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Criminal Procedure: The Admissibility of a Criminal Defendant's Hypnotically Refreshed Testimony - *Rock v. Arkansas*

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CRIMINAL PROCEDURE—THE ADMISSIBILITY OF A CRIMINAL DEFENDANT'S HYPNOTICALLY REFRESHED TESTIMONY—*Rock v. Arkansas*

INTRODUCTION

The mention of hypnosis often evokes thoughts of a wizard-like hypnotist wielding evil powers over his subject. Soothsayers, magicians, witches, and priests utilized hypnosis thousands of years ago.¹ In 1958, the American medical community accepted hypnosis as a valid therapeutic technique for the treatment of various illnesses and addictions.² Based upon the medical community's increased use and acceptance of hypnosis, law enforcement agencies turn to hypnosis as a method of refreshing the recollection of a witness or victim who is experiencing difficulty in recalling the events or details surrounding a particular crime.³ However, certain risks associated with hypnosis may affect the reliability of a witness's testimony when that witness has been previously hypnotized for the purpose of enhancing memory.⁴

Because of inherent risks associated with hypnosis, the judicial system has wrestled for the past twenty years with the issue of whether a witness should be allowed to testify at trial after being hypnotized to refresh recollection. Courts have adopted one of three approaches when faced with the issue of hypnotically refreshed testimony: the *per se* admissible approach, the procedural safeguards approach, or the *per se* inadmissible approach. Courts following the *per se* admissible approach hold that hypnosis only affects credibility of the testimony, not admissibility, and permit a previously hypnotized witness to testify at trial.⁵ This approach

1. Ladd, *Legal Aspects of Hypnotism*, 11 YALE L.J. 173, 174 (1902).

2. *Council on Scientific Affairs: Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 J.A.M.A. 1918 (1985).

3. Sies, *Judicial Approaches to the Question of Admissibility of Hypnotically Refreshed Testimony: A History and Analysis*, 35 DE PAUL L. REV. 77, 83 (1985).

4. Ruffra, *Hypnotically Induced Testimony: Should It Be Admitted?*, 19 CRIM. L. BULL. 293, 295-97 (1983).

5. See, e.g., *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974) (plaintiff sued helicopter manufacturer and underwent hypnosis to refresh his memory, which had been impaired by the crash); *Connally v. Farmer*, 484 F.2d 456 (5th Cir. 1973) (the first reported civil case in which a court admitted a plain-

views the challenged testimony as a present recollection of past events refreshed by hypnosis.⁶

Courts which adhere to the procedural safeguards approach recognize problems associated with hypnosis that may affect the reliability of a witness's later testimony.⁷ Because these courts view procedural safeguards as reducing dangers inherent in the hypnotic process, they allow a previously hypnotized witness to testify if certain procedures were followed during the hypnotic process.⁸ Courts advocating the procedural safeguards approach believe that rendering hypnotically refreshed testimony inadmissible may result in the loss of important, reliable evidence.⁹

Finally, courts adopting the *per se* inadmissible approach hold that hypnotically refreshed testimony is inadmissible.¹⁰ These courts preclude the admission of hypnotically induced testimony because of problems associated with hypnosis.¹¹

In *Rock v. Arkansas*,¹² the United States Supreme Court answered the question of whether a court should admit a criminal defendant's hypnotically refreshed testimony. The Court held that

tiff's hypnotically refreshed testimony); *People v. Smrekar*, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979) (murder case in which the principal witness stated prior to hypnosis that there was only a "50-50 chance" that the defendant was the person she had seen commit the murders); *State v. Brom*, 8 Or. App. 598, 494 P.2d 434 (1972) (where the court admitted a witness's testimony where that witness's amnesia was cured by hypnosis and sodium amytal).

6. See *Harding v. Maryland*, 5 Md. App. 230, 246 A.2d 302 (1968).

7. See *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981).

8. Dr. Martin Orne originally proposed a set of procedural safeguards to reduce risks associated with hypnosis that may affect the reliability of subsequent testimony. See Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L. J. CLINICAL AND EXPERIMENTAL HYPNOSIS 311, 335-36 (1979).

9. *State v. Peoples*, 311 N.C. 515, 527, 319 S.E.2d 177, 184 (1984).

10. See *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981).

11. Several characteristics related to hypnosis may cause subsequent testimony to be unreliable. First, hypnosis is characterized as a state of heightened suggestibility. Because of subtle cues the hypnotist gives to the subject, the subject may recall as his own recollections the hypnotist's suggestions. A subject who realizes the importance of solving a crime may attempt to please the hypnotist with answers the subject knows will be met with approval. Because of this desire to please, the subject may "confabulate," or fill in gaps in his memory. In addition, a subject may intentionally lie during hypnosis or feign a hypnotic trance. The extent of the accuracy of hypnotically refreshed memories is difficult to ascertain because of "post-hypnotic source amnesia," or the subject's inability to differentiate between pre- and post-hypnotic memories. Ruffra, *supra* note 4, at 295-97.

12. 107 S. Ct. 2704 (1987).

Arkansas's evidentiary rule, which precluded the admission of hypnotically refreshed testimony, violated a criminal defendant's constitutional right to testify on her own behalf at trial.¹³ The Court stated that the procedural safeguards approach was the proper approach for lower courts to employ when a criminal defendant testifies after undergoing hypnosis to refresh recollection.¹⁴

This Note discusses the nature and history of hypnosis and supports the *Rock* Court's holding as the correct approach. The procedural safeguards approach decreases risks associated with hypnosis that may adversely affect the reliability of a defendant's subsequent testimony and protects a defendant's constitutional right to testify in her own behalf. This approach allows a court to admit hypnotically enhanced testimony where there are indices that the testimony is reliable and advances our judicial system's search for the truth.

THE CASE

On July 2, 1983, Vickie Lorene Rock was charged with manslaughter in the death of her husband, Frank Rock.¹⁵ The couple had been involved in a disagreement over Mr. Rock's desire to move to a trailer outside of town.¹⁶ When police officers arrived at the home, they discovered Mr. Rock lying on the floor with a bullet wound in his chest. Mrs. Rock appeared extremely agitated and begged police officers to save her husband's life. She related to po-

13. *Id.* at 2714-15.

14. *Id.* at 2714. The *Rock* Court stated:

A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case. Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections. The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified. But it has not 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.

Id.

15. *Id.* at 2706.

16. *Id.* During the evening of July 2, 1983, Mr. Rock prevented his wife from eating some pizza and leaving their apartment, and a fight ensued. *Id.*

lice officers conflicting versions of how the shooting occurred.¹⁷

Because Mrs. Rock could not recall the exact details of the shooting, her attorney suggested that she undergo hypnosis to refresh her recollection.¹⁸ Dr. Betty Back, a licensed neuropsychologist with training in the field of hypnosis, hypnotized Mrs. Rock on two occasions.¹⁹ Dr. Back interviewed Mrs. Rock for one hour prior to the first hypnotic session and took notes on her general history and recollection of the shooting. Dr. Back also recorded both hypnotic sessions on tape.²⁰

During the hypnotic sessions, Mrs. Rock divulged no new or additional information from that which she had given the police; however, after being hypnotized, Mrs. Rock recalled that, at the time of the shooting, she held her thumb on the hammer of the gun but did not hold her finger on the trigger.²¹ She related that the gun discharged when her husband grabbed her arm.²² Based on this information, Mrs. Rock's attorney engaged a gun expert to examine the gun. After examining the gun, the expert ascertained that the gun was defective and prone to fire if hit or dropped, without the trigger being pulled.²³

The prosecutor filed a motion to exclude Mrs. Rock's testimony when he learned of the hypnotic sessions. The trial judge held a hearing on the motion and issued an order limiting the defendant's testimony to facts she remembered and related before Dr. Back hypnotized her.²⁴ At trial, the defendant introduced the gun expert's testimony. However, the trial court limited the defendant's own testimony to her recitation of the facts contained in Dr. Back's sketchy, handwritten notes taken before the hypnotic

17. One of the investigating officers testified that Mrs. Rock told him that her husband grabbed her, choked her, and threw her against a wall, and that she picked up the weapon and pointed it toward the floor. She shot Mr. Rock after he hit her a second time. *Id.* Another officer reported a different version of events related by Mrs. Rock. This officer stated that Mrs. Rock told him her husband prevented her from going outside and began choking her. She grabbed a gun and threatened her husband to leave her alone. The gun misfired when Mr. Rock struck her. *Id.* at n.1.

18. *Id.* at 2706.

19. *Id.*

20. *Id.* at 2706-07.

21. *Id.* at 2707.

22. *Id.*

23. *Id.*

24. *Id.*

sessions.²⁵ A jury convicted the defendant of manslaughter, and the defendant received a prison sentence of ten years and a \$10,000 fine.²⁶

The Arkansas Supreme Court adopted an evidentiary rule of *per se* inadmissibility which precluded the admission of hypnotically refreshed testimony at trial.²⁷ The court recognized a defendant's constitutional right to testify but stated that any "prejudice or deprivation"²⁸ the defendant experienced "was minimal and resulted from her own actions and not by any erroneous ruling of the court."²⁹ The United States Supreme Court deliberated over the constitutionality of Arkansas's exclusionary rule prohibiting admission of a defendant's hypnotically refreshed testimony at trial and held that Arkansas's ruling violated a criminal defendant's constitutional right to testify on her own behalf.³⁰

BACKGROUND

A. *History of Hypnosis*

Earliest recorded history indicates that medical and psychological researchers studied the practice of hypnosis.³¹ Over fifty centuries ago, Assyrian and Babylonian priests used hypnosis to treat various illnesses. Practitioners in Egyptian sleep temples employed hypnosis as a regular form of therapy thirty centuries ago. Doctors and medicine men practiced hypnosis in ancient India, Africa, and pre-Columbian America.³²

During the middle ages in Christian Europe, people regarded hypnosis as an evil power and considered hypnotists to be agents of the devil victimizing helpless subjects with bizarre spells.³³ Franz Mesmer, a Viennese physician living in Paris during the 18th century, attempted to establish hypnosis as a science or

25. *Id.*

26. *Rock v. Arkansas*, 288 Ark. 566, 708 S.W.2d 78 (1986), *vacated and remanded*, 107 S. Ct. 2704 (1987).

27. *Id.* at 570, 708 S.W.2d at 80.

28. *Id.* at 580, 708 S.W.2d at 85.

29. *Id.*, 708 S.W.2d at 86.

30. *Rock v. Arkansas*, 107 S. Ct. at 2714-15. The *Rock* Court stated, "Arkansas' *per se* rule excluding all posthypnosis testimony infringes impermissibly on the right of a defendant to testify on his or her own behalf." *Id.*

31. Comment, *Hypnotically Enhanced Testimony in Criminal Trials: Current Trends and Rationales*, 19 Hous. L. Rev. 765 (1982).

32. Sies, *supra* note 3, at 82.

33. *Id.*

pseudo-science. Dr. Mesmer created a theory and practice of medical therapy known as "animal magnetism." He opined that all reality was filled with an invisible fluid and that illness was caused by an imbalance of fluid in the body. Dr. Mesmer maintained that he could cure illnesses by increasing the flow of magnetic fluids in the body by using magnets and performing an elaborate ritual.³⁴ An investigatory commission of the French government condemned Dr. Mesmer and his practices, and the practice of hypnosis fell into disrepute.³⁵

Additional research and experimentation during the next century contributed to the usage, understanding, and legitimacy of hypnosis.³⁶ In 1958, the American Medical Association recognized the use of hypnosis by adequately trained physicians and psychologists.³⁷ Today, physicians and psychologists use hypnosis to treat various illnesses and addictions, such as smoking, asthma, burns, chronic pain, grief, impotency, obesity, migraine and tension headaches, and warts.³⁸

B. *Nature of Hypnosis*

No generally accepted theory of hypnosis exists. Authorities have never reached a consensus regarding a single definition of hypnosis.³⁹ Simply defined, hypnosis is "an artificially induced sleeplike condition in which an individual is extremely responsive to suggestions made by the hypnotist."⁴⁰ Despite disagreement on

34. *Id.* Mesmer ensconced groups of his patients around a large tub of water filled with glass and iron filings. Mesmer touched iron rods protruding from the tub to afflicted parts of a patient's anatomy. Mesmer appeared in a darkened room wearing silk robes and magnetized the tub with a touch of his hand, creating "convulsive crises" in his patients. See Comment, *The Admissibility of Hypnotically Refreshed Testimony*, 20 WAKE FOREST L. REV. 223, 224 n.10 (1984).

35. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313, 318 (1980). Authorities consider Professor Diamond to be a leading expert on hypnosis and the legal ramifications of hypnotically refreshed testimony.

36. Sies, *supra* note 3, at 82.

37. *Council on Scientific Affairs: Scientific Status of Refreshing Recollection by the Use of Hypnosis*, *supra* note 2, at 1918.

38. Comment, *The Admissibility of Hypnotically Induced Recollection*, 70 KY. L.J. 187, 189 n.18 (1981-1982).

39. *Council on Scientific Affairs: Scientific Status of Refreshing Recollection by the Use of Hypnosis*, *supra* note 2, at 1919.

40. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 648 (1980).

technical points, most authorities agree that hypnosis requires superficial cooperation of the subject, the development of rapport between the subject and hypnotist, and the subject's focus of attention.⁴¹ Usually, the hypnotist carries out some form of an induction procedure or "ceremony" to induce hypnosis. After the induction procedure, the subject becomes increasingly responsive to explicit or implicit suggestions of the hypnotist or someone designated by the hypnotist. During this process, the hypnotist encourages the subject to suspend critical judgment and accept rather than question suggestions given.⁴²

Even though investigative agencies of police departments increasingly utilize hypnosis for investigative purposes and for enhancement of a witness's memory,⁴³ certain risks associated with hypnosis may affect the reliability of a witness's subsequent testimony. Researchers characterize hypnosis as a state of heightened suggestibility.⁴⁴ Frequently, the subject of hypnosis understands the nature of a case and the importance of solving a crime, particularly where the subject is the victim of the crime. During the hypnotic experience, the subject may create false memories resulting from a desire to please the hypnotist or law enforcement personnel.⁴⁵ In addition, a subject may create false memories due to the expectations of appropriate behavior for hypnotized individuals or due to a ready acceptance of the hypnotist's deliberate suggestions or inadvertent cues.⁴⁶ Furthermore, the subject may confabulate or fill in memory gaps with logical deductions of what should have happened.⁴⁷ As a defense, the subject may produce fantasies known as "screen memories" to prevent the retrieval of real but traumatic memories.⁴⁸

41. *Council on Scientific Affairs: Scientific Status of Refreshing Recollection by the Use of Hypnosis*, *supra* note 2, at 1919.

42. *Id.*

43. Hypnosis may provide a means of helping a witness or victim of a crime recover lost or repressed memories. Often, physical or emotional trauma causes various degrees of amnesia or psychological blocking of memory. Also, the passage of time frequently erodes memory. Sies, *supra* note 3, at 84.

44. *Id.* at 85.

45. Kroger and Douce, *Hypnosis in Criminal Investigation*, 27 INT'L. J. CLINICAL AND EXPERIMENTAL HYPNOSIS 358, 366 (1979).

46. *Id.*

47. Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 OHIO N.U.L.REV. 1, 4-5 (1977).

48. See generally, Kroger and Douce, *Forensic Uses of Hypnosis*, 23 AM. J. CLINICAL AND EXPERIMENTAL HYPNOSIS, 86-93 (1980).

Another risk reported by researchers is that hypnotized individuals express greater confidence in the recall of details following hypnosis than individuals who were never hypnotized.⁴⁹ This factor precludes cross-examination from being used as an effective method to test credibility. In addition, the extent of the accuracy of hypnotically refreshed memories is difficult to ascertain because of "post-hypnotic source amnesia," or the subject's inability to distinguish between pre- and post-hypnotic memories.⁵⁰ Finally, a subject may feign a hypnotic trance and deceive highly trained hypnotists⁵¹ or willingly lie during a deep hypnotic trance.⁵²

C. Case History

Three lines of decision have emerged because of problems with hypnosis that may adversely affect the reliability of hypnotically induced testimony. In the 1968 case of *Harding v. State*,⁵³ a court for the first time dealt with the use of hypnosis as a means of refreshing a witness's recollection. In *Harding*, a clinical psychologist hypnotized a rape and assault victim for the purpose of refreshing the victim's memory of events surrounding the crime.⁵⁴ During the trial, the victim stated she was testifying from her own present recollection; the hypnotist testified as an expert witness and declared that the hypnotic process which he used was generally reliable and not unduly suggestive.⁵⁵ The court allowed the testimony to be admitted but cautioned the jury against giving the hypnotized witness's testimony more weight than they would give to other testimony.⁵⁶ The *Harding* court held that testimony resulting from hypnosis affects credibility but not the testimony's admissibility.⁵⁷ This ruling set a trend followed by other state and federal courts.⁵⁸

49. Buckhout, Eugenio, Licitra, Oliver, and Kramer, *Memory, Hypnosis, and Evidence: Research on Eyewitnesses*, 7 Soc. ACT. AND L. 67, 68 (1981).

50. Diamond, *supra* note 35, at 335-36.

51. *Id.* at 336-37.

52. Orne, *supra* note 8, at 313.

53. 5 Md. App. 230, 246 A.2d 302 (1968).

54. *Id.* at 234, 246 A.2d at 305.

55. *Id.* at 236, 240, 246 A.2d at 306, 308. The hypnotist stated, "In my own experience, I seriously doubt suggestibility in the way we think of, in that you have an influence and the person subjects himself to your influence." *Id.* at 240, 246 A.2d at 308.

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

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

58. See, e.g., *Kline v. Ford Motor Co., Inc.*, 523 F.2d 1067 (9th Cir. 1975); *Wyler v. Fairchild Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974); *United States v.*

The courts which followed *Harding* viewed hypnotically refreshed testimony as a witness's present recollection of events refreshed by hypnosis. Under *Harding*, the underlying rationale for admissibility is that with the use of traditional legal devices, such as cross-examination, expert testimony regarding problems associated with hypnosis, and cautionary instructions, a jury will give the proper weight to the evidence. Following *Harding*, several courts expressed concern over the jury's ability to assess accurately the credibility of hypnotically refreshed testimony.⁵⁹ These courts adopted the procedural safeguards approach as the correct approach for trial courts to follow when confronted with the question of the admissibility of hypnotically induced testimony. Under the procedural safeguards approach, the trial judge must make an initial ruling on the admissibility of hypnotically refreshed testimony by determining whether the hypnotist followed certain procedural safeguards which are designed to protect against the danger of unreliability associated with hypnotically enhanced testimony.⁶⁰ The New Jersey Supreme Court case of *State v. Hurd*⁶¹ epitomized the procedural safeguards approach.

In *Hurd*, the court advocated six procedural safeguards that the hypnotist must comply with during the hypnotic process before the trial judge will admit the testimony: the hypnotist must be a qualified psychiatrist or psychologist; the hypnotist should be independent of either side involved in the litigation; all information given to the hypnotist prior to the hypnotic session must be recorded; the subject must describe the facts as he remembers them to the hypnotist prior to hypnosis; all contact between the subject and hypnotist must be recorded, preferably on videotape; and no person, other than the hypnotist and subject, should be present during any contact between the two.⁶² The *Hurd* court imposed

Narciso, 446 F. Supp. 252 (E.D. Mich. 1977); *People v. Colligan*, 91 Cal. App. 3d 846, 154 Cal. Rptr. 389 (1979); *Creamer v. State*, 232 Ga. 136, 205 S.E.2d 240 (1974); *People v. Smrekar*, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979); *Pearson v. State*, 441 N.E.2d 468 (Ind. 1982); *State v. Wren*, 425 So. 2d 756 (La. 1980); *State v. Greer*, 609 S.W.2d 423 (Mo. App. 1980), *vacated on other grounds*, 450 U.S. 1027 (1981); *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978); *State v. Brown*, 337 N.W.2d 138 (N.D. 1983); *State v. Bram*, 8 Or. App. 598, 494 P.2d 434 (1972); *State v. Glebock*, 616 S.W.2d 897 (Tenn. Crim. App. 1981); *Chapman v. State*, 638 P.2d 1280 (Wyo. 1982).

59. Ruffra, *supra* note 4, at 299.

60. *Id.*

61. 86 N.J. 525, 432 A.2d 86 (1981).

62. *Id.* at 545-46, 432 A.2d at 96-97.

these guidelines to guard against undue suggestiveness during the hypnotic process. Subsequent cases have followed the procedures delineated in *Hurd* or developed similar guidelines.⁶³

Finally, other courts adopted the rule of *per se* inadmissibility and precluded the admission of hypnotically refreshed testimony.⁶⁴ These courts expressed concern over risks associated with hypnosis that may adversely affect the reliability of subsequent testimony⁶⁵ and believed that procedural safeguards were inadequate in ameliorating this unreliability.⁶⁶ In ruling that hypnosis as a scientific means of refreshing recollection is unreliable, these courts determined that the scientific community has not acknowledged hypnosis as a generally reliable method of refreshing recollection to the

63. See, e.g., *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1263 (1986); *House v. State*, 445 So. 2d 815 (Miss. 1984); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (N.M. App. 1981), *writ quashed*, 98 N.M. 51, 644 P.2d 1040 (1982); *State v. Weston*, 16 Ohio App. 3d 279, 475 N.E.2d 805 (1984); *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W. 2d 386, *cert. denied*, 461 U.S. 946 (1983).

64. See, e.g., *Contreras v. State*, 718 P.2d 129 (Alaska 1986) (consolidated petitions where a victim of kidnapping and sexual assault was hypnotized to identify her attacker; another victim, who was shot after she discovered a burglar in her apartment, was hypnotized to identify her attacker); *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982) (where police investigators hypnotize an individual, any corroborating evidence subsequently obtained is admissible in a criminal trial); *People v. Quintanar*, 659 P.2d 710 (Colo. App. 1982); *State v. Davis*, 490 A.2d 601 (Del. Super. 1985); *Bundy v. State*, 471 So. 2d 9 (Fla. 1985), *cert. denied*, 107 S. Ct. 295 (1986) (This case involved a 12-year-old girl who was kidnapped and murdered, and the only witness to the abduction underwent hypnosis to refresh recollection. The witness identified the defendant as the kidnapper, but the hypnotically refreshed testimony was held *per se* inadmissible in a criminal trial. The hypnosis was not held to render the witness incompetent to testify to facts recalled prior to hypnosis.); *State v. Moreno*, ___ Haw. ___, 709 P.2d 103 (1985); *State v. Haislip*, 237 Kan. 461, 701 P.2d 909, *cert. denied*, 106 S. Ct. 575 (1985); *State v. Collins*, 296 Md. 670, 464 A.2d 1028 (1983); *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E.2d 1190 (1983); *People v. Gonzales*, 415 Mich. 615, 329 N.W.2d 743 (1982), *on reconsideration*, 417 Mich. 968, 336 N.W.2d 751 (1983), *appeal denied*, 424 Mich. 908, 385 N.W.2d 585 (1986); *Alsbach v. Bader*, 700 S.W.2d 823 (Mo. 1985); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981); *People v. Hughes*, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983); *Robison v. State*, 677 P.2d 1080 (Okla. Crim. App.), *cert. denied*, 467 U.S. 1246 (1984); *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981); *State v. Martin*, 101 Wash. 2d 713, 684 P.2d 651 (1984).

65. See *State v. Peoples*, 311 N.C. at 530, 319 S.E.2d at 186.

66. *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied*, 459 U.S. 860 (1982).

extent hypnosis should be used in judicial proceedings.⁶⁷

The courts following the *per se* rule of inadmissibility rely upon the standard originally outlined in *Frye v. United States*.⁶⁸ The court in *Frye* detailed the general rule that expert testimony on a new scientific technique can be admitted at trial only when that technique has "gained general acceptance in the particular field in which it belongs."⁶⁹ Under *Frye*, the results of mechanical or scientific testing are inadmissible unless the testing attains the point where experts in the field widely share the opinion that the results are scientifically reliable and accurate.⁷⁰ Courts relying on the *Frye* standard review the scientific literature and discover that authorities do not credit hypnosis as a method for retrieving totally accurate recollections.⁷¹ Therefore, courts adopting the *per se* inadmissible rule hold that trial courts are not justified in admitting hypnotically refreshed testimony.⁷²

Courts following the *per se* rule of inadmissibility reject both the belief that hypnosis only affects credibility of the subsequent testimony and not admissibility and the belief that procedural safeguards can eliminate or adequately decrease problems associated with hypnosis.⁷³ By excluding hypnotically refreshed testimony, these courts risk excluding evidence that may be relevant and probative on some vital issues.

ANALYSIS

In *Rock v. Arkansas*, the United States Supreme Court held that Arkansas's evidentiary rule precluding admission of hypnotically refreshed testimony violated a criminal defendant's fundamental right to present a defense at trial.⁷⁴ The Court appropriated the procedural safeguards approach after utilizing a balancing test to determine whether a criminal defendant's hypnotically induced testimony should be excluded or admitted at trial.⁷⁵ In reaching its holding, the Court balanced the state's interest in reli-

67. See *Commonwealth v. Nazarovitch*, 496 Pa. 97, ___, 436 A.2d 170, 177 (1981).

68. 293 F. 1013 (D.C. Cir. 1923).

69. *Id.* at 1014.

70. See *State v. Mack*, 292 N.W.2d 764, 768 (Minn. 1980).

71. See *State v. Peoples*, 311 N.C. at 530, 319 S.E.2d at 186.

72. *Id.*

73. See *United States v. Valdez*, 722 F.2d 1196, 1202 (1984).

74. 107 S. Ct. at 2714-15.

75. *Id.* at 2711-14.

able testimony against a defendant's constitutional right to testify on her own behalf at a criminal trial.

The Court acknowledged that problems associated with hypnosis may affect the reliability of subsequent testimony: the hypnotic subject, who is suggestible, may attempt to please the hypnotist with answers the subject believes will be met with approval; the subject may confabulate or fill in details from his imagination in order to make an answer more coherent and complete; and the subject may experience "memory hardening," which gives him more confidence in both true and false recollections and renders cross-examination less efficacious.⁷⁶ Juxtaposed to the state's interest in the reliability of testimony is a criminal defendant's constitutional right to testify in his own behalf. Several provisions of the Constitution encompass this right.⁷⁷ The Court noted that a defendant's right to present relevant testimony is not without limitation.⁷⁸ In certain situations, this right must yield to accommodate other legitimate interests of the state.⁷⁹ For example, the accused must comply with established evidentiary and procedural rules created to promote fairness and reliability in the ascertainment of guilt and innocence.⁸⁰ A defendant must observe nonarbitrary rules which disqualify individuals as witnesses when they are incapable of observing events due to mental infirmities.⁸¹ However, restrictions placed on a defendant's constitutional right to testify must not be arbitrary or disproportionate to the purposes which the restrictions are designed to promote.⁸² A state must evaluate whether the purposes served by the rule justify the restrictions imposed on a defendant's constitutional right to testify in a criminal trial.⁸³

The United States Supreme Court held that Arkansas's *per se* inadmissible rule amounted to an arbitrary restriction on a defend-

76. *Id.* at 2713.

77. *See* *Faretta v. California*, 422 U.S. 806 (1975) (the sixth amendment grants to the defendant personally the right to make his defense); *Harris v. New York*, 401 U.S. 222 (1971) (the fifth amendment grants to a criminal defendant the privilege to testify in his own defense or refuse to do so); *Ferguson v. Georgia*, 365 U.S. 570 (1961) (the fourteenth amendment secures a criminal defendant's right to testify in his own behalf or remain silent).

78. *Rock v. Arkansas*, 107 S. Ct. at 2711.

79. *See Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

80. *Id.* at 302.

81. *See Washington v. Texas*, 388 U.S. 14, 23 n.21 (1967).

82. *Rock v. Arkansas*, 107 S. Ct. at 2711.

83. *Id.*

ant's right to testify.⁸⁴ The Court found that the Arkansas Supreme Court neglected to apply the constitutional analysis required when a defendant's right to testify is at stake.⁸⁵ The state failed to prove that all hypnotically refreshed testimony is so unreliable that an evidentiary rule prohibiting a defendant's hypnotically induced testimony is justified.⁸⁶ The Court pointed out that authorities credit hypnosis as a valuable means of obtaining investigative leads or identifications subsequently corroborated by independent evidence.⁸⁷

The Court advocated the procedural safeguards approach as the appropriate approach for lower courts to follow when confronted with the question of the admissibility of a criminal defendant's hypnotically induced testimony.⁸⁸ The Court suggested that the following procedures be followed during the hypnotic process to reduce risks associated with hypnosis: only a psychologist or psychiatrist with special training in the use of hypnosis should carry out the hypnotic procedure; the hypnotist should be independent of the investigation; the hypnotic process should be performed in a neutral setting with no one but the hypnotist and subject present; and tape or video recordings should be prepared of all contact between the hypnotist and subject before, during, and after hypnosis.⁸⁹ The Court stated that these guidelines do not guarantee accurate recollections but provide a means of controlling overt suggestions.⁹⁰ Furthermore, the procedural safeguards approach allows a trial judge to utilize his discretion and admit hypnotically refreshed testimony in a particular case if he is convinced

84. *Id.* at 2714-15.

85. *Id.* at 2712.

86. *Id.* at 2714.

87. *See, e.g.,* *People v. Hughes*, 59 N.Y.2d 523, 533, 453 N.E.2d 484, 488, 466 N.Y.S.2d 255, 259 (1983). In the famous Chowchilla, California, kidnapping case of 1976, kidnappers abducted twenty-six school children riding on a school bus and their school bus driver. The bus driver escaped and during hypnosis recalled a partial license plate number of the abductor's car. The driver had failed to remember this number in the waking state. This recollection led to apprehension of the kidnappers. W. KROGER, *CLINICAL AND EXPERIMENTAL HYPNOSIS* 116 (1977);

In the airport raid at the Entebbe airport in Uganda, Israeli police used hypnosis to obtain recollections from released victims of the airport's layout and construction prior to carrying out their successful assault. G. AMBROSE, *A HANDBOOK OF MEDICAL HYPNOSIS* 19 (1980).

88. *Rock v. Arkansas*, 107 S. Ct. at 2714.

89. *Id.*

90. *Id.*

of the testimony's reliability.

In the *Rock* dissent, Justice Rehnquist argued that he found no justification in the United States Constitution for the *Rock* Court's holding.⁹¹ However, the United States Supreme Court has held in previous cases that a defendant has a constitutional right to testify on his or her own behalf in a criminal trial.⁹² First, the fourteenth amendment guarantees that no one shall be deprived of liberty without due process of law.⁹³ This right encompasses a right to be heard and offer testimony.⁹⁴ Second, the defendant's right to testify is included in the compulsory process clause of the sixth amendment.⁹⁵ The defendant's right to testify is logically included in his right to call witnesses whose testimony is "material and favorable to his defense."⁹⁶ Third, the opportunity to testify is a necessary corollary to the fifth amendment's guarantee against compelled testimony.⁹⁷ Each criminal defendant holds the right to testify in his own defense or refuse to do so.⁹⁸

In addition, Justice Rehnquist stated that the principles the *Rock* Court recognized as underlying a criminal defendant's right to testify on her own behalf furnished scant support for invalidating Arkansas's exclusionary rule.⁹⁹ Justice Rehnquist noted that one of the justifications for permitting a defendant to testify at trial was advancement of a trial's truth-seeking function.¹⁰⁰ However, he stated that advancement of the truth-seeking function necessarily precluded Mrs. Rock's hypnotically refreshed testimony.¹⁰¹

Contrary to Rehnquist's finding, however, Arkansas's *per se* rule of inadmissibility virtually prevented Mrs. Rock from describ-

91. *Id.* at 2715.

92. *See, e.g., Jones v. Barnes*, 463 U.S. 745, 751 (1983) (the defendant has the "ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . testify in his or her own behalf"); *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972) ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right").

93. U.S. Const. amend. XIV.

94. *See In re Oliver*, 333 U.S. 257, 273 (1948).

95. *See Washington v. Texas*, 388 U.S. 14, 17-19 (1967).

96. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

97. *See Harris v. New York*, 401 U.S. 222, 230 (1971).

98. *Id.* at 225.

99. *Rock v. Arkansas*, 107 S. Ct. at 2715.

100. *Id.*

101. *Id.*

ing any of the events which occurred on the day of the shooting.¹⁰² For example, Arkansas's rule prohibited Mrs. Rock from testifying about her husband's activities on the morning of the shooting or their discussion and argument concerning their move to Mrs. Rock's trailer,¹⁰³ although witnesses could have corroborated many of these events.¹⁰⁴ In addition, Arkansas's rule precluded Mrs. Rock from testifying about the actual shooting beyond the words contained in Dr. Back's notes taken prior to the hypnotic process.¹⁰⁵ Arkansas's exclusionary rule hindered any consideration of the reliability of Mrs. Rock's hypnotically refreshed testimony and severely thwarted the search for the truth in this case.

Rehnquist's dissent noted that a defendant's right to testify is subject to reasonable restrictions.¹⁰⁶ However, the Arkansas Supreme Court failed to impose reasonable restrictions. The Arkansas Supreme Court avoided the constitutional analysis required when a defendant's right to testify is at stake and failed to balance the purpose for precluding such testimony against a defendant's right to testify. Arkansas's rule amounted to an arbitrary, rather than a reasonable, restriction.

The factor distinguishing this case from other cases dealing with the issue of admissibility of hypnotically refreshed testimony appears to be that the Court in *Rock* dealt with the testimony of a *defendant*, rather than the testimony of a *witness* to a crime. In formulating its holding, the Arkansas Supreme Court relied to a great extent on the reasoning of the California Supreme Court case of *People v. Shirley*.¹⁰⁷ In *Shirley*, the court adopted a strict rule of inadmissibility.¹⁰⁸ However, the *Shirley* court specifically exempted a defendant's hypnotically refreshed testimony from its rule of inadmissibility and stated that it created "this necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf."¹⁰⁹

The *Rock* Court pointed out that it faced the question of the admissibility of a defendant's testimony, rather than a witness's testimony, and refused to determine the same issue for a witness's

102. *Id.* at 2712.

103. *Id.* at 2707 n.4.

104. *Id.* at 2712.

105. *Id.* at 2707.

106. *Id.* at 2715-16.

107. *Rock v. Arkansas*, 708 S.W.2d at 83-84.

108. 31 Cal. 3d at 67, 723 P.2d at 1384, 181 Cal. Rptr. at 256.

109. *Id.*

testimony.¹¹⁰ If the Court in *Rock* had considered the question of the admissibility of a witness's testimony, the Court probably would have reached a different holding because it would not have applied a balancing test or regarded constitutional considerations in reaching its conclusion.

In addition, the corroboration of Mrs. Rock's testimony swayed the Court and led the Court to reach its holding.¹¹¹ After undergoing hypnosis, Mrs. Rock recalled that at the time of the shooting she only grasped the gun's hammer; she remembered that she did not have her finger on the trigger.¹¹² She recalled that the gun discharged when her husband struck her arm.¹¹³ A gun expert examined the gun and concluded that it would discharge if hit or dropped.¹¹⁴ The Arkansas trial court allowed the gun expert to testify regarding the gun's defective condition; however, the court prohibited Mrs. Rock from testifying about her hypnotically refreshed recollections that the gun discharged when her husband struck her arm.¹¹⁵ The gun expert's testimony would have been more significant if the court had allowed the jury to hear Mrs. Rock's testimony. Instead, Arkansas's rule of inadmissibility precluded her testimony even when that testimony was highly reliable as evidenced by corroborative evidence.

Courts adopting a *per se* rule of inadmissibility often refrain from making that rule absolute. The Fifth Circuit Court of Appeals noted that in a particular case "the evidence favoring admissibility might make the probative value of the testimony outweigh its prejudicial effect."¹¹⁶ The court stated further that if adequate procedural safeguards have been followed, corroborative post-hypnotic testimony might be admissible.¹¹⁷

By adopting the procedural safeguards approach, the Court in *Rock* singled out the correct approach to be followed by trial courts when faced with the issue of the admissibility of hypnotically induced testimony. In *Rock*, Dr. Back prepared tape recordings of the hypnotic sessions, which furnished a means of evaluat-

110. *Rock v. Arkansas*, 107 S. Ct. at 2712 n.15.

111. *Id.* at 2714.

112. *Id.* at 2707.

113. *Id.*

114. *Id.*

115. *Id.*

116. *United States v. Valdez*, 722 F.2d at 1203.

117. *Id.*

ing Dr. Back's hypnotic procedures.¹¹⁸ After consideration of these recordings, the trial judge concluded Dr. Back did not suggest responses with leading questions.¹¹⁹ The gun expert's findings and testimony corroborated Mrs. Rock's hypnotically refreshed testimony.¹²⁰ All of these factors provide an argument for the reliability and admissibility of Mrs. Rock's testimony. However, Arkansas's *per se* rule of inadmissibility totally precluded the hypnotically refreshed testimony without regard for the reasons for hypnosis, the circumstances under which it occurred, or any independent corroboration of information it produced.¹²¹ On the other hand, the procedural safeguards approach allows a trial court to review the circumstances under which hypnosis took place and independent verification of information it produced and allows admission of hypnotically refreshed testimony where it appears reliable.

Procedural safeguards do not guarantee the accuracy of hypnotically refreshed testimony; however, as one writer noted, factual accuracy of testimony is not an inflexible requirement for admissibility.¹²² Frequently, eyewitness testimony is factually inaccurate because of prejudice, misperception, and bias.¹²³ However, courts routinely admit such testimony and rely on procedural safeguards, such as cross-examination, to reduce the risks of ambiguity, erroneous recall, flawed perception, and prevarication.¹²⁴ Similarly, trial courts should admit hypnotically refreshed testimony if the hypnotist followed adequate procedural safeguards to protect against unreliability.

The *Rock* Court's holding furthers the search for the truth and protects the integrity of the judicial system by encouraging the admission of reliable testimony at trial. In pursuing the search for the truth, the law of evidence proceeds on the premise that the way to discover the truth is to allow the parties to present to the court or jury all relevant evidence.¹²⁵ Then, the court or jury may ascertain the reliability of the evidence, assisted by traditional

118. *Rock v. Arkansas*, 107 S. Ct. at 2706-07.

119. *Id.* at 2714.

120. *Id.*

121. *Id.* at 2712.

122. Spector and Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567, 584 (1977).

123. Stewart, *Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1.

124. Spector and Foster, *supra* note 122, at 584.

125. MCCORMICK ON EVIDENCE § 184 (3d ed. 1984).

means of assessing credibility, such as cross-examination, expert testimony, and cautionary jury instructions. A state court should not be allowed to adopt an evidentiary rule that precludes a criminal defendant's hypnotically refreshed testimony without looking at the reasons for the hypnosis, the circumstances under which it took place, or any independent verification of the information it produced.¹²⁶ Such a *per se* rule of inadmissibility may preclude relevant evidence and thwart the search for the truth.

In *State v. McQueen*,¹²⁷ the North Carolina Supreme Court confronted the issue of the admissibility of a witness's hypnotically induced testimony and adopted the *per se* admissible rule.¹²⁸ Prior to trial, a witness to two murders requested that she be hypnotized for the purpose of refreshing her recollection of the details surrounding the crimes.¹²⁹ The witness subsequently testified at trial. The North Carolina Supreme Court held that the fact that a witness is hypnotized prior to trial affected credibility but not admissibility of the witness's testimony and pointed out that the trial court fully advised the jury of the witness's hypnotic experience.¹³⁰

In *State v. Peoples*,¹³¹ the North Carolina Supreme Court again faced the issue of the admissibility of a witness's hypnotically refreshed testimony. The *Peoples* opinion represented the opposite end of the spectrum when it held that hypnotically refreshed testimony is inadmissible in a judicial setting.¹³² The court adopted a *per se* rule of inadmissibility because of problems associated with hypnosis that may lead to inaccurate subsequent testimony.¹³³ The court allowed a previously hypnotized witness to testify as to facts that he or she related prior to hypnosis.¹³⁴ The *Peoples* court pointed out that several courts that have adopted a rule of inadmissibility refuse to make the rule absolute.¹³⁵ For example, the Fifth Circuit adopted a rule of inadmissibility but ex-

126. See *Rock v. Arkansas*, 107 S. Ct. at 2712.

127. 295 N.C. 96, 244 S.E.2d 414 (1978).

128. *Id.* at 119-20, 244 S.E.2d at 427-28.

129. *Id.* at 119, 244 S.E.2d at 417.

130. *Id.*

131. 311 N.C. 515, 319 S.E.2d 177 (1984). See generally Note, *Criminal Procedure—The Admissibility of Evidence Obtained Through Hypnosis—State v. Peoples*, 7 CAMP. L. REV. 409 (1985).

132. *Id.* at 531-32, 319 S.E.2d at 187.

133. *Id.*

134. *Id.* at 533, 319 S.E.2d at 188.

135. *Id.* at 531, 319 S.E.2d at 186.

empted a defendant from this rule because of a defendant's fundamental right to testify in his own behalf.¹³⁶

The North Carolina Supreme Court answered the question of whether a witness's hypnotically refreshed testimony should be admitted at trial but failed to answer the same question regarding a defendant's hypnotically induced testimony. In *Peoples*, the court alluded to the admissibility of a defendant's hypnotically refreshed testimony and intimated that North Carolina would carve out an exception to its rule of inadmissibility for a defendant's testimony.¹³⁷

Nevertheless, the United States Supreme Court in *Rock* answered the issue of the admissibility of a defendant's hypnotically refreshed testimony and encouraged lower courts to undergo a constitutional analysis and adopt the procedural safeguards approach in such a situation.¹³⁸ The *Rock* court's holding should affect North Carolina courts in the future when they confront the question of the admissibility of a defendant's hypnotically refreshed testimony and may influence North Carolina's creation of a necessary exception to its rule of inadmissibility.

CONCLUSION

Over the course of history, civilizations and tribes used hypnosis for medical and therapeutic purposes.¹³⁹ At times, people accepted hypnosis as a valid practice but at other times rejected it as an evil power or form of quackery.¹⁴⁰ Today, the American Medical Association advocates hypnosis as a valuable therapeutic technique.¹⁴¹ However, due to risks associated with hypnosis, courts have wrestled over the past two decades with the question of whether hypnotically refreshed testimony should be admitted at trial. Courts have adopted one of three approaches when faced with this issue, yet no definitive standard emerges.

In *Rock v. Arkansas*, the United States Supreme Court considered whether a defendant's hypnotically induced testimony

136. See *People v. Shirley*, 31 Cal. 3d 18, 67, 641 P.2d 775, 805, 181 Cal. Rptr. 243, 273.

137. See *State v. Peoples*, 311 N.C. at 531, 319 S.E.2d at 186-87.

138. See *Rock v. Arkansas*, 107 S. Ct. at 2714.

139. Comment, *supra* note 31, at 765.

140. See *Sies*, *supra* note 3, at 81-83.

141. *Council on Scientific Affairs: Scientific Status of Refreshing Recollection by the Use of Hypnosis*, *supra* note 2, at 1918.

should be admitted or excluded at trial.¹⁴² The Court balanced a defendant's constitutional right to testify against unreliability associated with hypnotically enhanced testimony and adopted the procedural safeguards approach.¹⁴³ Before *Rock*, courts dealt with the issue of the admissibility of a witness's hypnotically refreshed testimony. The Court in *Rock* settled the question of the admissibility of a defendant's hypnotically refreshed testimony, yet the court failed to settle this issue in relation to the hypnotically induced testimony of witnesses or victims of a crime.¹⁴⁴ Therefore, the law in this area remains in a state of confusion with no consistent standard to be applied by lower courts.

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142. *Rock v. Arkansas*, 107 S. Ct. at 2708.

143. *Id.* at 2714.

144. *Id.* at 2712, n.15.