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ROCK v. ARKANSAS: AN INDIVIDUAL INQUIRY APPROACH TO THE ADMISSIBILITY OF HYPNOTICALLY INDUCED TESTIMONY

The United States Constitution affords American citizens due process prior to a deprivation of life, liberty, or property.[1] Although due process is "flexible,"[2] the United States Supreme Court has held that due process requires at a minimum notice and an opportunity for a hearing.[3] The opportunity to be heard includes the opportunity to present evidence in one's defense,[4] and restrictions on this right violate due process.[5] The Constitution also guarantees criminal defendants the right to confront witnesses against them.[6] Consequently, the sixth amendment confrontation clause might restrict the right of a party to present evidence where presenting such evidence violates the defendant's right to confront witnesses.[7] Likewise, state and federal rules of procedure and evidence may prohibit a party from presenting evidence.[8] Where a state's evidentiary rule prohibits a criminals defendant from testifying to posthypnotic recall, however, the United States Supreme Court, in *Rock v. Arkansas,*[9] has held that such a limit violates the defendant's due process right to present evidence on her own behalf.[10]

In *Rock,* the Court considered whether a state per se evidentiary rule excluding posthypnotic testimony violated the petitioner's constitutional right

1. U.S. CONST. amend. XIV, § 1.

2. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The Court stated that "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.*

3. *See, e.g.,* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951). Justice Frankfurter, one of five Justices concurring in the decision, noted that one "in jeopardy of serious loss" requires "notice of the case against him and opportunity to meet it." *Id.* at 171-72 (Frankfurter, J., concurring).

4. *See, e.g., In re* Oliver, 333 U.S. 257 (1948). The Court held that a person's right to be heard includes "a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *Id.* at 273.

5. *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

6. U.S. CONST. amend. VI.

7. *See, e.g.,* Ohio v. Roberts, 448 U.S. 56 (1980). The Court noted that the confrontation clause may restrict the introduction of admissible hearsay evidence where the declarant is available and where the hearsay statement lacks trustworthiness. *Id.* at 65.

8. *See, e.g.,* FED. R. EVID. 802.

9. 107 S. Ct. 2704 (1987).

10. *Id.* at 2714.

to present her defense.[11] The state charged the petitioner with manslaughter when a gun went off during a struggle between the petitioner and her husband, shooting her husband.[12] Because the petitioner could not remember the exact details of the struggle, she submitted to hypnosis to refresh her memory.[13] As a result of the hypnosis, the petitioner recalled that although she held her thumb on the gun's hammer, she did not have her finger on the trigger and that the gun had fired when her husband grabbed her arm.[14] Testimony by an expert corroborated this version of events based on a determination that the gun was defective and likely to fire when hit or dropped.[15]

At trial, the court limited the petitioner's testimony to matters she remembered prior to the hypnotic session.[16] On appeal from her conviction of manslaughter,[17] the Arkansas Supreme Court affirmed the holding of the trial court.[18] The court reasoned that because of the inherent unreliability of hypnotically refreshed testimony, the dangers of admitting such testimony outweighed its probative value.[19] Thus, the Arkansas Supreme Court followed the jurisdictions holding posthypnotic testimony inadmissible per se.[20]

Moreover, the Arkansas Supreme Court determined that a defendant's fundamental right to testify is not limitless.[21] The court held that standard rules of evidence[22] mandated the restriction of the petitioner's testimony,[23] and found no constitutional violations in this limit.[24] The United States

11. *Id.* at 2714-15.

12. *Id.* at 2706.

13. *Id.*

14. *Id.* at 2707.

15. *Id.*

16. *Id.* The court's pretrial order limited Rock's testimony to "matters remembered and stated to the examiner prior to being placed under hypnosis." *Id.* at 2707 n.3. As a result of this restriction, the trial court excluded virtually all of petitioner's testimony. *Id.*

17. *Id.* at 2707.

18. Rock v. State, 288 Ark. 566, 581, 708 S.W.2d 78, 86 (1986).

19. *Id.* at 573, 708 S.W.2d at 81. The court found hypnotically refreshed testimony unreliable because of the subject's tendency to confabulate, or invent facts where gaps exist in recall. *Id.* at 572, 708 S.W.2d at 81; *see also infra* note 53.

20. *Rock,* 288 Ark. at 575, 708 S.W.2d at 83. The Arkansas Supreme Court relied on People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied,* 458 U.S. 1125 (1982). *See infra* notes 130-40 and accompanying text.

21. *Rock,* 288 Ark. at 578, 708 S.W.2d at 84.

22. *Id.* at 579, 708 S.W.2d at 85. The Arkansas Supreme Court commented that defendants must abide by rules of evidence, such as the exclusion of "evidence that is prejudicial, confusing, misleading, cumulative or time consuming." *Id.* at 578, 708 S.W.2d at 85. The court determined that hypnotically induced testimony may mislead the jury because the unreliability of hypnosis may outweigh its probative value. *Id.* at 579, 708 S.W.2d at 85.

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

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

Supreme Court granted certiorari[25] to determine the constitutionality of Arkansas' per se exclusionary rule.

Writing for the majority,[26] Justice Blackmun held that the state could not arbitrarily restrict a criminal defendant's constitutional right to testify in his own defense.[27] The Court found the Arkansas court's per se exclusionary rule overly restrictive because the rule barred all posthypnotic testimony and did not allow for an individual determination of admissibility of such testimony.[28] Although the Court agreed that hypnotically refreshed testimony could produce unreliable evidence, it suggested procedural safeguards to reduce these inaccuracies.[29] Moreover, the Court looked to traditional means of determining the accuracy of testimony, such as corroboration and cross-examination.[30] Because hypnotically induced testimony could be reliable in a particular case, the Court held Arkansas' per se exclusionary rule an arbitrary restriction on a defendant's right to testify.[31] The Court vacated the Arkansas Supreme Court's judgment and remanded the case, instructing the trial court to consider petitioner's argument for admissibility.[32]

The dissent, written by Chief Justice Rehnquist, asserted that the trial court properly limited the petitioner's testimony. The dissent agreed with the Arkansas Supreme Court's analysis, finding that a defendant's right to present a defense is subject to "reasonable restrictions."[33] The dissent found the restriction reasonable because the dissenters agreed that posthypnotic testimony involves suggestion and increased confidence, and thus is inherently unreliable.[34] Moreover, because procedural safeguards do not guarantee reliability, the dissent found acceptable the trial court's limitation on the petitioner's testimony.[35]

This Note will analyze the therapeutic and legal uses of hypnosis and will discuss the problems inherent in the hypnotic process. Next, the Note will discuss the approaches the state and federal courts have employed when faced with the admissibility of hypnotically induced testimony. It then will

25. Rock v. Arkansas, 107 S. Ct. 430, 431 (1986).

26. Rock v. Arkansas, 107 S. Ct. 2704 (1987). The Court was divided five-to-four with retired Justice Lewis Powell in the majority. *Id.* at 2706.

27. *Id.* at 2714. The Court found constitutional support for the right to testify in the due process clause of the fourteenth amendment, as well as in the fifth and sixth amendments. *Id.* at 2709-10; *see also infra* notes 179-83 and accompanying text.

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

29. *Id.* at 2714; *see also infra* note 208.

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

31. *Id.*

32. *Id.* at 2714-15.

33. *Id.* at 2715-16 (Rehnquist, C.J., dissenting).

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

35. *Id.* (Rehnquist, C.J., dissenting); *see also infra* notes 220-29.

analyze the approach the Supreme Court has espoused recently and will demonstrate how the Court has expanded criminal defendants' use of post-hypnotic testimony by denouncing the per se inadmissible rule as too far-reaching. This Note agrees with the *Rock* Court's balancing approach and urges the admissibility of hypnotically induced testimony in an effort to present all relevant evidence.

I. THE USE OF HYPNOSIS IN THE SCIENTIFIC SETTING

A. *The Origins and Uses of Hypnosis*

The word "hypnosis" derives from the Greek word *hypnos,* which means sleep.[36] Initially, the public associated hypnosis with mysterious rituals rather than with valid medical techniques[37] and as a result, many misconceptions concerning the nature of hypnosis have emerged.[38] In 1958, the American Medical Association Council on Mental Health accepted hypnosis as a viable means of medical therapy,[39] and the use of hypnosis today is widespread.[40]

Where a person suffers from amnesia,[41] hypnosis often aids that person's

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36. H. ARONS, HYPNOSIS IN CRIMINAL INVESTIGATION 11 (1967).

37. *Id.* at 10. The birth of hypnosis dates back to the eighteenth century work of Franz Anton Mesmer. According to Mesmer, hypnosis involved an "invisible fluid which pervaded the body and which could be manipulated by magnets or magnetized objects." *Id.* at 12. In addition, a medical hypnosis specialist has suggested that the Old Testament contains the earliest description of hypnosis:

> And the Lord God caused a *deep sleep* to fall upon Adam, and he slept; and He took one of his ribs, and closed up the flesh inside thereof; and the rib, which the Lord God had taken from the man, made he a woman, and brought her unto the man.

Comment, *Hypnosis: Understanding Its Use in the Criminal Process,* 11 TEX. TECH. L. REV. 113, 114 n.2 (1979) (quoting *Genesis* 2:21-22).

38. Contrary to popular belief, the hypnotized subject is neither asleep nor unconscious during the hypnotic state, and is more atuned to his surroundings than a nonhypnotized individual. Comment, *supra* note 37, at 120.

39. Council on Mental Health, *Medical Use of Hypnosis,* 168 J. A.M.A. 186, 187 (1958).

40. Today the medical community uses hypnosis to reduce labor pains and to effectuate surgery. Note, *The Continuing Controversy of Hypnosis in the Legal Setting—The Need for a More Flexible Approach,* 12 MEM. ST. U.L. REV. 471, 473 (1982). Hypnosis also is useful as an anesthetic and in treating mental disorders. Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?,* 38 OHIO ST. L.J. 567, 567 (1977).

Many commentators also recognize forms of hypnosis in everyday life. *See id.* at 567 (lulling a baby to sleep and advertising are hypnotic phenomena); H. ARONS, *supra* note 36, at 18 (suggestion is a common element in politics); W. BRYAN, LEGAL ASPECTS OF HYPNOSIS 5 (1969) ("extension of concentration" characteristic of hypnosis is an element of many religions).

41. Many types of amnesia exist. The medical profession has employed hypnosis in treating the following kinds of amnesia: congrade amnesia (complete loss of recall of the event), retrograde amnesia (diminished recall of events preceding the incident), and anterograde am-

memory recall.[42] Although traditionally used as a therapeutic tool for amnesia, experts now employ hypnosis where the subject does not demonstrate pathological memory loss.[43] A victim of, or witness to a crime, who suffers a memory loss as a result of the experience, may submit to hypnosis to refresh his memory. Critics, however, doubt the accuracy of information elicited through this process.[44]

B. *The Accuracy of Hypnosis*

The process of hypnosis elicits details.[45] However, many of the side effects inherent in the hypnotic process, such as heightened suggestibility,[46] confabulation,[47] pseudomemories,[48] the subject's inability to distinguish between fact and fantasy,[49] and the subject's desire to gain approbation from the hypnotist,[50] may affect the accuracy of these details. Therefore, experts have criticized this process.

Scientists agree that subjects under hypnosis are prone to suggestibility.[51] The hypnotist often asks the subject leading questions to which the subject responds with "created memory."[52] Where the subject has gaps in his recollection, he may confabulate,[53] or fill in the missing pieces with information

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nesia (recall impairment of events taking place after the incident). Spector & Foster, *supra* note 40, at 572.

42. Orne, *The Use and Misuse of Hypnosis in Court,* 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 323 (1979). Hypnotic techniques include age regression, wherein the subject actually relives a past event; posthypnotic suggestion, wherein the subject may recall events once he no longer is hypnotized; and hypermnesia, wherein the subject recalls information while under hypnosis. Spector & Foster, *supra* note 40, at 572-74.

43. Orne, *supra* note 42, at 324.

44. *See* Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness,* 68 CALIF. L. REV. 313, 314 (1980); Dywan & Bowers, *The Use of Hypnosis to Enhance Recall,* 222 SCIENCE 184, 185 (1983).

45. *See* Orne, *supra* note 42, at 326.

46. *See* Comment, *Hypnosis—Its Role and Current Admissibility in the Criminal Law,* 17 WILLAMETTE L. REV. 665, 667 (1981).

47. *See infra* note 53.

48. *See infra* note 55 and accompanying text.

49. *See* Diamond, *supra* note 44, at 314.

50. *See* Orne, *supra* note 42, at 326.

51. *See* Henderson, *The Admissibility of Hypnotically Enhanced Testimony: Have the Courts Been Mesmerized?,* 6 J. LEGAL MED. 293, 300 (1985). Suggestibility is a "state of mind which is conducive to the acceptance of suggestion." H. ARONS, *supra* note 36, at 15. Suggestions are found in both tone of voice and body language. Note, *Admissibility of Hypnotically Enhanced Testimony in Louisiana,* 44 LA. L. REV. 1039, 1044 (1984). Clinical studies show that the subjects most prone to suggestibility are between seven and eight years old, female rather than male, and have a high intelligence level. *See* Comment, *supra* note 46, at 667-68.

52. Orne, *supra* note 42, at 323.

53. Confabulation is the process of filling gaps in memory with inaccurate or fictitious

that was likely to have happened.[54] This confabulation results in pseudomemories, which the individual believes are his true recollections.[55] Moreover, because neither the subject nor the hypnotist can distinguish between actual recall and confabulation, commentators have criticized the accuracy of the hypnotic process.[56]

Commentators additionally fault the hypnotic process because subjects become confident in recalling events even where such recall is erroneous.[57] Studies show that once a subject makes a statement either under hypnosis or following hypnosis, he will not alter that statement.[58] This particular characteristic of hypnosis has spawned criticism because of its effect on cross-examination.[59] Cross-examination assists the trier of fact in assessing a witness' reliability.[60] However, because a hypnotized subject believes that the recalled memory is his own experience, even if the recollection results from confabulation, critics assert that the subject has become immune to cross-examination.[61] Consequently, critics argue that this heightened confidence deprives the defendant of his sixth amendment right to confront that witness.[62]

Critics further doubt the reliability of posthypnotic testimony because the subject may desire to please the hypnotist, and thus may alter responses according to the degree of approbation that the hypnotist displays.[63] Addi-

information. Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 OHIO N.U.L. REV. 1, 4 n.13 (1977).

54. Orne, *supra* note 42, at 321.

55. *Id.* at 322-23.

56. *See* Note, *supra* note 51, at 1044.

57. *See* Smith, *Hypnotic Memory Enhancement of Witnesses: Does it Work?*, 94 PSYCHOLOGICAL BULL. 387, 398-99 (1983). In a clinical study of both hypnotized and nonhypnotized subjects, hypnotized subjects made more errors, yet their confidence level was as high as that of nonhypnotized subjects. *Id.*

58. *See* Levitt, *The Use of Hypnosis to "Freshen" the Memory of Witnesses or Victims*, 17 TRIAL 56, 58 (1981).

59. *See* Falk, *Posthypnotic Testimony—Witness Competency and the Fulcrum of Procedural Safeguards*, 57 ST. JOHN'S L. REV. 30, 50 (1982); Orne, *supra* note 42, at 332; Ruffra, *Hypnotically Induced Testimony: Should It Be Admitted?*, 19 CRIM. L. BULL. 293, 313 (1983); Note, *The Use of Hypnosis to Refresh Memory: Invaluable Tool or Dangerous Device?*, 60 WASH. U.L.Q. 1059, 1072 (1982).

60. Orne, *supra* note 42, at 332.

61. *See* Note, *supra* note 59, at 1072.

62. The sixth amendment provides that an accused has the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. Where a witness agrees to hypnosis, however, his original memory may be clouded or entirely lost, which may deprive the defendant of his right to confront that witness. *See* Falk, *supra* note 59, at 54.

63. Orne, *supra* note 42, at 326. Orne explains that the hypnotic process includes positive reinforcement from the hypnotist, including comments such as, "You are doing well." If after responding to a question, the hypnotist does not give a verbal sign of approbation, the subject will try another response that will elicit an approval. *Id.*

tionally, studies show that while hypnotized subjects remember an increased number of meaningful items, their responses also include more incorrect statements.[64] While many criticize the use of hypnosis as a method of obtaining accurate information, the technique nonetheless reveals relevant evidence.

II. THE USE OF HYPNOSIS IN THE LEGAL SETTING: A TREND AWAY FROM PER SE ADMISSIBILITY

The use of hypnosis in the legal setting was a rarity until the 1950's.[65] In the first case to discuss the use of hypnotism, *People v. Ebanks,*[66] the defendant denied his guilt while under hypnosis.[67] The hypnotist attempted to testify as to the defendant's statements, however the court sustained an objection to the testimony and noted that "[t]he law of the United States does not recognize hypnotism."[68] This case established a trend of judicial hostility toward the use of hypnosis in the legal community.[69]

The legal community employs hypnosis in four contexts: the in-court testimony of a witness, victim, or defendant made while under hypnosis;[70] the out-of-court statements made while under hypnosis; the in-court testimony of the hypnotist; and the in-court testimony of a witness whose memory has been refreshed to recall critical events.[71] In criminal prosecutions, counsel use hypnosis to obtain additional evidence and introduce this evidence as direct testimony.[72]

The use of hypnosis as an investigatory tool to develop new sources of information has received acceptance.[73] By contrast, however, the use of

64. In a recent experiment, hypnotized subjects recalled twice as many items, but made three times as many errors. *See* Dywan & Bowers, *supra* note 44, at 185.

65. Of the reported American cases between 1915 and 1950, only one concerned hypnosis. *See* Spector & Foster, *supra* note 40, at 579 n.67.

66. 117 Cal. 652, 49 P. 1049 (1897).

67. *Id.* at 656, 49 P. at 1053.

68. *Id.*, 49 P. at 1053.

69. *See* Note, *Hypnotically Induced Testimony: Credibility versus Admissibility,* 57 IND. L.J. 349, 353 (1982).

70. Although statements a defendant makes while under hypnosis generally are inadmissible, the court allowed the in-court hypnotism of a defendant in an unreported case. The defendant was hypnotized in court, without the presence of the jury. Under hypnosis, the defendant recalled that he shot his wife after seeing her with another man. This was the first time a court permitted the use of hypnotism in the courtroom. However, this case did not raise the issue of the admissibility of pretrial hypnotic statements. *See* H. ARONS, *supra* note 36, 106-08 (discussing State v. Nebb, No. 39,540 (Ohio C.P., Franklin County, May 28, 1962)).

71. *See* Note, *supra* note 40, at 475.

72. *See* Alderman & Barrette, *Hypnosis on Trial: A Practical Perspective on the Application of Forensic Hypnosis in Criminal Cases,* 18 CRIM. L. BULL. 5, 9-10 (1982).

73. *Id.* "That hypnosis has significant value for investigative purposes is widely accepted

hypnosis as testimony has given rise to disagreements. Judicial treatment of the use of hypnosis as admissible evidence has varied. Generally, states have adopted one of three approaches in deciding whether to admit hypnotically induced testimony: 1) the testimony is per se admissible because hypnosis only affects credibility, which the fact-finder determines;[74] 2) the testimony is admissible if the hypnotic session follows procedural safeguards;[75] or 3) the testimony is inadmissible per se, although matters recalled prior to hypnosis may be admitted.[76]

A. *Per Se Admissibility: Credibility, Not Admissibility*

In *Harding v. State,*[77] the first decision discussing the pretrial use of hypnosis to enhance a witness' memory,[78] the Maryland Court of Special Appeals held admissible a victim's hypnotically induced testimony.[79] In *Harding,* the victim was shot and raped and could not remember the events that occurred after the shooting.[80] A psychologist hypnotized the victim out of court in an effort to refresh the victim's memory. Under hypnosis, the victim identified the defendant as her attacker.[81] At trial, the victim testified to what she recalled under hypnosis. Because the victim testified that she remembered the events that she described under hypnosis, and the hypnotist testified that he made "no improper suggestions" during the hypnotic procedure, the court allowed the testimony.[82] According to the court, a witness' use of hypnosis to achieve present recollection was a "question of the weight of the evidence"[83] for the trier of fact to determine.[84] *Harding* became a trend-setting decision espousing the admissible per se rule of hypnotically induced testimony.[85]

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by the courts and both by proponents and opponents of evidentiary applications." Note, *supra* note 51, at 1042 (footnotes omitted).

74. *See cases cited infra* note 85.

75. *See cases cited infra* note 97.

76. *See cases cited infra* note 123.

77. 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied,* 395 U.S. 949 (1969).

78. *See* Henderson, *supra* note 51, at 306.

79. 5 Md. App. at 236, 246 A.2d at 306.

80. *Id.* at 233-34, 246 A.2d at 305.

81. *Id.* at 234-35, 246 A.2d at 304-05.

82. *Id.* at 246, 246 A.2d at 311.

83. *Id.* at 236, 246 A.2d at 306.

84. Proponents of this rule argue that traditional means of testing credibility, including cross-examining the witness and revealing to the jury the risks involved in hypnosis, enable the jury to evaluate properly the hypnotized witness' credibility. *See, e.g.,* State v. Peoples, 311 N.C. 515, 524-25, 319 S.E.2d 177, 183 (1984).

85. States following the *Harding* approach include: Florida, Clark v. State, 379 So. 2d 372, 375-76 (Fla. Dist. Ct. App. 1979) (the credibility of the witness' posthypnotic identification of the defendant was for the jury to decide); Indiana, Pearson v. State, 441 N.E.2d 468,

Harding and its progeny contend that hypnosis falls within the traditional methods of refreshing a witness' present recollection. Just as a witness may refresh his recollection by reading a memorandum, so too may he refresh his recollection by submitting to hypnosis.[86] A concern with using any form of present memory refreshment, however, is that the witness merely may agree with information in the writing, rather than actually experience a revival of memory.[87] Despite this risk, courts generally allow a witness to refresh his recollection.[88]

Although the *Harding* approach was once the "universal view of the courts,"[89] critics agree that the court's analysis was too simplistic.[90] The *Harding* court failed to address the problems attributable to the hypnotic process. For example, the court assumed that the victim's posthypnotic testimony was both accurate and reliable, but did not discuss the possibility of confabulation[91] or memory distortion.[92] Although the victim's prehypnosis account of the events conflicted with her posthypnotic recollection,[93] the court allowed the jury to weigh this discrepancy in determining the witness'

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473 (Ind. 1982) (hypnosis does not per se disqualify the witness but is a matter for the trier of fact to consider); North Dakota, State v. Brown, 337 N.W.2d 138, 151 (N.D. 1983) ("hypnosis affects credibility but not admissibility"); Oregon, State v. Jorgensen, 8 Or. App. 1, 9, 492 P.2d 312, 315 (1971) (objections to hypnosis go to the weight, not to the admissibility of evidence); Tennessee, State v. Glebock, 616 S.W.2d 897, 903-04 (Tenn. Ct. App. 1981); and Wyoming, Chapman v. State, 638 P.2d 1280, 1282 (Wyo. 1982).

Federal courts also have adhered to the *Harding* approach. Kline v. Ford Motor Co., 523 F.2d 1067, 1069 (9th Cir. 1975) (memory refreshed by hypnosis affects credibility of testimony, not witness competency); Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509 (9th Cir. 1974) (weight to be given to hypnotically induced testimony is for the jury to determine); United States v. Awkard, 597 F.2d 667, 669 (9th Cir.) (hypnosis may affect credibility of evidence, but not admissibility), *cert. denied,* 445 U.S. 885 (1979); United States v. Adams, 581 F.2d 193, 198 (9th Cir.) (hypnosis affects credibility but not admissibility), *cert. denied,* 439 U.S. 1006 (1978); United States v. Waksal, 539 F. Supp. 834, 838 (S.D. Fla. 1982), *rev'd on other grounds,* 709 F.2d 653 (11th Cir. 1983); United States v. Narciso, 446 F. Supp. 252, 284 (E.D. Mich. 1977) (the jury is to determine the credibility of a witness who testifies after undergoing hypnosis).

86. C. McCormick, McCormick on Evidence § 9 (3d ed. 1984). McCormick explains that it is accepted practice for a witness to refresh his recollection by inspecting a memorandum at trial. When the witness has revived recollection by inspecting the exhibit, he testifies from his present recollection revived, not from the exhibit. The exhibit itself becomes the testimony, however, where the witness' memory is not revived from inspecting the exhibit, and the witness displays past recollection recorded. *Id.* at 18; *see also* Fed. R. Evid. 612 (permitting a writing to refresh a witness' memory).

87. *See* Falk, *supra* note 59, at 54.

88. *See, e.g., Kline,* 523 F.2d at 1069-70; *Wyller,* 503 F.2d at 509-10.

89. Henderson, *supra* note 51, at 310.

90. *See infra* notes 97, 123, and accompanying text.

91. *See supra* note 53.

92. *See* Dilloff, *supra* note 53, at 19.

93. Before hypnosis, the victim told the police that three black males had raped her; how-

credibility.[94] As courts have become more familiar with the problems inherent in hypnosis, they have become less willing to accept *Harding*'s per se admissibility rule and instead have adopted either an approach that employs procedural safeguards[95] or a per se inadmissible approach.[96]

B. Procedural Safeguards: Conditional Admissibility

Some courts follow a middle ground between automatic admissibility and per se inadmissibility and admit hypnotically induced testimony provided that the parties used procedural safeguards in the hypnotic process.[97] These courts support the analysis the New Jersey Supreme Court set forth in *State v. Hurd.*[98] In *Hurd,* a victim's hypnotic session resulted in her identification of the defendant.[99] In deciding whether to admit her posthypnotic testimony, the court emphasized the unreliability of such testimony.[100] Although the court recognized the inherent dangers in the hypnotic process, such as suggestibility and increased confidence resulting in ineffective cross-examination, it held that a rule of per se inadmissability was "unnecessarily broad and [would] result in the exclusion of evidence that [was] as trustworthy as other eyewitness testimony."[101] To lessen these inherent dangers, the court adopted procedural requirements based on those suggested by Dr. Martin Orne, a leading expert in hypnosis.[102] Because the hypnotic session

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ever, after hypnosis, she identified only Harding as the one involved. Harding v. State, 5 Md. App. 230, 233-35, 246 A.2d 302, 304-05 (1968), *cert. denied,* 395 U.S. 949 (1969).

94. *Id.* at 236, 246 A.2d at 306.

95. *See cases cited infra* note 97.

96. *See cases cited infra* note 123.

97. States employing procedural safeguards include: Mississippi, House v. State, 445 So. 2d 815, 826-27 (Miss. 1984); New Jersey, State v. Hurd, 86 N.J. 525, 545-46, 432 A.2d 86, 96-97 (1981); New Mexico, State v. Beachum, 97 N.M. 682, 689-90, 643 P.2d 246, 253-54 (1981); Ohio, State v. Weston, 16 Ohio App. 3d 279, 287, 475 N.E.2d 805, 813 (1984); Washington State v. Long, 32 Wash. App. 732, 737, 649 P.2d 845, 847 (1982); and Wisconsin, State v. Armstrong, 110 Wis. 2d 555, 571, 329 N.W.2d 386, 394, *cert. denied,* 461 U.S. 946 (1983).

A federal civil case, Sprynczynatyk v. General Motors Corp., 771 F.2d 1112, 1122-23 (8th Cir. 1985), *cert. denied,* 475 U.S. 1046 (1986), also followed this approach. Interestingly, the Ninth Circuit, which followed *Harding,* first suggested procedural safeguards: "We think that, at a minimum, complete stenographic records of interviews of hypnotized persons who later testify should be maintained." United States v. Adams, 581 F.2d 193, 199 n.12 (9th Cir.), *cert. denied,* 439 U.S. 1006 (1978).

98. 86 N.J. 525, 432 A.2d 86 (1981).

99. *Id.* at 531, 432 A.2d at 89.

100. *Id.* at 536, 432 A.2d at 91.

101. *Id.* at 541, 432 A.2d at 94.

102. *Id.* at 545, 432 A.2d at 96. Orne proposed the following procedural safeguards in the hypnosis of a witness:

1. A psychiatrist or psychologist with special training in hypnosis should carry out the hypnosis. The hypnotist should not have any involvement in the investigation of the case.

did not follow these procedures,[103] the *Hurd* court disallowed the post-hypnotic testimony.[104]

In an effort to include reliable hypnotically-induced testimony, the *Hurd* court held that where the hypnosis was "reasonably likely to result in recall comparable in accuracy to normal human memory,"[105] the trial court should admit the testimony. This proposition has prompted debate concerning the similarity between ordinary and hypnotic recall.[106] Although the courts generally admit eyewitness testimony, this testimony often suffers reliability problems similar to those of hypnotically refreshed recall. An eyewitness may alter his memory to suit the available suspects[107] or may fabricate portions of his memory to make a "chaotic memory seem more plausi-

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2. All contact between the psychiatrist or psychologist and the subject should be videotaped. Prior to hypnosis, the witness should describe the facts as he remembers them.

3. Only the hypnotist and the subject should be present before and during the hypnotic session.

4. Prior interrogations should be tape recorded. Orne, *supra* note 42, at 335-36.

The *Hurd* court adopted a modified version of these safeguards. The court agreed that only a psychiatrist or psychologist "experienced in the use of hypnosis" should conduct the session. 86 N.J. at 545, 432 A.2d at 96. Requiring the hypnotist to be independent from the prosecutor, investigator, or defense would eliminate any possible bias on the part of the hypnotist. *Id.*, 432 A.2d at 96. Recording of information given to the hypnotist prior to the session would help determine what information the hypnotist could have communicated to the witness. *Id.* at 546, 432 A.2d at 96. Prior to hypnosis, the subject should give the hypnotist the facts as the subject remembers them. *Id.*, 432 A.2d at 96. Only the hypnotist and the subject should be present during all phases of the session and the session should be recorded. *Id.*, 432 A.2d at 97.

103. In addition to the hypnotist and subject, two police officers and a medical student attended the hypnotic session. *Hurd*, 86 N.J. at 530, 432 A.2d at 88. Moreover, one of the officers questioned the subject during the session, *id.* at 531, 432 A.2d at 89, and no one made a record of what either the hypnotist or the subject knew prior to the session. *Id.* at 548-49, 432 A.2d at 98.

104. *Id.* at 549, 432 A.2d at 98. Interestingly, in 1977, before the court decided *Hurd*, Oregon enacted procedural safeguards for the admissibility of hypnotically induced testimony. Act of July 20, 1977, ch. 540, § 1, 1977 Or. Laws 469 (codified as amended at OR. REV. STAT. § 136.675 (1985)). Before the state may use the testimony of a witness who agrees to hypnosis, the statute requires that the entire procedure be recorded. *Id.*

105. 86 N.J. at 543, 432 A.2d at 95.

106. Some commentators assert that because ordinary eyewitness recall, which generally is admissible, is plagued with problems similar to those found in hypnotic recall, the courts also should admit hypnotic recall. *See* Buckhout, *Eyewitness Testimony*, 231 SCI. AM. 23, 25 (1974); Spector & Foster, *supra* note 40, at 584; Comment, *Hypnosis—Should the Courts Snap Out of It?—A Closer Look at the Critical Issues*, 44 OHIO ST. L.J. 1053, 1068-71 (1983); Note, *supra* note 40, at 509-15; Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 976-89 (1977) [hereinafter Note, *Did Your Eyes Deceive You?*]. Others assert that problems in eyewitness testimony are heightened in the hypnotized subject and thus, the two types of recall are not analogous. *See, e.g.*, Diamond, *supra* note 44, at 342.

107. Buckhout, *supra* note 106, at 27.

ble."[108] These characteristics of ordinary recall parallel the confabulation problem of hypnotic recall.

Moreover, just as commentators have criticized hypnotically induced testimony because the subject may be unable to distinguish between matters of fact and fantasy, the ordinary eyewitness likewise "may be unaware he is distorting or reconstructing his memory."[109] Because of the manner in which the mind combines information learned about an event, a witness may have difficulty distinguishing between matters originally seen and information later discovered.[110] In addition, the court must consider the witness' motive at the time of the crime in determining whether the witness reported events that he desired to see.[111] Although psychologists agree that eyewitness testimony may be inaccurate and unreliable,[112] the trier of fact nonetheless may consider this testimony because safeguards, such as the opportunity for cross-examination, combat its dangers.[113] Commentators have suggested that the courts should apply similar standards of scrutiny to both types of recall: "[e]ither more rigorous standards for ordinary eyewitness testimony should be applied or standards for the admissibility of hypnotically refreshed testimony should be relaxed."[114]

Those opposing the use of hypnotically induced testimony find inappropriate the analogy of hypnotically induced recall to ordinary eyewitness recall. According to this view, the two types of recall are dissimilar because the hypnotized subject is much more susceptible to suggestion than is the eyewitness and the hypnotized distortions are greater.[115] The difference between eyewitness and hypnotic recall, then, is one of degree: "*some* unreliable distortions" may exist in ordinary recall, however "inevitable distortions" exist in hypnotic recall.[116]

Additionally, courts have criticized *Hurd*'s procedural safeguards as ineffective.[117] The California Supreme Court observed that the *Hurd* safeguards are incomplete, because although hypnosis produces many dangers, the safe-

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108. *Id.*

109. *Id.*

110. Note, *Did Your Eyes Deceive You?*, *supra* note 106, at 983.

111. Buckhout, *supra* note 106, at 26.

112. *See* Spector & Foster, *supra* note 40, at 584.

113. *Id.* One commentator complains that although similar problems are recognized in both forms of recall, the problems in hypnotic recall are "amplified and associated exclusively with the hypnotic process itself." Comment, *supra* note 106, at 1071.

114. Note, *supra* note 40, at 515.

115. *See, e.g.*, Diamond, *supra* note 44, at 342.

116. *Id.*

117. *See, e.g.*, People v. Shirley, 31 Cal. 3d 18, 39, 641 P.2d 775, 787, 181 Cal. Rptr. 243, 255, *cert. denied*, 458 U.S. 1125 (1982).

guards address only the heightened suggestibility risk of hypnosis.[118] The United States Court of Appeals for the Fourth Circuit observed that even if parties use all the *Hurd* safeguards, the safeguards cannot guarantee that hypnosis has not "irreparably distorted"[119] the witness' memory. Moreover, if parties employ flawed safeguards, the fact-finder nonetheless may believe that the use of safeguards insulated the hypnotic process from danger and may place undue weight on that testimony.[120] Critics further assert that because tone of voice and body language can relay suggestions, a written transcript of the session may mislead the jury, for the transcript does not display these suggestions.[121] For some critics, even a videotape recording of the hypnotic session may mislead the jury because the subject may behave differently if he knows he is being taped.[122] Those who look with disfavor on the procedural safeguard approach to the admissibility of posthypnotic testimony turn instead to the inadmissible per se view.

C. *Per Se Inadmissibility: The Frye Test*

Recent judicial reaction to the question of admissibility has favored total exclusion of posthypnotic testimony.[123] Cases rejecting *Harding* attack the witness' competency to testify and assert that before a witness may testify to

118. *Id.* at 39, 641 P.2d at 787, 181 Cal. Rptr. at 255. This court criticized the *Hurd* safeguards because they fail to protect against the subject's loss of critical judgment, the subject's inability to distinguish fact from fantasy, and the subject's increased confidence in his recollection. *Id.*, 641 P.2d at 787, 181 Cal. Rptr. at 255.

119. McQueen v. Garrison, 814 F.2d 951, 958 (4th Cir.), *cert. denied,* 108 S. Ct. 332 (1987).

120. *Id.* Because hypnosis is not within a juror's common experience, critics fear that the jury will place "absolute reliability" on hypnosis without considering its problems. *See* Spector & Foster, *supra* note 40, at 583.

121. *See* Diamond, *supra* note 44, at 339.

122. *See id.*

123. The following state cases hold that hypnotically induced testimony is inadmissible per se: Contreras v. State, 718 P.2d 129 (Alaska 1986); State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981); People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied,* 458 U.S. 1125 (1982); State v. Atwood, 39 Conn. Supp. 273, 479 A.2d 258 (1984); Bundy v. State, 471 So. 2d 9 (Fla. 1985), *cert. denied,* 107 S. Ct. 295 (1986); Strong v. State, 435 N.E.2d 969 (Ind. 1982); State v. Haislip, 237 Kan. 461, 701 P.2d 909, *cert. denied,* 474 U.S. 1022 (1985); Collins v. State, 52 Md. App. 186, 447 A.2d 1272 (1982); Polk v. State, 48 Md. App. 382, 427 A.2d 1041 (1981); Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983); People v. Gonzales, 415 Mich. 615, 329 N.W.2d 743 (1982); State v. Mack, 292 N.W.2d 764 (Minn. 1980); State v. Palmer, 210 Neb. 206, 313 N.W.2d 648 (1981), *cert. denied,* 108 S. Ct. 206 (1987); State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984).

Most of these cases do not render the hypnotized witness completely incompetent to testify, but rather limit the testimony to matters disclosed prior to hypnosis. *Cf. Shirley,* 31 Cal. 3d at 67, 641 P.2d at 805, 181 Cal. Rptr. at 273 (a previously hypnotized witness is incompetent to testify to any matters relating to the subject of the hypnotic session).

information retrieved through hypnosis, the scientific community first must accept hypnosis as a reliable means of recalling memory.

This general acceptance standard emerged from a 1923 federal case, *Frye v. United States.*[124] In *Frye,* the jury convicted the defendant of second degree murder. Prior to trial, the defendant agreed to take a systolic blood pressure deception test.[125] The defense offered the administrator of the test as an expert witness to testify about the test's results.[126] The court, however, disallowed the expert's testimony because scientists had not recognized the reliability of this test. The court held that the scientific principle about which the expert testifies "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[127] The *Frye* test balances the prejudice of admitting the testimony against the probative value of that testimony.[128] In *Frye,* the court disallowed the testimony because the probative value was low and the prejudice in favor of the defendant was high. Thus, courts that hold hypnotically induced testimony inadmissible per se assert that hypnosis is a scientific process similar to the polygraph, and because no general acceptance exists as to the reliability of hypnosis, testimony derived therefrom is inadmissible.[129]

The leading case that follows this view is *People v. Shirley.*[130] In that case, a rape victim sought to testify to posthypnotic recollections. The trial court allowed her testimony, but the California Supreme Court reversed.[131] The court rejected both the *Harding* and *Hurd* approaches,[132] and instead followed those decisions invoking *Frye.*[133] In a concurring and dissenting opin-

124. 293 F. 1013 (App. D.C. 1923).

125. *Id.* This test, which measures a person's blood pressure, is premised on the theory that more effort is required in conscious deception, and thus when a person lies, his blood pressure increases. *Id.* at 1013-14.

126. *Id.* at 1014.

127. *Id.*

128. *See* Contreras v. State, 718 P.2d 129, 135 (Alaska 1986). This balancing approach is codified in 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." *Id.*

129. The Minnesota Supreme Court was the first to apply *Frye*'s "general acceptance" test to hypnosis in State v. Mack, 292 N.W.2d 764 (Minn. 1980). There, the court commented that "[a]lthough hypnotically adduced 'memory' is not strictly analogous to the results of mechanical testing, we are persuaded that the *Frye* rule is equally applicable." *Id.* at 768.

130. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied,* 458 U.S. 1125 (1982).

131. *Id.* at 72, 641 P.2d at 808, 181 Cal. Rptr. at 276.

132. The court rejected the *Harding* approach because *Harding* failed to observe the dangers of hypnosis. *Id.* at 36, 641 P.2d at 785, 181 Cal. Rptr. at 253. Also, the court found *Hurd*'s safeguards inadequate. *Id.* at 39, 641 P.2d at 786-87, 181 Cal. Rptr. at 255.

133. *Id.* at 54, 641 P.2d at 796, 181 Cal. Rptr. at 265.

ion, Judge Kaus rejected the majority's "sweeping, 'per se' rule"[134] and urged an individual case inquiry into the circumstances surrounding the hypnotic session.[135] The dissent agreed with *Hurd* that a per se inadmissible rule would exclude potentially reliable evidence.[136] Thus, the dissent would have employed *Hurd*'s "more cautious approach"[137] and would have examined the facts of the particular case.

The *Shirley* court based its decision largely upon the opinion of one expert, Dr. Diamond.[138] According to Diamond, the pretrial hypnosis of a witness renders the potential witness "incompetent"[139] to testify. Because the reliability of hypnosis is questionable, so too is the veracity of matters recalled during or relating to a hypnotic session. This view prevents the witness from testifying to posthypnotic recall and, likewise, restricts the witness from testifying to matters recalled prior to hypnosis. Such is the effect of *Shirley*'s sweeping per se rule.[140]

As illustrated, the attitude of the courts toward the admissibility of hypnotic evidence has changed recently. For example, in *Collins v. State,*[141] the Maryland Court of Special Appeals overruled the per se admissible approach adopted in *Harding,* noting that in the years following *Harding,* a controversy arose concerning the scientific justification for admitting hypnotically induced testimony.[142] Rather than addressing hypnotically induced testimony as a matter of credibility, the court adopted the *Frye* test and held that because the scientific community did not accept the reliability of hypnosis to refresh memory, such testimony was inadmissible.[143] The Maryland Court of Special Appeals adhered to the *Shirley* court's analysis and barred witnesses from testifying to matters relating to the hypnotic session.[144] The

134. *Id.* at 74, 641 P.2d at 809, 181 Cal. Rptr. at 277 (Kaus, J., concurring and dissenting).

135. *Id.*, 641 P.2d at 809, 181 Cal. Rptr. at 277-78 (Kaus, J., concurring and dissenting).

136. *Id.* at 76, 641 P.2d at 810, 181 Cal. Rptr. at 278 (Kaus, J., concurring and dissenting).

137. *Id.* at 77, 641 P.2d at 811, 181 Cal. Rptr. at 279 (Kaus, J., concurring and dissenting).

138. *Id.* at 63 n.45, 641 P.2d at 802 n.45, 181 Cal. Rptr. at 270 n.45.

139. Diamond, *supra* note 44, at 332. Diamond asserts that the fact that the witness was hypnotized "destroy[s] the probative value of any evidence that the witness might otherwise have been able to produce." *Id.*

140. In a subsequent opinion, the *Shirley* court modified its decision and included an exception for defendants: "[W]hen it is the defendant himself—not merely a defense witness—who submits to pretrial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. In that case, the rule we adopt herein is subject to a necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf." People v. Shirley, 31 Cal. 3d 18, 67, 723 P.2d 1354, 1384, 181 Cal. Rptr. 243, 273, *cert. denied,* 458 U.S. 1125 (1982).

141. 52 Md. App. 186, 447 A.2d 1272 (1982).

142. *Id.* at 196, 447 A.2d at 1278.

143. *Id.* at 205, 447 A.2d at 1283.

144. *Id.*, 447 A.2d at 1283.

Maryland high court, however, rather than rendering the previously hypnotized witness incompetent to testify, allowed the witness to testify to matters recalled and related prior to hypnosis.[145] Only posthypnotic testimony, then, would be inadmissible per se.[146]

As more courts applied the *Frye* test to hypnosis, controversy arose as to whether courts should apply this test to the hypnotic process. The cases invoking *Frye* to exclude posthypnotic testimony suggest that hypnosis is similar to other types of scientific tests,[147] such as the polygraph test and narcoanalysis.[148] Thus, the same rationale for disallowing evidence obtained from these tests, that they lack scientific acceptance, also applies to hypnosis. However, because *Frye* is factually distinguishable from most cases seeking to introduce a witness' hypnotically induced testimony, the commentators have criticized the application of the *Frye* test to hypnosis.[149] In *Frye*, the subject of the scientific testing did not attempt to testify; rather the prosecution objected to the testimony of the expert interpreting the polygraph results.[150] The *Frye* rule, then, arguably applies to the testimony of the hypnotist rather than that of the subject, yet courts nonetheless invoke this test to hold inadmissible even the subject's testimony.[151] Proponents of this rule argue that the *Frye* test has expanded to include the subject's testimony because of the inseparability of the technique's final product, the testimony, from the scientific test, the hypnosis.[152]

The application of the *Frye* analysis to hypnosis also has drawn criticism because hypnosis is "conceptually different" from other scientific tests to which *Frye* traditionally applies.[153] The purpose of using hypnosis differs from that of other types of tests. Unlike the polygraph or truth serum tests, which measure factual truth, hypnosis is a device for "retrieving relevant testimony previously forgotten or psychologically suppressed *regardless* of

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145. State v. Collins, 296 Md. 670, 702, 464 A.2d 1028, 1044 (1983).

146. The North Carolina Supreme Court applied the *Collins* analysis in State v. Peoples, 311 N.C. 515, 531-32, 319 S.E.2d 177, 187 (1984), which overruled State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978). The court noted that at the time of *McQueen*, it was not aware of the problems inherent in hypnosis. *Peoples*, 311 N.C. at 519, 319 S.E.2d at 180. Thus, the court limited the testimony to facts related prior to hypnosis. *Id.* at 533, 319 S.E.2d at 188.

147. *See* Alderman & Barrette, *supra* note 72, at 23-24.

148. Comment, *supra* note 37, at 127-28. Narcoanalysis is the truth serum test.

149. Note, *Pretrial Hypnosis and Its Effect on Witness Competency in Criminal Trials*, 62 NEB. L. REV. 336, 351-52 (1983); Note, *supra* note 40, at 518; *see also* United States v. Valdez, 722 F.2d 1196, 1200-01 (5th Cir. 1984) (the *Frye* test applies to expert opinion and experimental data).

150. *See supra* notes 125-27 and accompanying text.

151. *See supra* note 123.

152. Ruffra, *supra* note 59, at 317.

153. *See* Note, *supra* note 149, at 352.

the factual truth or falsity of that testimony."[154] Commentators suggest that because hypnosis does not attempt to establish scientific facts or data, courts should not evaluate its reliability according to a standard that requires perfect results.[155] Instead, courts ought to leave the reliability assessment of hypnosis for the jury's determination.[156]

D. The Federal Approach

In contrast to the varied approaches among the states concerning the admissibility of hypnotically induced testimony, the federal courts initially were consistent in their treatment of such testimony and adhered to the *Harding* approach that hypnosis affects credibility, not admissibility.[157] More recently, however, the federal trend favors an individual case inquiry rather than a per se rule of either admissibility or inadmissibility.[158] This individual inquiry requires a balancing of the possible unfair prejudice to the defendant if the testimony is admitted, against the testimony's probative value if it is exluded.[159] For the federal courts, a per se rule excluding hypnotically induced testimony would destroy the investigatory benefits that "responsible" hypnosis may produce.[160] In addition, the federal courts recognize the need for a "factual analysis on a case-by-case basis."[161] Thus, while the federal courts reject the *Hurd* guidelines as a "litmus test for determining the reliability of pre-trial hypnosis,"[162] they adopt a "middle ground"[163] analysis, namely admission of hypnotically induced testimony in a particular case, in an effort to admit all reliable evidence.[164]

E. Posthypnotic Testimony of a Defendant

In the majority of cases addressing the admissibility of hypnotically in-

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154. Spector & Foster, *supra* note 40, at 584.

155. *See* Note, *supra* note 149, at 352.

156. Falk, *supra* note 59, at 51.

157. *See supra* note 85 and accompanying text.

158. *See* McQueen v. Garrison, 814 F.2d 951 (4th Cir.), *cert. denied,* 108 S. Ct. 332 (1987); United States v. Kimberlin, 805 F.2d 210 (7th Cir.), *cert. denied,* 107 S. Ct. 3270 (1987); Harker v. Maryland, 800 F.2d 437 (4th Cir. 1986); Wicker v. McCotter, 783 F.2d 487 (5th Cir.), *cert. denied,* 106 S. Ct. 3310 (1986); United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984).

159. *See Valdez,* 722 F.2d at 1201; *see also supra* note 128 and accompanying text (discussing the balancing approach of FED. R. EVID. 403).

160. *See Harker,* 800 F.2d at 441.

161. *McQueen,* 814 F.2d at 958.

162. *Id.*

163. *Id.* at 956.

164. This federal trend is distinguishable from the trend among the states to disallow such testimony as per se inadmissible. *See, e.g.,* People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied,* 458 U.S. 1125 (1982).

duced testimony, the testimony in question was that of either a witness to or a victim of the crime, not that of the accused.[165] In the cases where the defendant had undergone hypnosis, however, the questions before the court included whether the defendant should have undergone hypnosis[166] or whether the defendant could have testified while under hypnosis,[167] rather than whether the defendant's posthypnotic testimony was admissible.

In *Cornell v. Superior Court,*[168] the California Supreme Court allowed the defense to use hypnosis in the preparation of its case,[169] however the court did not discuss the question of the admissibility of testimony derived from this hypnosis. In *Greenfield v. Robinson,*[170] the United States District Court for the Western District of Virginia found no error in the trial court's disallowing the defendant's request to testify while under hypnosis.[171] Again, the question was not one of admissibility, and the court followed the general rule of disallowing in-court hypnosis.[172]

Moreover, in *State v. Atwood,*[173] the Connecticut Superior Court denied the defendant's request to admit posthypnotic testimony should the defendant eventually undergo hypnosis.[174] The court denied the motion because hypnosis did not pass *Frye*'s test of general acceptance in the scientific community.[175]

Both state and federal courts have given widespread attention to whether a witness or a victim may testify to posthypnotic recollections. These same courts, however, have given little consideration to the admissibility of a defendant's posthypnotic testimony. With *Rock v. Arkansas*[176] the Supreme Court distinguished between these two lines of cases and required a different analysis when a state evidentiary rule limits a defendant's testimony.

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165. *See* cases cited *supra* notes 85, 97, 123.

166. *See* Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447 (1959).

167. *See* Greenfield v. Robinson, 413 F. Supp. 1113 (W.D. Va. 1976).

168. 52 Cal. 2d 99, 338 P.2d 447 (1959).

169. *Id.* at 104, 338 P.2d at 449.

170. 413 F. Supp. 1113 (W.D. Va. 1976).

171. *Id.* at 1117.

172. Because there was no eyewitness and little evidence suggesting that the defendant did not commit the crime, the court prevented the defendant from testifying while under hypnosis. *Id.* at 1120; *see also supra* note 70. However, in an unreported case a defendant under hyponosis was allowed to testify. H. ARONS, *supra* note 36, at 106-08 (discussing State v. Nebb, No. 39,540 (Ohio C.P., Franklin County, May 28, 1962)).

173. 39 Conn. Supp. 273, 479 A.2d 258 (1984).

174. *Id.* at 283, 479 A.2d at 265.

175. *Id.* at 284, 479 A.2d at 264.

176. 107 S. Ct. 2704 (1987).

III. *Rock v. Arkansas:* An Individual Inquiry

The much-debated issue of the admissibility of hypnotically induced testimony finally reached the United States Supreme Court in *Rock v. Arkansas.*[177] In this case, the Court retreated from the stringent majority view of per se inadmissibility and instead announced a rule of individual inquiry into the circumstances of each case. In reaching its conclusion, the Court performed a balancing test to determine whether the purpose of a state's evidentiary rule justifies the limit the rule places upon the defendant's right to present his defense.[178] Through this decision, the Court broadened the use of hypnosis in the courtroom, thereby denouncing the inadmissible per se rule as an arbitrary restriction on relevant and reliable evidence.

In its analysis of a defendant's fundamental right to present a defense,[179] the Court pointed to three sections of the federal Constitution that support this right: the fourteenth amendment, the sixth amendment, and the fifth amendment. The Court reasoned that a mandate of due process includes "a right to be heard and to offer testimony."[180] Further, the Court relied on the defendant's sixth amendment right to call witnesses in the defendant's favor, in this case the defendant herself,[181] to determine the defendant's right to testify.[182] Lastly, the Court deemed the right to testify a "necessary corollary" to the fifth amendment's guarantee against self-incrimination.[183] Because the defendant may choose to remain silent by invoking the fifth amendment, the Court asserted, so too may he invoke the fifth amendment

177. *Id.*

178. *Id.* at 2711-12.

179. *Id.* at 2708-10. The Court discussed the transformation from the common law rule of defendant incompetency to the statutory rule of defendant competency. At common law, criminal defendants were deemed incompetent to testify. The courts were concerned that because defendants were interested in the outcome of the trial, the defendants' motivation was suspect. *Id.* at 2708-09. Yet, because allowing the defendant to testify aids in the "detection of guilt" and the "protection of innocence," this rule of incompetency gave way to a rule of defendant competency. *Id. See generally* Ferguson v. Georgia, 365 U.S. 570, 573-82 (1961) (discussing the history of the transformation from the common law rule to the rule of defendant competency). Moreover, the Court noted that Arkansas' Constitution guarantees an accused the right to testify, ARK. CONST. art. II, § 10, and that rule 601 of the Arkansas Rules of Evidence, ARK. STAT. ANN. § 28-1001 (1979), provides a general rule of competency: "Every person is competent to be a witness except as otherwise provided in these rules." *Id.; Rock,* 107 S. Ct. at 2708 n.6.

180. *Rock,* 107 S. Ct. at 2709.

181. *Id.* The pertinent part of the sixth amendment states that an accused shall "have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

182. *Rock,* 107 S. Ct. at 2709. The Court asserted that "the most important witness for the defense in many criminal cases is the defendant himself." *Id.*

183. *Id.* at 2710.

as a right to speak.[184] Thus, because the Constitution supports the defendant's right to testify, the Court closely scrutinized Arkansas' ban on the defendant's posthypnotic testimony.

Although the Court recognized a defendant's right to present testimony, it also recognized that states may impose certain limits on that right through their own rules of evidence and procedure.[185] These rules, however, may not "arbitrarily exclude" testimony.[186] In evaluating Arkansas' rule of evidence,[187] the Court relied on its reasoning in *Chambers v. Mississippi.*[188] There, the Court struck down a state's hearsay rule because it conflicted with the defendant's right to "present witnesses in his own defense."[189] When a state's evidentiary rule conflicts with a defendant's right to present witnesses, the *Chambers* Court held that due process requires that the rule may "not be applied mechanistically to defeat the ends of justice."[190] Likewise in *Rock,* rather than an automatic application of Arkansas' inadmissible per se rule, the Court suggested a balancing approach to determine the legitimacy of the interest embodied in the state rule. According to the Court, the state "must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify."[191] Although the Court recognized the state's "legitimate interest in barring unreliable evidence,"[192] it nonetheless rendered Arkansas' inadmissible per se rule an "arbitrary restriction on the right to testify"[193] because hypnotically induced testimony is not necessarily unreliable.[194]

The Court criticized the Arkansas Supreme Court's reliance on *Shirley* to justify an inadmissible per se rule, for in so doing, the Arkansas court failed to perform the proper constitutional analysis.[195] Unlike the Arkansas Supreme Court ruling, which limited the testimony of a criminal defendant, the rule announced in *Shirley* limited the testimony of a witness.[196] In fact,

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184. *Id.*

185. *Id.* at 2711.

186. *Id.*

187. Arkansas had a rule of per se inadmissibility of posthypnotic testimony. *See supra* note 20 and accompanying text.

188. 410 U.S. 284 (1973).

189. *Rock,* 107 S. Ct. at 2711 (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). In *Chambers,* the state's hearsay rule prevented Chambers from introducing as evidence the confessions of the real murderer. *Id.*

190. *Id.* (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

191. *Id.*

192. *Id.* at 2714.

193. *Id.*

194. *See infra* notes 208-14 and accompanying text.

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

196. People v. Shirley, 31 Cal. 3d 18, 23, 641 P.2d 775, 804, 181 Cal. Rptr. 243, 245, *cert. denied,* 458 U.S. 1125 (1982).

the *Shirley* court necessarily excepted defendants from this inadmissible per se rule and recognized that such a rule would inhibit the defendant's right to testify.[197] The Arkansas Supreme Court conceded that the defendant's right to testify is "fundamental,"[198] however the court asserted that because "standard rules of evidence"[199] restricted the defendant's testimony, such a limit was permissible.[200] The state court, like the Supreme Court, performed a balancing test, yet the Supreme Court implied that the state court weighed the wrong factors. The state court weighed the risk of unreliability against the probative value of the testimony.[201] The Supreme Court's balancing test, on the other hand, weighed the danger of unreliability against the limit on the defendant's right to testify, rather than the probative value of that testimony.[202] Thus, the Supreme Court found the state court's analysis faulty because the state court "simply followed"[203] the inadmissible per se cases without fully examining the ramifications of limiting the defendant's right to testify.

In addition, the Court invalidated Arkansas' per se rule because the rule renders hypnotically induced testimony inherently unreliable without considering whether such testimony may be reliable in an individual case.[204] The Court recognized the proferred dangers of hypnosis, such as suggestibility, production of inaccurate memories, confabulation, and an increased confidence in the subject's responses.[205] In fact, the Court justified the exclusion of such testimony where a party proved that, in a given case, the testimony was so unreliable as to outweigh its probative value.[206] Thus, the Court rejected *Harding*'s automatically admissible approach. According to the Court, because scientific understanding of hypnosis and procedures to control the effects of hypnosis still are developing,[207] a per se admissible rule may result in the admission of unreliable evidence, a risk that the Court was unwilling to take.

Just as the Court refused to follow an admissible per se rule for fear that the trial court would admit unreliable evidence, so too did the Court hesitate in accepting an inadmissible per se rule for fear that the trial court would

197. *See supra* note 140 and accompanying text.
198. Rock v. State, 288 Ark. 566, 578, 708 S.W.2d 78, 84 (1986).
199. *Id.* at 579, 708 S.W.2d at 86.
200. *Id.* at 580, 708 S.W.2d at 86.
201. *Id.* at 573, 708 S.W.2d at 81.
202. *See* Rock v. Arkansas, 107 S. Ct. 2704, 2711 (1987).
203. *Id.* at 2712.
204. *Id.* at 2711-12.
205. *Id.* at 2713.
206. *Id.* at 2714.
207. *Id.*

exclude reliable evidence. The Court rejected the inadmissible per se rule because the Court noted that many factors may reduce the risks of hypnosis. The Court pointed to a modified version of the *Hurd* safeguards as one way to reduce the risk of unreliability.[208] Unlike the *Shirley* court's requirement of absolute scientific accuracy of the hypnotic process, the *Rock* Court recognized that these guidelines do not guarantee accuracy of the hypnotically induced testimony,[209] but rather "provide a means of controlling overt suggestions,"[210] and by controlling suggestion, the accuracy of the hypnotically induced testimony increases. Thus, because the inadmissible per se rule demands absolute accuracy of the hypnotic process, the Supreme Court rejected the cases supporting this rule.

Moreover, unlike the supporters of the inadmissible per se rule, the Court found merit in the "traditional means"[211] available to test the veracity of testimony and therefore to reduce the risk of unreliability of posthypnotic testimony. Even if the defendant experienced increased confidence as a result of hypnosis, the Court rejected the contention that hypnosis bars effective cross-examination.[212] Just as the prosecution may detect testimonial inconsistencies in a nonhypnotized witness, so too may the prosecution test for inaccuracies in a defendant who agreed to hypnosis. The Court also found that the use of corroborating evidence was an additional means of proving the accuracy of hypnotically induced testimony.[213] Lastly, the Court suggested that expert testimony and jury instructions could be used to apprise the jury of the risks involved in the hypnotic process.[214] Because the parties and counsel may reduce the risks and increase the reliability of hypnotically induced testimony through these techniques, the Court rejected the inadmissible per se rule.

To determine the accuracy of the petitioner's hypnotic recall, the Court

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208. *Id.* The Court asserted that the hypnotic session ought to follow these procedural guidelines to reduce suggestion:

1. A psychologist or psychiatrist with special training in the use of hypnosis and independent from the investigation should conduct the hypnosis.
2. The psychologist or psychiatrist should conduct the hypnosis in a "neutral setting" with only the hypnotist and subject present.
3. The parties should tape or video record all interviews before, during, and after the hypnosis to determine whether the hypnotist asked any leading questions. *Id.*

209. The Court acknowledged that these safeguards cannot guarantee accuracy because the procedures fail to control the subject's motivations and tendency to confabulate. *Id.*

210. *Id.*

211. *Id.* The Court considered cross-examination, corroborating evidence, expert testimony, and jury instructions as the traditional methods of assessing testimony. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

looked to the circumstances of the case. Through hypnosis, Rock recalled that she did not have her finger on the trigger and that the gun discharged when her husband hit her arm.[215] The Court noted that the gun expert's testimony as to the gun's defective condition corroborated what the petitioner recalled under hypnosis.[216] Moreover, the hypnotic process incorporated safeguards,[217] which further added to the reliability of the recall. Under these conditions, the majority held that the Arkansas court should not have limited the petitioner's testimony. The state's interest in reliable testimony did not justify the per se inadmissible rule, because hypnotically induced testimony is not necessarily unreliable. In adhering to a case-by-case determination, the Supreme Court adopted both the dissenting opinion in *Shirley*[218] and the approach more recently seen in the lower federal courts.[219]

All members of the Court did not agree with the majority's constitutional analysis. The dissent recognized that because due process is flexible, countervailing considerations may outweigh an individual's right to present evidence without depriving the individual of due process.[220] The dissent saw Arkansas' rule as a reasonable restriction on an individual's right to present evidence.[221] In concluding that this limit did not violate petitioner's due process rights, the dissent balanced the petitioner's interest in presenting a defense against the state's interest in reliable evidence.[222] Because experts have not fully developed procedures to control the effects of hypnosis,[223] the state's interest outweighed the petitioner's and therefore, the dissent would have limited Rock's testimony.

215. *Id.* at 2707.

216. *Id.* The Court asserted that had the trial court allowed Rock to testify to her recollection that her finger was not on the trigger and that the gun fired when her husband hit her, the gun expert's testimony would have taken on greater significance. *Id.* at 2712.

217. *Id.* at 2706-07. A licensed neuropsychologist hypnotized the petitioner twice and recorded both sessions. *Id.*

218. *See supra* notes 134-37 and accompanying text.

219. *See supra* note 158 and accompanying text. The Court also noted that the state has "the power to enact guidelines for determining how to evaluate posthypnotic testimony." *Rock,* 107 S. Ct. at 2714. Thus, the Court encouraged the state legislatures to follow Oregon's lead and establish statutory procedural safeguards. *Id.; see also supra* note 104.

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

221. *Id.* at 2715-16 (Rehnquist, C.J., dissenting).

222. *Id.* at 2716 (Rehnquist, C.J., dissenting). In support of its proposition, the dissent cited Goldberg v. Kelly, 397 U.S. 254 (1970), where the Court balanced whether the private interest "in avoiding [loss of welfare payments] outweighed the governmental interest in summary adjudication." *Id.* at 263. The *Rock* dissent suggested that the individual interest in *Goldberg v. Kelly,* loss of life, was greater than that in *Rock v. Arkansas,* loss of liberty, and therefore Rock was not entitled to as much due process as was the individual in *Goldberg v. Kelly. Rock,* 107 S. Ct. at 2716 (Rehnquist, C.J., dissenting).

223. *Rock,* 107 S. Ct. at 2715 (Rehnquist, C.J., dissenting).

The dissent further criticized the majority's view that admitting the defendant's posthypnotic testimony aids in the advancement of truth,[224] and suggested that "advancement of the truth-seeking function of Rock's trial was the sole motivation behind limiting her testimony."[225] For the dissent, hypnosis produces "inherently unreliable"[226] evidence because the subject is prone to confabulation and suggestion, and therefore admitting such testimony would not result in reliable evidence.[227] Moreover, because hypnosis produces heightened confidence, the dissent disagreed with the majority's view that cross-examination can effectively test the accuracy of the testimony.[228] The dissent did not engage in a case-by-case analysis and did not look at the circumstances of the case. Rather, the dissent determined that because hypnosis produced unreliable evidence, courts should not admit any posthypnotic testimony. Thus, the dissent adopted the *Frye* view and asserted that until the scientific and legal worlds arrive at a "more general consensus on the use of hypnosis,"[229] the majority's individual inquiry analysis would remain untenable.

IV. EFFECT OF *ROCK V. ARKANSAS* ON FUTURE CASES

A. Rock*'s Effect on Criminal Defendants*

Rock's individual inquiry approach admits a criminal defendant's posthypnotic testimony where the parties show particular signs of reliability through corroborating evidence and procedures controlling suggestion.[230] Because *Rock* broadens the use of hypnosis in criminal cases, courts no longer may deny an accused the opportunity to undergo hypnosis and must look at the circumstances of each case to determine the reliability and, therefore, admissibility of the evidence the hypnosis produces.

Applying *Rock*'s rule to *Cornell v. Superior Court,*[231] where the California Superior Court allowed the defense to use hypnosis in preparing its case[232] but did not decide the issue of admissibility, *Rock* modifies *Cornell.* In *Cornell,* the court allowed the defense attorney to question the defendant with the help of a hypnotist.[233] One of *Rock*'s suggested procedural protections is

224. *Id.* (Rehnquist, C.J., dissenting).
225. *Id.* (Rehnquist, C.J., dissenting).
226. *Id.* (Rehnquist, C.J., dissenting).
227. *Id.* (Rehnquist, C.J., dissenting).
228. *Id.* (Rehnquist, C.J., dissenting).
229. *Id.* at 2716 (Rehnquist, C.J., dissenting).
230. *Id.* at 2714.
231. 52 Cal. 2d 99, 338 P.2d 447 (1959).
232. *See supra* text accompanying note 169.
233. 52 Cal. 2d at 104, 338 P.2d at 450.

that only the hypnotist should question the subject,[234] and therefore the parties failed to meet one of the preferred safeguards. In addition, there was evidence of hypnotist bias,[235] another factor adding to the unreliability of the hypnosis in *Cornell.* Despite these flaws in the hypnotic procedure, however, the court should examine whether corroborating evidence existed and whether the prosecution cross-examined the defendant, because procedural safeguards are only part of the *Rock* formula. Thus, if other evidence of reliability exists to overcome these flawed procedural safeguards, then the court must allow not only the hypnosis, it also must allow any evidence derived therefrom.

In expanding the use of hypnotically induced testimony in criminal cases, *Rock* also limited the holding of *State v. Atwood.*[236] In *Atwood,* the Connecticut Superior Court followed the *Frye* test in denying the defendant's motion to admit his hypnotically induced testimony if he agreed to hypnosis.[237] Because *Rock* demands an individual inquiry to determine if signs of reliability in the hypnotic process exist, courts no longer can apply *Frye*'s blanket exclusionary rule to a defendant's posthypnotic testimony. Although *Rock* does not overrule *Frye, Rock* does suggest that *Frye* does not apply to hypnosis[238] and therefore, courts no longer can rely on *Frye.*

B. Rock*'s Effect on Civil Defendants and Victims: How Far Does* Rock *Extend?*

Although *Rock* has broadened the use of hypnosis, the decision has led to the question of just how far *Rock*'s rule extends.[239] For example, would the Court have reached the same conclusion if this were a civil case? Because the Court based its decision on the criminal defendant's constitutional right to testify, the individual inquiry approach probably would not extend to a civil case.[240] Due process extends to civil parties where the state may deprive an individual of property.[241] However, the deprivation of property probably is not as strong an interest as the deprivation of life or liberty and, therefore, the state's interest in reliable evidence probably will prevail in civil cases.

234. 107 S. Ct. at 2714.

235. In *Cornell,* the defense attorney had seen the hypnotist work with other subjects and specifically requested him to conduct his client's hypnosis. 52 Cal. 2d at 101, 338 P.2d at 448.

236. 39 Conn. Supp. 273, 479 A.2d 258 (1984).

237. *See supra* text accompanying notes 173-75.

238. 107 S. Ct. at 2714.

239. *See* Stewart, *Hypnotized Witnesses, Loaded Jurors,* 73 A.B.A. J. 54, 54 (1987).

240. *See id.* at 56. Stewart suggests that because the Court based its decision in part on the fifth and sixth amendments, this decision applies only in criminal cases.

241. *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

Another question that *Rock* provokes is whether its rule should extend to the testimony of victims or witnesses. Had Arkansas' rule limited the testimony of a victim or witness, the Court probably would have allowed the limitation. The victim's interest in apprehending the assailant probably is not as significant as the private interest of the accused, that is, the possible deprivation of his life or liberty. If *Rock*'s policy does extend to victims or witnesses, however, courts must engage in *Rock*'s analysis to determine whether the hypnotically induced testimony is admissible.

Applying *Rock*'s rule to the three trend-setting pre-*Rock* cases, *Harding,*[242] *Hurd,*[243] and *Shirley,*[244] *Rock* affirms the results, but applies a different analysis. In *Harding,* the parties used procedural safeguards, such as having a psychologist conduct the hypnosis,[245] however there was no evidence that the parties recorded the session. Another sign of reliability was that evidence corroborated the victim's posthypnotic testimony.[246] Also, because she took the stand, the defense had an opportunity to cross-examine the victim. Lastly, the trial judge gave jury instructions warning the jury not to give the posthypnotic testimony any more weight than any of the other evidence.[247] Thus, applying the *Rock* analysis to the *Harding* facts results in a concurrence: the same result, admitting the testimony, but for a different reason. Unlike the *Harding* rule, the holding in *Rock* does not let the jury weigh the posthypnotic testimony unless signs of reliability in the hypnosis exist. Because signs of reliability exist under the *Harding* facts, the Court would admit this testimony if *Rock*'s rule extends to victims.

Likewise, an application of *Rock* to the facts of *Hurd* results in the same outcome that the *Hurd* court rendered. In *Hurd,* a psychologist conducted the hypnosis, but two police officers and a medical student also were present, and one of the officers asked the victim questions during the hypnotic session,[248] contrary to *Rock*'s procedural requirements. In addition, the reliability of the victim's posthypnotic testimony was weakened because there was no other corroborating evidence.[249] Thus, while the *Hurd* court disallowed the testimony because of lack of procedural safeguards, the *Rock* rule

242. 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied,* 395 U.S. 949 (1969).

243. 86 N.J. 525, 432 A.2d 86 (1981).

244. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied,* 458 U.S. 1125 (1982).

245. 5 Md. App. at 235-36, 246 A.2d at 306.

246. *Id.* at 247, 246 A.2d at 312. During her posthypnotic testimony, the victim revealed that the defendant had raped her and upon examination, doctors found sperm in her vagina. *Id.*, 246 A.2d at 312.

247. *Id.* at 244, 246 A.2d at 310.

248. 86 N.J. 525, 530-31, 432 A.2d 86, 88 (1981).

249. 86 N.J. at 549, 432 A.2d at 98.

looks for other signs of reliability. Because there are no signs of reliability, the *Rock* rule also would disallow this testimony.

Lastly, applying *Rock* to the *Shirley* facts results in the same end, but because *Shirley* invoked *Frye* to restrict the testimony[250] the *Rock* rule again requires a different analysis. The procedural safeguards the parties used in *Shirley* were flawed because the parties conducted the session in the presence of people beside the hypnotist and subject.[251] As in *Hurd,* the posthypnotic testimony was the only evidence that incriminated the defendant,[252] and the lack of corroborating evidence weakened the reliability of the victim's posthypnotic testimony. Under these facts, because the parties did not show the reliability of hypnosis, the *Rock* Court also would have disallowed this testimony.

As this analysis illustrates, *Rock*'s liberal rule probably does not extend to victims or witnesses. Unless signs of reliability exist, such as those similar to the *Harding* facts, victims and witnesses probably will be prevented from testifying to their posthypnotic recollections. The *Rock* policy affording due process to individuals who have a great private interest at stake probably will not extend to victims or witnesses unless their interest is as grave as the deprivation of life or liberty, which faces the criminally accused. Thus, *Rock* indeed is a significant decision for criminal defendants.[253]

C. *Possible Problems in Applying* Rock's *Rule*

Whether the *Rock* rule will lead to uniform results is a question that remains unanswered. Unlike the objective standard of the *Frye* general acceptance test, *Rock*'s individual inquiry test is a subjective standard. Under *Frye,* if the scientific community generally accepts the scientific test, the results of that test are admissible; if the scientific community does not accept the test, the results are inadmissible.[254] Under the *Rock* analysis, however, the test is a subjective examination of the surrounding circumstances in an

250. *See supra* text accompanying notes 130-33.

251. 31 Cal. 3d 18, 29, 641 P.2d 775, 780, 181 Cal. Rptr. 243, 248, *cert. denied,* 458 U.S. 1125 (1982).

252. *Id.* at 70, 641 P.2d at 806, 181 Cal. Rptr. at 275.

253. The Court expressly denied any opinion on whether the same analysis applies to any matter other than a criminal defendant's posthypnotic testimony. "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 v. Arkansas, 107 S. Ct. 2704, 2712 n.15 (1987).

According to a study of the Supreme Court's decisions in the 1986-1987 Term, *Rock* was one of three criminal cases representing a "significant victor[y]" for criminal defendants. Whitebread & Heilman, *The Counterrevolution in Criminal Procedure,* 9 NAT'L L.J., Aug. 17, 1987, at S-7.

254. Frye v. United States, 293 F. 1013, 1014 (App. D.C. 1923).

individual case. Such an analysis may lead to a lack of uniformity in decisions because no specific test exists to assess the reliability of such testimony.

Subsequent cases may combat the lack of uniformity by adhering to the specific signs of reliability the *Rock* Court examined: procedural safeguards, cross-examination, and corroborating evidence.[255] The *Rock* Court, however, did not announce a litmus test for determining reliability of hypnosis, and therefore intended some fluidity in examining the defendant's posthypnotic testimony. If *Rock* does result in a lack of uniformity, the ends, the admissibility of the testimony, justify the means, the hypnotic procedure, as long as the parties can point to some signs of reliability.

V. CONCLUSION

The question of whether to admit hypnotically induced testimony has led to inconsistency in the state courts. The early cases held that hypnosis went to credibility, not admissibility, and established a rule of admissibility per se. As courts recognized the dangers inherent in the hypnotic process and questioned its reliability, many allowed the admission of posthypnotic testimony only if parties employed procedural safeguards. Still other courts held that because hypnosis generally was not accepted as reliable in the scientific community, posthypnotic testimony was inadmissible per se. The lower federal courts adopted yet another approach, that of a case-by-case examination into the circumstances surrounding the hypnosis.

In *Rock v. Arkansas*, the Supreme Court expanded the use of criminal defendants' posthypnotic testimony and conducted an individual inquiry to determine if, in a given case, testimony resulting from hypnosis might be reliable. In its analysis, the Court weighed the state's interest in barring untrustworthy evidence against the defendant's right to present his defense, and on balance, concluded that the defendant's constitutional right to testify outweighed the state's interest where hypnosis is proven reliable in an individual case. The *Rock* approach rejected both *Harding* and *Shirley*, and modified *Hurd*'s safeguards. Although this individual inquiry analysis is a subjective one that may lead to a variety of outcomes, it nonetheless is the appropriate approach in light of the private interest the defendant risks; the deprivation of life or liberty without the opportunity to present testimony in his defense.

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255. 107 S. Ct. at 2714.