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Psychiatrist's Testimony That State's Principal Witness's Psychological Condition Might Prompt Him to Distort Facts Was Not Admissible for Purposes of Impeachment of the Witness.

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not on trial. We must look to the harm inflicted on Hoover. It is identical to the injury suffered by Bruton."[54]

The instant case exemplifies the long standing problem of interpreting the confrontation clause. As the Solicitor General stated: "Our experience with the Sixth Amendment has taught us that it does not mean what it says . . . . Like all good constitutional provisions, the crisp language of the confrontation clause turns out to be somewhat cryptic."[55] It is apparent that the importance of cross-examination or adequate safeguards loom larger as hearsay's damaging quality increases, but at the same time the state should not as a matter of course be deprived of apparently reliable hearsay when the declarant is legitimately unavailable. Perhaps the best means for the Supreme Court to relieve lower courts of the burden of testing certain hearsay would be to develop a standard that could serve as a solution to the lower courts that is much more workable than the tests in *Dutton, Green,* and *Bruton.* Such present tests are confusing and subject to radically different interpretations, as exemplified by the instant case.

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EVIDENCE—IMPEACHMENT OF WITNESSES—PSYCHIATRIST'S TESTIMONY THAT STATE'S PRINCIPAL WITNESS'S PSYCHOLOGICAL CONDITION MIGHT PROMPT HIM TO DISTORT FACTS WAS NOT ADMISSIBLE FOR PURPOSES OF IMPEACHMENT OF THE WITNESS. *Hopkins v. State,* 480 S.W.2d 212 (Tex. Crim. App. 1972).

The defendant, Gregory K. Hopkins, was convicted of unlawful possession of heroin and sentenced to confinement in the penitentiary for five years. The defendant was convicted largely on the testimony of Frank Marquez, a former heroin addict turned informer and undercover "buyer" for the Police Department of Austin, Texas. At trial, Marquez gave the incriminating testimony of his narcotics transaction with the defendant. The trial court refused to allow psychiatric testimony by a defense witness challenging the competence and credibility of Frank Marquez. On appeal, the appellant alleged that the trial court erred in not allowing testimony by the psychiatrist challenging the credibility of Frank Marquez. Held—*Affirmed.* Expert testimony is allowed for the purpose of impeachment of witnesses, but in the case of psychiatric opinion, it is inadmissible due to its divergence of opinion and frequent inexactness. It is more an art than a science. In view of

[54] Hoover v. Beto, 467 F.2d 516, 559 (5th Cir. 1972).
[55] Griswold, *The Due Process Revolution and Confrontation,* 119 U. PA. L.J. 711, 728 (1971).

the nature of psychiatry, the jury would be often subjected to conflicting witnesses and inexact opinions, the value of which would be minimal in enabling the jury to decide the issue of credibility.

The problem presented in *Hopkins* is an issue of first impression for the court. Other jurisdictions, both federal and state, however, have been confronted with the concept of psychiatric testimony for impeachment of witnesses. Acceptance of such an investigative tool has been mixed, with some jurisdictions making psychiatric testimony inadmissible,[1] and others adopting it as proper court procedure.[2] A large segment of authority allowing psychiatric opinions has permitted them in order to challenge the credibility of a witness due to mental defectiveness,[3] narcotic addiction,[4] where a defendant alleges a defect for his benefit,[5] where the witness is a complaining prosecutrix in a rape case,[6] or where the witness is the plaintiff in a civil action.[7]

An arrangement has been developed in the courts by which the existence of the proper qualifications for the competence of a witness to testify are presumed, unless the witness reveals their absence, or an opposing party proves the witness's inability.[8] Competence may be

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1 United States v. Klein, 271 F. Supp. 506 (D.D.C. 1967); United States v. Daileda, 229 F. Supp. 148 (M.D. Pa.), *aff'd*, 342 F.2d 218 (3d Cir. 1965); United States v. Rosenberg, 108 F. Supp. 798 (S.D.N.Y.), *aff'd*, 200 F.2d 666 (2d Cir. 1952), *cert. denied*, 345 U.S. 965 (1953); Mangrum v. State, 299 S.W.2d 80 (Ark. 1957); Ballard v. Superior Ct., 49 Cal. Rptr. 302 (1966); People v. Champion, 225 P. 278 (Cal. 1924); People v. Bell, 291 P.2d 150 (Cal. Dist. Ct. App. 1955); People v. Nash, 222 N.E.2d 473 (Ill. 1966); Wedmore v. State, 143 N.E.2d 649 (Ind. 1957); Commonwealth v. Repyneck, 124 A.2d 693 (Pa. Super. Ct. 1956); State v. Driver, 107 S.E. 189 (W. Va. 1921).

2 Andersen v. United States, 237 F.2d 118 (9th Cir. 1956); O'Kon v. Roland, 247 F. Supp. 743 (S.D.N.Y. 1965); Markakis v. Liberian S/S The Mparmpa Christos, 161 F. Supp. 487 (S.D.N.Y.), *rev'd on other grounds*, 267 F.2d 926 (2d Cir. 1959); United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y.), *aff'd*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951); Taborsky v. State, 116 A.2d 433 (Conn. 1955); Jeffers v. State, 88 S.E. 571 (Ga. 1916); Mosley v. Commonwealth, 420 S.W.2d 679 (Ky. Ct. App. 1967); Fries v. Berberich, 177 S.W. 2d 640 (Mo. Ct. App. 1944); State v. Butler, 143 A.2d 530 (N.J. 1958); People v. Joyce, 134 N.E. 836 (N.Y. 1922); Aguilar v. State, 108 N.Y.S.2d 456 (Sup. Ct. 1951); Ellarson v. Ellarson, 190 N.Y.S. 6 (Sup. Ct. 1921); State v. Armstrong, 62 S.E.2d 50 (N.C. 1950).

3 O'Kon v. Roland, 247 F. Supp. 743 (S.D.N.Y. 1965); United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950); Taborsky v. State, 116 A.2d 433 (Conn. 1955); State v. Butler, 143 A.2d 530 (N.J. 1958); People v. Joyce, 134 N.E. 836 (N.Y. 1922); State v. Armstrong, 62 S.E. 2d 50 (N.C. 1950).

4 Effinger v. Effinger, 239 P. 801 (Nev. 1925); State v. Smith, 174 P. 9 (Wash. 1918); *cf.* State v. Prentice, 183 N.W. 411 (Iowa 1921). *See also* Rossman, *The Testimony of the Drug Addicts*, 3 ORE. L. REV. 81 (1924); Comment, EVIDENCE—WITNESSES—NARCOTICS AS AFFECTING CREDIBILITY, 16 S. CAL. L. REV. 333 (1943).

5 Fries v. Berberich, 177 S.W.2d 640 (Mo. Ct. App. 1944). A defendant truck driver was impeached from showing that he had suffered a loss of memory. *But see* State v. Schrader, 55 N.W.2d 232 (Iowa 1952).

6 Jeffers v. State, 88 S.E. 571 (Ga. 1916); Mosley v. Commonwealth, 420 S.W.2d 679 (Ky. Ct. App. 1967); People v. Cowles, 224 N.W. 387 (Mich. 1929); State v. Wesler, 59 A.2d 834, *aff'd on rehearing*, 61 A.2d 746 (N.J. 1948); Miller v. State, 295 P. 403 (Okla. Ct. App. 1930); Rice v. State, 217 N.W. 697 (Wis. 1928); *cf.* Derwin v. Parsons, 18 N.W. 200 (Mich. 1884); State v. Perry, 24 S.E. 634 (W. Va. Ct. App. 1896).

7 Ellarson v. Ellarson, 190 N.Y.S. 6 (Sup. Ct. 1921).

8 II J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 484 (3d ed. 1940) [hereinafter cited as EVIDENCE].

defined as the ability of a witness to fulfill the three elements of testimonial assertion. These are his abilities of observation, recollection, and communication.[9] In evaluating capacity for the third aspect, communication, two factors must be weighed. These are (1) a mental capacity to understand the questions and to respond intelligently, and (2) a willingness to speak the truth as he sees it.[10] It is in this second component of capacity to communicate where the problem of credibility of witnesses has arisen. As can be seen, there is a difference between competence and credibility, the latter being a much narrower and more subtle factor. Competency is usually a determination of the court alone, whereas credibility is always an issue to be decided by the jury.[11]

The mainstream of federal decisions dealing with psychiatric impeachment have established relevant factors in determining admissibility. First, a derangement or inability of testimonial assertion must be charged against the witness or evidenced by the witness himself.[12] Secondly, certain circumstances may exist which make admissibility the key to the outcome of the case, such as where an entire case rests upon the testimony of one witness.[13] The third and paramount factor controlling admissibility of psychiatric testimony is the sound discretion of the court in light of the circumstances of each particular case.[14] All these factors are important and interrelated.

Admissibility of psychiatric opinion for impeachment was first established in *United States v. Hiss*.[15] The defendant, Alger Hiss, was convicted of perjury largely on the testimony of one man, Whittaker Chambers, the government's principal witness. The defense challenged the witness's credibility by producing a psychiatrist. This psychiatrist had never examined Chambers, but had observed him during the trial. Basing his opinion on courtroom diagnosis, the psychiatrist concluded that the witness had " 'a condition known as psychopathic personality,

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9 *Id.* §§ 479, 493-495; I C. MCCORMICK & R. RAY, TEXAS ON EVIDENCE § 271 (2d ed. 1956).

10 II J. WIGMORE, EVIDENCE § 495 (3d ed. 1940); I C. MCCORMICK & R. RAY, TEXAS ON EVIDENCE § 271 (2d ed. 1956).

11 II J. WIGMORE, EVIDENCE § 487 (3d ed. 1940).

12 United States v. Flores-Rodriguez, 237 F.2d 405, 407 (2d Cir. 1956) (homosexuality); Andersen v. United States, 237 F.2d 118 (9th Cir. 1956) (sanity of defendant); O'Kon v. Roland, 247 F. Supp. 743, 745 (S.D.N.Y. 1965) (homosexuality); Markakis v. Liberian S/S The Mparmpa Christos, 161 F. Supp. 487, 498 (S.D.N.Y.), *rev'd on other grounds*, 267 F.2d 926 (2d Cir. 1959) (post-traumatic personality disorder); *cf.* United States v. Rosenberg, 108 F. Supp. 798, 806 (S.D.N.Y. 1952) (ability to draw scientific diagram from memory).

13 United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y.), *aff'd*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951); *accord*, United States v. Daileda, 229 F. Supp. 148, 153 (M.D. Pa.), *aff'd*, 342 F.2d 218 (3d Cir. 1965).

14 *E.g.*, Andersen v. United States, 237 F.2d 118, 124 (9th Cir. 1956); United States v. Klein, 271 F. Supp. 506, 507 (D.D.C. 1967); United States v. Hiss, 88 F. Supp. 559, 560 (S.D.N.Y. 1950).

15 88 F. Supp. 559 (S.D.N.Y.), *aff'd*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951).

which is a disorder of character, of which the outstanding features are behavior of what . . . [is called] amoral or an asocial or deliquent nature.' "[16] After carefully weighing both the motion for the testimony and strong objections by the government, the *Hiss* court ruled:

> It is apparent that the outcome of this trial is dependent to a great extent upon the testimony of one man—Whittaker Chambers. Mr. Chambers' credibility is one of the major issues upon which the jury must pass. . . .
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> . . . .
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> [E]vidence concerning the credibility of the witness is undoubtedly relevant and material and under the circumstances in this case, and in view of the foundation which has been laid, I think it should be received.[17]

With the traditional "hornbook law" of inadmissibility as its main obstacle,[18] efforts to apply the *Hiss* rule have had favorable results in federal jurisdictions.[19] Most cases denying admissibility of psychiatric opinion have carefully left an open door for a relaxation of the traditional rule of strict inadmissibility.[20]

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16 Transcript of Record, Vol. IV, at 2550, United States v. Hiss, 88 F. Supp. 559 (S.D. N.Y. 1950), *quoted in* Conrad, *Psychiatric Lie Detection: The Federal Courts' Break with Tradition*, 21 F.R.D. 199, 205 (1958).

17 United States v. Hiss, 88 F. Supp. 559, 560 (S.D.N.Y. 1950).

18 United States v. Rosenberg, 108 F. Supp. 798, 806 (S.D.N.Y. 1952); E. CONRAD, MODERN TRIAL EVIDENCE § 667, at 555-56 (1956), *quoted in* United States v. Daileda, 229 F. Supp. 148, 153 (M.D. Pa. 1964) provides:

> As a general rule, one witness may not give his opinion as to the credibility of another witness. It is improper to adduce testimony that in the opinion of one witness another witness is not telling the truth. An expert cannot be asked to give his opinion on conflicting testimony since to do so he must invade the province of the jury and pass on the credibility of witnesses.

19 Andersen v. United States, 237 F.2d 118 (9th Cir. 1956); O'Kon v. Roland, 247 F. Supp. 743, 750 (S.D.N.Y. 1965); Markakis v. Liberian S/S The Mparmpa Christos, 161 F. Supp. 487, 499 (S.D.N.Y. 1958).

20 United States v. Klein, 271 F. Supp. 506, 507 (D.D.C. 1967). In denying a psychiatric examination of a witness, the court stated: "It is well established that the grant or denial of the motion in question [psychiatric examination] is within the discretion of the trial judge." The *Klein* court quotes from State v. Butler, 143 A.2d 530, 556 (N.J. 1958):

> Manifestly, a practice of granting psychiatric examination of witnesses must be engaged in with great care. Orders to permit it to be done should be executed only upon a substantial showing of need and justification. . . . Much reliance must be placed upon the judgment of the trial court in the individual case.

United States v. Daileda, 229 F. Supp. 148, 153 (M.D. Pa. 1964). The court stated: "Although there has been a tendency in some instances toward a relaxation of this rule, special circumstances must exist for recognizing an exception to the rule." In discussing *Hiss*, the court continued: "However, it is apparent from the opinion that the Court predicated its ruling on the contended insanity or mental derangement of the witness. Moreover, it was a perjury trial *in which the testimony of the witness attacked was indispensable* . . . ." (Emphasis added.) United States v. Rosenberg, 108 F. Supp. 798, 806 (S.D.N.Y. 1952) provided:

> There may be some rare instances when a trial judge permits testimony by medical experts as to the competence or probity of a witness when appraised solely on his mental ability to testify truthfully,—that is, whether the witness is a pathological liar or mentally incapable of telling the truth.

See also Lindsey v. United States, 237 F.2d 893, 897 (9th Cir. 1956). Although the court

The existing division among state courts prior to *Hiss*[21] was not substantially alleviated by its decision.[22] Most state courts allowing psychiatric testimony have done so mainly on the same basis as federal courts; that is where the fate of the defendant rested on the testimony of one person and where the discretion of the court had been established.

On occasion the absence of psychiatric testimony has been considered so critical as to require a new trial.[23] Subsequent to a murder conviction, the defendant's brother, who was the state's principal witness, was found to be a psychotic schizophrenic. Citing a Texas case as support,[24] a Connecticut court held:

> If the court, after a proper consideration of the evidence as to Albert's sanity, were to admit his testimony, the evidence of his mental condition . . . would be available for the jury to use in passing on his credibility. . . . And there can be little doubt that psychiatric testimony is admissible to impeach credibility.[25]

The discretion of a court to determine the admissibility of psychiatric testimony has not been exercised as uniformly in state courts. Some state courts, both in favor of and against the admissibility of psychiatric testimony, have not allowed flexibility in a lower court's discretion.[26] Surprisingly, some state courts denying admissibility have provided for

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refused to allow testimony by a psychiatrist in relation to a sodium-pentothal induced statement, the court did acknowledge "an increasing tendency to allow expert psychiatric opinion testimony as to the credibility and character traits of a witness. . . ."

21 For cases ruling in favor of admissibility, *see* Jeffers v. State, 88 S.E. 571 (Ga. 1916); People v. Cowles, 224 N.W. 387 (Mich. 1929); Fries v. Berberich, 177 S.W.2d 640 (Mo. Ct. App. 1944); Effinger v. Effinger, 239 P. 801 (Nev. 1925); State v. Wesler, 59 A.2d 834, *aff'd on rehearing*, 61 A.2d 746 (N.J. 1948); People v. Joyce, 134 N.E. 836 (N.Y. 1922). Ruling against admissibility were People v. Champion, 225 P. 278 (Cal. 1924); State v. Driver, 107 S.E. 189 (W. Va. 1921); Goodwin v. State, 90 N.W. 170 (Wis. 1902).

22 For cases allowing psychiatric opinion for impeachment, *see* Ingalls v. Ingalls, 59 So. 2d 898 (Ala. 1952); Taborsky v. State, 116 A.2d 433 (Conn. 1955); Mosley v. Commonwealth, 420 S.W.2d 679 (Ky. Ct. App. 1967); State v. Butler, 143 A.2d 530 (N.J. 1958); State v. Sinnott, 132 A. 2d 298 (N.J. 1957); State v. Armstrong, 62 S.E.2d 50 (N.C. 1950); State v. Kleuber, 132 N.W.2d 847 (S.D. 1965). For cases still holding psychiatric testimony inadmissible for impeachment, *see* Mangrum v. State, 299 S.W.2d 80 (Ark. 1957); Ballard v. Superior Ct., 49 Cal. Rptr. 302, 311 (1966); People v. Nash, 222 N.E.2d 473 (Ill. 1966); Wedmore v. State, 143 N.E.2d 649, 654 (Ind. 1957); Commonwealth v. Repyneck, 124 A.2d 693 (Pa. Super. Ct. 1956).

23 Taborsky v. State, 116 A.2d 433 (Conn. 1955).

24 Bouldin v. State, 87 Tex. Crim. 419, 222 S.W. 555 (1920).

25 Taborsky v. State, 116 A.2d 433, 437 (Conn. 1955).

26 In Wedmore v. State, 143 N.E.2d 649, 654 (Ind. 1957), the court stated:

> In our opinion the court has no power on request of the State, to compel a prosecuting witness in a criminal case to submit to a medical examination and, on its behalf, present the findings of such an examination to the jury *via* the testimony of the examining physician, for the purpose of impeaching or supporting the testimony of such witness.

In a case allowing impeachment, Ellarson v. Ellarson, 190 N.Y.S. 6, 10 (1921), it was stated that "the court ruled broadly that no evidence could be offered tending to attack the sanity of the plaintiff. . . . [I]f necessary to the full development of the truth, the party charging insanity is entitled to an opportunity to prove it, if he can."

a relaxation of this strict inadmissibility.[27] A California court in *Ballard v. Superior Court*,[28] relied upon in *Hopkins*, cited considerable authority[29] in holding:

> Rather than formulate a fixed rule in this matter we believe that discretion should repose in the trial judge to order a psychiatric examination of the complaining witness in a case involving a sex violation if the defendant presents a compelling reason for such an examination. . . .
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> . . . Such necessity would generally arise only if *little or no corroboration supported the change* and if the defense raised the issue of *the effect of the complaining witness's mental or emotional condition upon her veracity*.[30]

This flexibility, although restricted in *Ballard*, has not always been subject to this limitation. Another court, in *Mangrum v. State*,[31] also held inadmissible psychiatric testimony for impeachment. Nevertheless, the court did not hold for inadmissibility as an inflexible rule, but instead expressed a flexibility much broader than *Ballard*. In an aptly worded opinion, the court not only emphasized flexibility, but actually based its conclusion upon the injustice which a mentally abnormal witness could create without competent psychiatric impeachment.[32]

Some early Texas cases allowed testimony to impeach the credibility of a witness, but such testimony usually came from personal acquaintances and were not professional opinions in any sense.[33] Nevertheless, such early lay opinions have made Texas law widely recognized as ad-

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27 Mangrum v. State, 299 S.W.2d 80 (Ark. 1957); Ballard v. Superior Ct., 49 Cal. Rptr. 302 (1966); Commonwealth v. Repyneck, 124 A.2d 693 (Pa. Super. Ct. 1956).

28 49 Cal. Rptr. 302 (1966).

29 *Id.* at 313. The court quotes from Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 CALIF. L. REV. 648, 663 (1960):

> Most of the courts which have dealt with this problem have recognized the authority of the trial judge to order a psychiatric examination of a witness on the question of credibility. The principle established by the majority of the cases is that the judge has the *discretion* to order such an examination, although the failure to do so has rarely been held an abuse of discretion.

30 Ballard v. Superior Ct., 49 Cal. Rptr. 302, 313 (1966) (emphasis added).

31 299 S.W.2d 80 (Ark. 1957).

32 *Id.* at 84. The court provided:

> We agree that evidence may be offered to the jury regarding the *insanity* of a witness or *mental delusions* that a witness may suffer. This is because a witness may testify ever so brilliantly to the jury, and yet his insanity or mental delusions may not appear. But, when we come to the question of whether a witness has low mental comprehension—absent, as here, any claim of insanity or mental delusions—it seems that the trial judge should have discretion to decide whether the trial should be prolonged by calling witnesses to give their opinions to the jury, or whether the matter is sufficiently clear for the jury to intelligently determine credibility without the trial being prolonged by such testimony as to the mental comprehension of another witness. We hold that the trial judge has discretion in this matter; and we cannot say that he abused his discretion in the case at bar. (Court's emphasis.)

33 Kellner v. Randle, 165 S.W. 509 (Tex. Civ. App.—Galveston 1914, writ dism'd); Wren v. Howland, 75 S.W. 894 (Tex. Civ. App. 1903, writ ref'd).

mitting impeachment evidence alleging mental disorder.[34] With one exception,[35] Texas precedent does not clearly demonstrate whether opinion given for impeachment was professional in nature or volunteered by acquaintances.[36] For example, in a trial for robbery by firearms, the defendant attempted to discredit the state's principal witness, the victim of the crime.[37] It cannot be determined from the opinion the precise nature of the impeachment testimony. Nevertheless, the lower court did not admit such impeachment on credibility. In holding error, the court of criminal appeals reversed the judgment, stating:

> Appellant should have been permitted to make proof that the witness was idiotic, and therefore incompetent as a witness. . . . It was admissible for another purpose. If he was not insane or idiotic so as not to be able to testify, still such testimony could be used as impeachment of the witness. . . .[38]

The same court relied on this decision in determining a more recent Texas case, in which a trial court had not allowed the appellant in a murder prosecution to challenge the credibility of a witness before the jury.[39] In reversing the trial judgment, the court found that the "appellant had the right to offer evidence before the jury as to . . . [a witness's] insanity or the extent of his impairment of mind . . . ."[40]

There is an earlier Texas criminal case which shakes the roots of *Hopkins'* strict inadmissibility rule. *Anderson v. State*[41] borders on outright admissibility of psychiatric testimony for impeachment, and may have feasibly been just that.[42] The appellant was convicted of second-degree murder. In his defense, the defendant offered evidence that one of the state's main witnesses was a "cocaine fiend."[43] As in *Hopkins*, the defendant offered an expert witness to show the effect of the habitual use of morphine and cocaine upon an individual.[44] This

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[34] Note, *Psychiatric Challenge of Witnesses*, 9 VAND. L. REV. 860, 864 (1956) provides, "The Texas Court of Civil Appeals has consistently admitted lay testimony on the question of mental condition offered for purposes of impeachment." *See also*, Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 CALIF. L. REV. 648, 654 (1960).

[35] Anderson v. State, 65 Tex. Crim. 365, 144 S.W. 281 (1912).

[36] Bouldin v. State, 87 Tex. Crim. 419, 222 S.W. 555 (1920).

[37] *Id.*

[38] *Id.* at 423, 222 S.W. at 556. It is interesting to note that *Bouldin* was interpreted as supporting the *Hiss* decision. In citing the Texas case, the *Hiss* court concluded, "There are some state cases in which such testimony [psychiatric] has been held admissible *or which indicate that if this question had been presented, it would have been admissible.* (Emphasis added.)

[39] Saucier v. State, 156 Tex. Crim. 301, 235 S.W.2d 903 (1950).

[40] *Id.* at 320, 235 S.W. at 916.

[41] 65 Tex. Crim. 365, 144 S.W. 281 (1912).

[42] It cannot be determined from the opinion whether Dr. Woods was a licensed psychiatrist, but the nature of his testimony would imply a psychiatric opinion. *Id.* at 367, 144 S.W. at 282.

[43] *Id.*

[44] *Id.* at 367, 144 S.W. 282.

testimony was excluded by the trial court. In finding error, the court of criminal appeals held:

> We are of opinion, as the matter is presented by this record, that this evidence should have gone to the jury. If upon another trial it can be shown the witness was a cocaine fiend and to such an extent that it would impair her mental and moral sensibilities, it is and would be a legitimate inquiry before the jury. It certainly would affect the credibility of the witness and the weight to be given her testimony.[45]

With *Hopkins* in mind, the *Anderson* decision is alarmingly clear. It has been cited as support for admission of expert medical testimony in other cases where drug addiction impaired a witness's credibility.[46]

The *Hopkins* court expresses alarm at the thought of juries being exposed to a "battle of experts" by the use of psychiatry.[47] But why should such a battle develop only with psychiatrists and not other experts?[48] The Texas court acknowledges that fact in its own opinion:

> It is true that these same objections can be properly leveled at all expert testimony. However, we feel that psychiatric impeachment testimony differs, for the reasons stated, from other expert testimony.[49]

It is true that psychiatric testimony can become very lengthy and involved,[50] but why it should be distinguished from evidence supplied by other experts as in fingerprinting, medicine, or other complex sciences, is difficult to reconcile. In cases where such confusion or disagreement could occur, the jury is always free to reject the psychiatric testimony just as any other expert testimony.[51]

> While psychiatric information is not known by most laymen, there is still available to the jury the usual impeachment evidence such as criminal convictions and prior inconsistent statements to assist in the determination of credibility. Thus, unlike the case of highly technical issues, the jury, even without psychiatric testimony will not be left "in the dark."[52]

The court in its opinion would infer that, where psychiatric opinion is

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45 *Id.* at 367, 144 S.W. 282.
46 State v. Smith, 174 P. 9 (Wash. 1918).
47 Hopkins v. State, 480 S.W.2d 212, 221 (Tex. Crim. App. 1972).
48 *See* II J. WIGMORE, EVIDENCE § 563 (3d ed. 1940).
49 Hopkins v. State, 480 S.W.2d 212, 221 (Tex. Crim. App. 1972).
50 *See, e.g., State v. Jack Ruby*, 6:4 TRAUMA 5 (1964).
51 II J. WIGMORE, EVIDENCE § 673 (3d ed. 1940). Dean Wigmore states:
[T]he jury may still reject his testimony (expert) and accept his opponent's, and no legal power, not even the judge's order, can compel them to accept the witness' statement against their will.
52 Hopkins v. State, 480 S.W.2d 212, 221 (Tex. Crim. App. 1972).

unavailable, the tools of criminal convictions and prior inconsistent statements are always at hand as protection against a cunning psychopathic liar who could "brilliantly" deceive any jury.[53]

In citing *United States v. Flores-Rodriguez*,[54] the *Hopkins* court cannot add support to its adoption of inadmissibility as an inflexible rule. In an effort to emphasize the vagueness and confusion that psychiatry can breed in the courtroom the *Hopkins* court misleadingly quotes the concurring opinion by Judge Jerome N. Frank.[55] Ironically, the Texas court is apparently unaware of Judge Frank's true outlook on psychiatry clearly expressed in literature authored by the same jurist.[56] In all likelihood, Judge Frank would have probably disagreed with the *Hopkins* decision in light of his interpretation of *Hiss*.[57] His main reason for disagreeing with the *Hiss* ruling was that Chambers, the government's key witness, had not received previous clinical observation or interviews by the psychiatrist, a requirement which seems to have been fulfilled in *Hopkins*.[58]

In summary, it is evident that the Texas Court of Criminal Appeals has clearly laid down in *Hopkins* a rigid and inflexible rule for exclusion of psychiatric opinion for impeachment. It has not followed a more lenient path evidenced in many federal and state jurisdictions. The court has disregarded previous Texas precedent which would seem to have justified a more elastic result. In leaving such inconsistencies as *Anderson* unattended, not only does it evidence a lack of depth

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[53] Mangrum v. State, 299 S.W.2d 80, 84 (Ark. 1957).

[54] 237 F.2d 405 (2d Cir. 1956), *cited in* Hopkins v. State, 480 S.W.2d 212, 221 (Tex. Crim. App. 1972).

[55] United States v. Flores-Rodriguez, 237 F.2d 405, 412 (2d Cir. 1956). It is worth noting that *Flores-Rodriguez* is the only federal case cited by the court in *Hopkins* which could be interpreted as adverse to admissibility of psychiatric testimony, and yet psychiatric testimony was never an issue in the case. In his concurring opinion, Circuit Judge Frank states: "I think it a mistake for my colleagues needlessly to embark—without a pilot, rudder, compass or radar—on an amateur's voyage on the fog-enshrouded sea of psychiatry." *Id.* at 412. Judge Frank was referring to the court's effort to interpret psychiatric terminology in various statutes, without the aid of psychiatrists. He did not mean to keep a wary distance from psychiatry because of its confusion and complexity as the *Hopkins* court implies in its opinion. Psychiatric opinion, in fact, may well have provided the "pilot, rudder, compass or radar" Judge Frank's brothers on the court so badly needed.

[56] Frank, *Judicial Fact-Finding and Psychology*, 14 OHIO ST. L.J. 183 (1953). Judge Frank comments:

> It is a commonplace that a witness may be seriously mistaken in one or all of three ways: (1) He may have erred in his original observation of the past event. (2) Or in his subsequent memory of what he observed. (3) Or in the way his memory of his original observation is communicated to the trial court.
>
> The psychologists and psychiatrists know much about each of these three foci of infection and about the physiological and psychological factors which cause such errors. *The courts, however, have done relatively little to learn, or to use, this psychological and psychiatric wisdom.* (Emphasis added.)

[57] *Id.* at 185. Judge Frank observes: "In the *Hiss* case, the psychiatrists testified about the witness Chambers. But they did so without an opportunity for clinical examination or interviews."

[58] Hopkins v. State, 480 S.W.2d 212, 217 (Tex. Crim. App. 1972): "Dr. Yero testified that he had 'previously examined' Marquez."

for its strict inadmissibility rule, but has also culminated in a decision which prevents a far more workable and flexible rule for the courts of Texas. The point respectfully made is not whether psychiatric testimony for impeachment should or should not be allowed in Texas, but rather, whether it was wise for the *Hopkins* decision to provide for Texas courts a strict inflexible rule of inadmissibility for such testimony, in light of the elasticity provided for the rule by courts of other jurisdictions, both for and against admissibility. Not only could such an opinion be critical in many instances, but more importantly the courts should be allowed to exercise discretion in consideration of the facts in each case. As complex as facts and personalities can be in each particular case, the *Hopkins* court has deprived Texas criminal courts of the right to exercise their discretion in determining the benefit that competent psychiatric testimony would give their juries. In overlooking the opinion of evidence scholars on the matter[59] and other varied literature in favor of the increased use of psychiatry in the courtroom,[60] the Texas court has failed to recognize that "there are certain difficult areas in which the jury may be assisted by, or must have, expert testimony in determining fact questions."[61] The court unduly limited the potential benefit of psychiatry in Texas courts by establishing such rigid inadmissibility and disregarding the discretion of the courts. In dissenting, Judge Morrison aptly states:

> I cannot, however, bring myself to agree with that portion of the majority opinion which pronounced an inflexible rule which does not permit any psychiatric testimony for impeachment purposes. . . . I quote from Ballard, supra:
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> "Thus, in rejecting the polar extremes of an absolute prohibition and an absolute requirement that the prosecutrix submit to a psychiatric examination, we have accepted a middle ground, *placing the matter in the discretion of the trial judge.*"[62]

Joseph H. Vives

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59 III J. WIGMORE, EVIDENCE §§ 924a, 931, 932, 935, 997b, 998b (3d ed. 1940).

60 ALI MODEL CODE OF EVIDENCE Rules 106, 401, & 409, *cited in* United States v. Hiss, 88 F. Supp. 559, 560 (S.D.N.Y. 1950); *Report of the American Bar Association's Committee on the Improvement of the Law of Evidence, 1937-1938, discussed in* III J. WIGMORE, EVIDENCE §§ 746, 924a (3d ed. 1940, Supp. 1970); Conrad, *Psychiatric Lie Detection: The Federal Courts' Break with Tradition*, 21 F.R.D. 199 (1958); Curran, *Expert Psychiatric Evidence of Personality Traits*, 103 U. PA. L. REV. 999 (1955); Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 CALIF. L. REV. 648 (1960); Comment, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 YALE L.J. 1324 (1950); Comment, *Psychiatric Testimony for the Impeachment of Witnesses in Sex Cases*, 39 J. CRIM. L. 750 (1949); Note, *The Mentally Abnormal Witness: Challenges to His Competency and Credibility*, 13 RUTGERS L. REV. 330 (1959); Note, *Psychiatric Challenge of Witnesses*, 9 VAND. L. REV. 860 (1956); Note, *Psychiatric Aid in Evaluating the Credibility of a Prosecuting Witness Charging Rape*, 26 IND. L.J. 98 (1950).

61 Steakley, *Expert Medical Testimony in Texas*, 1 ST. MARY'S L.J. 161 (1969).

62 Hopkins v. State, 480 S.W.2d 212, 221 (Tex. Crim. App. 1972) (emphasis added).