside as I
24 understand it says that certainly the right to testify is
25 now a Fourteenth Amendment right.

1 QUESTION: It's assumed to be.

2 MR. LUFFMAN: It's assumed to be. And I would
3 apply to that, you know, to that question the Chambers
4 reasoning that where the state evidentiary rules or, even
5 though there may be good reason for them, when they are
6 applied in such a way so that a criminal defendant does
7 not have that fundamental right of fairness to tell his
8 story to the jury then due process is violated.

9 Because two things, number one, the inherent
10 value on allowing an individual accused of a crime to tell
11 his story and number two, the traditional function as
12 between the judge and the jury.

13 And that determination of reliability and
14 inherent worth of the testimony is historically and
15 traditionally the function of the jury and I think
16 properly so. Thank you.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
18 Luffman. The case is submitted. We'll hear argument
19 next, number 86-243, the City of Houston v. Raymond Wayne
20 Hill.

21 (Whereupon, at 2:54 p.m. o'clock, oral argument
22 in the above-entitled case was submitted).

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#86-130 - VICKIE LORENE ROCK, Petitioner V. ARKANSAS

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BY Paul A. Richardson

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