Journal of Criminal Law and Criminology

Volume 78
Issue 4 *Winter*

Article 6

Winter 1988

Fifth, Sixth, and Fourteenth Amendments-A Constitutional Paradigm for Determining the Admissibility of Hypnotically Refreshed Testimony

Francis P. Kuplicki

0091-4169/88/7804-853
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 78, No. 4
 Printed in U.S.A.

FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS—A CONSTITUTIONAL PARADIGM FOR DETERMINING THE ADMISSIBILITY OF HYPNOTICALLY REFRESHED TESTIMONY

Rock v. Arkansas, 107 S. Ct. 2704 (1987).

I. INTRODUCTION

In *Rock v. Arkansas*,[1] the United States Supreme Court expanded the range of evidence available to the defense in state criminal trials to include a defendant's hypnotically refreshed testimony.[2] Grounding its decision in the fifth,[3] sixth,[4] and fourteenth[5] amendments to the United States Constitution, the Court held that "Arkansas' *per se* rule excluding all posthypnosis testimony infringes impermissibly on the right of a defendant to testify on his or her own behalf."[6] By allowing a criminal defendant to present poten-

---

1 107 S. Ct. 2704 (1987).

2 *Id.* at 2714. "Hypnotically refreshed testimony" is the statement under oath of a witness as to his or her memory of matters recalled as a result of undergoing hypnosis. It is at least inferentially distinct from "posthypnosis testimony" and "hypnotically induced" or "adduced testimony," the former suggesting all statements made subsequent to undergoing hypnosis and the latter implying statements made under the influence of hypnosis. Courts and commentators use these phrases without distinction often to characterize the issue in a manner favorable to their conclusions. As used throughout this Note, however, "hypnotically refreshed testimony" is intended to be a neutral label.

3 "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

4 "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

5 "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

6 *Rock*, 107 S. Ct. at 2714-15. The Court misstates the scope of the Arkansas rule. Only testimony on matters recalled due to hypnosis was deemed inadmissible in Rock v. State, 288 Ark. 566, 573, 708 S.W.2d 78, 83 (1986). Earlier in its opinion, the Court correctly said that the Arkansas court ruled that testimony the defendant could "prove to be the product of prehypnosis memory" was admissible. *Rock*, 107 S. Ct. at 2714.

tially unreliable evidence[7] to the factfinder in this case, the Court gave a liberal reading to the constitutional provisions permitting the criminally accused to present a defense. The Court thus defined future debate surrounding the admissibility of hypnotically refreshed testimony in constitutional terms.

This Note argues that this reading of the constitutional protections afforded criminal defendants provides an appropriate and functional means for constructing an acceptable standard for determining the admissibility of hypnotically refreshed testimony in criminal trials. In response to the Court's decision in *Rock*, this Note argues that hypnotically refreshed testimony offered by the defense in criminal trials should generally be admitted and that hypnotically refreshed testimony offered by the prosecution ought to be generally excluded. This bifurcated rule of admissibility protects criminal defendants by erring always in the defendant's favor. It furthers judicial efficiency by confining the scope of a trial court's inquiry in determinations of admissibility to constitutional considerations. Moreover, this guideline strikes a fair balance between judicial concerns for accuracy of evidence admitted in criminal trials and just resolution of the dispute at issue.

II. BACKGROUND

Centuries of conjecture, research, quackery, and experiment have resulted in little empirical certainty about the phenomenon of hypnosis.[8] Defying definition,[9] hypnosis has been endorsed as a therapeutic technique for three decades.[10] To date, however, the scientific community has not encouraged the use of hypnosis as a truth-inducing device.[11] Because this skepticism lies at the heart of

---

[7] *See infra* notes 21-36 and accompanying text.

[8] For a brief overview of the history of hypnosis, see generally Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 316-21 (1980). *See also* sources cited *infra* note 36.

[9] Hypnosis is characterized by a subject's increased responsiveness to suggestions. Typically these suggestions involve the person's ability to experience alterations of perception, memory, or mood. Regardless of whether the phemomenon is conceptualized as an altered state of consciousness, as believed-in imagining, as role enactment, as fantasy absorption, or as focused attention, hypnosis is a real experience; the hypnotized individual believes in it and is not merely acting as if he did.

M. ORNE, D. SOSKIS, D. DINGES, E. ORNE & M. TONRY, HYPNOTICALLY REFRESHED TESTIMONY: ENHANCED MEMORY OR TAMPERING WITH EVIDENCE? 6 (National Institute of Justice Issues and Practices in Criminal Justice, 1985)[hereinafter M. ORNE].

[10] By 1960, both the American Medical Association and the American Psychological Association had officially recognized the therapeutic value of hypnosis. *Id.* at 29.

[11] Leading authorities on the use of hypnosis in the criminal justice system believe hypnosis may be an appropriate tool for eliciting investigative leads. *Id.* at 30. Most warn, however, that, without independent verification, information obtained through

the legal debate surrounding the admissibility of hypnotically refreshed testimony, some understanding of the current state of scientific knowledge about hypnosis is required.[12]

Typically, hypnosis sessions begin with a period known as induction.[13] The hypnotist initially establishes some rapport with the subject by discussing the purpose of the session and by making certain that the subject freely wishes to proceed.[14] Through a variety of methods,[15] the subject is then asked to focus intensely on the hypnotist, to relax, and to try to visualize what the hypnotist is saying.[16]

Once hypnotized,[17] the subject generally becomes increasingly willing to suspend his or her critical judgment.[18] Apparently, this results in a response criterion shift,[19] which is a willingness to report details about events that are usually rejected as too unsure to relay.[20] Unfortunately, this laxed response criterion often results in an increase in inaccurate as well as accurate recollections.[21]

---

hypnosis cannot be relied upon as accurate. *Id.* at 51. They, therefore, oppose the use of hypnosis to form the basis for a witness' testimony in court. *Id.* at 27. *See also* R. UDOLF, FORENSIC HYPNOSIS 9-10 (1983). "[Using hypnosis] as an investigative or discovery device to develop leads to new and independent evidence . . . is the most appropriate and potentially the most productive use. . . . It is best limited to witnesses whose testimony is not likely to be needed at trial." *Id.* at 157.

12 The lack of resolution of this question of admissibility has been attributed in great part to legal misunderstandings of scientific conclusions regarding hypnosis. R. UDOLF, *supra* note 11, at 8. The scientific community suffers from an analogous lack of sensitivity to the requirements of the criminal justice system. *Id.* at 6.

13 M. ORNE, *supra* note 9, at 7. Induction is "[t]he procedure used by the hypnotist to bring about the condition or state of hypnosis." *Id.* at 66.

14 *Id.* at 7.

15 "Many different procedures can be used to induce hypnosis." *Id.* However, the authors did not elaborate on these techniques.

16 *Id.*

17 Hypnotizability, the ability of an individual "to respond to hypnotic induction and to experience hypnotic suggestions," *id.* at 66, varies widely among individuals. *Id.* at 6.

18 *Id.* at 9.

> Individuals who are hypnotized are generally relaxed, less anxious, and less critical than when not hypnotized. The context of hypnosis allows subjects to say things about which they are uncertain—things that would not be said in contexts where subjects feel responsible for their memories and challenged about their consistency.

Id.

19 The response or report criterion is "[t]he variable psychological threshold at which a subject is willing to report his recollections; the level of the criterion will depend upon the context in which an individual is asked to report as well as upon his critical judgment at the time." *Id.* at 67.

20 *Id.* at 19 (citing the results of an independent study).

21 *Id.* Subjective uncertainty and objective inaccuracy have no necessary logical correlation. However, the "problem with hypnotically refreshed recall is that false recollections are often experienced not as guesses, but rather, as contextually appropriate and meaningful memories." *Id.* at 20. This is particularly significant in a legal context. Given the nature of factfinding in litigation, which involves the piecing together of facts

Distinct from, yet congruent with, the lowered response criterion is the hypnotized subject's increased suggestibility resulting from the attention he or she focuses on the hypnotist.[22] Having suspended his or her critical judgment, the subject may be anxious to please the questioner by responding favorably to both the explicit and implicit suggestions made by the hypnotist or anyone else present at the session.[23] This may lead the subject to confabulate, or fill gaps in his or her memory with plausible, but not necessarily accurate, data.[24] It may also result in pseudomemory, which is a perceived recollection where there is no memory at all.[25]

Additionally, the subject's preconceptions about the ability of hypnosis to induce recollections[26] and the nature of the hypnotist's questions[27] enhance the possibility of inaccurate recall.[28] A subject may unconsciously alter his or her responses during hypnosis in accordance with any expectations he or she has prior to the session.[29] There is also evidence that hypnotized subjects make more errors in responding to leading questions than non-hypnotized subjects.[30]

---

derived from multiple sources, what is determined to be the truth for the purposes of a trial may be based on unreliable information because of the elimination, through hypnosis, of the subjective uncertainty of a witness that is relayed as certainty.

22 *Id.* at 6.

> Of course, inadvertent influences by the interviewer can occur even without hypnosis, particularly when the witness is asked to comment upon specific details of an event. A critical question concerning hypnosis, however, is the extent to which it significantly *increases* the impact of biasing procedures on the memories reported by the subject.

Id. at 22 (emphasis in original).

23 *Id.* at 8. *See also* COUNCIL ON SCIENTIFIC AFFAIRS, *Scientific Status of Refreshing Recollections by the Use of Hypnosis*, 253 J. A.M.A. 1918, 1919 (1985)[hereinafter COUNCIL].

24 M. ORNE, *supra* note 9, at 10. *See also* COUNCIL, *supra* note 23, at 1920. One study in which hypnotized subjects were asked to recite poetry they had learned years prior to the experiment demonstrates the confabulation phenomenon. The subjects recited more verses under hypnosis than they could prior to being hypnotized, but subsequent comparison with the actual poems revealed that the subjects improvised language and mimicked the poet's style. M. ORNE, *supra* note 9, at 10-11. *See also* COUNCIL, *supra* note 23, at 1920.

25 M. ORNE, *supra* note 9, at 11. Pseudomemory is "[a] false recollection that may be brought about by confabulation, suggestion, and organic factors. Though factually inaccurate, they [pseudomemories] are accepted by the subject as actual recollections." *Id.* at 67. *See also* COUNCIL, *supra* note 23, at 1922.

26 Prehypnotic suggestion encompasses "[i]deas presented to the subject prior to hypnosis as though they are factual or in the form of suggestive statements, which imply how the individual will respond either during or after hypnosis or both." M. ORNE, *supra* note 9, at 66.

27 Questions eliciting recall memory are open-ended and allow the subject to freely respond while questions eliciting recognition memory are detailed and usually require a yes, no, or multiple choice answer. COUNCIL, *supra* note 23, at 1920.

28 M. ORNE, *supra* note 9, at 7.

29 *Id.* at 8.

30 *Id.* at 22 (citing the results of an independent study). Moreover, "there is no evi-

Compounding these accuracy problems is a change in confidence subjects often experience after hypnosis as a result of their perceived increased recollection.[31] This phenomenon becomes particularly significant in the context of a trial.[32] A witness who testifies with self-assurance, even if misplaced, and in great detail, though inaccurate, is considerably more credible to a jury than his or her less confident and less descriptive counterpart.[33] A witness whose confidence has been artificially increased is also less vulnerable to cross-examination.[34] Thus, the risk inherent in admitting hypnotically refreshed testimony in a trial is an outcome based on unreliable information.[35] This risk forms the basis for the legal debate as to whether hypnotically refreshed testimony ought to be admitted in criminal trials.[36]

Prior to *Rock*, four states adopted evidentiary rules which stated that hypnosis of a witness affects the crediblity, but not the admissibility, of his or her testimony.[37] Noting the elimination of compe-

---

dence of increased recollection by means of hypnosis for recall memory of meaningless material or of recognition memory for any types of material." COUNCIL, *supra* note 23, at 1922.

31 M. ORNE, *supra* note 9, at 25. "[H]ypnosis can either increase the inaccuracy of recollections without diminishing confidence in the 'memories,' or it can increase confidence without increasing accuracy, or both. The amount of confidence and certitude an individual associates with his remembrances is more a function of hypnotic responsiveness than accuracy." *Id. See also* COUNCIL, *supra* note 23, at 1921.

32 M. ORNE, *supra* note 9, at 24.

33 *Id.* at 25.

34 *Id.* at 27.

35 *Id.* at 26. The situation best illustrating the risks run by relying on hypnosis to reveal the truth is one in which the media, the authorities, the hypnotist, or the subject believe they know an answer and want it confirmed by hypnotically refreshed recall. Affirmation of the presumed information by the subject is likely because the idea is planted in his or her mind. Unfortunately, the recollection may be solely the product of suggestion. *Id.* at 30.

36 A comprehensive survey of the extensive legal literature devoted to the use of hypnosis in the criminal justice system would be onerous and of little help. A cross section of articles written on this topic over the last five years includes: Falk, *Posthypnotic Testimony—Witness Competency and the Fulcrum of Procedural Safeguards*, 57 ST. JOHN'S L. REV. 30 (1982); Mickenberg, *Mesmerizing Justice: The Use of Hypnotically-Induced Testimony in Criminal Trials*, 34 SYRACUSE L. REV. 927 (1983); Sies & Wester, *Judicial Approaches to the Question of Admissibility of Hypnotically Refreshed Testimony: A History and Analysis*, 35 DE PAUL L. REV. 77 (1985); Comment, *The Admissibility of Hypnotically Refreshed Testimony*, 20 WAKE FOREST L. REV. 223 (1984); Comment, *Hypnosis in Our Legal System: The Status of its Acceptance in the Trial Setting*, 16 AKRON L. REV. 517 (1983); Note, *Excluding Hypnotically Induced Testimony on the "Hearsay Rationale"*, 20 VAL. U.L. REV. 619 (1986); Note, *Hypnotically Induced Testimony: Credibility versus Admissibility*, 57 IND. L.J. 349 (1982); Note, *Refreshing Memory Through Hypnosis—Admissibility of Witness Testimony*, 9 OKLA. CITY U.L. REV. 149 (1984).

37 State v. Wren, 425 So. 2d 756, 759 (La. 1983); State v. Brown, 337 N.W.2d 138, 151 (N.D. 1983); State v. Hartman, 703 S.W.2d 106, 115 (Tenn. 1985)(adopting State v.

tency standards in modern rules of evidence[38] and the adequacy, though added difficulty, of cross-examination to challenge testimonial reliability, courts in these states fashioned a rule deferring evaluation of a witness' veracity to the factfinder.[39] Essentially, each of the state supreme courts reasoned that, as a logical matter, any attempt to preserve testimony from external suggestion would require that lawyers not be allowed to talk with witnesses prior to trial and that friends and relatives of a party be excluded from the courtroom.[40] Each court also concluded that an increased exposure of the factfinder to expert testimony is preferable to an exclusion of potentially relevant information.[41]

Modifying this rule, five states adopted an admissibility standard requiring that the hypnosis session comply with specific procedures before any hypnotically refreshed testimony would be considered for submission to the factfinder.[42] These states en-

---

Glebock, 616 S.W.2d 897, 904 (Tenn. Crim. App. 1981)); Chapman v. State, 638 P.2d 1280, 1284 (Wyo. 1982).

38 *See, e.g.*, FED. R. EVID. 601: "Every person is competent to be a witness except as otherwise provided in these rules."

39 *See, e.g.*, State v. Brown, 337 N.W.2d 138, 151 (N.D. 1983)(defendant's conviction for felonious restraint not based on error of admitting alleged victim's posthypnotic identification because other evidence corroborated the identification).

40 *See, e.g., id.*

41 *See, e.g., id.*

42 House v. State, 445 So. 2d 815, 827 (Miss. 1984); State v. Hurd, 86 N.J. 525, 543, 432 A.2d 86, 91 (1981); State v. Beachum, 97 N.M. 682, 690, 643 P.2d 246, 252 (1981); State v. Armstrong, 110 Wis. 2d 555, 580, 329 N.W.2d 386, 394-95 (1983), *cert. denied*, 461 U.S. 946 (1983); OR. REV. STAT. § 136.675 (1985). The Oregon statute states:

> If either prosecution or defense in any criminal proceeding in the State of Oregon intends to offer the testimony of any person, including the defendant, who has been subjected to hypnosis, mesmerism or any other form of the exertion of will power or the power of suggestion which is intended to or results in a state of trance, sleep or entire or partial unconsciousness relating to the subject matter of the proposed testimony, performed by any person, it shall be a condition of the use of such testimony that the entire procedure be recorded either on videotape or any mechanical recording device. The unabridged videotape or mechanical recording shall be made available to the other party or parties in accordance with ORS 135.805 to 135.873.

This language implies that evidence obtained through hypnosis must be admitted if the recording and disclosure requirements are met. R. UDOLF, *supra* note 11, at 97.

The so-called *Hurd* guidelines, first proposed by Dr. Martin Orne and adopted by the Supreme Court of New Jersey in State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981), are the most well-known procedural prerequisites:

> 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 . . . the prosecutor, investigator, or defense [so as to avoid leading questions]. . . . 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

dorsed safeguards intended to reduce the amount of suggestion to which a witness is exposed while also preserving for judicial review a record of the hypnotist's questioning.[43] They also determined that it is the responsibility of the trial court to ascertain whether, given the kind of memory loss alleged, hypnosis is an appropriate means of inducing recall,[44] whether the safeguards have been properly taken,[45] and whether the testimony is reasonably reliable.[46]

In *State v. Iwakiri*,[47] the Supreme Court of Idaho formulated another alternative with an added level of judicial discretion.[48] The court adopted a rule whereby trial judges are permitted to overlook noncompliance with any of the procedural safeguards cited in the opinion to admit hypnotically refreshed testimony if the totality of the circumstances of the case so warrants.[49] The court reasoned that this case-by-case standard, requiring a trial court to hold pretrial hearings on the competency of the formerly-hypnotized witness,[50] would balance the benefits and dangers of using hypnosis.[51] The court asserted that the standard squares with other rules of evidence that place an initial determination of the reliability of a witness upon "the entity most experienced in dealing with evidentiary questions, the trial court,"[52] before submitting the evidence to the jury.[53]

In opposition to these variations on admissibility rules, four states held prior to the Supreme Court's decision in *Rock* that pos-

---

any phase of the hypnotic session, including the pre-hypnotic testing and the post-hypnotic interview.

Id. at 545-46, 432 A.2d at 96-97 (emphasis in original). In addition to these guidelines for the hypnosis session itself, a party wishing to use hypnosis on a potential witness must inform and provide a record of the session to the opposing party. *Id.* at 543, 432 A.2d at 95.

43 *See, e.g.*, State v. Hurd, 86 N.J. 525, 545, 432 A.2d 86, 96 (1981)(trial court's exclusion of alleged victim's identification of her former husband as her assailant sustained primarily because of the pressure exerted upon her by the hypnotist to make that identification).

44 *See, e.g., id.* at 544, 432 A.2d at 95.

45 *See, e.g., id.* at 546, 432 A.2d at 96.

46 *See, e.g., id.*, 432 A.2d at 97.

47 106 Idaho 618, 682 P.2d 571 (1984)(defendant's conviction for second-degree kidnapping reversed and remanded on another issue, with the trial court instructed to introduce the hypnotically refreshed testimony of a state witness on remand).

48 *Id.* at 625, 682 P.2d at 578.

49 *Id.*, 682 P.2d at 578.

50 *Id.*, 682 P.2d at 578.

51 *Id.* at 625-26, 682 P.2d at 579.

52 *Id.* at 626, 682 P.2d. at 579.

53 *Id.*, 682 P.2d at 579. *Accord* Peterson v. State, 448 N.E.2d 673, 679 (Ind. 1983)(Hunter, J., concurring)(clarifying decision in *Peterson* to exclude alleged victim's hypnotically refreshed identification of defendant as endorsing rule that fits somewhere between *per se* exclusion and general admissibility standard).

thypnosis testimony is *per se* inadmissible in criminal trials.[54] Another fourteen states refused to admit hypnotically refreshed testimony, but allowed a formerly hypnotized witness to testify as to his or her prehypnosis memory.[55] Also, three states leaned toward a general rule of inadmissibility.[56] Applying the scientific acceptance standard of *Frye v. United States*,[57] these twenty-one state courts uniformly rejected the use of hypnotically refreshed testimony because of a lack of consensus among the academic, scientific, and health care professions as to what effect hypnosis has upon memory.[58] The

---

54 People v. Shirley, 31 Cal. 3d 18, 66-67, 723 P.2d 1354, 1384, 181 Cal. Rptr. 243, 273 (witness only competent to testify on matters unrelated to hypnosis session), *cert. denied*, 458 U.S. 1125 (1982); State v. Atwood, 39 Conn. Supp. 273, —, 479 A.2d 258, 264 (1984); People v. Gonzales, 415 Mich. 615, 627, 329 N.W.2d 743, 748 (1982), *modified*, 417 Mich. 1129, 1129, 336 N.W.2d 751, 751 (1983)(reserving question of witness' ability to testify as to prehypnosis memory); People v. Hughes, 59 N.Y.2d 523, 545, 453 N.E.2d 484, 496, 59 N.Y.S.2d 255, 266 (1983)(permitting pretrial hearing to determine if witness competent to testify as to prehypnosis memory).

55 Contreras v. State, 718 P.2d 129, 133, 139 (Alaska 1986); State ex rel. Collins v. Superior Court, 132 Ariz. 180, 207-208, 644 P.2d 1266, 1293, 1295 (1982); Rock v. State, 288 Ark. 566, 573, 576, 708 S.W.2d 78, 81, 83, *cert. granted*, 107 S. Ct. 430 (1986), *rev'd* 107 S. Ct. 2704 (1987); People v. Quintanar, 659 P.2d 710, 711 (Colo. Ct. App. 1982); Bundy v. State, 471 So. 2d 9, 18 (Fla. 1985), *cert. denied*, 107 S. Ct. 295 (1986); Walraven v. State, 255 Ga. 276, 282, 336 S.E.2d 798, 803 (1985); State v. Moreno, — Haw. —, —, 709 P.2d 103, 105 (1985); State v. Haislip, 237 Kan. 461, 482, 701 P.2d 909, 925 (1985), *cert. denied*, 474 U.S. 1022 (1985); State v. Collins, 296 Md. 670, 702, 464 A.2d 1028, 1044 (1983); Commonwealth v. Kater, 388 Mass. 519, 528, 447 N.E.2d 1190, 1197 (1983); State v. Palmer, 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981), *modified*, 224 Neb. 282, 298, 399 N.W.2d 706, 719 (1986), *cert. denied*, 108 S. Ct. 206 (1987); State v. Peoples, 311 N.C. 515, 533, 319 S.E.2d 177, 187 (1984); Robinson v. State, 677 P.2d 1080, 1085 (Okla. Crim. App.), *cert. denied*, 467 U.S. 1246 (1984); State v. Martin, 101 Wash. 2d 713, 722, 684 P.2d 651, 657 (1984).

56 State v. Seager, 341 N.W.2d 420, 431 (Iowa 1983)("We conclude that if the trial testimony of the witnesses . . . is substantially the same as that in statements . . . prior to their being hypnotized . . . such testimony should be deemed admissible."); State v. Ture, 353 N.W.2d 502, 513-14 (Minn. 1984)("[T]his court has consistently adhered to the rule of general inadmissibility of hypnotically-induced testimony in criminal cases. . . . It will be a rare case when a conviction will be sustained if hypnotically-influenced testimony is used at trial."); Commonwealth v. Nazarovitch, 496 Pa. 97, 111, 436 A.2d 170, 178 (1981)("While we do not want to establish a *per se* rule of inadmissibility at this time, we will not permit the introduction of hypnotically-refreshed testimony until we are presented with more conclusive proof . . . of the reliability of hypnotically-retrieved memory.").

57 293 F. 1013, 1014 (D.C. Cir. 1925)("[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.").

58 *See, e.g.*, Contreras v. State, 718 P.2d 129, 139 (Alaska 1986), in which the appellate court's admission of hypnotically refreshed identification by victims in separate suits was reversed.

> [The *Frye* test is] appropriate when reviewing the admission of new types of scientific evidence [because]: 1) the standard is judicially manageable; 2) the standard saves judicial time and resources; 3) the standard assures that juries will not be

courts deemed that the prejudicial impact of potentially inaccurate testimony outweighed any probative value it may have for a jury.[59] They asserted that such a *per se* rule would be administratively efficient,[60] uniform in its application,[61] and, given the possibility of an increase in false confidence by a once-hypnotized witness, protective of a defendant's right to confront his or her opposition.[62] The states that, nevertheless, allowed a formerly hypnotized witness to testify as to his or her prehypnosis memory did so in order to guarantee testimonial rights while preserving the use of hypnosis as an investigative tool.[63] By placing the burden of proving the scope of the witness' prehypnosis memory on the party offering the testimony, these courts attempted to regulate the use of hypnosis.[64] At the same time, these courts eased any harmful impact the *per se* rule might have upon witnesses opting for hypnosis.[65]

Notably absent from the fact situations inducing these decisions is a case in which hypnosis was used on a defense witness or defendant prior to trial.[66] The risks inherent in hypnotically refreshed testimony remain.[67] But, those concerns are elevated because it is possible that a subject may feign hypnosis or willfully lie while hypnotized.[68] This possibility is exacerbated by the fact that, even with

---

misled by unproven, unsound 'scientific' procedures, thus safeguarding the court's truth-finding role; and 4) the standard assures fairness and uniformity of decision-making.

Id. at 135.

59 *See, e.g., id.* at 137. *See also* FED. R. EVID. 403 ("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.").

60 *See, e.g., Contreras*, 718 P.2d at 138.

61 *See, e.g., id.* at 137.

62 *See, e.g., id.* at 138-39.

63 *See, e.g., id.* at 139 (construing State v. Peoples, 311 N.C. 515, 533, 319 S.E.2d 177, 188 (1984)).

64 *See, e.g., id.* (construing *Peoples*, 311 N.C. at 533, 319 S.E.2d at 188).

65 *See, e.g., id.*

66 *But cf.* Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 313-14 (1979).

> Because the defendant in a legal case is highly motivated to utilize the hypnotic situation to aid his cause, great care must be taken in the interpretation of hypnotic material. It must also be kept in mind that the hypnotic session, which may involve displays of considerable affect [sic], is extremely arousing and compelling to the naive observer.

Id.

67 *See supra* notes 21-36 and accompanying text.

68 M. ORNE, *supra* note 9, at 31-32. A strong motivation to deceive makes overcoming the effects of hypnosis possible. *Id.* at 9-10. For this reason, "there is no justification for the authorities hypnotizing suspects in a case." *Id.* at 31. *See also* R. UDOLF, *supra* note 11, at 160. Moreover, the use of hypnosis to elicit a confession is unduly coercive. M. ORNE, *supra* note 9, at 32; R. UDOLF, *supra* note 11, at 159. *Cf.* Leyra v. Denno, 347

procedural safeguards,[69] it is difficult to identify subjects who are faking hypnosis.[70]

However, a criminal defendant's offer of hypnotically refreshed testimony confounds the evidentiary standards discussed heretofore. The commitment to the integrity of the jury system displayed by the credibility, but not admissibility, standard, the allegiance to judicial discretion for determining the admissibility of reliable evidence furthered by the procedural prerequisites parameters, and the efficiency and confrontation-enabling objectives of the *per se* inadmissibility rule are valid evidentiary concerns. But, additional issues emerge if evidentiary rules directly challenge the ability of a criminal defendant to present a defense. The difficulty in formulating rules to respond to all of these interests is to prioritize the evidentiary objectives so as to ensure fair application in a variety of unpredictable fact situations.

III. Facts and Procedural History

On the night of July 2, 1983, police officers found Frank Rock lying on the floor of the apartment he shared with his wife, Vickie Lorene Rock.[71] Frank had suffered a bullet wound in his chest.[72] Vickie and Frank had apparently argued earlier that night about moving from their apartment to a trailer Vickie owned outside of town.[73] Shortly thereafter, the State of Arkansas charged Vickie with manslaughter for the death of her husband.[74]

At trial, one of the officers present at the scene testified that Vickie told him that, at some point during the argument, she stood up to leave the room and Frank " 'grabbed her by the throat and choked her and threw her against the wall and . . . at that time she walked over and picked up the weapon and pointed it toward the floor and he hit her again and she shot him.' "[75] Another officer

U.S. 556, 561 (1954)("We hold that use of confessions extracted in such a manner [through intensive questioning of a physically and emotionally exhausted suspect by psychiatriast trained in hypnosis] from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution.")

69 *See supra* note 42 and accompanying text. Additional recommendations include videotaping all contacts between the hypnotist and subject, standard application of hypnosis with minimal prehypnotic or posthypnotic suggestion of the likelihood of increased memory, and further consultations after the hypnosis session to determine the subject's hypnotic responsivity. M. Orne, *supra* note 9, at 43-48.

70 *Id.* at 11.

71 *Rock*, 107 S. Ct. at 2706.

72 *Id.* Vickie urged the officers to save Frank, but they could not.

73 *Id.*

74 *Id.*

75 *Id.*

testified that Vickie:

> had told her husband that she was going to go outside. He refused to let her leave and grabbed her by the throat and began choking her. They struggled for a moment and she grabbed a gun. She told him to leave her alone and he hit her at which time the gun went off. She stated that it was an accident and she didn't mean to shoot him. She said she had to go to the hospital to talk to him.[76]

Prior to trial, however, Vickie could not remember the precise details about Frank's shooting.[77]

Upon the suggestion of her attorney, Vickie agreed to undergo hypnosis to refresh her memory.[78] Before being hypnotized, Vickie made a statement of what she could remember to Doctor Bettye[79] Back, a licensed neuropsychologist specially trained in hypnosis, who took notes of their conversation.[80] Vickie was hypnotized, but revealed no new information until after the sessions.[81] Vickie then remembered that during the argument with Frank she had her thumb on the hammer of the gun and did not have her finger on the trigger.[82] The gun, she said, discharged when Frank grabbed her arm.[83]

Based on this information, Vickie's attorney had a gun expert examine the weapon.[84] The expert concluded that the gun was defective and prone to fire when hit or dropped.[85] The expert testified at trial that the trigger of the weapon did not have to be pulled for it to discharge.[86] After learning of Vickie's hypnosis session, the prosecutor successfully filed a motion to exclude her hypnotically re-

---

76 *Id.* at 2706 n.1.

77 *Id.* at 2706.

78 *Id.*

79 Two spellings, "Betty" and "Bettye" are offered in the Court opinion. "Bettye" is consistent with Rock v. State, 288 Ark. 566, 568, 708 S.W.2d 78, 79 (1986).

80 *Rock*, 107 S. Ct. at 2706. Dr. Back's handwritten notes read as follows:

> "Pt. states she & husb. were discussing moving out to a trailer she had prev. owned. He was 'set on' moving out to the trailer—she felt they should discuss. She bec(ame) upset & went to another room to lay down. Bro. came & left. She came out to eat some of the pizza, he wouldn't allow her to have any. She said she would go out and get (something) to eat he wouldn't allow her—He pushed her against a wall an end table in the corner (with) a gun on it. They were the night watchmen for business that sets behind them. She picked gun up stated she didn't want him hitting her anymore. He wouldn't let her out the door, slammed door & 'gun went off & he fell & he died.' "

Id. at 2706-07 n.2.

81 *Id.* at 2707.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

freshed testimony.[87] The court's pretrial order read, in part, " 'Defendant may testify to matters remembered and stated to the examiner[88] prior to being placed under hypnosis. Testimony resulting from post-hypnotic suggestion will be excluded.' "[89] The trial judge and the prosecutor admitted that, as a result of this order, "ninety-nine percent" of Vickie's testimony was deemed inadmissible.[90] The jury convicted Vickie of manslaughter and sentenced her to ten years imprisonment and a fine of $10,000.[91]

The Supreme Court of Arkansas affirmed the conviction, holding that "the dangers of admitting [hypnotically refreshed] testimony outweigh whatever probative value it may have."[92] The court observed that "a defendant's right to testify is fundamental, but even that right is not without limits."[93] The court reasoned that Vickie's testimony was limited only by the standard rules of evidence.[94] Moreover, the court stated that "nothing was excluded that would have been of much assistance to appellant, or would have enlarged on her testimony to any significant degree."[95] Therefore, the court concluded, there was no violation of Vickie's constitutional rights.[96]

The United States Supreme Court granted Vickie's petition for certiorari to review the Arkansas high court's decision.[97] The Court framed the issue as "whether Arkansas' evidentiary rule prohibiting the admission of hypnotically refreshed testimony violated petitioner's right to testify on her own behalf as a defendant in a criminal case."[98]

---

87 *Id.*

88 The examiner was Dr. Back. To determine the scope of Vickie's prehypnosis memory, the court compared Dr. Back's prehypnosis notes with the testimony Vickie offered at trial. Any testimony made by Vickie that was not recorded in Dr. Back's notes was deemed inadmissible. *Id.*

89 *Id.* at 2707 n.3.

90 *Id.* at 2707 n.4.

91 *Id.* at 2707.

92 Rock v. State, 288 Ark. 566, 573, 708 S.W.2d 78, 81 (1986).

93 *Id.* at 578, 708 S.W.2d at 84.

94 *Id.* at 579, 708 S.W.2d at 85.

95 *Id.*, 708 S.W.2d at 85.

96 *Id.* at 580, 708 S.W.2d at 86.

97 107 S. Ct. 430 (1986).

98 *Rock*, 107 S. Ct. at 2706.

IV. THE SUPREME COURT OPINIONS

A. THE MAJORITY

Writing for the majority,[99] Justice Blackmun rejected the Arkansas Supreme Court's *per se* rule against the admission of hypnotically refreshed testimony as a violation of Vickie Lorene Rock's right as a criminal defendant to testify on her own behalf.[100] Justice Blackmun traced the historic concern for the trustworthiness of a party's testimony[101] through the common law protection of the accused from the ill inferences of choosing not to testify or the rigors of cross-examination[102] to the modern recognition that, for detecting guilt and protecting innocence, the criminally accused is competent to testify.[103] Justice Blackmun noted that there is " 'no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecutor's case.' "[104]

Beyond competence, Justice Blackmun construed a right to testify from several provisions of the United States Constitution.[105] Citing *Faretta v. California*,[106] *Ferguson v. Georgia*,[107] and *In re Oliver*,[108]

---

99 Justices Blackmun, Brennan, Marshall, Powell, and Stevens constituted the majority.

100 107 S. Ct. at 2714-15.

101 *Id.* at 2708. Justice Blackmun cited Wigmore, who described eighteenth century testimonial privileges as subject to the syllogism, "[t]otal exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class specially likely to speak falsely; persons having a pecuniary interest in the event of the cause are likely to speak falsely; therefore such persons should be totally excluded." 2 J. WIGMORE, EVIDENCE § 576, at 810 (J. Chadbourn rev. ed. 1979).

102 Justice Blackmun quoted Wigmore for the common law position:

> [i]f, being competent, [the accused] failed to testify, that (it was believed) would damage his cause more seriously than if he were able to claim that his silence were enforced by law. Moreover, if he did testify, that (it was believed) would injure more than assist his cause, since by undergoing the ordeal of cross-examination, he would appear at a disadvantage dangerous even to an innocent man.

2 J. WIGMORE, EVIDENCE § 579, at 828 (J. Chadbourn rev. ed. 1979).

103 *Rock*, 107 S. Ct. at 2708 (construing Ferguson v. Georgia, 365 U.S. 570, 581 (1961)). In *Ferguson*, the Supreme Court held unconstitutional a Georgia statute that limited a criminal defendant's ability to make an unsworn statement to the jury in conjunction with another Georgia statute that denied a criminal defendant the opportunity to be questioned by counsel. 365 U.S. at 596. Justice Blackmun cited this decision to illustrate the elimination of competency standards in the United States and in support of his fourteenth amendment due process rationale. *Rock*, 107 S. Ct. at 2708.

104 *Id.* at 2708 (quoting *Ferguson*, 365 U.S. at 582).

105 *Id.* at 2709. *See supra* notes 3-5 and accompanying text.

106 422 U.S. 806 (1975). In *Faretta*, the Supreme Court held that "a defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so." *Id.* at 807 (emphasis in original). Justice Blackmun noted that this decision grants criminal defendants broad governance over the presentation of their defense. *Rock*, 107 S. Ct. at 2709.

Justice Blackmun concluded that the opportunity to give testimony in one's own defense is among a catalogue of rights " 'essential to due process of law in a fair adversary process' "[109] guaranteed in state criminal trials by the fourteenth amendment.[110]

Additionally, Justice Blackmun asserted that *Washington v. Texas*[111] and *United States v. Valenzuela-Bernal*[112] support a finding that the compulsory process clause of the sixth amendment confers upon the accused a right to testify.[113] Justice Blackmun noted that the defense's most important witness may, at times, be the accused.[114] Justice Blackmun identified self-representation and the right to tell one's own story as fundamental to any criminal defense.[115]

Justice Blackmun also observed that a corollary to the fifth amendment privilege against self-incrimination is the option to testify.[116] Justice Blackmun gleaned authority for this proposition from *Harris v. New York*'s[117] dissenting opinions.[118] Justice Black-

---

107 365 U.S. 570, 581 (1961).

108 333 U.S. 257 (1948). In re Oliver is scarcely related to the issue in *Rock*. The petitioner in that case successfully challenged his conviction for contempt of court by a one-man grand jury. 333 U.S. at 259. The Supreme Court held that the "failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law." *Id.* at 273. Justice Blackmun quoted broad language from the opinion granting a criminal defendant " 'an opportunity to be heard in his defense.' " *Rock*, 107 S. Ct. at 2709 (emphasis omitted)(quoting In re Oliver, 333 U.S. at 273).

109 *Rock*, 107 S. Ct. at 2709 (quoting *Faretta*, 422 U.S. at 819).

110 *Id.*

111 388 U.S. 14 (1967). In *Washington*, the Supreme Court held that the sixth amendment right to compulsory process of witnesses is applicable to state criminal trials through the fourteenth amendment, *id.* at 19, and that the petitioner was denied that right in this case by a Texas statute prohibiting as witnesses principals in, accomplices in, or accessories to the same crime. *Id.* at 23.

112 458 U.S. 858 (1982). Justice Blackmun cited *Valenzuela-Bernal* as authority for the proposition that a criminal defendant has a right under the sixth amendment to present testimony " 'material and favorable to his defense.' " *Rock*, 107 S. Ct. at 2709 (quoting *Valenzuela-B ernal*, 458 U.S. at 867). The petitioner's compulsory and due process claims were actually rejected in this decision because, the Court held, an allegation of a violation of either the sixth or fifth amendments requires a showing of materiality and favorableness. *Valenzuela-Bernal*, 458 U.S. at 872-73. Deportation of defense witnesses in this case was an insufficient showing. *Id.*

113 *Rock*, 107 U.S. at 2709.

114 *Id.*

115 *Id.*

116 *Id.* at 2710.

117 401 U.S. 222 (1971). The Supreme Court held in *Harris* that a prior conflicting statement made by a criminal defendant could be used to impeach his or her credibility even though the statement is inadmissible as evidence of guilt. *Id.* at 226. Justices Brennan, Douglas, and Marshall dissented on fifth amendment grounds, stating: "[T]he accused is denied an 'unfettered' choice when the decision whether to take the stand is

mun noted that the proviso against compelled testimony is fully enforced only when the accused is given " 'the right to remain silent unless he chooses to speak in the unfettered exercise of his own will.' "[119]

The only circumstance in which a state's procedural or evidentiary rules may impinge upon a criminal defendant's right to present relevant testimony, concluded Justice Blackmun, is where some greater interest, proportionate to the rights of the criminally accused, is served and applied in a non-arbitrary manner.[120] Justice Blackmun cited the statute in *Washington* as an example of a state rule that was laudably designed to ensure the trustworthiness of evidence, but that arbitrarily and, thus, unconstitutionally inhibited a criminal defendant from presenting evidence " 'relevant and material to the defense.' "[121] By reference, Justice Blackmun impliedly approved of the rationale in *Washington* that the sixth amendment was designed " 'to make the testimony of a defendant's witnesses admissible on his behalf in court.' "[122]

Moreover, Justice Blackmun interpreted the holding in *Chambers v. Mississippi*[123] to be: "[W]hen a state rule of evidence conflicts with the right to present witnesses, the rule may 'not be applied mechanistically to defeat the ends of justice,' but must meet the fundamental standards of due process."[124] With his citations to *Washington* and *Chambers*, Justice Blackmun defined a standard of review of state evidentiary rules grounded in constitutional considera-

---

burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony . . . ." *Id.* at 230 (Brennan, J., dissenting).

118 *Rock*, 107 S. Ct. at 2710.

119 *Id.* (quoting *Harris*, 401 U.S. 222, 230 (1971)(Brennan, J., dissenting)).

120 *Id.* at 2711.

121 *Id.* (quoting *Washington*, 388 U.S. at 23).

122 *Id.* at 2711 (quoting *Washington*, 388 U.S. at 22).

123 410 U.S. 284 (1973). In *Chambers*, the petitioner challenged both Mississippi's party witness or voucher rule and a state hearsay rule as impinging upon his fourteenth amendment due process rights. *Id.* at 285. The petitioner was implicated in a murder by a state witness who had formerly confessed to the crime and then repudiated his confession. *Id.* at 287-88. Through the operation of the Mississippi rules, the petitioner was unable to cross-examine the witness and present his own witnesses to challenge the state witness' repudiation. *Id.* at 294.

124 *Rock*, 107 S. Ct. at 2711 (quoting *Chambers*, 410 U.S. at 302). Actually, the *Chambers* Court's holding was:

> We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine [the witness], denied him a trial in accord with traditional and fundamental standards of due process. . . . [W]e hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

Chambers, 410 U.S. at 302-03.

tions.[125] Justice Blackmun reasoned from the outcomes of those decisions that "[j]ust as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony."[126]

On that basis, Justice Blackmun concluded that "[t]he Arkansas Supreme Court failed to perform the constitutional analysis that is necessary when a defendant's right to testify is at stake."[127] Conceding that serious risks accompany the admission of hypnotically refreshed testimony,[128] Justice Blackmun concluded that a *per se* rule of inadmissibility "operates to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced."[129] Without "clear evidence by the State repudiating the validity of all posthypnosis recollections,"[130] Justice Blackmun reasoned that it cannot be shown that "hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial."[131] Justice Blackmun viewed "[w]holesale inadmissibility"[132] as an arbitrary restriction and, therefore, constitutionally impermissible.[133]

B. THE DISSENT

In dissent, Chief Justice Rehnquist[134] endorsed the Arkansas Supreme Court's exclusion of Vickie Lorene Rock's "hypnotically

---

125 *Rock*, 107 S. Ct. at 2710-11.

126 *Id.* at 2711.

127 *Id.* at 2712.

128 *Id.* at 2713-14. Justice Blackmun cited with little commentary several scientific sources. *See* sources cited *supra* notes 8, 11, 23, and 66 and accompanying text.

129 *Rock*, 107 S. Ct. at 2712.

130 *Id.* at 2714.

131 *Id.* Justice Blackmun endorsed the Orne safeguards, *supra* notes 42 and 69, as a means of reducing the inaccuracies of hypnotically refreshed testimony, but he left to the states the formulation of specific guidelines to aid trial courts in making admissibility determinations. *Id.*

132 *Id.*

133 *Id.* at 2714-15. Justice Blackmun carefully noted that the gun expert's corroborating testimony and the trial court's conclusion that Dr. Back's questioning was not leading "present an argument for admissibility . . . in this particular case." *Id.* at 2714. Justice Blackmun did not, however, explicitly state that these factors are necessary for admissibility in future cases.

134 Joining the Chief Justice were Justices White, O'Connor, and Scalia. *Id.* at 2715 (Rehnquist, C.J., dissenting).

induced testimony"[135] as "an entirely permissible response to a novel and difficult question."[136] Emphasisizing Justice Blackmun's concession concerning the unreliability of hypnosis, the Chief Justice criticized the majority for requiring each state trial court "to make its own scientific assessment of reliability in each case [in which] it is confronted with a request for the admission of hypnotically induced testimony."[137] Chief Justice Rehnquist added that, by admitting evidence derived through reliance on an unresolved science, "the Court chooses . . . to restrict the ability of both state and federal courts to respond to changes in the understanding of hypnosis."[138]

The Chief Justice agreed that the Court has formerly recognized the right of a defendant to testify on his or her own behalf "in dictum,"[139] but he emphasized that "throughout our decisions . . . an individual's right to present evidence is subject always to reasonable restrictions."[140] This is true, according to Chief Justice Rehnquist, in alleged due process[141] as well as compulsory process

---

135 *Id.* (Rehnquist, C.J., dissenting).

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

137 *Id.* at 2715 (Rehnquist, C.J., dissenting). The Chief Justice inaccurately characterized the Court's ruling as requiring a scientific determination in each case. By acknowledging the implications of the scientific data and still ruling as he did, Justice Blackmun purposely limited future debate regarding the admission of hypnotically refreshed testimony to constitutional queries of the type courts deal with every day. *See infra* note 168.

138 *Id.* at 2716 (Rehnquist, C.J., dissenting). It is difficult to logically reconcile what the Chief Justice characterizes as the majority's case-by-case rule with his critique of that rule as inhibiting flexible response to future changes.

139 *Id.* at 2715 (Rehnquist, C.J., dissenting). The Chief Justice cited *Faretta*, 422 U.S. at 819, as providing this dictum, but said, without elaborating, that the principles "underlying this right provide little support for invalidating the evidentiary rule applied by the Arkansas Supreme Court." *Rock*, 107 S. Ct. at 2715 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist then criticized Justice Blackmun's use of *Ferguson*, again for unstated reasons. *Id.* (Rehnquist, C.J., dissenting). The Chief Justice did note an inconsistency between the majority's granting of a right to criminal defendants to testify and the limitation of the Arkansas rule on that right because, he said, both were intended to facilitate truth-seeking. *Id.* (Rehnquist, C.J., dissenting). The Chief Justice ignored the fact that Justice Blackmun's rationale for invalidating the Arkansas rule was based upon concerns that go beyond truth-seeking. *See supra* notes 99-133 and accompanying text.

140 *Id.* at 2715-16 (Rehnquist, C.J., dissenting). In a footnote, Chief Justice Rehnquist mentioned testimonial privileges and rules disqualifying infants and the mentally infirm as not offending a criminal defendant's constitutional rights and said: "I fail to discern any meaningful constitutional difference between such rules and the one at issue here." *Id.* at 2716 n* (Rehnquist, C.J., dissenting). The difference lies in the impact these rules have on the defendant. These nonarbitrary categories may affect one aspect of the presentation of a defense, but they do not directly inhibit the defendant from testifying.

141 Chief Justice Rehnquist cited In re Oliver, 333 U.S. at 273, 275, Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972), and Goldberg v. Kelly, 397 U.S. 254, 263 (1970) as examples of situations in which "an individual's right to present evidence on his behalf . . . must . . . give way to countervailing considerations." *Rock*, 107 S. Ct. at 2716

violations.[142] Moreover, the Chief Justice cited *Marshall v.*

(Rehnquist, C.J., dissenting). No language in the pages cited by Chief Justice Rehnquist in In re Oliver supports this proposition.

In *Morrissey*, the Supreme Court considered whether fourteenth amendment due process rights require "that a State afford an individual some opportunity to be heard prior to revoking his parole." *Morrissey*, 488 U.S. at 472. The pages Chief Justice Rehnquist cited cryptically discuss due process as being "flexible and call[ing] for such procedural protections as the particular situation demands. . . . Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." *Id.* at 481. Chief Justice Rehnquist might have been better served by quoting then Chief Justice Burger's subsequent language that "[w]e cannot write a code of procedure; that is the responsibility of each State," *id.* at 488, but that would have required that he deal with the Court's follow-up statement that "[o]ur task is limited to deciding the minimum requirements of due process." *Id.* at 488-89.

In *Goldberg*, the Supreme Court affirmed the district court's decision that due process entitles a welfare recipient to an evidentiary hearing before any benefits are terminated. *Goldberg*, 397 U.S. at 261. The passage cited by the Chief Justice reads: " '[C]onsideration of what due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action.' " *Id.* at 263 (quoting Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961)). This language implies little more than the test Justice Blackmun formulated in the majority opinion. *See Rock*, 107 S. Ct. at 2711.

[142] *Rock*, 107 S. Ct. at 2716 (Rehnquist, C.J., dissenting). The Chief Justice said that "our Compulsory Process Clause decisions make clear that the right to present relevant testimony 'may, in appropriate cases, bow to accomodate other legitimate interests in the criminal trial process.' " *Id.* at 2716 (Rehnquist, C.J., dissenting)(quoting *Chambers*, 410 U.S. at 295). The full text reads: "[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accomodate other legitimate interests in the criminal trial process. . . . But its denial or significant diminution calls into question the ultimate 'integrity of the factfinding process' and requires that the competing interest be closely examined." *Chambers*, 410 U.S. at 295 (quoting Berger v. California, 393 U.S. 314, 315 (1969)).

In the same paragraph, *Rock*, 107 S. Ct at 2716 (Rehnquist, C.J., dissenting), Chief Justice Rehnquist slightly altered a passage from *Chambers* that begins: "Few rights are more fundamental than that of an accused to present witnesses in his own defense. . . . In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedures and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302. The Chief Justice's alteration concluded that "[t]he Constitution does not in any way relieve a defendant from compliance with 'rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' " *Rock*, 107 S. Ct. at 2716 (Rehnquist, C.J., dissenting)(quoting *Chambers*, 410 U.S. at 302). The Chief Justice also ignored the outcome of *Chambers*, upon which Justice Blackmun relied, that a state rule applied " 'mechanistically' " is unconstitutional. *Id.* at 2711 (quoting *Chambers*, 410 U.S. at 302).

The Chief Justice's citation to *Washington*, *Rock*, 107 S. Ct. 2716 (construing 388 U.S. at 22), is questionable support for his compulsory process claim. In *Washington*, the Supreme Court said that

> it could hardly be argued that a State would not violate the [compulsory process] clause if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief.

Lonberger[143] and *Patterson v. New York*[144] to support his contention that the Supreme Court has traditionally deferred to state " 'establishment and implementation of their own criminal trial rules and procedures.' "[145] Parenthetically, Chief Justice Rehnquist asserted that " '[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' "[146] and that " '[w]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.' "[147] The Chief Justice concluded that constitutional considerations do not warrant invalidation of "a rule designed to exclude testimony whose trustworthiness is inherently suspect."[148]

V. ANALYSIS

As the resolution to a relatively simple fact situation, the Court's decision in *Rock v. Arkansas* seems intuitively correct.[149] Convicting a woman of manslaughter without affording her the opportunity to fully testify because she was hypnotized prior to trial

---

Washington, 388 U.S. at 22.

143 459 U.S. 422 (1983). In *Marshall*, the Supreme Court held that the admission of a prior conviction in the defendant's murder trial "deprived respondent of no federal right." *Id.* at 438.

144 432 U.S. 197 (1977). In *Patterson*, the Supreme Court held that New York's burdening of a defendant accused of murder with proving an extreme emotional disturbance defense does not violate his or her fourteenth amendment due process rights. *Id.* at 210. The situation in *Rock* is distinguishable from those in *Marshall* and *Patterson* in that the violation alleged by Vickie did not impose additional burdens upon her defense, but, rather, substantially limited her opportunity to present a defense at all.

145 *Rock*, 107 S. Ct. at 2716 (Rehnquist, C.J., dissenting)(quoting *Chambers*, 410 U.S at 302-03).

146 *Id.* (Rehnquist, C.J., dissenting)(quoting *Marshall*, 459 U.S. at 438). This is actually a direct quotation from Spencer v. Texas, 385 U.S. 554, 564 (1967)(Texas procedure of admitting evidence of prior conviction at guilt-determination stage of trial for purpose of sentencing not unconstitutional). Preceding the language quoted by the Chief Justice is the statement that "[c]ases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." *Id.* at 564.

147 *Rock*, 107 S. Ct. at 2716 (Rehnquist, C.J., dissenting)(quoting *Patterson*, 432 U.S. at 201). Neither the language in *Marshall* nor that in *Patterson* is dispositive. The relevant inquiry concerns the infringement of Vickie's constitutional rights under the fifth, sixth, and fourteenth amendments. Resolution of that question does not require a finely tuned review of state evidentiary rules. Nor does resolution of that question lightly construe constitutional considerations for the criminally accused.

148 *Id.* at 2716 (Rehnquist, C.J., dissenting).

149 Interviewed after the decision in *Rock*, Martin Orne agreed that a criminal defendant ought to be allowed to offer hypnotically refreshed testimony because of the protections entitled to him, and because "the judge or jury takes into account that he is putting his best foot forward." Stewart, *Hypnotized Witnesses, Loaded Jurors*, 73 A.B.A. J. 54, 57 (1987).

offends modern conceptions of justice.[150] As a statement of law by the Supreme Court of the United States, however, the decision in *Rock* also provides a judicial paradigm for formulating an appropriate standard to determine whether hypnotically refreshed testimony should be admitted in criminal trials.

None of the state standards proposed prior to *Rock* provide an adequate means by which to evaluate the admissibility of hypnotically refreshed testimony in every case.[151] The standards attempt to resolve questions of fact *a priori*[152] or demonstrate a confusion between admissibility and sufficiency.[153] The standards ignore constitutional guarantees in criminal trials[154] and strain the existing balance between judge and jury by limiting the function of each.

By transcending concerns for the potential unreliability of hypnosis and refining the judicial role in making evidentiary decisions regarding testimony derived therefrom, the rule in *Rock* places questions of the admissibility of hypnotically refreshed testimony within

---

150 Actually, the injustice done to Vickie was the limitation of her testimony to statements consistent with Dr. Back's sketchy notes. *Rock*, 107 S. Ct. at 2712. Compliance with the third *Hurd* guideline, *supra* note 42, or the recommendation that a full narrative description of the subject's memory regarding the incident be recorded prior to the hypnosis session, Orne, *supra* note 9, at 45, would have alleviated much of the injustice by expanding the scope of her testimony in an allowable manner. *See* 18 U.S.C. § 3503 (1982)(in "exceptional circumstances," depositions to preserve testimony permitted in criminal trials). This apparent solution, however, merely begs resolution of the question this Note addresses. It does not answer whether a codification of this precaution, like any of the other standards previously discussed for dealing with hypnotically refreshed testimony, eliminates potential injustices to criminal defendants in the presentation of their defense.

151 The exception for defendants who have been hypnotized under California's *per se* rule of inadmissibility, People v. Shirley, 31 Cal. 3d 18, 67, 723 P.2d 1354, 1384, 181 Cal.Rptr. 243, 273 (1982), comes closest to the standard espoused in this Note. This mechanical approach, however, is incapable of dealing with hypnotically refreshed testimony in situations that demand a specific determination.

152 The *per se* inadmissibility standard is essentially a conclusion based on expert testimony refuting the content of hypnotically refreshed testimony as a matter of course before that content is examined.

153 "Admissibility" requires only that the evidence offered increase the probability that that which is to be proven by the evidence is true. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. "Sufficiency" is a conclusion about the evidence to be made by the factfinder that that which was to be proven true is true. The procedural prerequisites standard tends to require trial courts to make determinations on the truth of the matters asserted beyond that required by the probity standard.

154 Not only does the *per se* standard impinge upon a criminal defendant's right to present a defense, *Rock*, 107 S. Ct. at 2714-15, but, a general rule of admissibility, like the credibility but not admissibility standard, also impinges upon a defendant's constitutional protections. *See infra* notes 158-64 and accompanying text.

a preliminary constitutional framework.[155] The fifth, sixth, and fourteenth amendments[156] appropriately afford criminal defendants liberal opportunity to present a defense. Consequently, when offering hypnotically refreshed testimony, the defense is subject to a low standard of admissibility. However, whether this translates into a *lower* standard than that which the prosecution must meet in offering similar testimony is not addressed in *Rock*.[157] As a viable rule for determining the admissibility of hypnotically refreshed testimony, the rule to be derived from *Rock* should provide such a lower standard of admissibility only for the defense.

In the typical situation in which hypnotically refreshed testimony is offered at trial, an alleged victim or eyewitness with memory failure identifies a defendant as a perpetrator of a crime subsequent to hypnosis and then is called to testify for the state.[158] All of the concerns associated with hypnotically refreshed testimony remain.[159] In this situation, however, the possibility of a suggested identification, of a confabulated accusation, or of a damning association that is the result of pseudomemory may lead to a wrongful conviction. Although, theoretically, the likelihood of inaccuracy of hypnotically refreshed testimony admitted against a criminal defendant is as great as it would be if admitted against the state, the presumption of innocence in our criminal justice system magnifies the injustice imposed upon a defendant when possibly unreliable evidence is admitted to obtain a conviction.[160]

Moreover, under the sixth amendment,[161] the right to confront

---

155 This reading of *Rock* may be logically derived from the assumption that the three objectives of formulating evidentiary rules are to "[a]void the introduction of collateral matters and keep the evidence confined to the operative issues of the case, . . . [l]imit evidence to material whose probative value is not outweighed by the prejudice it may produce, . . . [and p]rotect the constitutional rights of the parties." R. UDOLF, *supra* note 11, at 59. Analytically, then, the rule in *Rock* places greatest weight on this third objective.

156 *See supra* notes 3-5.

157 "This case does not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants and we express no opinion on that issue." *Rock*, 107 S. Ct. at 2712 n.15.

158 In every case surveying the pre-*Rock* decisions dealing with hypnotically refreshed testimony, the source of the testimony was either an alleged victim of the crime or a witness for the prosecution. *See supra* notes 37, 42, 47, 53-56 and accompanying text. A rule limiting admissibility in these situations would, therefore, likely limit the admission of hypnotically refreshed testimony overall.

159 *See Rock*, 107 S. Ct. at 2711-15.

160 After *Rock*, Martin Orne maintained his opposition to the admission of state-sponsored hypnotically refreshed testimony. " '[I]f you change the memory of an unbiased witness or a victim (through hypnosis), it is a catastrophe, because you can convict anyone.' " Stewart, *supra* note 149, at 57.

161 *See supra* note 4.

one's accusers is a guaranteed part of any criminal defense. Because hypnosis may impinge upon the ability of cross-examination to reveal inconsistencies,[162] a rule admitting state-sponsored hypnotically refreshed testimony would seem to constrain a defendant's constitutional rights as recognized in *Rock*.[163] Thus, *Rock* provides a context within which a standard for the admissibility of hypnotically refreshed testimony may be discussed.[164]

An appropriate state standard enlisting the constitutional analysis in *Rock* should be generally to admit hypnotically refreshed testimony on behalf of the defense and generally exclude hypnotically refreshed testimony on behalf of the prosecution.[165] The party offering the evidence should have the burden of coming forward with a video recording of the hypnosis session(s) prior to trial,[166] a copy of which should be supplied to opposing counsel.[167] Challenges to

---

162 *See supra* notes 31-36 and accompanying text.

163 It can be argued that this analysis uses the scientific data too conveniently. The data is ignored so that a justification may be made for admitting a defendant's evidence. The data is relied upon to inhibit the prosecution from offering the testimony. Such criticism is valid and precisely the point. By prioritizing the evidentiary considerations as the Court did in *Rock*, an appropriate standard of admissibility uses the current scientific conclusions always to the defendant's advantage.

164 This reading of the logic of the majority opinion skews the ideological split within the Court. Justice Blackmun's endorsement, though qualified, of the reliability of hypnotically refreshed testimony is an unnecessary supplement to his constitutional framework. Ironically, allegiance to Chief Justice Rehnquist's state deference argument might read as an unchecked license for local courts to admit testimony the Chief Justice opposed as unreliable. But, this is not the only possible interpretation of *Rock*.

In State v. Pollitt, 205 Conn. 61, 530 A.2d 155 (1987), the Connecticut Supreme Court held that the trial court did not err in admitting the alleged victim's posthypnosis testimony because that testimony was consistent with her prehypnosis statements. *Id.* at 81, 530 A.2d at 165-66. Avoiding a determination on the admissibility of hypnotically refreshed testimony after *Rock* because of that consistency, *id.* at 85, 530 A.2d at 167, the court referred in dicta to *Rock* as a decision delineating procedural prerequisites more than providing a constitutional framework for resolving this evidentiary issue. *Id.* at 79, 530 A.2d at 164. Despite this inaccurate assessment of *Rock*, the Connecticut court reached a conclusion that is consistent with the standard espoused in this Note because of the critical distinction between hypnotically refreshed testimony and posthypnosis testimony. *See supra* note 2.

165 This is not an entirely novel idea:

> There is an alternative approach to the problem of the admissibility of hypnotically refreshed testimony that the auther finds appealing. . . . It is based on the belief that it is a more serious error to convict an innocent defendant than to acquit a guilty one. Hence, it might be proposed to admit hypnotically refreshed testimony of defense witnesses freely leaving the issue of their credibility to the jury while invoking stricter standards for testimony of prosecution witnesses.

R. UDOLF, *supra* note 11, at 168.

166 "Without such a recording it is impossible to evaluate the probability that factual error has been introduced into the testimony as a result of faulty technique." *Id.* at 166. Challenges to credibility of the witness based on examination of the tape could then be offered at trial.

167 *Cf.* FED. R. EVID. 612: "[Where a witness uses a writing to refresh memory,] an

or support for the testimony of the formerly hypnotized witness would then have to be resolved at a pretrial hearing.[168] If, however, the defense offers the videotape without objection by the prosecution, the witness' testimony should be freely admitted. Only if the state makes a showing overcoming the constitutional concerns for the defendant should its hypnotically refreshed testimony be admitted.

This is not an espousal of two *per se* rules: one always admitting defense hypnotically refreshed evidence and one always prohibiting the prosecution's hypnotically refreshed evidence.[169] If a defendant is discovered faking hypnosis so as to contrive exonerating testimony or purposely lying while hypnotized, the evidence possibly ought not be admitted.[170] Circumstances in which the state is somehow able to overcome the constitutional protections of the criminally accused may justify the admission of such evidence.[171] Also, the possibility of a defense witness offering hypnotically refreshed testimony does not clearly fit within constitutional parameters addressed heretofore by any courts, thus requiring a case-by-case evaluation of admissibility.[172]

Nor is the rule proposed in this Note intended or likely to result in the abuse of the privilege it affords criminal defendants. The frequency of use of hypnosis by future parties will be regulated by the

---

adverse party is entitled to have the writing produced at the hearing, to inspect [and] to cross-examine the witness thereon . . . ." The rule also allows material portions of the writing to be introduced into evidence. Admission of the tape of the hypnosis session is an appropriate tool to challenge the witness' credibility. However, this raises other concerns that must be resolved in each case. *Cf.* Sprynczynatyk v. General Motors Corp., 771 F.2d 1112, 1124 (8th Cir. 1985)(civil case in which issue of admission of videotape of the hypnosis session said to raise prejudicial concerns under the Federal Rules of Evidence. *See supra* note 59).

168 The inquiry would be much different under this bifurcated rule than that involved in a highly discretionary standard like that in *Iwakiri, see supra* notes 47-53 and accompanying text, because it is legal, not scientific. The analysis required of a trial court confronted with a request that hypnotically refreshed testimony be admitted would center around the constitutional concerns for the criminally accused. Any scientific challenges to the testimony ought to be put forth at trial to impeach the credibility of the witness. This rule, therefore, eliminates the judicial burden of making scientific determinations about the reliability of the testimony and leaves questions of sufficiency to the factfinder.

169 Practically, however, this may be the effect given the substantial weight of the criminal defendant's constitutional protections.

170 The weasal word "possibly" is added because, if the state has discovered that a defendant feigned hypnosis, it could presumably impeach his or her credibility at trial in an effective manner, thereby eliminating the necessity of excluding the testimony.

171 "May" is meant to greatly limit the scope of such situations.

172 The constitutional protections afforded a defendant by the Court in *Rock* are not clearly applicable to defense witnesses. But, a rule consistent with the latitude afforded a defendant in putting forth his or her defense suggests that defense witnesses' hypnotically refreshed testimony should also be generally admissible.

credibility juries give hypnotically refreshed testimony. Credibility may be challenged by expert testimony explaining the unreliability of hypnosis or other conflicting evidence. Assuming juries are as capable of determining the proper weight to be given hypnotically refreshed testimony as they are deemed capable of examining other types of evidence,[173] the jury serves as a check on the liberal admissibility standard for hypnotic evidence offered by the defense. The jury is capable of responding to changing scientific perceptions of the reliability of hypnosis and, thus, will monitor the future use of hypnotically refreshed testimony.

VI. CONCLUSION

Concerns in criminal trials for the accuracy of evidence admitted and the outcome of the proceeding are at odds in many of the variations of standards used to determine the admissibility of hypnotically refreshed testimony. Liberal rules of admissibility challenge confrontational protections developed from constitutional interpretation. Stringent rules of admissibility discount testimonial privileges that have historically evolved to guarantee fair trials to those accused of crimes.

Rock v. Arkansas provides an analytical framework by which states may direct concerns for accuracy and outcome toward a viable standard of admissibility that limits the prejudicial impact hypnotically refreshed testimony may have upon criminal defendants. By adopting a standard that generally admits hypnotically refreshed testimony offered by the defense and that generally excludes hypnotically refreshed testimony offered by the prosecution, state courts can lend efficient and appropriate coherence to this complex evidentiary matter. Grounded in presumptions fundamental to the American criminal justice system, the bifurcated standard put forth in this Note serves to punctuate an all too lengthy debate over the use of hypnosis in a manner that does not sacrifice fairness for expediency.

FRANCIS P. KUPLICKI

---

173 Our legal system is based on the premise that juries are competent to decide contested issues of fact and ultimate guilt or innocence based on sound instructions from the court concerning the law. If a lay jury, with the help of expert testimony, is not capable of deciding the probative value of hypnotic evidence intelligently, how can it evaluate the sanity of a defendant based on the same kind of testimony? If it can do both, there is no need for legislation concerning hypnotic evidence. If it can do neither, it makes no sense to exclude hypnotic evidence while continuing to permit juries to decide the issue of insanity. A basic restructuring of our legal system would be required.

R. UDOLF, *supra* note 11, at 167.