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Rock v. Arkansas: Hypnotically Refreshed Testimony or Hypnotically Manufactured Testimony

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NOTES

ROCK v. ARKANSAS: HYPNOTICALLY "REFRESHED" TESTIMONY OR HYPNOTICALLY "MANUFACTURED" TESTIMONY?

The Constitution does not expressly grant a criminal defendant the right to testify on his own behalf, although the United States Supreme Court recognizes this right as a fundamental element of due process.[1] In June 1987, the Supreme Court, in a 5-4 vote, decided *Rock v. Arkansas*.[2] This decision expands the scope of a defendant's right to testify on his own behalf.

In *Rock*, the Court examined the controversial issue of "hypnotically refreshed testimony."[3] The Court held Arkansas's *per se* rule excluding a criminal defendant's hypnotically refreshed testimony unconstitutional. The Court deemed the restriction "arbitrary" because hypnotically refreshed testimony may be reliable in an individual case.

This Note argues that neither the Constitution nor Supreme Court precedent mandates the Court's conclusion in *Rock*. Arkansas's rule of exclusion should not be considered "arbitrary," given the extensive expert and judicial support it enjoys. It therefore should stand as a legitimate restriction on a defendant's right to offer evidence. Supreme Court due process decisions establish that the right to present evidence on one's own behalf is not absolute. Similarly, compulsory process decisions demonstrate that the right is qualified by other legitimate interests in the criminal trial process.

The *Rock* decision is significant for several reasons. First, it broadly protects a criminal defendant's right to present evidence in his favor. This Note argues that this protection exceeds constitutional requirements, in essence permitting the defendant to present virtually untestable evidence. Current scientific research suggests that not even experts can assess the reliability of hypnotically re-

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1 *See infra* notes 156-59 and accompanying text.

2 483 U.S. 44 (1987).

3 "Hypnotically refreshed testimony" is a phrase which courts use to describe the testimony of a witness or defendant who attempts to enhance his recollection through pretrial hypnosis. Any hypnosis of a witness or defendant is done before trial; there is no hypnosis in the courtroom. Thereafter, the previously hypnotized witness or defendant testifies as would any witness, seeking to include any new information acquired through hypnosis.

freshed testimony in a particular case.[4] The trier of fact, however, is forced to assess testimony labeled hypnotically "refreshed," testimony which may, in fact, be hypnotically "manufactured." Unqualified to make such an assessment, the trier of fact can only speculate whether the events recalled actually occurred. Secondly, *Rock* may signal the demise of the *Frye* test[5] which requires that a scientific method of producing evidence gain acceptance among the scientific community before a court may admit evidence it produces. Because the *Frye* test may *per se* exclude reliable evidence in a specific case, it appears "arbitrary" under *Rock*. Thirdly, implementation of procedural safeguards, constitutionally permissible under *Rock*, can not adequately curb the inherent unreliability which accompanies the admission of hypnotically refreshed testimony. Finally, some courts, determined to preserve exclusion of hypnotically refreshed testimony, may employ a *per se* inadmissible approach, albeit not expressly.

I
BACKGROUND

Although hypnosis is an ancient practice, a precise understanding of it continues to elude the scientific community.[6] Initially, American law completely rejected hypnosis.[7] Following psychologists' increased use of hypnosis as therapy, some courts permitted hypnosis as a method of refreshing recall.[8] However, as courts looked to the scientific community for assessment of hypnosis, many courts excluded hypnotically refreshed testimony.[9]

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4 *See infra* notes 165-77 and accompanying text.

5 *See infra* notes 33-35 and accompanying text.

6 No generally accepted definition of hypnosis exists. Contreras v. State, 718 P.2d 129, 131 & n.5 (Alaska 1986) (citing Orne, *On the Simulating Subject as a Quasi-Control Group in Hypnosis Research, What, Why, and How*, in HYPNOSIS: DEVELOPMENTS IN RESEARCH AND NEW PERSPECTIVES 520-21 (E. Fromm & R.E. Shor 2d ed. 1979)). It appears, however, that hypnosis is suggestive by its very nature. *See infra* note 94 and accompanying text. One source defines hypnotism as "[t]he act of inducing artificially a state of sleep or trance in a subject by means of verbal suggestion by the hypnotist or by the subject's concentration upon some object." BLACK'S LAW DICTIONARY 668 (5th ed. 1979). Another authority defines hypnosis as a "highly suggestible state into which a willing subject is induced by a skilled therapist . . . ." State v. Mack, 292 N.W.2d 764, 765 (Minn. 1980) (citation omitted).

Hypnosis theorists are divided into two major factions. One group holds that "hypnosis is a distinctive altered mental state or 'trance' in which a person tends to respond to suggestions in an uncritical fashion." *Contreras*, 718 P.2d at 131. The other group "denies the existence of a special trance state and explains hypnotic behavior as simply a function of the subject's rapport with the hypnotist, as well as his set of attitudes, reservations and expectations regarding hypnosis." *Id.*

7 *See infra* text accompanying notes 12-15.

8 *See infra* notes 16-21 and accompanying text.

9 *See infra* notes 22-24 & 30-37 and accompanying text.

In the past two decades, courts have struggled with the issue of whether hypnotically refreshed testimony is admissible in a criminal trial.[10] State and federal courts have used at least four approaches in deciding the issue.[11]

A. Early American Courts Ignore Hypnosis

An American court first considered hypnosis in *People v. Ebanks*[12] in 1897. Declaring that "the law of the United States does not recognize hypnotism,"[13] the California Supreme Court refused to admit testimony by a hypnotist relating exculpatory statements made by the defendant while hypnotized.[14] Courts almost completely ignored hypnosis in the decades following *Ebanks*.[15]

The revival of hypnosis in forensic use coincided with increased acceptance of hypnosis as therapy.[16] Today, the legal controversy over hypnosis focuses on the admissibility of hypnotically refreshed testimony. Those opposing hypnotically refreshed testimony urge its exclusion as a matter of law. They argue using hypnosis to enhance memory is inherently unreliable, and thus testimony refreshed through hypnosis should be inadmissible. Those who favor admitting hypnotically refreshed testimony view hypnosis as an acceptable method of refreshing recall. They believe that the trier of

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10 The scope of this Note is limited to use of hypnotically refreshed testimony in criminal trials.

11 *See infra* notes 18-70 and accompanying text.

12 117 Cal. 652, 49 P. 1049 (1897).

13 *Id.* at 665, 49 P. at 1053.

14 *Id. See also* Austin v. Barker, 110 A.D. 510, 96 N.Y.S. 814 (1906) (civil case holding evidence insufficient to sustain plaintiff's verdict where the only evidence amounted to plaintiff's hypnotically refreshed testimony claiming alleged seduction). *But cf.* State v. Exum, 138 N.C. 599, 609, 50 S.E. 283, 285-86 (1905) (previously hypnotized witness permitted to testify; fact of hypnosis admissible relative to credibility as a witness).

15 Between 1915 and 1950, only one reported American case considered any aspect of hypnosis. Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Suspectable?*, 38 OHIO ST. L.J. 567, 579 n.67 (1977). *See* People v. Bishop, 359 Ill. 112, 115-18, 198 N.E. 238, 239-41 (1934) (where defendant claimed he signed arson confession involuntarily and testified that he confessed while hypnotized, court held that inconsistencies between confession and other facts in evidence affect weight of confession rather than admissibility).

16 The American Medical Association and the American Psychiatric Association officially recognized hypnosis as a therapeutic technique in 1958 and 1960 respectively. M. ORNE, D. SOSKIS, D. DINGES, E. ORNE, M. TONRY, HYPNOTICALLY REFRESHED TESTIMONY: ENHANCED MEMORY OR TAMPERING WITH EVIDENCE? 29-36 (1985) [hereinafter M. ORNE]. Dr. Martin T. Orne has thirty-five years of experience in the field of hypnosis, with special expertise regarding hypnotically refreshed testimony and its use in criminal trials. Dr. Orne is a Professor of Psychiatry at the University of Pennsylvania, as well as Director of the Unit for Experimental Psychiatry and Senior Attending Psychiatrist at The Institute of Pennsylvania Hospital. He serves as a consultant to several government agencies, including the U.S. Department of Justice and the National Institute of Mental Health. Dr. Orne is also Editor-in-Chief of the *International Journal of Clinical and Experimental Hypnosis*, a position he has held since 1961.

fact should decide the credibility and reliability of hypnotically induced testimony.[17]

B. Recent Determinations Regarding the Admissibility of Hypnotically Refreshed Testimony

Since 1968, courts addressing whether hypnotically refreshed testimony is properly admissible at criminal trials have employed at least four approaches. The first court faced with hypnotically refreshed testimony adopted a *per se* admissible approach. However, deferring to recognized scientific doubts about the reliability of hypnosis as a memory enhancer, later courts adopted a *per se* inadmissible approach. Still other courts developed one of two intermediate approaches: some jurisdictions permit hypnotically refreshed testimony if the proponent can demonstrate compliance with strict procedural safeguards, while others reject any hard rules and assess such testimony on a case-by-case basis.

1. *Hypnotically Refreshed Testimony* Per Se *Admissible: Hypnosis Raises Questions of Credibility, But Not Admissibility*

A court first considered the admissibility of hypnotically refreshed testimony in *Harding v. State*[18] in 1968. In *Harding*, the victim of a shooting and alleged rape was hypnotized several weeks after the incident in an attempt to increase her recollection of the crime. The *Harding* court admitted the victim's hypnotically refreshed testimony with "no difficulty,"[19] accepting the victim's testimony that she was reciting facts from her own memory.[20] "The fact that she had told different stories or had achieved her present knowledge after being hypnotized concerns the question of the weight of the evidence which the trier of fact . . . must decide."[21] Thus, *Harding* created a *per se* admissible approach to hypnotically refreshed testimony.

However, many subsequent courts rejected the *Harding* approach, noting that it "engaged in little or no analysis of the issue, and merely reiterated the general proposition that the fact of hypno-

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17 *Id.* at 37-40.

18 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969). *Harding* was subsequently overruled by State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983). *See infra* note 37 and accompanying text.

19 5 Md. App. at 236, 246 A.2d at 306.

20 *Id. But see infra* notes 163 & 177 discussing expert opinion that a subject cannot reliably tell what parts of his memory are hypnotically refreshed and what parts were originally remembered.

21 *Harding*, 5 Md. App. at 236, 246 A.2d at 306. The *Harding* court apparently considered hypnosis an acceptable way of refreshing memory, similar to traditional methods such as having a witness look at notes or memoranda. M. ORNE, *supra* note 16, at 37.

sis 'goes to the weight, not the admissibility' of the evidence."[22] By the late 1970s, some courts recognized inherent dangers in admitting hypnotically refreshed testimony.[23] These courts considered the *Harding* approach's "failure to provide an adequate record of the scientific opinion and consensus on the reliability of hypnotically refreshed testimony" among its serious shortcomings.[24]

Nevertheless, some recent decisions adhere to a *per se* admissible approach similar to the *Harding* analysis.[25] These courts always admit hypnotically refreshed testimony; the credibility of testimony refreshed by hypnosis is a question for the trier of fact. In *Beck v. Norris*,[26] the Sixth Circuit admitted hypnotically refreshed testimony by prosecution witnesses, in accordance with Tennessee law.[27] The defendant argued that the admission of the witnesses' hypnotically refreshed testimony deprived him of a fair trial. The court rejected the defendant's claim because the state employed procedural safeguards[28] and a witness not subjected to hypnosis also identified the defendant.[29]

2. *Hypnotically Refreshed Testimony* Per Se *Inadmissible: The* Frye *Test and the Abandonment of* Harding

In 1980, declining to follow the *Harding* approach, the Minnesota Supreme Court refused to admit hypnotically refreshed testimony. In *State v. Mack*,[30] the court relied on "the best expert testimony" indicating that "no expert can determine whether memory retrieved by hypnosis . . . is truth, falsehood, or confabulation—

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22 People v. Shirley, 31 Cal. 3d 18, 36, 723 P.2d 1354, 1364, 181 Cal. Rptr. 243, 253 (1982) (citations omitted). The courts following the *Harding* approach "simply noted that the witness believed he was testifying from his own memory and that his credibility could presumably be tested by ordinary cross-examination." *Id.*

23 *Id.* In 1978, the Ninth Circuit extended *Harding*'s *per se* admissibility approach to criminal cases, yet warned against the dangerous potential for abuse and proposed several safeguards. United States v. Adams, 581 F.2d 193, 198-99 (9th Cir. 1978).

24 M. ORNE, *supra* note 16, at 37.

25 *See, e.g.*, State v. Wren, 425 So. 2d 756 (La. 1983) (any contamination of witness' testimony by hypnosis is a factual issue going to weight not admissibility); United States v. Awkard, 597 F.2d 667, 669 & n.2 (9th Cir. 1979) ("fact of hypnosis, if disclosed to jury, may affect the credibility of evidence, not its admissiblity").

26 801 F.2d 242 (6th Cir. 1986).

27 *Id.* at 244 (under Tennessee law, hypnosis affects credibility not admissibility).

28 For example, the hypnotic sessions were videotaped, the psychologist-hypnotist testified as to the procedure followed, and the videotapes of the hypnotic sessions were shown to the jury. *Id.* at 244-45. *See infra* note 61 for a comparison to the *Hurd* safeguards.

29 *Beck*, 801 F.2d at 244-45 (defendant was not deprived of the right of confrontation because he had the opportunity to cross-examine both the hypnotist and the witnesses who had been hypnotized).

30 292 N.W.2d 764 (Minn. 1980).

a filling of gaps with fantasy."[31] Accordingly, the court concluded that testimony induced through hypnosis is "not scientifically reliable as accurate."[32] The landmark decision in *Frye v. United States*[33] governed the question of admissibility in *Mack*. In *Frye*, the D.C. Circuit established a test to determine the admissibility of evidence produced by a scientific method. The *Frye* test requires that experts agree that a scientific method of producing evidence elicit scientifically reliable results before a court may admit such results.[34] Application of the test prevents misleading the jury by "unproven and ultimately unsound scientific methods."[35]

Several states followed the *Mack* analysis, adopting a *per se* rule excluding hypnotically refreshed testimony.[36] Even Maryland,

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31 *Id.* at 768. "Confabulation" is a phenomenon that occurs when a hypnotic subject fills in details from his imagination in order to make his answer more coherent and complete. Rock v. Arkansas, 107 S. Ct. 2704, 2713 (1987). Particularly troublesome is that often these false "recollections" are not viewed by the subject as guesses, but instead, as "contextually appropriate and meaningful memories." M. ORNE, *supra* note 16, at 19. For example, someone may be trying to remember a person whom he has seen at a distance of 100 yards. During hypnosis, the subject is asked to look through "binoculars" so he can "look at" that person. The subject may describe the person in detail even though it is beyond the physical ability of the human eye at 100 yards. *Id.* at 10. Other studies where hypnotic subjects describe the year 2000 in detail demonstrate the ease of inducing fantasy. Contreras v. State, 718 P.2d 129, 132 (Alaska 1986) (citing Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 312, 322-23 (1979)). *See also* Diamond, *Inherent Problems in the Use of Pretrial Hypnosis*, 68 CALIF. L. REV. 313, 337 (1980) (age progression experiments readily prove that detailed recall can be pure confabulation). The need to "fill gaps" is so strong that when asked a question, the hypnotic subject will only rarely respond "I don't know." *Mack*, 292 N.W.2d at 768.

32 292 N.W.2d at 768.

33 293 F. 1013 (D.C. Cir. 1923). In *Frye*, the court excluded expert testimony concerning the results of an early version of today's polygraph test. Because the court determined that the polygraph had not yet received general scientific acceptance, testimony regarding polygraph results was inadmissible.

Historically, the *Frye* test applied to physical tests such as radar, the polygraph and voiceprints. State v. Hurd, 86 N.J. 525, 536-37, 432 A.2d 86, 91-92 (1981). However, modern courts have applied the *Frye* test in a variety of contexts. *See, e.g.*, United States v. Tranowski, 659 F.2d 750 (7th Cir. 1981) (photograph dating by mathematical and astronomical calculations); United States v. Fosher, 590 F.2d 381 (1st Cir. 1979) (expert testimony on the unreliability of eyewitness identification); United States v. Brown, 557 F.2d 541 (6th Cir. 1977) (ion microprobic analysis of human hair); United States v. McDaniel, 538 F.2d 408 (D.C. Cir. 1976) (spectrographic voice identification); State v. Washington, 229 Kan. 47, 622 P.2d 986 (1981) (multi-system polymorphic enzyme blood analysis).

34 293 F.2d at 1014.

35 People v. Shirley, 31 Cal. 3d 18, 53, 723 P.2d 1354, 1379, 181 Cal. Rptr. 243, 264 (1982).

36 *See, e.g.*, State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981); People v. Shirley, 31 Cal. 3d 18, 723 P.2d 1354 181 Cal. Rptr. 243, (1982); Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983); People v. Gonzales, 108 Mich. App. 145, 310 N.W.2d 306 (1981), *aff'd* 415 Mich. 615, 329 N.W.2d 743 (1982); State v. Palmer, 210 Neb. 206, 313 N.W.2d 648 (1981); People v. Hughes, 59 N.Y.2d 523, 466 N.Y.S.2d 255,

which originally permitted such testimony in *Harding*, reversed its position. *State v. Collins*[37] overruled *Harding*, holding hypnotically refreshed testimony inadmissible as a matter of law.

Most courts considering the admissibility of hypnotically refreshed testimony have applied the *Frye* test or a similar "general acceptance standard."[38] In 1986, the Alaska Supreme Court held hypnotically refreshed testimony inadmissible because it failed the *Frye* standard.[39] It characterized the *Frye* test as "essentially a 'prejudice-versus-probative value test,' similar to Evidence Rule 403."[40]

Admitting evidence produced by an unaccepted scientific method poses a significant danger of prejudice. Jurors may unequivocally accept hypnotically refreshed testimony as accurate and truthful.[41] However, because the scientific community does not accept such testimony as reliable,[42] it offers little probative value. Therefore, evidence such as hypnotically refreshed testimony

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453 N.E.2d 484 (1983); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981).

37 296 Md. 670, 464 A.2d 1028 (1983).

38 Contreras v. State, 718 P.2d 129, 134 (Alaska 1986). *See, e.g.*, State ex rel. Collins v. Superior Court, 132 Ariz. 180, 196-99, 644 P.2d 1266, 1282-85 (1982) (Feldman, J., Supplemental Opinion); People v. Shirley, 31 Cal. 3d 18, 33-51, 723 P.2d 1354, 1361-73, 181 Cal. Rptr. 243, 262-65 (1982); Peterson v. State, 448 N.E.2d 673, 676-77 (Ind. 1983); *Collins*, 296 Md. at 679-81, 464 A.2d at 1033-34; Commonwealth v. Kater, 388 Mass. 519, 525-27, 447 N.E.2d 1190, 1195-96 (1983); People v. Gonzales, 415 Mich. 615, 622-23, 329 N.W.2d 743, 745-48 (1982); State v. Mack, 292 N.W.2d 764, 767-69 (Minn. 1986).

Furthermore, nearly every court faced with the contention that the *Frye* test does not apply to hypnosis has rejected it. *Contreras*, 718 P.2d at 134 n.15. *See, e.g.*, People v. Shirley, 31 Cal. 3d 18, 53, 723 P.2d 1354, 1374, 181 Cal. Rptr. 243, 264 (1982) (*Frye* test applies to evidence "based upon" or "developed by" new scientific techniques); Polk v. State, 48 Md. App. 382, 394, 427 A.2d 1041, 1048 (1981) ("The induced recall of the witness is dependent upon, and cannot be disassociated from, the underlying scientific method"); State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980) (although hypnotically refreshed recall not "strictly analogous" to mecbanical testing, *Frye* equally applicable); State v. Hurd, 86 N.J. 525, 536, 432 A.2d 86, 91 (1981) ("policy reasons embodied in [*Frye*] are germane to hypnotically refreshed testimony as well"); Commonwealth v. Nazarovitch, 496 Pa. 97, 101, 436 A.2d 170, 172 (1981) ("any means by which evidence is scientifically adduced must satisfy the standard established in *Frye*. . . ."). *But see* United States v. Valdez, 722 F.2d 1196, 1200-01 (5th Cir. 1984); State v. Seager, 341 N.W.2d 420, 429 (Iowa 1983); State v. Brown, 337 N.W.2d 138, 149 (N.D. 1983); State v. Armstrong, 110 Wis. 2d 555, 567-68, 329 N.W.2d 386, 393, *cert. denied*, 461 U.S. 946 (1983).

39 *Contreras*, 718 P.2d at 129.

40 *Id.* at 135. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

41 *See infra* note 218 and accompanying text.

42 The Supreme Court acknowledged that "scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy." Rock v. Arkansas, 107 S. Ct. 2704, 2714 (1987).

should be excluded.[43]

The courts employing this *per se* inadmissible approach do not completely bar the previously hypnotized witness from testifying. Only the hypnotically refreshed testimony is excluded. These courts permit a witness to testify about matters recalled and related to others prior to undergoing hypnosis.[44] However, at least one expert "believe[s] that once a potential witness has been hypnotized for the purpose of enhancing memory his recollections have been so contaminated that he is rendered effectively incompetent to testify. . . . [and] argues that testimony by previously hypnotized witnesses should never be admitted into evidence."[45]

At least two courts have adhered to a *per se* inadmissible approach to hypnotically refreshed testimony where the *defendant* has *no* pre-hypnotic memory.[46] In *Greenfield v. Commonwealth*,[47] the defendant claimed he had no recollection of the crime's events yet recounted those events while hypnotized.[48] The Virginia Supreme Court held the defendant's statements inadmissible, emphasizing that most experts view hypnotic evidence as unreliable because a hypnotic subject can "invent false statements" and is "subject to heightened suggestibility."[49] In denying *habeas corpus* relief to the same defendant, the district court in *Greenfield v. Robinson*[50] rejected defendant's claim that he was denied his constitutional right to testify solely because hypnotic testimony was his only evidence in defense.[51] The court stated, "[t]he mere fact that a crime has no eyewitnesses or direct evidence does not warrant a court to accept evidence that may be able to tell the trier of fact something about the crime, but may be of dubious quality."[52] In *State v. Atwood*,[53] the defendant, charged with murdering his wife, claimed he had no memory of the crime and made the same unsuccessful argument as the defendant in *Greenfield*.

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43 *Contreras*, 718 P.2d at 135. Under Rule 403, even relevant evidence can be excluded where the danger of prejudice substantially outweighs the probative value. *See supra* note 40.

44 Other decisions following this approach include State v. Davis, 490 A.2d 601 (Del. Super. Ct. 1985) and State v. Moreno 709 P.2d 103 (Hawaii 1985).

45 Diamond, *supra* note 31, at 314-15.

46 *See* Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414 (1974); State v. Atwood, 39 Conn. Supp. 273, 479 A.2d 258 (1984).

47 214 Va. 710, 204 S.E.2d 414 (1974).

48 *Id.* at 715, 204 S.E.2d at 419.

49 *Id.*

50 413 F. Supp. 1113 (D. Va. 1976).

51 *Id.* at 1120-21.

52 *Id.*

53 39 Conn. Supp. 273, 479 A.2d 258 (1984).

3. *Hypnotically Refreshed Testimony Admitted If Proponent Complies With Procedural Prerequisites Designed to Reduce Risks Associated with Hypnosis*

Some courts admit hypnotically refreshed testimony if the proponent can demonstrate compliance with strict procedural safeguards designed to ensure the testimony's reliability.[54] In *State v. Hurd*,[55] the leading case advancing this approach, the New Jersey Supreme Court did not require as a precondition of admitting hypnotically refreshed testimony, "that hypnosis be generally accepted as a means of reviving truthful or historically accurate recall."[56] The *Hurd* court declared that the purpose of hypnosis "is not to obtain truth, as [is] a polygraph or 'truth serum' . . . [but] as a means of overcoming amnesia and restoring the memory of a witness."[57] Given this purpose, the court held that use of hypnosis to refresh recollection can satisfy the *Frye* standard "in certain instances."[58] The court concluded that where hypnosis is conducted according to stringent guidelines, it is "generally accepted as a reasonably reliable method of restoring a person's memory."[59] Accordingly, hyp-

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54 *See, e.g.*, Sprynczynatyk v. General Motors Corp., 771 F.2d 1112, 1122-23 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986); Brown v. State, 426 So. 2d 76, 85-90 (Fla. App. 1983); House v. State, 445 So. 2d 815, 826-27 (Miss. 1984); State v. Weston, 16 Ohio App. 3d 279, 287, 475 N.E.2d 805, 813 (1984).

55 86 N.J. 525, 432 A.2d 86 (1981).

56 *Id.* at 537, 432 A.2d at 92. The *Hurd* court's position seems completely inconsistent with the *Frye* test. *See supra* notes 33-35 and accompanying text.

57 86 N.J. at 537, 432 A.2d at 92 (citing Spector & Foster, *supra* note 15, at 584). For a different approach, see State v. Mack, 292 N.W.2d 764 (Minn. 1980), where a state prosecutor argued that post-hypnotic testimony need not he truthful to be admissible; he argued that "it need only be based on 'what the witness actually saw or experienced, as opposed to suggestion.' " *Id.* at 769. The Minnesota Supreme Court rejected this argument because "the fact that a witness's memory results from hypnosis bears on the question of whether her testimony is sufficiently competent, relevant, and more probative than prejudicial, to merit admission at all." *Id.* Hypnosis can "create a memory of perceptions" which neither did occur nor could have occurred, and thus, elicit a "memory" from a person unable to "establish that she perceived the events she asserts to remember." *Id.*

58 *Hurd*, 86 N.J. at 538, 432 A.2d at 92. *But see* Note, *Breaking from the Hurd: Missouri Rejects Eighth Circuit—An Analysis of the Admissibility of Post-hypnotic Testimony*, 51 MO. L. REV. 793, 806 (1986) (citing Orne, *The Use and Misuse of Hypnosis*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 312, 328 (1979)) (some experts recognize that the purpose of hypnosis is often not to elicit a blocked subconscious memory, but rather to induce more details regarding an event readily communicated prior to hypnosis). This application of hypnosis heightens the risk of fallacious results. First, repeated questioning creates an environment conducive to suggestion, *see infra* notes 169-70 and accompanying text, or confabulation, *see supra* note 31. *See* Note, *supra*, at 806. Second, often the reason for not remembering a detail before hypnosis is "that the subject did not have the opportunity or the motivation at the time of the event to be cognitive of the detail sought. In such a situation *there is no memory to be refreshed*, only a strong motivation to comply with the hypnotist's request to provide more details." *Id.* (emphasis added).

59 *Hurd*, 86 N.J. at 538, 432 A.2d at 92.

notically refreshed testimony may be admissible if the trier of fact finds that the hypnotic procedure in the particular case was a "reasonably reliable" method of restoring recall comparable in accuracy to "normal recall."[60]

The *Hurd* court enumerated six prerequisites to introduction of hypnotically refreshed testimony.[61] However, conceding "the potential for abuse of hypnosis, the genuine likelihood of suggestiveness and error, and the consequent risk of injustice,"[62] the *Hurd* court held that the proponent offering hypnotically refreshed testimony must establish its admissibility by "clear and convincing evidence."[63] Several state and federal courts have adopted the *Hurd* approach.[64]

4. *Hypnotically Refreshed Testimony Assessed on a Case-by-Case Basis*

Some courts eschew any *per se* rule in assessing hypnotically refreshed testimony and do not view compliance with procedural safeguards as guaranteeing admissibility.[65] For example, in *McQueen v. Garrison*,[66] the Fourth Circuit held that a court must conduct a "balanced inquiry"[67] in each case to determine if the testimony was distorted by pretrial hypnosis. Under this approach, the *Hurd*

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60 *Id.* The *Hurd* court considered "normal recall" as "often historically inaccurate." The hypnotic procedure is "reasonably reliable if it is able to yield recollections as accurate as those of an ordinary witness." *Id.*

61 *Id.* at 545-46, 432 A.2d at 96-97. The six requirements are:

> First, a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session. . . . Second, the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense. . . . Third, any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or another suitable form. . . . Fourth, *before* inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them. . . . Fifth, all contacts between the hypnotist and the subject must be recorded. . . . Sixth, only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and the post-hypnotic interview.

Id.

62 *Id.* at 547, 432 A.2d at 97.

63 *Id.* at 546, 432 A.2d at 97.

64 *See* cases cited *supra* note 54.

65 *See, e.g.* Wicker v. McCotter, 783 F.2d 487, 492-93 (5th Cir.), *cert. denied*, 478 U.S. 1010 (1986) (probative value of the testimony weighed against its prejudicial effect); State v. Iwakiri, 106 Idaho 618, 625, 682 P.2d 571, 578 (1984) (weigh "totality of circumstances").

66 814 F.2d 951 (4th Cir. 1987).

67 *Id.* at 958. The term "balanced inquiry" describes a court's determination as to whether the hypnotically refreshed testimony "had a basis that was independent of the dangers associated with hypnosis—in other words, . . . whether a witness' memory and ability to testify from it was distorted by the earlier hypnosis." *Id.*

safeguards are rejected "as a litmus test for determining the reliability of pre-trial hypnosis."[68] Although compliance with *Hurd*-type safeguards is relevant to a court's "balanced inquiry," admissibility does not rest solely on the adequacy of the hypnotic procedure. Even if a proponent demonstrates strict compliance with procedural safeguards, his opponent "may still be able to demonstrate by expert testimony that a witness' memory has been irreparably distorted by hypnosis."[69] On the other hand, where the hypnotic procedure was "flawed," a court may find that "a witness' testimony was nonetheless independent of the dangers associated with hypnosis."[70]

II
ROCK V. ARKANSAS

In 1986, the Arkansas Supreme Court adopted a *per se* inadmissible approach and excluded a criminal defendant's hypnotically refreshed testimony in *Rock v. State*.[71] The court limited the defendant's testimony to a reiteration of her story prior to hypnosis.[72] The United States Supreme Court granted certiorari to consider the constitutionality of Arkansas's *per se* rule and overruled the Arkansas Supreme Court.[73]

A. Facts

The State of Arkansas charged Vickie Lorene Rock with manslaughter for shooting her husband after an argument on July 2, 1983. The couple's argument culminated in a physical struggle. According to an investigating officer's testimony, Mrs. Rock picked up a gun and "pointed it toward the floor and her husband hit her again and she shot him."[74] Rock could not remember the precise details of the incident. Without asking the court or informing the prosecutor, Rock's attorney hired a psychiatrist, Dr. Betty Back, to refresh Rock's recollection through two hypnotic sessions.[75] Dr. Back first conducted a pre-hypnotic interview to ascertain Rock's recollection of the shooting. Dr. Back took handwritten notes during the pre-hypnotic interview, but she did not make a video or sound recording. Dr. Back tape-recorded both hypnotic sessions,

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68 *Id.* at 958.
69 *Id.*
70 *Id.*
71 288 Ark. 566, 708 S.W.2d 78 (Ark. 1986).
72 *Id.*
73 Rock v. Arkansas, 107 S. Ct. 2704, 2708 (1987).
74 *Id.*
75 *Rock v. State*, 288 Ark. at 568, 708 S.W.2d at 79.

but failed to video tape either.[76] Rock did not relate any new information during either hypnotic session, although her post-hypnosis statements included previously unremembered details about the night of the shooting.[77]

After learning about the hypnotic sessions, the prosecutor moved to exclude Rock's hypnotically refreshed testimony. At a pretrial hearing, the trial judge granted the prosecutor's motion and refused to admit Rock's hypnotically refreshed testimony. He issued an order limiting Rock's testimony to "matters remembered and stated to [Dr. Back] prior to being placed under hypnosis."[78]

At trial, the judge held the hypnotically refreshed testimony "inadmissible because of its unreliability and because of the effect of hypnosis on cross-examination."[79] The trial court permitted Rock to introduce a gun expert's testimony indicating that the gun in question was prone to fire if hit or dropped, without the trigger being pulled, but Rock's own testimony was limited in accordance with the court order.[80] The jury convicted Rock of manslaughter and the court sentenced her to ten years imprisonment and a $10,000 fine.[81]

B. The Arkansas Supreme Court Decision

Affirming Rock's conviction, the Arkansas Supreme Court held that hypnotically refreshed testimony remains inadmissible whether considered under the *Frye* test or by "traditional evidentiary concepts."[82] The court found that hypnotically refreshed testimony failed the *Frye* test because many courts, tracking expert opinion in the field, have concluded that such testimony is "inherently unreliable and without sufficient acceptance to allow it in the courtroom."[83] The court also found that, according to "traditional

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76 *Rock*, 107 S. Ct. at 2706-07. Because Dr. Back did not video tape the hypnotic sessions, the Court's deference to the trial judge's conclusion that Dr. Back did not suggest responses to Rock appears unwarranted. *See infra* notes 146-52 and accompanying text.

77 *Rock*, 107 S.Ct. at 2707. For example, Rock remembered that she had her thumb on the hammer of the gun and no finger on the trigger, which suggested that her gun was defective and had misfired the night her husband died.

78 *Id.* at 2707 (quoting the pretrial order).

79 *Rock*, 288 Ark. at 568, 708 S.W.2d at 79.

80 *Rock*, 107 S. Ct. at 2707.

81 *Id.*

82 *Rock*, 288 Ark. at 579, 708 S.W.2d at 80 (citing UNIF. R. EVID. 403) (Although "[s]ome critics contend that *Frye* is too strict and will exclude helpful and probative evidence . . . we would find the hypnotically refreshed testimony inadmissible by either the *Frye* test, or some form of it, or by traditional evidentiary concepts.").

83 *Id. See, e.g.*, Collins v. Sup. Ct., 132 Ariz. 180, 644 P.2d 1266 (1982) (en banc); People v. Shirley, 31 Cal. 3d 18, 723 P.2d 1354 181 Cal. Rptr. 243 (1982); People v. Hughes, 59 N.Y.2d 523, 466 N.Y.S.2d 255, 453 N.E.2d 484 (1983). *See also* MCCORMICK ON EVIDENCE § 206, at 633 (3d ed. 1984) ("The more prevalent view is that testimony

evidentiary concepts,"[84] hypnotically refreshed testimony is inadmissible because the dangers of admitting such testimony outweigh its probative value.[85]

Responding to Rock's contention that the limitations on her testimony violated her right to present a defense, the Arkansas Supreme Court found no error in restricting Rock's testimony to her pre-hypnotic recollection.[86] Rock had the burden of establishing a reliable record of pre-hypnotic memory and therefore had to abide by the record she offered.[87]

Further, the Arkansas Supreme Court held that exclusion of Rock's hypnotically refreshed testimony did not violate her constitutional right to testify.[88] Although fundamental, a defendant's right to testify does not stand unqualified, and without limitation. Even defendants must adhere to "the rules of procedure and evidence."[89] Supporting this contention, the court cited two cases excluding a defendant's hypnotically refreshed testimony where the defendant had *no* pre-hypnotic recollection of the crime.[90] The Arkansas Supreme Court reasoned that no rule requires a court to admit "evidence of uncertain value to go to a defense that is otherwise completely uncorroborated."[91] The court only restricted Rock's testimony by "standard rules of evidence."[92] Based on the information before the court, not only is the probative value of hypnotically refreshed testimony "questionable," it is "substantially outweighed" by the problems associated with it.[93] Moreover, Rock

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about the post hypnotic memories is inadmissible."); *infra* notes 187-90 and accompanying text.

84 288 Ark. at 570, 708 S.W.2d at 80.

85 *Id.* at 572, 708 S.W.2d at 81. *See also supra* notes 39-43 and accompanying text. The Arkansas Supreme Court also rejected adopting the *Hurd* safeguards. 288 Ark. at 573-76, 708 S.W.2d at 81-83. *See supra* note 61 for a description of the *Hurd* safeguards.

86 288 Ark. at 575-76, 708 S.W.2d at 83-84 (Rock's pre-hypnotic recollection was ascertained by Dr. Back's notes and enlarged by Dr. Back's memory of Rock's pre-hypnotic memory).

87 *Id.* at 577, 708 S.W.2d at 84.

88 *See infra* note 157 and accompanying text.

89 *Rock*, 288 Ark. at 578, 708 S.W.2d at 85.

90 *Id.* at 578-79, 708 S.W.2d at 85 (citing Greenfield v. Robinson, 413 F. Supp. 1113 (D. Va. 1976); State v. Atwood, 39 Conn. Supp. 273, 479 A.2d 258 (1984)). *See supra* notes 46-53 and accompanying text.

Mere absence of admissible evidence does not trigger a violation of defendant's right to present relevant testimony. *See infra* note 158 and accompanying text.

91 *Rock*, 288 Ark. at 578, 708 S.W.2d at 85 (quoting *Greenfield*, 413 F. Supp. at 1120-21). *See supra* notes 46-53 and accompanying text. The court applied this reasoning despite the fact that Mrs. Rock's testimony was *not* "completely uncorroborated." Other courts, however, have noted that reliance on corroborative evidence may be misplaced. *See infra* notes 143-45 and accompanying text.

92 *Rock*, 288 Ark. at 578, 708 S.W.2d at 85.

93 *Id.* The problems include a hypnotic subject's 1) propensity to confabulate, *see supra* note 31; 2) increased confidence in both true and false memories, *see infra* note 184;

stood in a position more advantageous than a defendant without any pre-hypnotic memory.[94]

Rock appealed and the United States Supreme Court granted certiorari to consider the constitutionality of Arkansas's *per se* rule excluding a criminal defendant's hypnotically refreshed testimony.[95]

C. United States Supreme Court Decision

1. *Majority Opinion*

The Court considered the narrow issue of "whether a criminal defendant's right to testify may be restricted by a state rule that excludes her post-hypnosis testimony."[96] In a 5-4 decision written by Justice Blackmun,[97] the Court reversed Rock's conviction. The majority held that criminal defendants have a right to testify on their own behalf under the due process clause of the fourteenth amendment, the compulsory process clause of the sixth amendment, and the Fifth Amendment's guarantee against compelled testimony.[98] The Court declared that, although certain limitations restrict a defendant's right to present relevant testimony, state evidentiary rules "may not be arbitrary or disproportionate to the purposes they are desigued to serve."[99]

According to the majority, Arkansas's *per se* rule excluding all hypnotically refreshed testimony "infringes impermissibly" on a criminal defendant's right to testify on his own behalf.[100] Procedural safeguards such as tape or video recording can reduce inaccu-

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3) increased ability to recite peripheral detail, *see infra* note 185; 4) increased credibility solely because of hypnotic procedure, *see infra* note 185; and 5) resistance against effective cross-examination, *see infra* note 178. *Rock*, 288 Ark. at 572, 708 S.W.2d at 81.

94 *Rock*, 288 Ark. at 578, 708 S.W.2d at 85.

The Arkansas Supreme Court viewed Rock as in a better position than a defendant with no pre-hypnotic memory because Rock:

> was allowed to relate the substance of her version of the shooting to the jury, which she had remembered prior to hypnosis. [Rock's] defense was that the shooting was an accident and this she was able to adequately relay to the jury. She testified that she and her husband were quarrelling, that he pushed her against the wall, that she wanted to leave because she was frightened, and her husband wouldn't let her go. She said her husband's behavior that night was unusual, and the shooting was an accident, that she didn't mean to do it and that she would not intentionally hurt her husband.

Id.

95 *Rock*, 107 S. Ct. at 2708.

96 *Id.* at 2710.

97 Justice Blackmun delivered the opinion of the Court, in which Justices Brennan, Marshall, Powell and Stevens joined. Chief Justice Rehnquist filed a dissenting opinion, in which Justices White, O'Connor, and Scalia joined.

98 107 S. Ct. at 2710-11. *See supra* note 1 and accompanying text.

99 *Id.* at 2711.

100 *Id.* at 2714-15.

racies.[101] Moreover, corroborating evidence and other traditional means of assessing accuracy may verify hypnotically refreshed testimony.[102] "A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case."[103] According to the majority, the Arkansas Supreme Court should have considered two circumstances in determining the admissibility of Rock's hypnotically refreshed testimony: 1) the expert testimony corroborating Rock's hypnotically refreshed memories about the defective condition of the gun, and 2) the trial judge's conclusion, based on the tape recordings, that Dr. Back did not suggest responses with leading questions.[104]

Justice Blackmun, however, readily admitted the lack of scientific consensus regarding hypnosis.[105] He acknowledged that although hypnosis may increase recall, "no data" shows that hypnosis enhances recall of only accurate information without a corresponding increase in false information.[106] Nevertheless, the Court rejected the Arkansas Supreme Court's *per se* rule of exclusion; a rule based on Arkansas' conclusion that a defendant's testimony relating facts which she cannot prove she recalled prior to hypnosis lacks reliability.[107]

2. *Dissenting Opinion*

The dissenting opinion, written by Chief Justice Rehnquist, emphasized problems that undermine the reliability of hypnotically refreshed testimony, which he characterized as "inherently unreliable."[108] He noted that the majority opinion conceded that individual responses to hypnosis vary greatly and that the hypnotic subject "becomes subject to suggestion, is likely to confabulate, and

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101 *Id.* at 2714.

102 *Id.*

103 *Id. But see infra* note 163 and accompanying text discussing the lack of current methodology to assess accurately the reliability or credibility of hypnotically refreshed testimony in an "individual case."

104 107 S. Ct. at 2714. *But see infra* notes 141-50 and accompanying text, discussing problems with relying on corroborative evidence and inherent suggestibility in hypnotic procedure. Some studies show that it may not be possible to tell if a question is "leading." *See infra* note 148.

105 107 S. Ct. at 2713. Despite the unreliability of hypnosis as a memory enhancer, the Court apparently found it significant that investigators have successfuly used hypnosis to elicit investigative leads or identifications which were subsequently confirmed by independent evidence. *Id.* at 2713-14.

106 *Id.* at 2713 n.18 (citing Council on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 J. A.M.A. 1918, 1921 (1985)).

107 *Id.* at 2714. Because the Court conceded the unsettled scientific status regarding the reliability of hypnosis as a memory enhancer, *see infra* notes 195-206 and accompanying text discussing the future of the *Frye* test's constitutionality as applied to hypnosis.

108 107 S. Ct. at 2715 (Rehnquist, C.J., dissenting). *See also infra* note 163.

experiences artificially increased confidence in both true and false memories following hypnosis."[109] The Chief Justice could find no constitutional justification for the Court's conclusion "that a state trial court must attempt to make its own scientific assessment of reliability in each case it is confronted with a request for the admission of hypnotically induced testimony."[110]

The Chief Justice further argued that an individual's right to present evidence on his own behalf remains subject to "reasonable restrictions" and " 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' "[111] The Chief Justice believed that Arkansas's rule designed to prohibit "inherently suspect" testimony falls within this language.[112]

Finally, the Chief Justice noted that the Supreme Court traditionally defers to the states with respect to criminal trial rules and procedures.[113] Such deference should control in areas like hypnosis where " 'scientific understanding . . . is still in its infancy.' "[114] Until a general scientific consensus on the uses of hypnosis emerges, "the Constitution does not warrant this Court's mandating its own view of how to deal with the issue."[115]

III
ANALYSIS

Rock based her claim that the Arkansas rule impermissibly excluded her hypnotically refreshed testimony on "her constitutional right to testify in her own defense."[116] The Supreme Court held Arkansas's rule of exclusion unconstitutional as an "arbitrary" restriction[117] on the right to testify. However, neither the Constitution nor Supreme Court precedent mandates the Court's conclusion. Supreme Court due process decisions demonstrate that a defendant's right to present evidence on one's own behalf is not absolute.[118] Similarly, Supreme Court compulsory process deci-

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109 *Id.* On suggestion, see *infra* note 169 and accompanying text. On confabulation, see *supra* note 31. On increased confidence, see *infra* note 184.

110 107 S. Ct. at 2715.

111 *Id.* at 2715-16 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)). The Constitution does not exempt a defendant from complying with " 'rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' " 107 S. Ct. at 2716 (quoting *Chambers*, 410 U.S. at 302).

112 107 S. Ct. at 2716.

113 *Id.*

114 *Id.* (quoting majority opinion, 107 S. Ct. at 2714).

115 *Id.*

116 *Id.* at 2708. *See infra* note 157 and accompanying text for Supreme Court's analysis of the constitutional sources of the right to testify.

117 *See infra* note 127 and accompanying text.

118 *See infra* notes 125-55 and accompanying text.

sions recognize other legitimate interests in the criminal trial process which qualify the right to present relevant testimony.[119] The *Rock* decision protects a defendant beyond the constitutional requirements and deviates from the traditional deference accorded the states in establishing their own criminal procedures and trial rules.[120]

The Court's holding in *Rock* permits admission of evidence not subject to traditional methods of revealing inconsistencies[121] and casts doubt on the continued validity of the *Frye* standard of assessing scientific methods of producing evidence.[122] Further, implementation of procedural safeguards, constitutionally permissible under *Rock*, will not adequately alleviate the inherent dangers in admitting hypnotically refreshed testimony and will negatively affect the judicial system.[123] Finally, courts determined to preserve exclusion of hypnotically refreshed testimony may employ a *per se* inadmissible approach in practice.[124]

A. Constitutionality of Arkansas Supreme Court Approach

1. *Due Process and Limits on the Right to Present Evidence*

The United States Supreme Court has stated that "due process is flexible and calls for such procedural protections as the particular situation demands."[125] The *Rock* majority acknowledged that "the right to present relevant testimony is not without limitation," although any "restrictions . . . may not be arbitrary or disproportionate to the purposes they are designed to serve."[126] Yet Justice Blackmun never fully explained the "arbitrary or disproportionate" nature of Arkansas's exclusionary rule. He merely stated that "[w]holesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of *all* post-hypnosis recollections."[127] In this case, however, the Arkansas trial court did not declare any wholesale inadmissibility of Rock's testimony. It permitted Rock to testify in accordance with her pre-hypnotic

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119 *See infra* notes 156-64 and accompanying text.

120 *Rock*, 107 S. Ct. at 2716 (Rehnquist, C.J., dissenting). *See also infra* notes 153-55 and accompanying text.

121 *See infra* notes 165-94 and accompanying text.

122 *See infra* notes 195-206 and accompanying text.

123 *See infra* notes 207-29 and accompanying text.

124 *See infra* notes 230-31 and accompanying text.

125 Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

126 *Rock*, 107 S. Ct. at 2711.

127 *Id.* at 2714 (emphasis added). Furthermore, the task of repudiating the validity of all post-hypnotic recollections may not be feasible. *See infra* notes 163 & 177 and accompanying text. Because "wholesale inadmissibility" was not defined further, this Note assumes it has no special meaning beyond its common usage.

recollection.[128]

Although Arkansas's rejection of a procedural safeguard approach[129] differed from how the Supreme Court would decide such a "novel and difficult question,"[130] it does not follow that Arkansas's rule of exclusion violates the Constitution. The *Rock* majority deemed Arkansas's rule "an arbitrary restriction on the right to testify."[131] Labeling the Arkansas rule "arbitrary" seems tenuous, however, given the substantial expert and judicial support it enjoys.[132] Moreover, the Court's rule requiring the trier of fact to evaluate hypnotically refreshed testimony on a case-by-case basis, when even experts cannot reliably do so, seems more akin to an arbitrary standard than Arkansas's *per se* rule "exclud[ing] testimony whose trustworthiness is inherently suspect."[133] When a jury is incapable of assessing the reliability of the evidence, "it denigrates the criminal trial's truth seeking functions. In each instance, guilt or innocence becomes a matter of mere conjecture."[134]

The Constitution unquestionably permits "testimonial privileges or nonarbitrary rules that disqualify those incapable of observing events due to mental infirmity or infancy from being witnesses."[135] Chief Justice Rehnquist, in his dissent, responded to the majority's unsatisfactory explanation of the "arbitrary or disproportionate" nature of the Arkansas rule stating, "I fail to discern any meaningful constitutional difference between [testimonial privileges or nonarbitrary rules] and the one at issue here."[136]

In light of a "flexible"[137] concept of due process, Arkansas's rule excluding testimony "whose trustworthiness is inherently suspect"[138] does not appear to violate due process. In *Chambers v. Mississippi*,[139] the Supreme Court viewed a criminal defendant's right to

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128 *See supra* note 94 for the Arkansas Supreme Court's description of Rock's admitted testimony.

129 *Rock*, 288 Ark. 566, 575, 708 S.W.2d 78, 83 (1986) ("In light of the questionable probative value of such proof and the risks inherent in the means by which it is retrieved, we think it would be a serious mistake to further encumber the pretrial process with the steps outlined in *Hurd*.").

130 *Rock*, 107 S. Ct. at 2716 (Rehnquist, C.J., dissenting).

131 *Id.* at 2714. *See supra* notes 125-28 and accompanying text.

132 Black's Law Dictionary defines arbitrary as "in an 'arbitrary' manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone .... Without fair, solid, and substantial cause; that is, without cause based upon the law ...." BLACK'S LAW DICTIONARY 96 (5th ed. 1979).

133 *Rock*, 107 S. Ct. at 2716 (Rehnquist, C.J., dissenting).

134 *Leading Cases*, 101 HARV. L. REV. 119, 127 (1987).

135 *Rock*, at 2711 n.11 (citing Washington v. Texas, 388 U.S. 14, 23 n.21 (1967)).

136 *Id.* at 2716 n.11 (Rehnquist, C.J., dissenting).

137 *See supra* text accompanying note 125.

138 *Rock*, 107 S. Ct. at 2716 (Rehnquist, C.J., dissenting).

139 410 U.S. 284 (1973).

due process as "the right to a fair opportunity to defend against the State's accusations."[140] The *Chambers* Court admitted testimony that Mississippi courts excluded because it found that the testimony excluded bore "persuasive assurances of trustworthiness."[141]

Rock's hypnotically refreshed testimony, however, did not reveal such assurances of trustworthiness. The majority in *Rock* relied on "the defective condition of the gun" and the trial judge's conclusion that Dr. Back "did not suggest responses with leading questions" to support its contention that the trier of fact could rely on Rock's hypnotically refreshed testimony and hence the court should admit it "in this particular case."[142] Neither of these circumstances provide strong support for the Court's contention.

First, the Court's focus on corroborative evidence is arguably misplaced. As one court recently stated:

> Reliability of hypnotically generated testimony, not its plausibility, should determine whether it is accepted. Polygraph evidence, voice stress test results, and pathometer exam readings are disallowed because the procedures used have not been generally accepted in the scientific community as producing reliable results; *such evidence does not become admissible because other evidence corroborates it.* For the court to admit what seems to be true and exclude what does not subverts the traditional role of jurors as the exclusive judges of the facts. With corroboration 'the linchpin of admissibility,' false hypnotically produced testimony based on 'pseudo memory' which happens to coincide with other evidence could come in. Crucial reliable but uncorroborated testimony would be barred. Consequences of such a rule are readily imagined.[143]

Reliance on corroborative evidence may result in "bootstrapping admissibility"[144] solely because both sets of evidence support the same proposition. In fact, corroborative evidence actually reduces the need for hypnotically refreshed testimony because "the corroborating evidence could often be used in its place."[145]

Second, scientific evidence does not support the Court's confidence in the trial judge's conclusion that Dr. Back did not suggest

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140 *Id.* at 294.

141 *Id.* at 302.

142 *Rock*, 107 S. Ct. at 2714. *See supra* text accompanying note 104.

143 Contreras v. State, 718 P.2d 129, 137 n.24 (Alaska 1986) (emphasis added) (quoting People v. Hughes, 88 A.D.2d 17, 22, 452 N.Y.S.2d 929, 932 (1982)).

144 *Id.* at 137.

145 *Id.* An additional problem with relying on corroborating evidence is that "the more suggestive the hypnotic interview, the more 'corroborative' detail there is likely to be." *Id.* at 137 n.24. Hypnotists often unconsciously cue their subjects into making certain statements. Diamond, *supra* note 31, at 338. When those statements prove to be accurate, the hypnotist believes the recollections are "independently" corroborated. *Id.* In fact, the subject may have been responding to the hypnotist's cues, especially if the hypnotist is familiar with the actual events. *Id.* at 338-39.

responses with leading questions. Suggestion is an integral part of the hypnotic process and its effects on a subject are not solely the product of leading questions.[146] Even the Court acknowledged that procedural safeguards, assuring that the hypnotist asks no leading questions, "cannot control the subject's own motivations or any tendency to confabulate."[147] Yet the Court seemed to claim that an absence of leading questions would cure hypnosis of its suggestive effect.[148] Furthermore, even if procedural safeguards cure hypnosis of its suggestive effect, Dr. Back did not abide by strict procedural guidelines when hypnotizing Rock.[149] For example, one *Hurd* procedural safeguard requires that "all contacts between the hypnotist and subject . . . be recorded."[150] Dr. Back made no video recording, although she tape recorded the hypnotic sessions. She did not tape the pre-hypnotic interviews and the Court's opinion made no reference to a tape recording of any formal post-hypnotic interview.[151] Clearly, Dr. Back's procedure could not pass scrutiny under the *Hurd* standard.[152]

Moreover, the *Chambers* Court expressly denied any reduction in the respect traditionally given States in forming and administering their criminal trial rules and procedures.[153] Both the accused and the State must comply with the court's rules of procedure and evidence desigued to fairly and reliably ascertain guilt and innocence.[154] Given the controversy surrounding the validity, reliability and trustworthiness of hypnotically refreshed testimony, the Supreme Court should continue its deference to the states by allowing them to implement their own rules.[155]

2. *Compulsory Process and Limits on the Right to Present Testimony*

The sixth amendment's compulsory process clause guarantees a criminal defendant "compulsory process for obtaining Witnesses in his favor."[156] Although the Constitution does not expressly grant a

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146 *See infra* notes 169-70.

147 *Rock*, 107 S. Ct. at 2714.

148 *Id. But see* M. ORNE, *supra* note 16, at 23 (describing studies that suggest it may not be possible to determine if a question is leading).

149 *See Rock*, 288 Ark. 566, 573-74, 708 S.W.2d 78, 82 (1986) (noting that Rock had not fully complied with the *Hurd* guidelines).

150 State v. Hurd, 86 N.J. 525, 546, 432 A.2d 86, 97 (1981). *See also supra* note 61.

151 *See supra* note 76 and accompanying text.

152 The *Hurd* standard is discussed *supra* notes 54-64 and accompanying text.

153 Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973).

154 *Id.* at 302.

155 "[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules." *Rock*, 107 S. Ct. at 2716 (Rehnquist, C.J., dissenting) (quoting Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983)).

156 U.S. CONST. amend. VI.

criminal defendant the right to testify on his own behalf, the Supreme Court has declared that such a right is logically included within the sixth amendment.[157] However, "[m]ore than the mere absence of testimony is necessary to establish a violation" of the defendant's right to present relevant testimony.[158] The right to offer relevant testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[159]

In *Rock*, Arkansas's interest was in barring unreliable testimony. The Supreme Court, however, held that such an interest did "not extend to *per se* exclusions that may be reliable in an individual case."[160] At first glance, Justice Blackmun's reasoning seems persuasive because not every hypnotically refreshed recollection necessarily lacks accuracy—generally, the amount of detail, both accurate and inaccurate, increases.[161] Difficulties arise, however, when a court must distinguish the reliable and credible portions of testimony from the unreliable and the incredible. Although other evidence, such as eyewitness testimony, may lack reliability, the American judicial system presumes the trier of fact is capable of assessing its reliability and credibility.[162] In contrast, the weight of current scientific evidence suggests that no one can determine the reliability of hypnotically refreshed testimony in a specific case.[163]

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157 *Rock*, 107 S. Ct. at 2709. The right to testify on one's own behalf "is one of the rights that 'are essential to due process of law in a fair adversary process.' " *Id.* (quoting Faretta v. California, 422 U.S. 806, 819 n.15 (1975)). A criminal defendant's sixth amendment right to call "witnesses in his favor" is applicable to the States through the fourteenth amendment. *Id.* "Logically included" under the sixth amendment's protection "is a [defendant's] right to testify himself." *Id.* The right to testify "is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id.* at 2710.

158 United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982) (referring to Washington v. Texas, 388 U.S. 14 (1967) (the "only recent" Supreme Court decision addressing sixth amendment compulsory process).

159 Chambers v. Mississippi, 410 U.S. 284, 295 (1973). *See e.g.*, Mancusi v. Stubbs, 408 U.S. 204, 215-16 (1972) (where state's witness unavailable, the court satisfies confrontation clause requirements when it admits the witness' prior-recorded testimony, if prior testimony bears "indicia of reliability" that afford trier of fact a satisfactory basis for evaluating truth of prior statement).

160 *Rock*, 107 S. Ct. at 2714. According to the Court, certain "circumstances present an argument for admissibility of [Rock's] testimony in this particular case." *Id. But see supra* notes 142-55 and accompanying text.

161 *See supra* note 106 and accompanying text.

162 *See infra* notes 172-77.

163 "[T]here is 'no truly objective scientific test for determining whether information related during a trance state is reliable.' " State v. Davis, 490 A.2d 601, 603 (Del. Super. Ct. 1985) (quoting Commonwealth v. Nazarovitch, 496 Pa. 97, 110, 436 A.2d 170, 177 (1981)). *See also* Diamond, *supra* note 31, at 340 ("wrong to claim that hypnotically enhanced memories are always false or distorted. . . . rather, . . . there exist no means to determine with certainty whether or not such falsity or distortion has been introduced by hypnotism"). The nature of hypnosis and its effects on memory may transform "beliefs of the hypnotist or subject . . . into inaccurate memories that the subject reports,

It is one thing to theorize that testimony "may" be reliable in a particular case and quite another to accurately assess such testimony as "actually" reliable in a particular case. The *Rock* decision affords a defendant protection which exceeds constitutional requirements. While protecting the rights of an accused may be a primary goal in the criminal process, "it is not the only one; another is the ascertainment of guilt and innocence. . . . '[A] criminal trial . . . ceases to be a judicial proceeding when the outcome rests on evidence that cannot be rationally considered.' "[164]

B. Future Impact of the Decision

1. *Admission of Potentially Critical Evidence Not Subject to Traditional Means of Revealing Inconsistencies*

The current scientific evidence on hypnosis suggests that the trier of fact is unqualified to assess the reliability of hypnotically refreshed testimony on a case-by-case basis. The research of eminent hypnosis experts, Dr. Martin T. Orne[165] and Dr. Bernard L. Diamond,[166] reveals a hypnotic subject's suggestibility and propensity to confabulate,[167] as well as the inability of the hypnotist or any other expert to verify the accuracy of any enhanced memory.[168] In Dr. Diamond's opinion, "[h]ypnosis is, almost by definition, a state of increased suggestibility."[169] In Dr. Orne's opinion, the hypnotist may influence the subject without the subject ever realizing it.[170]

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believes, and subsequently is willing to testify to under oath." M. ORNE, *supra* note 16, at 42. No current methodology can eliminate this possibility or distinguish in actual cases accurate from inaccurate post-hypnosis recall, unless the facts are verifiable. *Id.* Moreover, absent verified facts, neither subject nor hypnotist can identify the accurate recollections. *Id.* at 20. Generally no one can verify the "true" facts of a case; if they could, hypnosis to "refresh" recall would be unnecessary. Where the facts to be remembered are unknown, courts tend to accept "plausible recollections" as accurate. *Id. See also infra* notes 168-77 & 178-94 and accompanying text.

164 *Leading Cases*, *supra* note 134, at 127 (quoting Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 157 (1974)). *Cf.* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (exercise of right to present witnesses in own defense must comply with established rules "designed to assure both fairness and reliability in the ascertainment of guilt and innocence").

165 *See supra* note 16.

166 Dr. Diamond is a Professor of Law at the University of California, Berkeley and a Clinical Professor of Psychiatry at the University of California, San Francisco. He received his M.D. at the University of California, Berkeley in 1939.

167 *See supra* note 31.

168 *See* M. ORNE, *supra* note 16, at 1-2; Diamond, *supra* note 13, at 314.

169 Diamond, *supra* note 31, at 333.

170 M. ORNE, *supra* note 16, at 8-9. Hypnotists frequently encourage their subjects, with phrases such as "Good, fine, you're doing well." *Id.* at 8. This acts as an implicit suggestion. Subjects seek to maintain this approval; consequently, if the hypnotist merely stops expressing approval (as opposed to expressing disapproval), such as simply being silent instead of saying "good," he makes it clear that something different or more is wanted. *Id.* Moreover, once details reported by the subject are accepted as valid by

Moreover, even an expert cannot determine the reliability of the subject's "memories" resulting from such suggestions.[171]

Although ordinary eyewitness testimony is criticized as having similar defects, Dr. Diamond points out that witnesses not subjected to hypnosis may exhibit hesitancy, expressions of doubt, or body language communicating lack of confidence in their recall.[172] These witnesses may also concede the fallibility of their memory. Moreover, jurors often rely on these indicators of uncertainty in evaluating witness testimony.[173] Previously hypnotized witnesses, however, often become so confident of their memory that they do not hesitate to relate what they believe are the facts.[174] "A remarkable feature of hypnosis is its apparent ability to resolve doubts and uncertainties."[175] Not only is the recall likely to be inaccurate, but neither experts nor the witness himself can determine its accuracy.[176] Ac-

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the hypnotist, that very acceptance may persuade the subject that these "recollections" are accurate. *Id.* at 9. The danger exists that there "recollections" may be confabulations, *see supra* note 31, or extremely tentative memories that the subject was not confident enough to report as true recollection prior to hypnosis. M. ORNE, *supra* note 16, at 9. Hence, even extremely subtle communication may influence the hypnotic subject without either realizing what is happening. *Id.* at 21.

Further, subjects invariably have some expectations and preconceptions about hypnosis, and such beliefs can function as a prehypnotic suggestion. *Id.* at 8. "Preconceptions about what will occur during hypnosis can produce specific hypnotic results, without any additional suggestion by the hypnotist." *Id.* The risk of this phenomenon seems at its highest when the subject has a high stake in the outcome; namely, a criminal defendant whose life and liberty is at stake, thus creating a strong incentive to "remember" details exculpatory to himself.

171 *Id.* at 26.

172 Diamond, *supra* note 31, at 339. Dr. Diamond also points out that while interrogators may use "key words" to influence a witness' memory or testimony, hypnotic subjects are much more vulnerable to suggestion than ordinary witnesses. In his opinion, "[p]retrial hypnosis of a witness cannot be considered a harmless form of 'coaching' or legitimate preparation of the witness for the courtroom experience." *Id.* at 342. He argues it is even more objectionable because "it accomplishes the same effect, yet allows the perpetrator, the witness, and the trier of fact to remain unaware that the perversion of the evidence has occurred." *Id.*

173 *Id.*

174 *Id.* at 339-40. *See also* M. ORNE, *supra* notes 16 & 163; *infra* notes 184-86 and accompanying text.

In reviewing the guidelines espoused in State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981), *see supra* text accompanying notes 61-64, the supreme courts of both California and Pennsylvania rejected the *Hurd* court's analysis that hypnotically refreshed testimony should be admissible because ordinary eyewitness testimony may be erroneous or inaccurate. People v. Shirley, 31 Cal. 3d 18, 50-51, 723 P.2d 1354, 1373, 181 Cal. Rptr. 243, 262-63 (citing Commonwealth v. Nazarovitch, 496 Pa. 97, 109, 436 A.2d 170, 177 (1981)).

But see Spector & Foster, *supra* note 15, at 590-97 (arguing that previously hypnotized witness "may be able to recount an observed event more fully and accurately than any other witness," yet acknowledging several problems with the hypnotic process that could hamper the reliability of post-hypnotic testimony).

175 Diamond, *supra* note 31, at 339.

176 *Id. See also supra* note 163.

cordingly, it is naive to believe that a trial judge or jury can confidently assess the reliability of a particular hypnotic session.[177]

Scientific research and studies also demonstrate that hypnotically refreshed testimony is not subject to effective cross-examination.[178] The *Rock* majority held that Arkansas' *per se* rule unconstitutionally restricted Rock's right to testify on her own behalf because the state did not show "that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility . . . ."[179] However, while it is certainly possible for such testimony to be accurate in some cases, there are no known means of assessing its accuracy or credibility in a particular case.[180] The Court conceded that "effective cross-examination [of a previously hypnotized witness is] more difficult,"[181] yet two paragraphs later asserted that "[c]ross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies."[182] This latter statement contravenes much of the scientific evidence.[183]

A person's confidence level while testifying is an important factor weighed by the trier of fact in assessing credibility. A high confidence level makes cross-examination "more difficult."[184] A witness's confidence in his memory is "crucial for court testimony,"

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177 *Shirley*, 31 Cal.3d at 39 n.24, 723 P.2d at 1366 n.24, 181 Cal. Rptr. at 255 n.24. *See also* State v. Haislip, 237 Kan. 461, 478-79, 701 P.2d 909, 923 (1985) ("it is virtually impossible for the subject *or* the trained, professional hypnotist to distinguish between true memory and pseudo memory").

178 Often the perceived credibility of a witness is dependent on the effectiveness of cross-examination. The fact that hypnosis most often results in the reporting of more information, containing *both* accurate and inaccurate details, *Rock*, 107 S. Ct. at 2713 n.18, is particularly troublesome. Many courts have concluded that effective cross-examination of hypnotically refreshed testimony is not possible. This conclusion relies upon the "grave misgivings" articulated by the scientific community, such as

> the heightened suggestivity, the increased desire to satisfy the hypnotist, the tendency to confabulate, and the inability to distinguish in one's waking state the fact from the fantasy. . . . [T]he hypnotic subject, upon awakening, is often imbued with a confidence and conviction as to his memory which was not present before. Prehypnosis uncertainty becomes molded, in light of additional recall experienced under hypnosis, into certitude, with the subject unaware of any suggestions that he acted upon or any confabulation in which he engaged. The subject's firm belief in the veracity of his enhanced recollection is honestly held, and cannot be undermined through cross-examination.

People v. Shirley, 31 Cal. 3d 18, 50-51, 723 P.2d 1354, 1373, 181 Cal. Rptr. 243, 262, (1982) (quoting Commonwealth v. Nazarovitch, 496 Pa. 97, 105, 436 A.2d 170, 174-75 (1981)). *See also infra* notes 184-85 and accompanying text.

179 *Rock*, 107 S. Ct. at 2714.

180 *Id.* at 2715 (Rehnquist, C.J., dissenting).

181 *Id.* at 2713.

182 *Id.* at 2714.

183 *See supra* note 178 and *infra* notes 184-85.

184 *Rock*, 107 S. Ct. at 2713 ("the subject experiences 'memory hardening,' which

while of less importance in investigations where recollections may be subsequently corroborated by independent evidence.[185] Regardless of the *Rock* majority's praise for the usefulness of hypnosis in investigations, hypnotizing witnesses or defendants to refresh testimony in the courtroom poses serious problems because any inaccuracies can have drastic consequences.[186] Dr. Martin T. Orne concludes that "the present state of scientific knowledge is consistent with court rulings *proscribing* use of 'hypnotically-refreshed' eyewitness testimony in criminal trials."[187] Accordingly, Dr. Orne believes that hypnosis should be limited to investigative situations where the potential gains outweigh the risks.[188] Hypnosis "ought not to be permitted to form the basis of testimony in court"[189] because such testimony "may seriously jeopardize those efforts within

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gives him great confidence in both true and false memories, making effective cross-examination more difficult.").

Suppose a witness recites inconsistent versions of the events each time he is asked. Hypnosis can then "harden" the memories, consequently enabling him to "faithfully and reliably assert his version." M. ORNE, *supra* note 16, at 31. In such situations, "hypnosis need not produce any new information, but the procedure can bolster a formerly unreliable witness whose credibility might easily (and perhaps deservedly) have been undermined by cross-examination." *Id.* *See also* Diamond, *supra* note 31, at 339 ("Without adding anything substantive to the witness' memory of events, hypnosis may significantly add to his confidence in his recall").

Most startling are studies where hypnotic subjects "pass lie detector tests while attesting to the truth of statements they made under hypnosis which researchers know to be utterly false." State v. Mack, 292 N.W.2d 764, 769 (Minn. 1980) ("ordinary 'indicia of reliability' are completely erased"). In laboratory tests where " 'false guilt was induced . . . through hypnosis . . . subjects were so convinced of their gnilt that they were unable to pass a lie detector test thereafter.' " State *ex. rel.* Collins v. Superior Court, 644 P.2d 1266 (Ariz. 1982) (quoting Margolin, *Hypnosis-enhanced Testimony: Valid Evidence or Prosecutor's Tool?*, TRIAL, Oct. 1981, at 42). The admissions of guilt "registered as truths on the polygraph" although they were objectively false. *Id.*

185 M. ORNE, *supra* note 16, at 24. Notwithstanding a juror's likely preconceptions regarding hypnosis, *see infra* note 125, a witness or defendant testifying to hypnotically refreshed "memories" often portrays a misplaced confidence, which bolsters his credibility. *Id.* at 25. Unlike non-hypnotic memory, where confidence and accuracy of recall are generally correlated, "hypnosis dissociates accuracy of memory from the confidence that a person places in his memory reports." *Id.* *See also* Diamond, *supra* note 31, at 339-40. This misplaced confidence "can easily occur," while it is not common when hypnosis is not used. M. ORNE, *supra* note 16, at 25. Moreover, credibility can be enhanced by an increase in periphral detail, regardless of its accuracy, so long as the details provided are plausible. *Id.*

186 *Id.* at 13. "Despite the unreliability that hypnosis *concededly* may introduce," the *Rock* Court praised the procedure for success in investigatory use. *Rock*, 107 S. Ct. at 2713 (emphasis added). *See supra* note 105 and accompanying text. Unfortunately, hypnosis was not used for investigatory purposes in *Rock* and hypnosis as an investigative tool was not an issue before the Court.

187 M. ORNE, *supra* note 16, at 41 (emphasis added).

188 *Id.* Dr. Diamond holds the same opinion as Dr. Orne. *See supra* note 45 and accompanying text.

189 M. ORNE, *supra* note 16, at 51.

the legal system to permit a full and fair evaluation of the facts."[190]

Hypnotists' "post hypnotic suggestion" also contributes to an unwarranted increase in the confidence of a previously hypnotized witness. Hypnotists give post-hypnotic suggestions "[i]n an effort to improve the accuracy of hypnotic recall and minimize confabulations."[191] These suggestions are express requests that the subject "recall accurately and report only the events that really happened, no more no less."[192] Although use of this instruction is "impressive to lay observers," it is inconsistent with the "forensic context of hypnosis, which pressures the subject to provide more details."[193] The problem is significant because "the net effect . . . of these suggestions *will not be any increase in accuracy of recall but only an increase in the subject's conviction that his recall is accurate.*"[194]

2. *Future Validity of* Frye *Test Questionable*

The *Rock* majority acknowledged that "there is no generally accepted theory to explain the phenomenon [of hypnosis], or even a consensus on a single definition."[195] The Court, however, did not even address the role of the *Frye* test's requirement that scientifically produced evidence receive general acceptance by experts in the field before courts admit it.[196] The Court expressly limited the scope of its ruling to the admissibility of hypnotically refreshed testimony by criminal defendants.[197] Yet, because the right to testify necessarily falls within the broader sweep of a defendant's sixth amendment right to call witnesses in his favor,[198] "the Court's prohibition against arbitrary restrictions on a defendant's testimony logically applies to the testimony in general of defense witnesses."[199] The *Frye* test acts as a *per se* exclusion of mechanical or

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190 *Id.* at 27. *See also* State v. Mack, 292 N.W.2d 764, 768 n.7 (Minn. 1980) ("It is interesting to note Dr. Orne's testimony that, in his opinion, a witness' testimony to a 'memory' retrieved under hypnosis is 'infinitely less reliable' as an indicator of truth than the results of a polygraph test.").

191 M. ORNE, *supra* note 16, at 35. In *Rock*, Dr. Back employed post-hypnotic suggestion with the defendant. *Rock*, 107 S. Ct. at 2707 n.3.

192 M. ORNE, *supra* note 16, at 35.

193 *Id.*

194 *Id.* (emphasis added). *See also* Note, *supra* note 58, at 806.

195 *Rock*, 107 S. Ct. at 2713.

196 *See supra* text accompanying notes 34-35, 38-44 & 46-53.

197 *Rock*, 107 S. Ct. at 2712 n.15.

198 *See supra* notes 156-57 and accompanying text.

199 *Leading Cases*, *supra* note 134, at 125.

Future litigants may attempt to distinguish a defendant's right to offer her own testimony from her right to offer the testimony of others. They may argue, for example, that a personal right to testify deserves more protection than a right to present third-party testimony. Alternatively, they may contend that the defendant's right to testify enjoys a special status because it is supported by three different constitutional provisions.

scientific testing results unless experts in the field agree on the reliability of such results generally,[200] regardless of any finding of reliability in an individual case. Therefore the *Frye* test appears unconstitutionally "arbitrary" under *Rock*.[201]

Despite specific criticisms of the *Frye* test,[202] its general acceptance standard remains essential to our criminal justice system. The test excludes unaccepted scientific methods from misleading the trier of fact,[203] and prevents judges and jurors from attempting to resolve issues beyond the reach of even expert analysis.[204] *Rock*'s implied invalidation of the *Frye* test with respect to hypnosis will permit the trier of fact to base its verdict on unaccepted scientific methods and untestable evidence.[205] "In its eagerness to make secure a criminal defendant's right to testify, the *Rock* Court may have signaled the demise, as a matter of constitutional law, of a wise rule that contributes greatly to the integrity of the criminal process."[206]

3. *Implementation of Procedural Safeguards as a Constitutional Response to* Rock

So that trial courts may assess potentially reliable testimony in a particular case, the *Rock* majority endorsed the adoption of procedural guidelines as a constitutional approach for evaluating hypnotically refreshed testimony.[207] Many courts, however, faced with the decision of whether to adopt procedural guidelines have declined to do so, finding such safeguards incapable of guiding the trier of fact.[208] The California Supreme Court warned that such an ap-

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> Finally, they may emphasize the fifth and fourteenth amendment underpinnings of the right to testify as opposed to its sixth amendment foundation.

Id. at 125 n.55.

200 *See supra* note 34 and accompanying text; *see also Leading Cases*, *supra* note 134, at 126 n.57 (*Frye* rule precludes case-by-case inquiry regarding reliability of scientific methods failing the general acceptance standard as overly "time consuming and expensive") (quoting Commonwealth v. Kater, 388 Mass. 519, 526, 447 N.E.2d 1190, 1196 (1983)).

201 *Accord Leading Cases*, *supra* note 134, at 125-26.

202 *See id.* at 126 (*Frye* test criticized in recent years as difficult to apply, overly restrictive, and particularly problematic in the criminal context where the defendant's right to present witnesses in his favor). *See generally* United States v. Downing, 753 F.2d 1224, 1236-37 (3d Cir. 1985) (reviewing criticisms of *Frye* standard).

203 *See supra* note 35 and accompanying text.

204 *See supra* notes 168-71 and accompanying text.

205 *See Leading Cases*, *supra* note 134, at 127 (*Rock*'s implicit invalidation of *Frye* test disturbing; the test "has prevented justice from becoming a matter of amateur guesswork based on unreliable techniques and has helped to assure that determinations of guilt or innocence are not influenced by the vagaries of pseudoscience"); *see also supra* notes 134 & 164 and accompanying text.

206 *Leading Cases*, *supra* note 134, at 127.

207 *Rock*, 107 S. Ct. at 2714.

208 *See, e.g.*, cases cited *infra* note 216; *see also* Diamond, *supra* note 31, at 339 (some

proach requires trial courts to answer scientific issues "so subtle as to confound experts."[209]

The *Rock* Court conceded that hypnosis may introduce unreliability into the trial process, yet maintained that procedural safeguards tend to reduce inaccuracies.[210] Accordingly, Justice Blackmun concluded that Arkansas would have remained "well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony."[211] He candidly admitted, however, that "[s]uch guidelines do not guarantee the accuracy of the testimony."[212] Such guidelines not only fail to guarantee the accuracy of such testimony but also fail to address other important dangers at all.[213]

The California Supreme Court, after reviewing extensive expert testimony, concluded that procedural guidelines cannot curb the following problems: a hypnotic subject may "(1) lose his critical judgment and begin to credit 'memories' that were formerly viewed as unreliable; (2) confuse actual recall with confabulation and . . . be unable to distinguish between the two; and (3) . . . exhibit an unwarranted confidence in the validity of his ensuing recollection."[214] Other courts have rejected the *Hurd* guidelines[215] for similar reasons.[216]

Moreover, procedural safeguards inadequately reveal whether a hypnotic subject willfully lied or feigned hypnosis.[217] Unfortunately, contrary to current scientific evidence, both the general public and the law enforcement community believe that hypnosis serves

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courts' confidence "in the protection offered by stenographic, audio, or video recordings of the hypnotic sessions is not justified").

209 People v. Shirley, 31 Cal. 3d 18, 40, 723 P.2d 1354, 1366, 181 Cal. Rptr. 243, 255 (1982). The *Hurd* court itself stated that "[b]ecause of the unpredictability of what will influence a subject, it is difficult even for an expert examining a videotape of a hypnotic session to identify possible cues." State v. Hurd, 86 N.J. 525, 539, 432 A.2d 86, 93 (1981).

210 *Rock*, 107 S. Ct. at 2713-14.

211 *Id.* at 2714.

212 *Id.*

213 *See Shirley*, 31 Cal. 3d at 39, 723 P.2d at 1366, 181 Cal. Rptr. at 255 (1982) (referring to guidelines in State v. Hurd, 86 N.J. 525, 539-40, 432 A.2d 86, 93-94 (1981)).

214 *Id.*

215 *See supra* note 61.

216 *See, e.g.*, Contreras v. State, 718 P.2d 129, 138 (Alaska 1986) ("prejudice/probity balance weighs per se in favor of exclusion . . . even if strict procedural safeguards are observed"); State v. Davis, 490 A.2d 601, 605 (Del. Super. Ct. 1985) ("*Hurd* safeguards do not address . . . a previously hypnotized witness' increased confidence in his recollection").

217 Subjects can feign hypnosis or "deliberately lie even though deeply hypnotized, especially when this would serve the individual's interest," M. ORNE, *supra* note 16, at 10, while hypnotists often accept statements made while under hypnosis at "face value." *Id.* at 31. *See also* Diamond, *supra* note 31, at 337 ("even the best experts cannot consistenly distinguish between actual and pretended hypnosis").

as a valid means of assessing the truth.[218] This misapprehension poses serious problems when using hypnosis in criminal trials, especially with a defendant who has a strong motive to convince the court to accept his version of the facts.[219] Moreover, experts cannot reliably identify a subject faking hypnosis,[220] and "there is no way to determine from the content of the 'memory' itself which parts of it are historically accurate, which are entirely fanciful, and which are lies."[221]

Courts' use of extensive procedural safeguards also burdens valuable judicial resources, making an already slow and inefficient system even less efficient as criminal courts are forced to determine whether hypnotists adhered to strict guidelines in a particular case.[222] Dr. Orne points out the prohibitive expense that would accompany a case-by-case determination of admissibility, as well as "the difficulty of getting experts qualified to testify about hypnosis as an investigative rather than a therapeutic tool."[223] In addition to delays resulting from extensive discovery demands, expert witnesses, and special pretrial hearings, trial judges would face "scientific issues so subtle as to confound the experts."[224] Resolution of such issues can only create novel grounds for appeal, including complications with the " 'clear and convincing' " standard of proof[225] mandated by *Hurd*.[226] This will likely lead to more litiga-

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218 Many unsupported myths about hypnosis exist. Erroneous beliefs include: 1) that hypnotists can compel deeply hypnotized subjects to commit acts which they would not otherwise commit; 2) that hypnotists can compel subjects to tell the truth; and 3) that subjects cannot fake being hypnotized. M. ORNE, *supra* note 16, at 9. Because of these myths juries probably place undue emphasis on hypnotic recollections. *See* Bundy v. State, 471 So. 2d 9, 15 (Fla. 1985) ("hypnosis is often thought by lay persons to be a magical thing which can produce fantastic recall . . . [and] the jury is likely to place undue emphasis on what transpired during a hypnotic session"). Moreover, law enforcement officers may view hypnosis as comparable to a lie detector test. M. ORNE, *supra* note 16, at 31.

219 M. ORNE, *supra* note 16, at 11.

220 *Id.*

221 State v. Mack, 292 N.W.2d 764, 768-69 (Minn. 1980). At least one expert has testified that it may even be easier to lie while hypnotized "because from the viewpoint of the person in the trance 'the hypnosis would put the responsibility on the shoulders of the hypnotist.' " People v. Shirley, 31 Cal. 3d 18, 31, 723 P.2d 1354, 1360, 181 Cal. Rptr. 243, 250 (1982) (quoting a defense expert witness).

222 Henderson, *The Admissibility of Hypnotically Enhanced Testimony: Have the Courts Been Mesmerized?*, 6 J. LEGAL MED. 293, 334 (1985).

223 State v. Mack, 292 N.W.2d 764, 766 (Minn. 1980) (citing Orne testimony).

224 *Shirley*, 31 Cal. 3d at 40, 723 P.2d at 1366, 181 Cal. Rptr. at 255.

225 *Shirley*, 31 Cal. 3d at 40, 723 P.2d at 1366, 181 Cal. Rptr. at 255-56 (quoting State v. Hurd, 86 N.J. 535, 546, 432 A.2d 86, 97 (1982)).

226 86 N.J. at 546, 432 A.2d at 97 ("party seeking to introduce hypnotically refreshed testimony has burden of establishing admissibility by clear and convincing evidence"). *See infra* notes 62-63 and accompanying text. Two Justices in *Hurd* believed that hypnotically refreshed testimony should not be admitted against a defendant in a criminal trial. "To do so would have the defendant's innocence or guilt depend on the

tion, leaving open the question of the constitutionality of trial court decisions regarding the admissibility of hypnotically refreshed testimony.

Finally, assuming that courts could adequately devise strict requirements, their effective implementation in practice without causing undue delay and confusion remains dubious.[227] The *Hurd* court itself recognized that, "Because of the unpredictability of what will influence a subject, it is difficult even for an expert examining a videotape . . . to identify possible cues."[228] Accordingly, as the California Supreme Court stated, "it is vain to believe that a layman such as a trial judge can do so."[229]

4. *Possible* Per Se *Inadmissible Approach in Practice*

Courts, wanting to do so, may effectively circumvent the *Rock* prohibition and employ a *per se* inadmissible approach to hypnotically refreshed testimony in practice. According to the *Rock* Court, implementing guidelines that aid trial court assessment of the reliability of hypnotically refreshed testimony remains constitutional.[230] Given the problems and uncertainties associated with procedural guidelines, readily acknowledged by the Supreme Court,[231] trial judges might simply conclude that the hypnotic procedure did not satisfy such safeguards. A person's only recourse remains to enter the already overburdened appeal process, where appellate courts will likely defer to the trial judge unless judgment appears clearly erroneous. The logical conclusion of this analysis condemns the *Rock* decision to have no discernable effect on the admissibility of

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jury's speculating, on the basis of conflicting scientific-medical testimony, whether the identification was true recollection or implanted by the hypnosis." 86 N.J. at 550, 432 A.2d at 98 (Sullivan, J., concurring).

227 *Shirley*, 31 Cal. 3d at 31, 723 P.2d at 1366, 181 Cal. Rptr. at 249. For example, one *Hurd* guideline requires that "all contacts between the hypnotist and the subject must be recorded," *Hurd*, 86 N.J. at 546, 432 A.2d at 97, yet it seems farfetched to believe

> that a conscientious defense counsel would meekly agree that the prosecution had recorded every bit of relevant information conveyed to the hypnotist prior to the session, or that the hypnotist had conveyed absolutely none of that information to the subject either while extracting the latter's prehypnotic version of the facts or while questioning him both during and after hypnosis, or that every single contact between the hypnotist and the subject, no matter how innocuous, had been preserved on videotape.

Shirley, 31 Cal. 3d at 40, 723 P.2d at 1366, 181 Cal. Rptr. at 255. *See also* Diamond, *supra* note 31, at 339 (A "complete record of the hypnotic experience is never possible . . . [because] influences exerted both before and after the hypnotic session become integrated into the hypnotic experience.").

228 *Hurd*, 86 N.J. at 539, 432 A.2d at 93.

229 *Shirley*, 31 Cal. 3d at 39 n.24, 723 P.2d at 1366 n.24, 181 Cal. Rptr. at 255 n.24.

230 *Rock*, 107 S. Ct. at 2714. *See supra* notes 210-11 and accompanying text.

231 *See supra* notes 105-07 & 181-82 and accompanying text.

hypnotically refreshed testimony in courts determined to preserve its exclusion.

CONCLUSION

In *Rock v. Arkansas* the Supreme Court invalidated *per se* rules that exclude hypnotically refreshed testimony of criminal defendants. *Rock* expands the scope of a criminal defendant's right to testify on his own behalf. This expanded protection, however, exceeds constitutional reuqirements and permits the introduction of virtually untestable evidence. The Court's holding also casts doubt on the continued validity of the *Frye* test, thereby opening the door for admission of evidence which no one can reliably assess in a particular case.

Until the scientific community endorses hypnosis as a reliable method of enhancing recall, the states should have the power to formulate their own criminal trial rules and procedures regarding the use of hypnosis. The Constitution does not warrant the Supreme Court's imposition of its own solution to "a novel and difficult question."[232] The *Rock* majority deems *per se* exclusions of hypnotically refreshed testimony to be "arbitrary," thereby forcing trial courts to undertake a case-by-case approach. By doing so, it has denigrated a court's determination of whether to admit hypnotically refreshed testimony to mere speculation. Consequently, the trier of fact is compelled to distinguish between legitimate hypnotically "refreshed" testimony and hypnotically "manufactured" testimony, a task beyond the capability of even experts.

Andrew C. Callari

232 *Rock*, 107 S. Ct. at 2716 (Rehnquist, C.J. dissenting).