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THE ADMISSIBILITY OF HYPNOTICALLY ENHANCED TESTIMONY IN CRIMINAL TRIALS

BY GARY M. SHAW*

I. INTRODUCTION

Virtually everyone has heard of hypnotism; no one knows exactly what it is—including hypnotism researchers. Nonetheless, hypnotism is used with increasing frequency in law enforcement investigations. Witnesses and victims attempt to learn more about crimes through hypnosis. Similarly, accused persons seek possibly exculpatory information. Thus, in increasing criminal trials either the prosecution or the defense attempts to elicit evidence from witnesses who were hypnotized prior to the trial. Consequently, courts are frequently required to decide whether and to what extent a witness who has been hypnotized may testify.

In order to appreciate the questions raised by this issue, it is necessary to understand how memory works and how hypnosis affects memory. Accordingly, the first section of this paper begins with a brief discussion of the theory of memory and of how hypnosis affects memory, followed by a discussion of various issues raised in the forensic use of hypnosis, including an argument as to why a witness's posthypnotic recollections, known as hypnotically enhanced testimony,¹ should be inadmissible as a matter of policy. I then discuss the constitutional issues raised by the admissibility of hypnotically enhanced testimony. Finally, I discuss the current majority's position

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1. A number of courts use the phrase "hypnotically refreshed testimony" to describe a witness's posthypnotic recollections. In this paper I will refer to those recollections as hypnotically enhanced testimony. I do so because, as will be shown, hypnosis creates a great danger that prehypnotic memory will be augmented by pseudomemories. "Hypnotically enhanced testimony" is a more accurate descriptive term than "hypnotically refreshed testimony"; "enhanced" denotes 'augmented' while 'refreshed' denotes 'revived'. "State v. Tuttle, 780 P.2d 1203, 1206 n. 7 (Utah 1989), *cert. denied*, 494 U.S. 1018 (1990).

that previously hypnotized witnesses may testify so long as they testify only to prehypnotic recollections.

II. MEMORY

Determining just what memory is² and how it works has been a perplexing issue for millennia.³ Although there has been debate as to just what memory is, everyone agrees that memory is not infallible; people's remembrances of events are not always accurate.⁴ Further, although two or more people may view the same event, they may have very different memories of what actually occurred. Thus, it is important to understand what memory is and the process by which it becomes inaccurate.

Human memory involves two factors: the degree to which a mental representation corresponds to an actual event, called correspondent memory; and the degree to which a person experiences the mental representation as a memory, called experiential memory.⁵ Critical to determining the accuracy of a person's recall is the degree to which the experiential memory corresponds to what actually occurred.

Scientists generally agree that memory is reconstructive, rather than reproductive.⁶ This means that in addition to a person's actual observation of an event, external information communicated to the person as well as his or her own thoughts interact with and change recollections of the event so that the experiential memory may not correspond to what actually occurred.⁷ This phenomenon results from the way in which memory works.

Today there is "almost universal" agreement that memory is a three stage process involving the acquisition, retention, and retrieval of informa-

2. It would be impossible to recapitulate all the theories of memory and how they work. Researchers make new discoveries on an ongoing basis. For a concise discussion of various theories, see GEORGE JOHNSON, *IN THE PALACES OF MEMORY* (1991).

3. Theories as to what memory is date back at least to Plato. 5 *ENCYCLOPEDIA OF PHILOSOPHY* 265 (reprint 1972).

4. "The studies all lead inexorably to the conclusion that human perception is inexact and that human memory is both limited and fallible." *State v. Long*, 721 P.2d 483, 488 (Utah 1986).

5. Kenneth C. Bowers & Ernest R. Hilgard, *Some Complexities in Understanding Memory*, in *HYPNOSIS AND MEMORY* 3, 6-7 (Helen M. Pettinati ed., 1988).

6. *People v. Shirley*, 723 P.2d 1354 (Cal. 1982), *cert. denied*, 459 U.S. 860 (1982); Helen M. Pettinati, *Hypnosis and Memory: Integrative Summary and Future Directions*, in *HYPNOSIS AND MEMORY* 278 (Helen M. Pettinati ed., 1988).

7. Marilyn C. Smith, *Hypnotic Memory Enhancement of Witnesses: Does it Work?*, 94 *PSYCHOL. BULL.* 387, 388 (1983); Peter W. Sheehan & Jan Tilden, *Effects of Suggestibility and Hypnosis on Accurate and Distorted Retrieval From Memory*, 9 *J. EXPERIMENTAL PSYCHOLOGY, LEARNING, MEMORY, AND COGNITION*, 283 (1983).

tion.⁸ Acquisition refers to perception of an event, in which the information being perceived is encoded or entered into the memory system.⁹ Retention refers to the period of time between the event and the time it is recalled or recollected.¹⁰ Retrieval refers to the stage during which one recalls the information.¹¹

The memory can be readily distorted during any of the three stages. Initially, many factors can affect the accuracy of what one person perceives and stores in the memory.¹² Such include the length of time one observed an event,¹³ how salient the details of the event were,¹⁴ the kind of fact being observed,¹⁵ the violence of the observed event,¹⁶ the stress affecting the ob-

8. Martin T. Orne, et al., *Reconstructing Memory Through Hypnosis: Forensic and Clinical Implications*, in HYPNOSIS AND MEMORY 25-26 (Helen M. Pettinati ed., 1988).

9. Hayden D. Ellis, *Practical Aspects of Face Memory*, in EYEWITNESS TESTIMONY 21 (Gary L. Wells & Elizabeth F. Loftus eds., 1979). This work is one of a growing number of books and articles testifying to the unreliability of eyewitness identification due to the vagaries of memory. Since this book, four other treatises have been published which cite and discuss studies showing the problems inherent in eyewitness identification. See *State v. Gunter*, 554 A.2d 1356, 1362 (N.J. Super. 1989), cert. denied, 563 A.2d 841 (N.J. 1989) (quoting *People v. McDonald*, 690 P.2d 709 (Cal. 1984)).

But see John C. Yuille & N. Hope McEwan, *Use of Hypnosis as an Aid to Eyewitness Memory*, 70 J. APPLIED PSYCHOL. 389 (1985), in which the authors claim that eyewitness testimony is not as unreliable as Loftus' and others' work make it appear. The authors cite other experiments in which the investigators reported that seventy percent of the details recalled by the subjects in the experiments were accurate. The authors speculate that the negative view of eyewitness memory may be due more to experimental design than poor ability to recall.

10. Ellis, *supra* note 9, at 21.

11. *Id.*

12. Daniel R. Lenorowitz & Kenneth R. Laughery, *A Witness-Computer Interactive System for Searching Mug Files*, in EYEWITNESS TESTIMONY, *supra* note 9, at 37-51.

13. A study was done in which subjects were asked to identify human faces from slides shown to them for varying lengths of time, ranging from ten seconds per face to thirty-two seconds per face. The experimenters found, as expected, that the subjects were much more accurate at remembering a face that they had seen for thirty-two seconds than a face they had seen for only ten seconds. Ellis, *supra* note 9, at 23.

14. The saliency of a detail refers to how memorable a detail is to the observer. Salient details are those details which have a high probability of being spontaneously mentioned by witnesses to a particular event. *Id.* at 25. Observers are more likely to be accurate in reporting salient details than those which are not. *Id.* at 26.

15. Different types of facts are easier to recall than others. Studies have shown that, in particular, people have difficulty reporting time, speed, and distance. *Id.* at 27-30.

16. A study was done that showed that people who observed violent events remembered them less accurately than people who viewed non-violent events. *Id.* at 31-32.

server,¹⁷ the observer's expectations,¹⁸ and the observer's actions during perception.¹⁹

Distortion may also occur during the retention stage. It is well established that people are less accurate and complete in their accounts of events after a long period of retention than a short one.²⁰ The events that take place during the retention interval can also affect the observer's memory. Studies have shown that when an observer perceives an event and later learns a new piece of information that conflicts with what they previously saw, the observer's memory will often compromise what was seen and what was heard, to the extent that the observer may incorporate nonexistent facts into recall.²¹

17. Stress or other emotional arousal facilitates learning and memory up to a point, beyond which learning and memory are impaired. *See id.* at 33-36.

18. An observer's expectations as to what will occur distort the observer's perception of the event, and as a result, the observer's memory of the event. For example, Loftus relates a story of five men who were going deer hunting. Their car broke down and two of the men went for help. One of the men decided to return to the stranded car. The men who remained at the car were not expecting him to return and when they saw something moving mistook the man for a deer and shot him. Yet a policeman testified that under the same conditions, he perceived the object as a man. The next day the policeman had returned to the scene of the shooting and testified that he had no trouble discerning that he was looking at a man instead of a deer. Of course, the policeman knew he was looking at a man and that affected his perceptions.

Four types of expectations can affect perception: cultural expectations or stereotypes, expectations resulting from past experiences, personal prejudices, and momentary expectations. *See id.* at 36-48.

19. While an observer perceives an event, he may be engaged in different types of activity. For example, an eyewitness to a robbery may spend the time staring at the face of the robber, trying to memorize the robber's face, or he may spend the time trying to figure out what he can do about the event. The activity the observer engages in will have a significant effect on what aspects of the event the observer remembers. Daniel R. Lenorovitz & Kenneth R. Laughery, *A Witness-Computer Interactive System for Searching Mug Files*, in EYEWITNESS TESTIMONY, *supra* note 12, at 48-49.

20. *Id.* at 52-53.

21. Several factors play a major role in how post-event information affects memory of the event. For example, the length of time between the occurrence of the event and the acquisition of the new information plays a significant role. Experiments have been done in which observers view an event and are later given misinformation about the event. The experiments showed that misleading information as to specific details given immediately after the event has less impact on the observer's memory of those details than misleading information that is imparted after a longer interval. However, experiments have also shown that misinformation regarding the entire event, rather than a particular detail, is more effective in causing the observer to completely reorganize their memories of the event when the misinformation is imparted immediately after the event takes place than when it is imparted later.

Other factors that affect the extent to which post-event information can lead to alteration of memories include whether the information concerns a salient or non-salient detail or whether the information affects the way the observer feels about the event (for example, whether the observer felt the event was noisy or violent). Roy S. Malpass & Patricia G. Devine, *Research on Suggestion in Lineups*, in EYEWITNESS TESTIMONY, *supra* note 9, at 64-87.

Finally, the method of recall may also distort a person's memory. Several factors affect recall. One is the authority of the person asking the observer to recall the details. Studies have shown that if the questioner has high status the observer's recollections will be markedly different than if the interrogator is, say, a mere passerby.²² The form of the questions asked a witness to recall an event will also affect recall.²³ For example, the wording of the question²⁴ can play a critical part in affecting recall.²⁵

Just as important as what memory is, is what memory is not. Memory is not an organic analogue of a videotape recorder in which every perception experienced by a person is faithfully recorded, permanently stored in the brain, and then accurately replayed when the memory is recalled.²⁶ Numerous studies yield no support for the "videotape recorder" view that memory reproduces events as they actually occur and replays them exactly as they occurred.²⁷

Memory's failure to yield faithful reproductions of objective reality, along with its ready alteration in all three of its stages has important implications in forensic settings. It is clear that police and attorney investigations of crimes can result in alterations of memory. Such memory

22. See Ray Bull & Brian R. Clifford, *Eyewitness Voice Recognition Accuracy*, in EYEWITNESS TESTIMONY, *supra* note 9, at 97-99. Although the status of the interrogator affects recall, it seems that the attitude of the interrogator (for example, whether the interrogator is supportive or disapproving during the interrogation) makes little or no difference.

23. Experiments have shown that open-ended questions which allow the observer to report in a narrative form will yield more accurate reports but the reports will be less complete than reports obtained through the use of leading questions. Those reports will be more detailed but less accurate. Daniel F. Hall, et al., *Post-Event Information and Changes in Recollection for a Natural Event*, in EYEWITNESS TESTIMONY, *supra* note 9, at 129-31.

24. For example, in one experiment, subjects were asked "How long was the movie?" The average response was 130 minutes. Another group seeing the same movie was asked "How short was the movie?" The average response was one hundred minutes.

25. Wording is so important that even changing a question from "Did you see the . . ." to "Did you see a . . ." will change the response to a question about an event substantially. This is because an interrogator asking "Did you see the . . ." is making an assumption that the object referred to exists and may be familiar to the person being questioned. This assumption may influence the answer. The question "Did you see a . . ." does not make any assumption. See Hall, *supra* note 23, at 131.

26. This concept of memory is most notably espoused by Dr. Martin Reiser, a police psychologist in Los Angeles, who runs the Law Enforcement Hypnosis Institute, Inc., which runs 32-hour training courses for police officers and others in hypnosis techniques. ALAN W. SCHEFLIN & JERROLD L. SHAPIRO, *TRANCE ON TRIAL* 66-67 (1989).

27. *Id.* at 153. "The assumption, however, that a process analogous to a multichannel videotape recorder inside the head records all sensory impressions and stores them in their pristine form indefinitely is not consistent with research findings or with current theories of memory." Council on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 JAMA 1918, 1920 (1985).

alterations may result from any number of factors.²⁸ For example, if the police question a witness to the crime, the wording of the questions may affect the recall of the memory. Alternatively, through questioning, an officer may communicate post-event information to witnesses which alter recall. Showing photographs of suspects may even cause memory alteration resulting in misidentification.²⁹

Because police and attorney investigation can readily affect witness' memories, these agencies should be utilizing procedures that minimize the dangers.³⁰ Thus, the issue arises as to the propriety of using hypnosis on potential witnesses at trial. Is it so suggestive that its use irremediably taints witness' memories so that any testimony should be considered unreliable? Or is it no more suggestive than permissible procedures such that hypnosis should go to the weight, rather than to the admissibility of testimony? Should some testimony of a previously hypnotized witness be allowed (for example witness' memories prior to hypnosis), while other testimony is precluded?³¹ In order to answer these questions, it is necessary to explore the phenomenon of hypnosis.

III. HYPNOSIS

The use of hypnotism may well date to antiquity.³² It gained notoriety through Franz Anton Mesmer, an Austrian physician, who is universally considered the father of modern hypnotism.³³ Mesmer found that ailing

28. *People v. Wright*, 755 P.2d 1049 (Cal. 1988).

29. *State v. Williams*, 618 P.2d 110, 118 (Wash. App. 1980), *aff'd*, 634 P.2d 868 (1981).

30. The most dramatic example of an investigatory procedure with great potential to affect a witness's memory is a lineup in which a witness is asked if he or she can identify the perpetrator of a crime from a line of people. In *United States v. Wade*, 388 U.S. 218, 227 (1967), the government characterized the use of a lineup as a "mere preparatory step" in gathering its evidence. The Supreme Court rejected this argument, saying that the vagaries of eyewitness testimony were well established and that a major reason for the substantial number of misidentifications by witnesses was the suggestiveness inherent in the process by which suspects were presented for pretrial identification. The Court outlined several manners in which the lineup or other means of pretrial identification could be improperly suggestive and noted that the Sixth Amendment required that the accused be entitled to have counsel present at the lineup. *Wade*, 388 U.S. at 228-39.

31. The last three questions are all examples of rules that have been or currently are applied in various jurisdictions.

32. See HOWARD B. CRASILNECK & JAMES A. HALL, *CLINICAL HYPNOSIS: PRINCIPLES AND APPLICATIONS* 7 (2d ed. 1985). Crasilneck and Hall cite several authorities who would place the use of hypnosis back to biblical times. Indeed, one commentator places the power of suggestion all the way back to "the cunning serpent who overpowered Adam and Eve in the Garden of Eden." Lisa K. Rozzano, Comment, *The Use of Hypnosis in Criminal Trials: The Black Letter of the Black Art*, 21 LOY. L.A. L. REV. 635, 636 n.3 (1988).

33. CRASILNECK & HALL, *supra* note 32, at 7-8. Hypnotism became so well-known as a result of Mesmer's efforts that the term mesmerism became a synonym for hypnotism.

people were put in a sleep-like state when magnets were passed over their bodies,³⁴ and he concluded that these effects were caused by "animal magnetism," similar to physical magnetism.³⁵ Mesmer's theories of "animal magnetism" were eventually discredited³⁶ as it was discovered that sleep-like states could be induced by instructing subjects to concentrate on a single point for a short period of time.³⁷ The inducement of a sleep-like state became known as hypnosis.³⁸ As knowledge of hypnosis became more widespread, more research was done, including research into the use of hypnosis as a psychoanalytic tool; and hypnosis was also used to a limited extent for the treatment of combat fatigue in World Wars I and II.³⁹

It was not until after World War II, however, that hypnosis became widely accepted in the scientific community. Since then, widespread interest in hypnosis has resulted in the founding of the Society for Clinical and Experimental Hypnosis and the American Society of Clinical Hypnosis.⁴⁰ Scientific journals devoted exclusively to hypnosis are published in several countries, and international congresses on hypnosis have met on several occasions.⁴¹

Despite the vast research on hypnosis, there is no universally accepted definition of hypnosis.⁴² Nonetheless, most definitions include elements of extreme suggestibility and suspension of critical judgment on the part of the subject.⁴³ The combination of these elements gives rise to the three major

34. Diane Barr & Larry Spurgeon, *Testimony by Previously Hypnotized Witnesses: Should It Be Admissible*, 18 IDAHO L. REV. 111, 112 (1982).

35. CRASILNECK & HALL, *supra* note 32, at 8.

36. However, Dr. Lee Pulos has proposed that Mesmer's theories be reexamined in light of present scientific knowledge concerning electrical fields associated with the human body. *Id.* at 9 (citing Lee Pulos, *Mesmerism Revisited: the Effectiveness of Esdaile's Techniques in Production of Deep Hypnosis and Total Body Hypoanaesthesia*, 22 AM. J. CLINICAL HYPNOSIS 206-11 (1980)).

37. Barr & Spurgeon, *supra* note 34, at 112. James Braid, an English medical practitioner, is credited with having made this discovery.

38. It was Braid who coined the term "hypnosis," from the Greek *hypnos*, meaning sleep. *Id.*

39. See 9 ENCYCLOPEDIA BRITANNICA 133, 134 (15th ed. 1982); CRASILNECK & HALL, *supra* note 32, at 10-12.

40. CRASILNECK & HALL, *supra* note 32, at 13.

41. 9 ENCYCLOPEDIA BRITANNICA 135 (15th ed. 1982).

42. Council on Scientific Affairs, *supra* note 27, at 1919. This lack of agreement on a definition has been recognized by virtually every commentator on the subject. For example, Crasilneck and Hall give several definitions, each of which is different. CRASILNECK & HALL, *supra* note 32, at 18-20. Several courts have noted this lack of agreement, including the Supreme Court in *Rock v. Arkansas*, 483 U.S. 44, 58-59 (1987).

43. Council on Scientific Affairs, *supra* note 27, at 1919. The American Medical Association has adopted the British Medical Association's definition of hypnosis, which states that hypnosis is: [A] temporary condition of altered attention in the subject which may be induced by another person and in which a variety of phenomena may appear spontaneously or in response to verbal or other stimuli. These phenomena include alterations in consciousness

dangers in using hypnosis in an investigation where the person hypnotized will testify at a criminal trial. These are hypersuggestibility, confabulation, and memory hardening.

Hypersuggestibility refers to the hypnotist's capability to alter a subject's memory by placing memories which do not correspond to reality in the subject's mind.⁴⁴ This results from the fact that suggestion is a keystone to hypnosis; many experts define hypnosis as a state of heightened suggestibility.⁴⁵ As a result, a hypnotized person may adopt as his or her own recollection messages communicated to them by the hypnotist either inten-

and memory, increased susceptibility to suggestion, and the production in the subject of responses and ideas unfamiliar to him in his usual state of mind.

Gary E. Lambert, Note, *A Survey of Hypnotically Refreshed Testimony in Criminal Trials: Why Such Evidence Should be Admitted in Iowa*, 32 *DRAKE L. REV.* 749, 750 (1982-83) (quoting British Medical Ass'n, *Brit. Med. J. Supp.*, Apr. 23, 1955, quoted in Note, *The Admissibility of Testimony Influenced by Hypnosis*, 67 *VA. L. REV.* 1203, 1206-07 n.23 (1981)).

Even Black's Law Dictionary's definition of hypnotism states that it is "generally characterized by extreme responsiveness to suggestions from the hypnotist." *BLACK'S LAW DICTIONARY* 668 (5th ed. 1979).

Virtually every legal commentator dealing with the subject of hypnosis agrees that hypnosis results in increased suggestibility and decreased critical judgment. See, e.g., Mark A. Belasic, *Trial by Trance: The Admissibility of Hypnotically Enhanced Testimony*, 20 *COLUM. J.L. & SOC. PROBS.* 237, 239-40 (1986); Bernard L. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 *CAL. L. REV.* 313, 316-17 (1980); Ira Mickenberg, *Mesmerizing Justice: The Use of Hypnotically-Induced Testimony in Criminal Trials*, 34 *SYRACUSE L. REV.* 927, 932-33 (1983); Robert S. Spector & Teree E. Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 *OHIO ST. L.J.* 567, 568 (1977). Although commentators differ on admissibility of hypnotically enhanced testimony, it is not because of disagreement over the existence of these phenomena, but rather over the extent to which the effects of these phenomena can be mitigated.

Courts dealing with the issue of admissibility of hypnotically enhanced testimony also agree on the existence of these phenomena during hypnosis, although they differ over the extent to which they can be mitigated. For example, in *State v. Mena*, 624 P.2d 1274, 1276 (Ariz. 1981), the court stated "it is generally agreed that hypnosis is a state of altered consciousness and heightened suggestibility in which the subject is prone to experience distortions of reality, false memories, fantasies, and confabulation." In *People v. Zayas*, 546 N.E.2d 513 (Ill. 1989), the court adopts the American Medical Association's definition of hypnosis, which recognizes increased suggestibility. *Zani v. State*, 758 S.W.2d 233, 237 (Tex. Crim. App. 1988), the court states that "[t]he problem with hypnosis . . . is that it tends greatly to facilitate not only the retrieval of genuinely remembered data, but also construction of false but nevertheless plausible data."

Although each of these courts recognized the serious problem of suggestibility, each created a different rule regarding admissibility. The *Mena* court held that a witness who had previously been hypnotized was barred from any testimony regarding matters raised under hypnosis. *Mena*, 624 P.2d at 1280. The *Zayas* court held that posthypnotic recollections were inadmissible but that the witness could testify to his prehypnotic recollections. *Zayas*, 546 N.E.2d at 519. The *Zani* court held that a witness could testify to posthypnotic recollections if certain procedures were followed with respect to the hypnotic session. *Zani*, 758 S.W.2d at 243-44.

44. Kevin L. Pelanda, Comment, *The Probative Value of Testimony From the Hypnotically Refreshed Recollection*, 14 *AKRON L. REV.* 609, 622 (1981).

45. See *supra* note 43.

tionally or unintentionally.⁴⁶ These pseudomemories will stay with the subject even after he or she is no longer hypnotized, and the subject will be unable to distinguish between the memories he had prior to hypnosis and the memories resulting from hypnotic suggestion.⁴⁷ In other words, as one researcher stated, "[t]he very act of recalling under hypnosis may significantly change the witness's memory of an event, possibly resulting in the incorporation into memory of subtle cues or suggestions provided by the hypnotist—suggestions that become part of and hence cannot be differentiated from the original memory."⁴⁸

Where a previously hypnotized witness later testifies in court, the trier of fact may be unable to determine if the witness is testifying to his original memories or to memories created by the hypnotist's suggestions. That the hypnotist's suggestions may be incorporated into subjects' memories and be undifferentiable from original memories has significant forensic implications.⁴⁹

One's initial response may be that all these problems might be avoided by having the hypnotist be extremely careful not to suggest anything to the subject during hypnosis. Unfortunately, this is almost impossible to do. Experts on hypnosis doubt that a suggestion-free hypnotic session can occur.⁵⁰ The attitude, demeanor, body language, and tone of voice of the hypnotist may all unintentionally communicate messages to the subject that become incorporated in his memories.⁵¹ Further, the suggestions may even be unperceived by the hypnotist himself.⁵² Thus, suggestion during hypnosis is a serious problem that is not easily remedied.⁵³

46. "[H]ypnosis leads to an increased vulnerability to subtle cues and implicit suggestions that may distort recollections in specific ways, depending on what is communicated to the subject." Council on Scientific Affairs, *supra* note 27, at 1922.

47. *Pearson v. State*, 441 N.E.2d 468 (Ind. 1982).

48. Marilyn E. Smith, *Hypnotic Memory Enhancement of Witnesses: Does It Work?*, 94 PSYCHOL. BULL. 387, 388 (citing Diamond, *supra* note 43, at 314.)

49. See *infra* notes 251-63, 356-61 and accompanying text.

50. *State ex rel. Collins v. Superior Court*, 644 P.2d 1266, 1270 (Ariz. 1982).

51. *Harker v. Maryland*, 800 F.2d 437, 440 (4th Cir. 1986) (citing Diamond, *supra* note 43, at 333); *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984) (citing Diamond, *supra* note 43, at 333); Kroger & Douce, *Hypnosis in Criminal Investigation*, 27 INT'L J. CLINICAL AND EXPERIMENTAL HYPNOSIS 358, 366 (1979); Martin T. Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL AND EXPERIMENTAL HYPNOSIS 311, 328-32 (1979).

52. *Alsbach v. Bader*, 700 S.W.2d 823, 829 (Mo. 1985) (citing Diamond, *supra* note 43, at 330); *People v. Shirley*, 641 P.2d 775, 802-03 (Cal. 1982); and *State ex rel. Collins*, 644 P.2d at 1269 (Ariz. 1982).

53. Some courts, in an attempt to alleviate the problems associated with hypnotically enhanced testimony, have admitted hypnotically enhanced testimony upon observation of certain safeguards regarding the hypnosis. See, e.g., *State v. Hurd*, 432 A.2d 86 (N.J. 1981). These safe-

The second problem that arises out of the use of hypnosis is confabulation. Confabulation occurs when the subject, while under hypnosis, "responds to suggestion or expectation to fill in gaps in his memory with fantasy, exaggeration, or memories of other events transferred to compensate for the lack of actual memory."⁵⁴ In other words, the memory the subject experiences under hypnosis does not correspond to what actually occurred. Instead, the subject has confabulated it to compensate for the lack of actual experiential memory.

Numerous studies have shown that several factors can increase the incidence of confabulation. One such factor is the wish of the hypnotic subject to please the hypnotist. In an hypnotic session the subject experiences a compelling desire to please the hypnotist and wants to give the hypnotist the responses the subject thinks the hypnotist desires. As a result, when the subject is unable to recall a detail, this desire to please will lead the subject to confabulate.⁵⁵

Another factor that may lead to confabulation is the desire of the subject to be helpful. Those willing to be hypnotized in criminal investigations usually want to be helpful or want to see justice done. In an attempt to achieve these goals, they are likely to confabulate when their memory is unable to provide details.⁵⁶

In addition to motivational factors, the types of questions asked under hypnosis make a difference. When subjects under hypnosis are asked leading questions, they are more likely to give erroneous answers than

guards have been criticized by a number of later courts for, among other reasons, failing to address the problem of undue suggestiveness. *See infra* notes 158-68 and accompanying text.

54. *Walraven v. State*, 336 S.E.2d 798, 802 (Ga. 1985).

55. *State v. Peoples*, 319 S.E.2d 177, 181-82 (N.C. 1984) (citing Orne, *supra* note 51, at 316-20). Studies have shown that hypnotized subjects will try to respond to what they thought the hypnotist wanted them to do. Peter W. Sheehan, *Confidence, Memory, and Hypnosis*, in *HYPNOSIS AND MEMORY* 95, 115-16 (Helen M. Pettinati ed. 1988).

Orne says this willingness to please is a function of hypnosis. Orne, *supra* note 51, at 326. The hypnotized subject has a strong expectancy that hypnosis will succeed and believes that the hypnotist is an expert who will ensure that the subject succeeds. *Id.* The hypnotist makes certain that the subject succeeds. Hypnotic technique entails the use of verbal reinforcers such as "good", "fine", etc. *Id.* The hypnotized subject wants to maintain this approval and when the hypnotist stops his expressions of approval, the hypnotist is saying that he wants something else and the subject is willing to give it to him. *Id.*

56. *Harker*, 800 F.2d at 440 (quoting ELIZABETH LOFTUS, *EYEWITNESS TESTIMONY* 109 (1979), *quoted in* *People v. Shirley*, 641 P.2d 775, 801 (Cal. 1982)); Campbell W. Perry, et al, *Hypnotic Age Regression Techniques in the Elicitation of Memories: Applied Uses and Abuses*, in *HYPNOSIS AND MEMORY* 136 (Helen M. Pettinati ed. 1988).

nonhypnotized subjects.⁵⁷ One study showed that creating a leading question through a change as subtle as changing the article in a question from “a” to “the” led to substantially more incorrect answers.⁵⁸

Thus, when the hypnotist uses a method that conveys an assumption that the details of an event are present in the memory of the subject and that hypnosis will allow accurate recall of those details, it is likely the subject will accept that assumption.⁵⁹ These cues are present when the hypnotist uses a “video recorder” or television metaphor⁶⁰ or age regression⁶¹ procedures that encourage vivid “retelling” of the event.⁶² The subject’s desire to please by retrieving those memories will result in confabulation.⁶³ In fact, some psychologists have stated that the use of one version of the

57. Wagstaff, *The Enhancement of Witness Memory by ‘Hypnosis’: A Review and Methodological Critique of the Experimental Literature*, 2 BRIT. J. EXPERIMENTAL & CLINICAL HYPNOSIS 3, 9 (1984).

58. Putnam, *Hypnosis and Distortions in Eyewitness Memory*, 27 INT’L. J. CLINICAL & EXPERIMENTAL HYPNOSIS 437, 444 (1979).

59. Martin T. Orne, et al, *Hypnotically Enhanced Testimony: Enhanced Memory or Tampering With Evidence?*, in ISSUES AND PRACTICES IN CRIMINAL JUSTICE 34 (1985).

60. The video recorder technique used in hypnosis is described by Reiser as follows:

After an optimal state of hypnosis is achieved, the hypno-investigator indicates that the subject, in imagination, will be watching a special documentary film on television from a safe, secure and comfortable place. This special documentary can be speeded up, slowed down, stopped, reversed, with close-ups possible on any person, object or thing in the film. The sound can be turned up high so that anything that is said, even a whisper, can be heard very clearly. This will be a documentary film of the incident in question and will depict accurately and vividly everything of significance and importance the subject perceived and experienced in relationship to that crime event. And even though what occurred was very traumatic, the subject watching the TV documentary will be able to remain calm and relaxed, feeling detached from what is happening on the television set. The subject will be observing it as a reporter, covering an event to be written up accurately for a news story.

MARTIN REISER, *HANDBOOK OF INVESTIGATIVE HYPNOSIS* 158 (1980) (citations omitted).

61. An example of age regression technique in hypnosis is set out by Crasilneck and Hall: After reaching a state of somnambulism, our patient is told ‘Nothing is beyond the recall of one’s unconscious mind . . . you can remember material, events, facts, experiences, even if they are distasteful, or very shocking, and so you are going back in terms of time and space . . . going back to every space of time you can remember . . . You can remember quite clearly what happened [here indicate the past time to be remembered, as two weeks ago] when you were [specify the experience]. You are reliving the exact experience. You are again feeling the emotion . . . You are having the same thoughts, the same anxiety, the same fears . . . It is happening to you again. . . . Now you can recall every detail . . . [stress] every detail. You can feel the tension and tightness in your body. . . . You can remember and feel exactly what is happening. Now tell me everything that is happening.’

CRASILNECK & HALL, *supra* note 32, at 118.

62. Sheehan, *supra* note 55, at 118.

63. The video recorder or television metaphor is the one most commonly used by police hypnotists in hypnotic sessions. Perry, et al, *supra* note 56, at 136. The fact that it results in increased confabulation has significant ramifications for its use in forensic settings. See *infra* note 78 and accompanying text.

"video recorder" technique, employing a "hidden-observer"⁶⁴ method, can be "a free ticket to fantasy island."⁶⁵

Thus, the very use of hypnosis results in great danger of the creation of pseudomemories, either through suggestion or confabulation, that remain even after the hypnotic session.⁶⁶ This problem is compounded by the third phenomenon resulting from the use of hypnosis—memory hardening.

Memory hardening is a phenomenon in which pseudomemories are created during hypnosis and which are remembered after the hypnotic session. As a result of the hypnosis, the subject becomes more confident of these memories than he or she would otherwise normally be. This conviction can be so great that subjects have passed lie detector tests while recounting statements they swear are true and that researchers know are completely false.⁶⁷ One summary of studies involving this effect found that virtually every study on this issue has reported increased confidence and concludes that the increase in confidence for memories, both accurate and inaccurate, is the most consistent finding of all in studies on the various effects of hypnosis.⁶⁸ Although some psychologists dispute that memory hardening *inevitably* occurs,⁶⁹ the preponderance of studies finding this result suggests that its existence is a factor courts must consider in determining admissibility of hypnotically enhanced evidence.⁷⁰

64. The "hidden-observer" technique refers to the hypnotist's suggestion that the subjects refer to themselves separately from the persons experiencing the event, as if they were viewers of the crimes in which they were involved, rather than an actual participant. Perry, et al., *supra* note 56, at 137.

65. *Id.* Some hypnotists, in an effort to minimize confabulation caused by the use of the television technique, have explicitly suggested to subjects that they should recall the events accurately, and report only those events that actually occurred. This instruction is useless, given the fact that the very technique employed pressures the subject to provide more details than the subject could previously recall. In fact, the instruction is counterproductive in that while it does not increase the accuracy of the recall, it increases the subject's confidence that what he recalled is accurate.

66. See Orne, et al., *supra* note 8, at 44-46.

67. State v. Mack, 292 N.W.2d 764, 769 (Minn. 1980).

68. JEAN-ROCH LAURENCE & CAMPBELL PERRY, HYPNOSIS, WILL AND MEMORY 326-27 (1988); see also Diamond, *supra* note 43, at 339-40.

69. See SCHEFLIN & SHAPIRO, *supra* note 26, at 169-70 (in which the authors note Laurence's and Perry's conclusions as well as the existence of other studies indicating the existence of memory hardening, but conclude that the empirical evidence stops short of indicating that memory hardening occurs as an inevitable concomitant of hypnosis).

70. Memory hardening has several important ramifications in forensic settings. Among these are the effect of memory hardening on an attorney's ability to effectively cross-examine a witness who has previously been hypnotized, as well as the ability of the jury to accurately assess the witness's demeanor and determine which facts testified to by the witness are accurate and which are inaccurate.

In conclusion, the very fact of hypnosis creates serious problems with significant ramifications in forensic settings. Hypersuggestibility and confabulation can create pseudomemories that remain with the subject after the hypnosis is over. Not only do these memories remain with the subject, but confidence in recall of inaccurate, as well as accurate, memories increases. These potential alterations to a witness' memories have profound ramifications in forensic settings.

IV. IMPLICATIONS OF CHARACTERISTICS OF HYPNOSIS IN FORENSIC SETTINGS

The purpose underlying forensic hypnosis is to induce hypermnnesia, a state in which the subject has abnormally complete recall of the past, in order to retrieve memories that would otherwise be irretrievable. Such increased recall may be useful in the investigation of crimes.⁷¹

Claims were made in the late 1960s and 1970s that hypnosis had led to greater "successes" in investigations than traditional interrogatory techniques,⁷² and that in ninety percent of cases in which the Los Angeles County Sheriff's Department utilized hypnosis, the investigators in those cases reported the hypnosis was "helpful".⁷³ These claims have been attacked on two grounds. First, there is no quantifiable definition for words such as "success" and "helpful". Further, the claims of success and helpfulness were made without any description of the nature of the information obtained or of the methodology used to verify the accuracy of the information obtained. It is also impossible to determine the role of hypnosis in other cases where follow-up information was not available.⁷⁴ In other words, even if the terms "success" and "helpful" could be quantified, it was impossible to determine how many times the extra information proved to be inaccurate.

71. Probably the most oft-mentioned case in which hypnosis led to a detail enabling the police to solve a crime is the Chowchilla kidnapping case. In that case, a school bus was hijacked and the children and bus driver were imprisoned by the hijackers. Everyone ultimately escaped and the bus driver was questioned. He was unable to remember anything of significant help to the police. After he was placed under hypnosis, however, he could remember all but one digit of the license plate of the hijackers' car. The police were able to trace this lead and catch the kidnappers. *People v. Woods*, No.63187ANBC (Alameda Co. 1977) (reported in Schefflin & Shapiro, *supra* note 26, at 154-55). This case has been cited by numerous courts and commentators.

72. John C. Yuille & N. Hope McEwan, *Use of Hypnosis as an Aid to Eyewitness Memory*, 70 J. APPLIED PSYCHOL. 389 (1985).

73. Zelig & Beidleman, *The Investigative Use of Hypnosis: A Word of Caution*, 29 THE INT'L. J. CLINICAL AND EXPERIMENTAL HYPNOSIS 401-02.

74. *Id.* at 402-03.

Second, numerous laboratory experiments⁷⁵ have failed to demonstrate consistently that hypnosis increases accurate recall.⁷⁶ While studies show that the *amount* of information reported as a result of hypnosis increases, such increased information contains both accurate and inaccurate details.⁷⁷ This may be so because the hypnotic techniques that lead to increased recall are the very techniques likely to lead to confabulation. Age regression tech-

75. Of course, there is a difference between laboratory experiments and actual conditions. The most that can be said is that the laboratory experiments have failed to replicate the anecdotal evidence allegedly amassed by police investigators. It has been argued that the laboratory experiments have failed to duplicate the circumstances under which hypnosis gives rise to only veridical recollections, such as high emotional arousal of the witness.

However, laboratory experiments designed to include these characteristics have failed to demonstrate that hypnosis increases only reliable recall. See Smith, *supra* note 48, at 398, 405. When these failures are combined with the fact that the claims of increased memory by law enforcement agencies are merely anecdotal and have never been measured in any meaningful scientific manner, it throws great doubt on those claims.

76. A report for the National Institute of Justice summarizes the results of over two dozen experiments done over half a century. The authors of the report state that the studies consistently show the same results. If the material to be recalled is not meaningful to the observer, such as nonsense syllables, then hypnosis does not improve recall.

Even if the material to be recalled is meaningful, the authors find that many studies have shown no increase in hypnotic recall over nonhypnotic recall and that the most recent experiments do not support the view that hypnosis increases recall for meaningful material. However, some studies have shown an apparently significant degree of increase in recall as a result of hypnosis. The authors note that some of the studies that showed increased recall failed to measure the amount of inaccurate information reported as a result of hypnosis. See Orne, et al., *Hypnotically Enhanced Testimony: Enhanced Memory or Tampering With Evidence?*, ISSUES & PRAC. IN CRIM. JUST. 17-21 (1985).

One experimenter described the results of two laboratory experiments she conducted as "striking in their failure to provide any support for the contention that hypnosis can improve memory." Smith, *supra* note 7, at 392. Numerous other studies conclude that there is no evidence that hypnosis improves accurate recall. See, e.g., Putnam, *Hypnosis and Distortions in Eyewitness Memory*, 27 INT'L. J. CLINICAL & EXPERIMENTAL HYPNOSIS 437 (1979) (finding that subjects under hypnosis will have inaccurate recall when asked leading questions under hypnosis and no increase in recall when asked non-leading questions); Sanders & Simmons, *Use of Hypnosis to Enhance Eyewitness Accuracy: Does It Work?*, 68 J. APPLIED PSYCHOL. (1983) (finding that, based on previous research and data in the reported experiment, hypnosis does not enhance accuracy of recall); Peter W. Sheehan & Jan Tilden, *Effects of Suggestibility and Hypnosis on Accurate and Distorted Retrieval From Memory*, 9 J. EXPERIMENTAL PSYCHOL., LEARNING, MEMORY, & COGNITION 283 (1983) (finding that the data from the authors' experiments was consistent with prior studies showing no evidence that memory is superior under hypnosis); Nicholas P. Spanos, et al., *Are Hypnotically Induced Pseudomemories Resistant to Cross-Examination?*, 13 LAW & HUM. BEHAV. 271 (1989) (summarizing previous studies as indicating that hypnotic procedures are no more accurate than nonhypnotic procedures at increasing accurate eyewitness testimony); Yuille & McEwan, *supra* note 72, at 389 (finding that recall accuracy in general is high but that hypnosis did not have a positive effect on recall).

77. Orne, *supra* note 48, at 21. Laurence and Perry reach the same conclusion after summarizing reports of experiments conducted to measure this effect. LAURENCE & PERRY, *supra* note 68, at 318-27.

niques and "video recorder" metaphors often used to enhance memory in criminal cases are methods which psychologists have found are virtually guaranteed to induce confabulation.⁷⁸

Thus, although hypnosis may result in increased recall that might lead investigators to information that will help them solve crimes, it is also indisputable that much of the information investigators receive from witnesses under hypnosis will be inaccurate. Hypnotically enhanced recall containing inaccurate information has no significant negative impact on criminal investigations (other than perhaps some resources wasted following false leads), and positive impact even if only a very small percentage of the information recalled is accurate.

However, increased recall as a result of hypnosis is useful as testimony in a trial only if the newly retrieved memories are veridical. If a large percentage of these memories are inaccurate, then they are worse than useless; a jury might reach the wrong verdict in reliance upon them. Thus, if a party in a criminal trial wishes to have a previously hypnotized witness testify, the court must determine the extent that the witness will be testifying to accurate memories, not to pseudomemories created by suggestion or confabulation.

Courts addressing this issue have taken a variety of approaches.⁷⁹ A small number of jurisdictions have taken the position that the fact that the witness was previously hypnotized does not affect the admissibility of the

78. Indeed, one psychologist says that the use of the video recorder metaphor places such demands on the subject to engage in detailed, vivid recall that the subject will invariably confabulate. See Sheehan, *Confidence, Memory, and Hypnosis*, in *HYPNOSIS AND MEMORY* 118-19 (Helen M. Pettinati ed., 1988). Another study states that these methods of hypnosis are likely to elicit confabulation for a number of reasons, depending on the particular method utilized, citing legal cases in which it has been found that confabulation occurred. See Perry, et al., *supra* note 56, at 136-39.

Age regression techniques suffer from similar defects which lead to confabulation. See LAURENCE & PERRY, *supra* note 68, at 327-32, for a detailed discussion of how age regression leads to confabulation.

79. There are eight states that have not yet ruled on this issue: Kentucky, Montana, Nevada, New Hampshire, Rhode Island, South Carolina, Vermont, and West Virginia. One state, New Mexico, has addressed the issue without enunciating a general rule governing hypnotically enhanced testimony. See *State v. Hutchinson*, 661 P.2d 1315 (N.M. 1983) (holding that a witness's posthypnotic testimony was admissible because it did not significantly vary from her prehypnotic statements).

In Alabama, Oklahoma, and Texas, lower courts have addressed this issue, but the states' highest courts have not yet ruled. See *Chamblee v. State*, 527 So.2d 173 (Ala. Cr. App. 1988) (finding that an in-court identification of a criminal defendant by the victim of the rape, who had been hypnotized, was based on the victim's prehypnotic recall and that the hypnosis did not impermissibly taint her memory); *Harmon v. State*, 700 P.2d 212 (Okla. Crim. App. 1985) (holding that a previously hypnotized witness may testify only to those facts that can demonstrably have been shown to have been recalled prior to hypnosis); *Zani v. State*, 758 S.W.2d 233 (Tex. Crim.

witness's testimony; the facts surrounding the hypnosis merely affect the credibility of the witness and the weight the jury will give to that testimony.⁸⁰ A larger number of jurisdictions hold that when a witness takes the stand, he or she may testify to his posthypnotic memories so long as certain prophylactic guidelines, which vary in each jurisdiction, were adhered to when the hypnotic sessions occurred.⁸¹

The largest number of jurisdictions, in what has been categorized as an emerging majority, hold that hypnotically enhanced testimony is inadmissible.⁸² In such jurisdictions, previously hypnotized prosecution witnesses cannot testify to posthypnotic recollections; they may only testify to prehypnosis recollection.⁸³

App. 1988) (holding that a witness may testify to posthypnotic memories so long as the trial court has determined that the posthypnotic memory is sufficiently reliable).

Two federal circuits, the Second and the District of Columbia, have failed to address the issue in any way. Six circuits have failed to directly address the admissibility of hypnotically enhanced testimony under the federal rules of evidence, although in cases before them on writs of habeas corpus they have dealt with whether state rules regarding the admissibility of hypnotically enhanced evidence violate the United States Constitution. *See* Clay v. Vose, 771 F.2d 1 (1st Cir. 1985); Harker v. Maryland, 800 F.2d 437 (4th Cir. 1986); Beck v. Norris, 801 F.2d 242 (6th Cir. 1986); Little v. Armontrout, 819 F.2d 1425 (8th Cir. 1987); Beachum v. Tansy, 903 F.2d 1321 (10th Cir. 1990); Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988).

Finally, the Third Circuit has addressed the issue of posthypnotic testimony without stating a general rule. *See* United States v. Gatto, 924 F.2d 491 (3d Cir. 1991) (holding that a witness's posthypnotic in-court identification of the defendant would be admissible because the hypnosis did not affect the witness's memory of the crime).

80. At present, five states and two federal circuits have so held. *See* United States v. Kimberlin, 805 F.2d 210 (7th Cir. 1986); United States v. Awkard, 597 F.2d 667 (9th Cir. 1979); State v. Goutro, 444 So. 2d 615 (La. 1984); State v. Commeau, 438 A.2d 454 (Me. 1981); State v. Brown, 337 N.W.2d 138 (N.D. 1983); State v. Glebock, 616 S.W.2d 897 (Tenn. 1981); Chapman v. State, 638 P.2d 1280 (Wyo. 1982).

In addition, Oregon has enacted a statute which provides that witnesses who have previously been hypnotized may testify for either side in a criminal trial, provided that the entire hypnotic procedure was recorded on videotape or some other mechanical recording device. The recording or videotape must be made available to the opposing side. OR. REV. STAT. § 136.675 (1990).

81. At present, nine states have held this way. *See* People v. Romero, 745 P.2d 1003 (Colo. 1987); State v. Iwakiri, 682 P.2d 571 (Idaho 1984); State v. Butterworth, 792 P.2d 1049 (Kan. 1990); House v. State, 445 So. 2d 815 (Miss. 1984); State v. Hurd, 432 A.2d 86 (N.J. 1981); State v. Johnston, 529 N.E.2d 898 (Ohio 1988); State v. Adams, 418 N.W.2d 618 (S.D. 1988); Hopkins v. Commonwealth, 337 S.E.2d 264 (Va. 1985); State v. Armstrong, 110 Wis. 2d 555, 329 N.W.2d 386 (1983).

82. Zani v. State, 758 S.W.2d 233, 240 n.5 (Tex. Crim. App. 1988). State v. Tuttle, 780 P.2d 1203 (Utah 1988) also characterizes this approach as being adopted in a majority of jurisdictions. *See also* People v. Hayes, 783 P.2d 719 (Cal. 1989).

83. At present, twenty-three states have adopted this approach. Contreras v. State, 718 P.2d 129 (Alaska 1986); State v. Sherrill, 799 P.2d 849 (Ariz. 1990); Rock v. State, 708 S.W.2d 78 (Ark. 1986); People v. Hayes, 783 P.2d 719 (Cal. 1989) (applying only to cases arising before the California legislature passed a statute governing this issue); State v. Pollitt, 530 A.2d 155 (Conn. 1987); Elliotte v. State, 515 A.2d 677 (Del. 1986); Stokes v. State, 548 So. 2d 188 (Fla. 1989);

However, in *Rock v. Arkansas*,⁸⁴ the United States Supreme Court held that when a criminal defendant has previously been hypnotized and chooses to testify, the state may not invoke a *per se* prohibition against the testimony based on prior hypnosis. Instead, the trial court must make a case by case determination as to whether the hypnotically enhanced testimony is so unreliable that its exclusion is justified.⁸⁵ Thus, as a result of *Rock*, jurisdictions with a *per se* rule of inadmissibility for hypnotically enhanced testimony cannot apply the rule to a criminal defendant.⁸⁶

All three approaches to admissibility of hypnotically enhanced testimony are flawed. The question is whether they each have equal utility, or whether any one of them is so superior to the others that every jurisdiction should adopt it, or whether each is so flawed that an entirely new rule should be embraced.

Several evidentiary and constitutional issues must be considered in determining the propriety of each approach. The initial question that must be raised is whether hypnotically enhanced testimony is so unreliable that as a matter of public policy, it should always be inadmissible.

Walraven v. State, 336 S.E.2d 798 (Ga. 1985); State v. Moreno, 709 P.2d 103 (Haw. 1985); People v. Zayas, 546 N.E.2d 513 (Ill. 1989); Pearson v. State, 441 N.E.2d 468 (Ind. 1982); State v. Seager, 341 N.W.2d 420 (Iowa 1983); State v. Collins, 464 A.2d 1028 (Md. 1983); Commonwealth v. Kater, 447 N.E.2d 1190 (Mass. 1983); People v. Lee, 450 N.W.2d 883 (Mich. 1990); State v. Koehler, 312 N.W.2d 108 (Minn. 1981); Alsbach v. Bader, 700 S.W.2d 823 (Mo. 1985); State v. Palmer, 313 N.W.2d 648 (Neb. 1981); People v. Hughes, 453 N.E.2d 484, (N.Y. 1983); State v. Peoples, 319 S.E.2d 177 (N.C. 1984); Commonwealth v. Nazarovitch, 436 A.2d 170 (Pa. 1981); State v. Tuttle, 780 P.2d 1203 (Utah 1989); State v. Coe, 750 P.2d 208 (Wash. 1988).

In addition, California has enacted a statute which provides that testimony in a criminal proceeding of a previously hypnotized witness is admissible only with respect to matters recalled and related prior to the hypnosis, if the substance of the prehypnotic recall is preserved, the hypnosis was conducted in accordance with certain procedures and the hypnosis did not substantially impair the other party's ability to cross-examine the witness. CAL. EVID. CODE § 795 (West Supp. 1991).

One federal circuit, the Fifth, has held that hypnotically enhanced testimony is inadmissible, although the court allows witnesses to testify to their prehypnotic recall. See *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984).

84. 483 U.S. 44 (1987).

85. *Id.* at 61. The Court reasoned that a defendant has a constitutionally protected right to testify on her own behalf in a criminal trial. This right cannot be abridged by the state through evidentiary rules that are arbitrary. The Court found that it might be possible for posthypnotic testimony to be trustworthy and that an evidentiary rule that would automatically preclude such testimony without giving the defendant a chance to prove its reliability was arbitrary. For a further discussion of the Court's opinion in *Rock*, see *infra* notes 302-21 and accompanying text.

86. The Court in *Rock* stated that its holding applies only to criminal defendants who testify on their own behalf. *Rock*, 483 U.S. at 58 n.15. It is therefore an open question whether a jurisdiction can apply a rule of *per se* inadmissibility of hypnotically enhanced testimony to witnesses other than criminal defendants who testify on behalf of the defendant. See *infra* notes 319-21 and accompanying text.

In order to so decide, one must determine what standard to apply. The courts agree that hypnotically enhanced testimony is evidence resulting from the application of a scientific principle. They are not in agreement as to what the standard for such types of evidence should be or how any such standard chosen should apply to hypnotically enhanced testimony.

A. *The Frye Standard*

The predominant standard for evidence derived from the application of scientific principles is the *Frye*⁸⁷ test. Under *Frye*, when evidence is derived from the application of a scientific principle, the scientific principle must be one that has gained "general acceptance in the particular field in which it belongs."⁸⁸

The reasoning underlying *Frye* is that testimony must be reliable in order to be relevant in a forensic setting. Thus, when a scientific procedure yields data, the court must ensure that the data is reliable. *Frye* sets a standard that the data should not be deemed sufficiently reliable to be admitted into evidence unless the principle underlying the procedure is generally accepted in the relevant scientific community.⁸⁹ Thus, when a witness testifies to data resulting from a scientific procedure, *Frye* ensures that the procedure yields reliable data.

If *Frye* applies to hypnotically enhanced testimony, the question becomes whether the reliability of hypnotically enhanced recall has gained general acceptance in the scientific community. The answer to this question is unquestionably "no." The vast majority of studies conclude that hypnosis does not increase accurate recollection.⁹⁰ Further, the Council Report

87. This seminal standard was first enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

88. *Id.* at 1014.

89. The Arizona Supreme Court, in *State ex rel. Collins v. Superior Court*, 644 P.2d 1266 (Ariz. 1982), expanded on *Frye*, stating that when the court tries to determine the relevant scientific community, those accepting the principle must be "disinterested and impartial experts, knowledgeable in the scientific specialty which deals with and uses such procedures or techniques, [who] have come to recognize the methodology as having sufficient scientific basis to produce reasonably uniform and reliable results that will contribute materially to the ascertainment of the truth." *Collins*, 644 P.2d at 1285. The court further clarified that disinterested and impartial experts meant those people whose livelihood is not intimately connected with approval of the technique. *Id.*

The insistence that the experts relied upon in determining reliability of a procedure not having anything at stake is an important one. A number of police hypnotists have claimed that hypnotically enhanced recall is accurate. However, these hypnotists are not impartial in that their livelihoods are intimately connected with approval of hypnotically enhanced recall. Therefore, courts should not rely on those witnesses to determine the accuracy of hypnotically enhanced recall.

90. See *supra* note 76.

of the American Medical Association has stated that "recollections obtained during hypnosis not only fail to be more accurate, but actually appear to be generally less reliable than nonhypnotic recall."⁹¹ The conclusion that the scientific community does not regard hypnosis as an accurate means of refreshing recollection is indisputable.⁹²

This conclusion has been accepted by the Department of Justice and the courts. The Department of Justice, in a report issued in 1985, stated that "the present state of scientific knowledge is consistent with court rulings proscribing use of [hypnotically enhanced] eyewitness testimony in criminal trials."⁹³ Every jurisdiction that has applied the *Frye* standard has held that the reliability of hypnotically enhanced recall fails to meet this standard.⁹⁴ These courts have excluded hypnotically enhanced recall, finding that the relevant scientific community does not accept hypnosis as an acceptable means of refreshing recollection.⁹⁵ This analysis is undoubtedly correct.

However, some jurisdictions have held that *Frye* is inapplicable to hypnotically enhanced testimony.⁹⁶ These courts have focused on the fact that *Frye* addressed the admissibility of expert testimony in which the expert drew deductions from scientific tests. These courts reason that in cases dealing with hypnotically enhanced recall, there is no expert testifying. Rather, a lay witness testifies as to memories after being hypnotized. There is no expert testimony interpreting tests utilizing a scientific principle and, thus, there is no need to determine whether the scientific principle is generally accepted.⁹⁷ Instead, all the judge is trying to determine is whether the witness's memories are sufficiently reliable.

Such an analysis is an unduly crabbed interpretation of *Frye* and incorrect. Although *Frye* did specifically deal with the testimony of an expert witness, the reasoning underlying its holding is not restricted to expert testimony. *Frye* requires that evidence derived from scientific principles be suffi-

91. Council on Scientific Affairs, *supra* note 27, at 1918, 1921.

92. In *State v. Tuttle* the court quotes the report made to the National Institute of Justice, which states that "[t]he heavy weight of scientific evidence disfavors reliance on 'hypnotically refreshed' eyewitness testimony." *Tuttle*, 780 P.2d at 1210 (quoting Orne, et al, *supra* note 8, at 26).

93. Orne, et al, *supra* note 8, at 11.

94. See, e.g., *Contreras v. State*, 718 P.2d 129 (Alaska 1986); *People v. Shirley*, 723 P.2d 1354 (Cal. 1982); *People v. Zayas*, 546 N.E.2d 513 (Ill. 1989).

One jurisdiction, New Jersey, recognizes that as a general rule hypnotically enhanced recall is not reliable. However, in *State v. Hurd*, 432 A.2d 86, 95-97 (N.J. 1981), the court set forth guidelines which, if met, satisfy the *Frye* standard. See *infra* notes 120-38 and accompanying text.

95. *State v. Tuttle*, 780 P.2d 1203, 1209 (Utah 1989).

96. *State v. Brown*, 337 N.W.2d 138 (N.D. 1983); *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386 (1983).

97. *Brown*, 337 N.W.2d at 148-49.

ciently reliable and sets a standard for determining reliability. Nothing in *Frye* limits it to only those instances in which the evidence is the testimony of an expert witness, nor is there any policy consideration that should so limit it.⁹⁸

Where a witness is testifying to hypnotically enhanced recall, the recall is the product of a scientific procedure.⁹⁹ Thus, the court must ensure that the procedure yields accurate data. Similarly, in the case of hypnotically enhanced recall, the court must ensure that the hypnotic procedure yields accurate memories. *Frye* merely sets forth a standard for determining whether the memories are sufficiently accurate. Thus, in a *Frye* jurisdiction, hypnotically enhanced testimony should be subject to the *Frye* test.¹⁰⁰ Of

98. It is easy to construct a hypothetical to illustrate this point. Assume that in a jurisdiction that follows *Frye*, Officer Smith has arrested someone for selling cocaine. Taking the bag of cocaine, which he found in the defendant's coat pocket to the police laboratory. Officer Smith gives the bag to Dr. Pierce, who runs tests on the substance and determines that it is cocaine. Dr. Pierce explains each step of the test to Officer Smith, who is watching her conduct the tests. Before the trial, Dr. Pierce dies. The prosecution wants to introduce evidence showing that the tests identified the substance in the bag as cocaine and puts Officer Smith on the stand to testify to the procedures he saw Dr. Pierce use. If Dr. Pierce were testifying, the procedure would have to satisfy the *Frye* test. Officer Smith is not an expert witness. However, it would make no sense to say that because Officer Smith is not an expert witness, the procedure need not satisfy *Frye*. Rather, it seems clear that before evidence of the results of the test could be admitted, *Frye* would still have to be satisfied because the evidence results from a scientific procedure. (This hypothetical illustrates only the applicability of *Frye*. Hearsay problems remain with respect to the testimony.)

99. *Zayas*, 546 N.E.2d at 518. *Zayas* is not unique in holding that hypnotically enhanced recall is the product of a scientific procedure. No case has held to the contrary.

100. In fact, the rationale for not using *Frye* in *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386 (1983), contains several errors. The Wisconsin Supreme Court stated that *Frye* dictates that when an expert witness testifies to results from a scientific procedure, the judge need not make an independent examination of the underlying scientific principles. Rather, the judge evaluates the opinions of experts in the relevant field, and if enough accept the validity of the procedure, the judge may allow the witness to testify regarding the deductions he has made from that procedure. *Armstrong*, 110 Wis. 2d at 568, 329 N.W.2d at 393.

The *Armstrong* court further stated that the reliability of hypnosis is not at issue when a previously hypnotized witness testifies. Rather, it is the reliability of a specific human memory. Just as no expert could testify that a normal memory is accurate, the court noted that there are no experts capable of testifying as to the specific effects of hypnosis on the witness's memory. Thus, the court concluded that the most a judge can do is ensure that the hypnosis was not unduly suggestive, and that *Frye* was not relevant in such a situation. *Id.* at 571-73, 329 N.W.2d at 394-95.

The *Armstrong* court's analysis contains several flaws. First, it is unclear what the court meant when it said that no expert is capable of testifying as to the specific effects of hypnosis on a witness's memory. If this means that no expert could testify as to how hypnosis specifically affects a witness's memory, then the court is simply wrong. Numerous reports of the effects of hypnosis on memory are available. *See supra* note 76.

But if that language means that no expert could testify as to whether a specific memory was affected by hypnosis, then the court is correct. However, the posthypnotic memory is not comparable to memory of an un hypnotized person. While determining the accuracy of normal eyewitness

course, applying *Frye* will result in the inadmissibility of hypnotically enhanced testimony.

In recent years, *Frye* has been criticized and rejected by a number of jurisdictions as setting too stringent a standard.¹⁰¹ Instead, a number of jurisdictions have stated that the admissibility of evidence derived from scientific standards should be governed by the traditional standard of relevancy and general helpfulness.¹⁰² Under this standard, evidence is admissible if it is relevant; i.e., it is material¹⁰³ and probative.¹⁰⁴ However, the judge may exclude relevant evidence "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 evidence."¹⁰⁵

B. The Traditional Relevance Standard

Traditional relevance is a less stringent standard than the *Frye* test. As stated earlier, under *Frye*, if scientific evidence is proffered, the principle must be generally accepted in the relevant scientific community before it is

ness testimony is always problematic, hypnosis adds another complicating factor—the possibility that the hypnosis resulted in confabulation. Thus, hypnotically enhanced recall is not truly comparable to "normal" eyewitness testimony. As a result, the court was wrong in equating the two and in implying that the trial judge's function was no different in determining the reliability of the previously hypnotized witness's testimony than in determining the reliability of normal eyewitness testimony.

Further, the court's statement that the most a trial judge can do is ensure that the hypnotic session was not unduly suggestive emphasizes the very problem that *Frye* was intended to solve. The judge is not an expert in hypnosis. Thus, the judge is not qualified to determine whether the hypnotic session was unduly suggestive. While the judge might be able to spot instances of gross suggestion, the judge is almost always unqualified to determine whether subtle, unintended suggestion might affect the witness's memory. Thus, the intended safeguard is no safeguard at all.

Finally, although the court attempts to deal with the problem of suggestiveness (albeit ineffectively), it fails to deal at all with the other problems inherent in hypnosis: confabulation and memory hardening. Of course, a judge who is not an expert on hypnosis will not be qualified to deal with these issues. Thus, the *Armstrong* court fails to achieve even its own limited objective: determining the effect of a specific hypnotic session on a witness's memory.

101. See BROWN, ET AL., MCCORMICK ON EVIDENCE 606-07 (Edward E. Cleary, ed., 3d ed. 1984).

102. *Id.* at 607-08.

103. Materiality deals with whether the evidence is being offered to prove a proposition that is in issue in the case. If the evidence is offered to prove a matter that is not in issue in the particular case, then the evidence is considered immaterial. As such, it is irrelevant and inadmissible. *Id.* at 541.

104. Probative value deals with whether the proffered evidence tends to prove the proposition for which it is offered. *Id.* Federal Rule of Evidence 401 embodies the concept of both materiality and probative value in its definition of relevance. *Id.* at 541-42.

105. FED. R. EVID. 403. This rule is a codification of the common law rule. BROWN, ET AL., *supra* note 101, at 606-07.

admissible. In other words, the judge must already have found that the evidence is reliable. However, under the traditional relevance test, the judge need only determine that a reasonable juror could find that the evidence proffered is sufficiently reliable to support the proposition for which it is introduced.

This is a much lower standard of reliability than finding that the relevant scientific community finds the evidence reliable. Of course, relevant evidence may still be inadmissible if its probative value is substantially outweighed by factors such as unfair prejudice, misleading the jury, or other factors such as those mentioned in Federal Rule of Evidence 403 (FRE 403).

Courts applying a traditional relevancy test have taken three different positions regarding admissibility of hypnotically enhanced evidence. Some courts have held that hypnotically enhanced testimony is always inadmissible.¹⁰⁶ Others have held that hypnotically enhanced testimony is admissible if certain guidelines are followed regarding the hypnotic sessions.¹⁰⁷ Finally, some jurisdictions have held that hypnotically enhanced testimony is admissible, holding that hypnosis goes to the witness's credibility, rather than to admissibility.¹⁰⁸

The same theme that runs through the cases adopting *Frye* runs through all the cases using a relevance analysis; i.e., how reliable is hypnotically enhanced recall? If hypnotically enhanced recall is so unreliable that no reasonable juror could find it relevant, then the witness's testimony regarding it should be per se inadmissible. If a reasonable juror could find that the recall is probative, then the question must be raised as to whether the recall's probative value is substantially outweighed by the kinds of factors listed in FRE 403.

Hypnotically enhanced testimony is inherently unreliable because of two of the factors inherent in hypnosis: hypersuggestibility and confabulation.¹⁰⁹ Because of these factors, there is no way of knowing whether the

106. See, e.g., *Contreras v. State*, 718 P.2d 129 (Alaska 1986); *Rock v. State*, 708 S.W.2d 78 (Ark. 1986).

107. See, e.g., *House v. State*, 445 So.2d 815 (Miss. 1984); *State v. Hurd*, 432 A.2d 86 (N.J. 1981).

108. See, e.g., *State v. Brown*, 337 N.W.2d 138 (N.D. 1983); *Chapman v. State*, 638 P.2d 1280 (Wyo. 1982).

109. The third factor, memory hardening, relates not to whether the experiential memory is accurate, but rather to the witness's demeanor. It is relevant to whether the jury can accurately interpret the witness's testimony and to whether factors such as prejudicial effect substantially outweigh the recall's probative value. It is also important in analyzing whether a criminal defendant's Confrontation Clause rights have been violated when the prosecution wants to present hypnotically enhanced testimony. See *infra* notes 233-63 and accompanying text.

witness's memory corresponds to his perception of what occurred or is merely the result of the hypnosis.

No one is able to tell whether a memory is correspondent or fabricated—neither the witness nor the experts.¹¹⁰ If the trier of fact is unable to determine that the hypnotically enhanced recall is an accurate memory, the trier of fact has no principled basis by which it can determine whether the testimony pertaining to that memory makes a fact of consequence to the litigation more or less likely to have occurred.¹¹¹ Therefore, by definition, the testimony cannot be considered relevant.

Another way of looking at this issue is to say that the memory is not admissible because it cannot be authenticated.¹¹² That is, the proponent of the evidence cannot prove the testimony is what it purports to be—recall of an event that actually occurred. Because the proponent cannot prove this, the testimony cannot be connected to the case and, therefore, it is not helpful to the trier of fact and should be inadmissible.

The jurisdictions that admit hypnotically enhanced recall have addressed the issue of reliability in a variety of ways. None of these methods is satisfactory, either theoretically or from a practical standpoint.

One approach is to note that memories are often wrong. These jurisdictions note that human memory is fallible¹¹³ and that it can be affected by such factors as conversations with attorneys, reading or hearing about a

110. Orne, *supra* note 51, at 311, 317-18. *See also* State v. Seager, 341 N.W.2d 420, 428 (Iowa 1983) (describing Dr. Orne's testimony at trial that there is no reliable method of distinguishing "pseudomemory" from memory of what actually occurred).

111. This is the definition of relevance used in the Federal Rules of Evidence. Federal Rule 401 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This is essentially the same question considered in the common law, which defines relevant evidence as evidence that tends to prove or disprove a proposition provable in the case at bar. *See* George F. James, *Relevancy, Probability and the Law*, 29 CAL. L. REV. 689, 690-91 (1941).

112. The common law and the Federal Rules of Evidence require that before real evidence is admissible, the party proffering it must prove that the evidence is what it is purported to be. For example, in a bank robbery case, if the prosecution wishes to introduce the gun used in the robbery into evidence, it must show that this was indeed the gun used. This may be done in a variety of ways. *See* FED. R. EVID. 901(b) for an illustrative list.

Although testimonial evidence is generally distinguished from real evidence such that authentication of testimonial evidence, is unnecessary, analytically it can be argued that there is only one type of evidence, even though the forms of proof may differ. *See* RICHARD O. LEMPert & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 989-90 n.3 (2d ed. 1982) (citing Jerome Michael & Mortimer J. Adler, *Real Proof I*, 5 VAND. L. REV. 344, 356 (1952)). Thus, although the authentication requirement may not technically apply to hypnotically enhanced recall, it is an appropriate analogy.

113. *See supra* notes 12-25 and accompanying text.

case, and discussing with others.¹¹⁴ Although courts recognize that such factors might make testimony suspect, the testimony is nonetheless admissible. Thus, the courts conclude, although hypnosis might make a witness's testimony suspect, this is no different than admitting into evidence other testimonial evidence which might also be suspect.¹¹⁵

This argument, while perhaps superficially appealing, is conceptually flawed. The problems with evaluating memory in normal circumstances arise from the fallibility of human memory. This fallibility is a known quantity within the ordinary lay person's experience.¹¹⁶ Thus, jurors expect this fallibility and understand how to compensate for it. However, where the witness is testifying to hypnotically enhanced recall, the problems of accuracy do not arise only from the fallibility inherent in all normal recall. Further inaccuracy results from the virtually inevitable defects of hypersuggestibility and confabulation inherent in the hypnotic process.¹¹⁷

In other words, normal testimony contains one layer of inaccuracy: the normal fallibility of human memory. Hypnotically enhanced recall adds another layer of inaccuracy. As the Pennsylvania Supreme Court has eloquently stated:

It is of no moment that all evidence is ultimately delivered by fallible human agency. Such fallibility is a known human quantity, understood and expected in ordinary human experience. It is at least only the fallibility of the witness and not the added dimension of another stirring his psyche, waking who knows what fanciful ghosts.¹¹⁸

Beside the intrinsic undesirability of admitting testimony that the court has reason to believe is more inaccurate than normal testimony is the problem of how juries are to assess hypnotically enhanced testimony. While jurors may be well equipped to deal with normal inaccuracy of memory, they are not well equipped to assess the increased inaccuracies that may result from the utilization of hypnosis as a means of attempting to increase recall.¹¹⁹

Thus, the argument that testimony of hypnotically enhanced recall is no different from any other testimony of a witness as to her memory is inappropriate for two reasons. First, the danger of hypersuggestibility and con-

114. *Hurd*, 432 A.2d at 94-95.

115. *Brown*, 337 N.W.2d at 151-52.

116. *Commonwealth v. Smoyer*, 476 A.2d 1304 (Pa. 1984).

117. *State v. Tuttle*, 780 P.2d 1203 (Utah 1989). See *supra* notes 43-70 and accompanying text.

118. *Smoyer*, 476 A.2d at 1306.

119. *Tuttle*, 780 P.2d at 1212-13.

fabulation in hypnosis significantly increases the danger of inaccuracy of recall above the levels of fallibility normally present in memory. Second, the hypnosis renders the jury unable to properly assess the accuracy of the witness's testimony.

C. *The Hurd Guidelines*

Some jurisdictions have attempted to solve the problem of unreliability of posthypnotic recall by requiring that the hypnotic session be conducted according to certain guidelines. These guidelines are designed to eliminate the dangers of hypersuggestibility and confabulation. The rationale underlying this approach varies somewhat, but all jurisdictions adopting this approach find that hypnotically enhanced recall is sufficiently reliable when the hypersuggestibility and confabulation are eliminated.

Some courts reason that once hypersuggestibility and confabulation are eliminated, hypnotically enhanced recall is as reliable as normal human memory.¹²⁰ Other courts simply conclude that if hypersuggestibility and confabulation are eliminated, hypnotically enhanced recall is sufficiently reliable to be admissible, without equating it to the reliability of normal recall.¹²¹

The first jurisdiction to adopt guidelines in an attempt to ensure the reliability of hypnotically enhanced recall was New Jersey, in *State v. Hurd*.¹²² The *Hurd* court adopted guidelines under the theory that hypnotically enhanced recall is comparable in reliability to normal memory under appropriate circumstances.¹²³

Under *Hurd*, a party in a criminal trial wishing to introduce hypnotically enhanced recall must inform the opponent of this intention, and provide the opponent with a recording of the hypnotic session and any other pertinent material.¹²⁴ The trial court must then determine whether the hypnotically enhanced recall is admissible. The court makes this determination by looking first at several preliminary factors speaking to whether hypnosis was a reasonably reliable means of refreshing the witness's memory in the specific case.

120. See, e.g., *State v. Iwakiri*, 682 P.2d 571, 578-79 (Idaho 1984); *United States v. Harrington*, 18 M.J. 797 (1984); *Hurd*, 432 A.2d at 94.

121. See, e.g., *State v. Johnston*, 529 N.E.2d 898, 905-06 (Ohio 1988); *State v. Adams*, 418 N.W.2d 618, 623-24 (S.D. 1988); *People v. Romero*, 745 P.2d 1003 (Colo. 1987); *House v. State*, 445 So. 2d 815, 824-26 (Miss. 1984).

122. 432 A.2d at 86.

123. *Id.* at 95.

124. *Id.*

First, the trial judge considers the appropriateness of the use of hypnosis for the kind of loss of memory suffered by the witness. The *Hurd* court noted that hypnosis is often reasonably reliable when the memory loss results from some pathological dysfunction, such as traumatic neurosis.¹²⁵ It also recognized that hypnosis is less reliable as a means of refreshing memory when it is used to "verify" one of many conflicting accounts of the event in question which the witness has previously given.¹²⁶ Next, the trial judge considers whether the witness has any discernible motive for recalling a particular version of the event; in such cases a witness may confabulate a self-serving report of the incident.¹²⁷

If, after weighing the above factors, the trial judge determines that hypnosis would yield recall as reliable as normal memory, the judge must then evaluate whether the actual hypnotic procedure employed was reasonably reliable. In order to provide an adequate record for the court to be able to determine that the hypnotically enhanced recall was sufficiently reliable, the *Hurd* court adopted six procedural requirements with which the proponent of the hypnotically enhanced recall must comply.

First, the hypnotic session must be conducted by a psychiatrist or psychologist experienced in the use of hypnosis. This person should also be able to qualify as an expert so as to aid the court in evaluating the procedures employed.¹²⁸ Second, the professional conducting the hypnosis should be independent of any parties involved in the case, such as the defense, the prosecution, or an investigator in the case.¹²⁹ Third, any information given to the hypnotist by either law enforcement personnel or by the defense prior to the hypnosis must be recorded in writing or in some other suitable form.¹³⁰ Fourth, before inducing hypnosis, the hypnotist must

125. *Id.* at 95-96 (citing Orne, *supra* note 51, at 311, 325). The *Hurd* court noted that the lack of a pathological reason for the witness's loss of memory does not automatically render the use of hypnosis inappropriate. However, the court stated "the reliability of hypnosis" is not as great in such cases and, therefore, the trial judge should be "especially careful" in evaluating the propriety of its use in such a case. *Hurd*, 432 A.2d at 95 n.4.

126. *Id.* at 96 (citing Orne, *supra* note 51, at 324, 332).

127. *Id.* (citing Orne, *supra* note 51, at 311, 314-15.)

128. *Id.* The court expressly requires that the hypnotist be a professional. It acknowledges that non-professionals who are versed in hypnotism may be appropriate when the hypnosis is being used solely for investigative purposes, but says that in criminal trials, a professional is necessary so that the court can obtain information concerning the reason for the memory loss and how easily hypnotizable the witness is. The court also states that a professional will be more likely to conduct the procedures so as to obtain accurate recall.

129. *Id.* This requirement "safeguard[s] against any bias on the part of the hypnotist" which could result in conduct, conscious or unconscious, that suggests the proper answer to the hypnotized subject. *Id.*

130. *Id.* This requirement allows the court to determine what information the hypnotist had that might have been communicated to the subject either directly or by suggestion.

elicit from the subject a detailed description of the event as the subject remembers it.¹³¹ Fifth, every contact between the hypnotist and the subject must be recorded, including the prehypnotic interview, the hypnotic session itself, and the post-hypnotic period.¹³² The use of videotape as a means of recording the contacts is strongly recommended, although not mandatory.¹³³ Sixth, only the hypnotist and the subject should be present during the prehypnotic session, the hypnotic session, and the posthypnotic interview.¹³⁴

The court noted that its list of factors was not exclusive; other factors might be relevant depending on the facts of a particular case.¹³⁵ Further, no one factor is an absolute prerequisite for admissibility.¹³⁶ In other words, failure to comply with each of the factors would not preclude admissibility of the hypnotically enhanced recall. Rather, the factors are a guide by which the trial judge can determine whether the hypnotically enhanced recall is sufficiently reliable as to be admissible.

The proponent of the evidence must prove by clear and convincing evidence that the hypnotically enhanced recall was sufficiently reliable.¹³⁷ The *Hurd* court noted that the clear and convincing standard created a heavy burden on the proponent, but reasoned that this was appropriate because of the potential for abuse of hypnosis, the likelihood of suggestiveness and error, and the consequent risk of injustice.¹³⁸

Since *Hurd*, a number of other jurisdictions have adopted either the *Hurd* standard or similar standards. However, while most jurisdictions have used the *Hurd* standards as a starting point, they have been dissatisfied with aspects of *Hurd* and have either modified them or have imposed additional requirements for admissibility.¹³⁹

131. *Id.* Of course, the hypnotist should try to avoid or minimize influencing the subject while obtaining the description.

132. *Id.* at 97. Having a record of each contact will allow the court to determine the extent to which the subject received information or suggestions from the hypnotist during the hypnosis and what recall was elicited during the hypnosis.

133. *Id.* Videotaping is recommended because it will record non-verbal cues that might suggest answers to the subject.

134. *Id.* This requirement precludes other people who know about the case from intentionally or inadvertently suggesting the answers to questions asked by the hypnotist. In fact, the court noted that the mere presence of another person at the hypnotic session could influence the subject's responses. *Id.*

135. *Id.* at 96.

136. *Id.*

137. *Id.* at 97.

138. *Id.*

139. Of the eight jurisdictions besides New Jersey that have adopted the use of guidelines to determine the admissibility of hypnotically enhanced recall, every jurisdiction except Wisconsin

For example, the Idaho Supreme Court adopted the *Hurd* guidelines with one modification. It was concerned that the guideline requiring that only the hypnotist and subject be present during the hypnosis was overly restrictive. The court noted that this safeguard would preclude a criminal defendant from the protection that might be afforded by having his attorney present during the session, or even from having his own psychiatrist present to observe the session.¹⁴⁰ The court believed that the presence of such third persons was necessary to protect the subject's rights and that their presence would not necessarily render the hypnotically enhanced recall unreliable. Thus, the court adopted the *Hurd* guidelines with the provision that while it is preferable to have only the hypnotist and subject present during the hypnosis, other persons can attend the session if their attendance can be shown to be essential and if steps are taken to ensure their presence does not influence the recall.¹⁴¹ Additionally, rather than using the clear and convincing standard, the Idaho Supreme Court utilized the "totality of the circumstances" test. The trial judge is to look at the factors listed and decide whether, under the "totality of the circumstances," the hypnotically enhanced recall is sufficiently reliable to be admissible.¹⁴²

Colorado, as well, utilizes the *Hurd* guidelines in conjunction with a "totality of the circumstances" test. In *People v. Romero*,¹⁴³ the court held that the trial judge should look at the extent to which the guidelines in *Hurd* were complied with, and added one more guideline—the existence of other evidence that would corroborate the hypnotically enhanced recall.¹⁴⁴ After weighing all these factors, the trial judge must be satisfied that the recall has not been so affected by the hypnosis as to render it unreliable. If the judge is satisfied, the testimony is admissible, although the witness may be cross examined about the hypnosis.¹⁴⁵

has used the *Hurd* guidelines as a starting point. Wisconsin's standards are based on guidelines set forth by Dr. Orne. See Orne, *supra* note 51, at 311, 335-36. Dr. Orne, of course, was the expert who suggested the guidelines ultimately adopted by New Jersey in *Hurd*. Thus, most jurisdictional guidelines have essentially the same genesis.

140. *Iwakiri*, 682 P.2d at 577-78.

141. *Id.* at 578.

142. *Id.* The *Iwakiri* guidelines were adopted by the Ohio Supreme Court in *State v. Johnston*, 529 N.E.2d 898 (Ohio 1988).

143. 745 P.2d 1003 (Colo. 1987).

144. *Id.* at 1017. The corroboration requirement attempts to ensure the reliability of the hypnotically enhanced recall. However, corroboration does not increase the reliability of hypnotically enhanced recall. See *infra* notes 170-78 and accompanying text.

145. *Id.* In *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988), the court adopted the *Romero* standards.

Other states have made even more significant changes in the guidelines. Mississippi requires, in addition to the factors listed in *Hurd*,¹⁴⁶ that the opposing party or parties have full access to the recording of the hypnotic session prior to trial,¹⁴⁷ that all opposing parties be given “free rein” to cross examine the witness testifying to hypnotically enhanced recall and/or the hypnotist who conducted the hypnosis,¹⁴⁸ and that no hypnotically enhanced recall shall be admissible unless otherwise admissible corroborating testimony or physical evidence tends to substantiate the hypnotically enhanced recall.¹⁴⁹ Further, while *Hurd* states that no one factor is a prerequisite to admissibility, the Mississippi Supreme Court expressly states that compliance with its guidelines is mandatory for the hypnotically enhanced recall to be admissible, and that the trial judge must determine that the probative value of the hypnotically enhanced recall outweighs the risk of unfair prejudice to the defendant.¹⁵⁰

Kansas adopts the *Hurd* requirements verbatim, and then adds one additional requirement: If possible, the hypnosis should be conducted in a neutral office, such as the hypnotist’s office.¹⁵¹ The court expressly states that offices or locations controlled by the prosecution or the defense should be avoided.¹⁵² The court then requires that the proponent of the evidence

146. In *House v. State*, 445 So.2d 815, 826-27, Mississippi adopted five of the six *Hurd* guidelines. The court did not require that the hypnosis be conducted by a hypnotist independent of all parties involved in the case. *Id.* The court gave no reason for deletion of this requirement from the *Hurd* guidelines. *Id.* It simply stated that after reviewing specific suggestions for guidelines, it had settled on the guidelines it set forth. *Id.*

147. *Id.* at 827. This additional requirement seems to be one that is mandated by Mississippi state law, inasmuch as the court cites Rule 4.06 of the *Mississippi Uniform Criminal Rules of Circuit Court Practice*. Rule 4.06(a)(4) requires the prosecution, upon written request from the defendant, to disclose to the defendant any reports or statements of experts made in connection with the case. Rule 4.06 (a)(5) requires that any physical evidence or photograph relevant to the case be disclosed. In theory, a recording of the hypnotic session could fall under either of these sections. By stating that full access is mandated under the rule, the court is apparently taking the position that the recording of a hypnotic session is not to be considered work product, which is exempt from disclosure under Rule 4.06 (b)(1).

148. *House*, 445 So.2d at 827. The court notes that the hypnotist is a necessary witness for the admissibility of hypnotically enhanced recall. *Id.* at 827 n.8.

149. *Id.* at 827.

150. *Id.*

151. *State v. Butterworth*, 792 P.2d 1049, 1058 (Kan. 1990). The court adopts the use of the guidelines only when the witness who would be testifying to hypnotically enhanced recall is the criminal defendant.

152. *Id.* at 1057-58. In adopting such a requirement, the court is clearly concerned that the problem of improper suggestion is so great that even the location of the hypnotic session could influence the subject’s responses.

prove substantial compliance with the guidelines by a preponderance of the evidence.¹⁵³

Wisconsin's guidelines are not based on *Hurd*, but because they are based on suggestions made by Dr. Orne, they are similar to the *Hurd* guidelines.¹⁵⁴ In addition to utilizing the *Hurd* factors, the Wisconsin Supreme Court recommended consideration of corroborating evidence.¹⁵⁵ It also suggested that the subject be examined to exclude the possibilities of physical or mental illness and to ensure the comprehension of what is occurring.¹⁵⁶ The trial judge is then to determine if the proponent of the hypnotically enhanced recall has sufficiently proven its reliability.¹⁵⁷

In analyzing the *Hurd* guidelines and the variations thereon, the conclusion is inescapable that they do not establish sufficient reliability to justify the admissibility of hypnotically enhanced recall.¹⁵⁸ The premise underlying *Hurd*, that under certain circumstances hypnotically enhanced recall is comparably reliable to ordinary memory, is fatally flawed, and the procedures aimed at making the premise a reality fail to achieve that aim.

One cannot expect hypnotically enhanced recall to yield memories as accurate as ordinary recall. Intrinsic in hypnosis are the problems of hypersuggestibility and confabulation.¹⁵⁹ Unless hypersuggestibility and confabulation are eliminated, hypnosis will yield recall that is less reliable than ordinary recall.¹⁶⁰

153. *Id.* at 1058. The court's decision to use the preponderance of the evidence standard is an interesting one. It is clear from the court's decision to impose the additional guideline that it is very concerned about the reliability of the hypnotically enhanced recall. After all, it not only adopted the *Hurd* guidelines intact, but it added another guideline. Yet, at the same time that it creates a more stringent standard than *Hurd*, it lessens the standard of proof imposed on the proponent from clear and convincing to preponderance of the evidence. *Id.* Thus, the court's actions seem contradictory.

154. These guidelines are set forth in *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386 (1983).

155. *Id.* at 394-95 n.23.

156. *Id.*

157. *Id.* at 394-96.

158. That one must conclude that the *Hurd* guidelines fail to establish sufficient reliability for the admissibility of hypnotically enhanced recall may seem incongruous in light of the foregoing discussion. However, the language propounded by each court shows that the *Hurd* guidelines suffice the courts' deep concern over the idea of per se inadmissibility and their struggle to find the evidence admissible. The courts' desire to justify the admissibility of hypnotically enhanced recall led to the adoption of guidelines that do not achieve their stated ends.

159. *See supra* notes 42-66 and accompanying text.

160. This is not just a matter of speculation. One commentator summarized empirical studies of hypnotically enhanced recall by stating that these studies suggest that hypnotically enhanced recall is significantly less accurate than ordinary recall and concluded that the empirical data do not support the premises underlying *Hurd*. Paul G. Harnisch, Note, *Hypnotically Refreshed Testi-*

Nothing in the *Hurd* guidelines prevents the hypnotist from unintentionally or subconsciously planting suggestions in the subject's mind.¹⁶¹ Remember that the very definition of hypnosis embodies the notion of extreme suggestibility¹⁶² and that experts doubt that a suggestion-free hypnotic session can ever occur.¹⁶³ Complicating this problem is the fact that it would be difficult for even an expert to identify impermissible cues from the hypnotist to the subject, even if the hypnotic session were on videotape.¹⁶⁴ It would be correspondingly even more difficult, if not impossible, for a lay person such as a judge or juror to discern the existence of such cues.¹⁶⁵ Thus, while the *Hurd* guidelines may provide a method of precluding the hypnotist from intentionally providing suggestions, the very nature of hypnosis precludes the possibility that all suggestion will be kept from the subject.

Nor do the *Hurd* guidelines prevent the subject from confabulating.¹⁶⁶ The guidelines provide no control over the subject's motivation.¹⁶⁷ Remember that the subject's desire to please the hypnotist or to provide help in solving a crime play a large part in the subject's confabulating. When the subject is a criminal defendant, the motive to confabulate is even stronger.¹⁶⁸ Because the guidelines provide no control over this problem, they provide no protection against confabulation during the hypnotic session.

In conclusion, the *Hurd* guidelines offer inadequate or no protection against either suggestibility or confabulation. These problems will occur

mony: *In Support of the Emerging Majority and People v. Hughes*, 33 BUFF. L. REV. 417, 444-46 (1984).

161. The court in *State v. Peoples*, 319 S.E.2d 177,188 (N.C. 1984) generally implies that even Dr. Orne, the progenitor of the *Hurd* guidelines, finds them ineffective in eliminating the dangers inherent in hypnosis. See also *People v. Zayas*, 546 N.E.2d 513, 517 (Ill. 1989); *Alsbach v. Bader*, 700 S.W.2d 823, 826-27 (Mo. 1985).

162. See *supra* note 43 and accompanying text.

163. See *supra* note 50 and accompanying text.

164. *Alsbach*, 700 S.W.2d at 826-27; *Peoples*, 319 S.E.2d at 177.

165. The court in *People v. Shirley*, 723 P.2d 1354 (Cal. 1982), recognized this problem, stating that "[i]f even an expert cannot confidently make that identification, it is vain to believe that a layman such as a trial judge can do so." *Id.* at 1366.

166. Dr. Orne, the progenitor of the guidelines, agrees. *Peoples*, 319 S.E.2d at 185-88.

167. A number of courts have reached this conclusion and have accordingly rejected the *Hurd* guidelines. See *Shirley*, 723 P.2d at 1365-66; *Zayas*, 546 N.E.2d at 517; *Hughes*, 453 N.E.2d 484 (N.Y. 1983).

168. This point is particularly relevant in light of the United State Supreme Court's decision in *Rock v. Arkansas*, 483 U.S. 44 (1987). In *Rock*, the Court held that the Sixth Amendment Compulsory Process Clause precluded states from ruling that hypnotically enhanced recall is per se inadmissible when the witness who will testify to the recall is a criminal defendant. *Id.* at 52, 62-63.

even if the guidelines are scrupulously followed. Therefore, they are not appropriate guarantors of the accuracy of hypnotically enhanced recall and the use of these procedures does not ensure sufficient reliability of hypnotically enhanced recall that it should be admissible at trial.¹⁶⁹

Nor do any of the additional guidelines suggested by the other courts obviate the problems of suggestibility or confabulation. The *Iwakiri* court's modification, that parties other than the hypnotist and subject be present when necessary to protect the subject's interest, do not address either of these problems. In fact, it exacerbates suggestibility by providing other people who might unconsciously or unintentionally send improper cues to the subject.

The *House* court's guidelines also fail to address these problems. Giving the opposing side free access to the recording of the interview will allow the opposing side to see if any blatant suggestiveness has taken place. However, it does not alleviate the problem of an expert's, as well as a lay person's, inability to detect subtle, unintentional cuing. It also fails to solve the problem of confabulation.

The *House* court's guideline that opposing parties have free rein to cross examine the witness who was hypnotized and/or the hypnotist regarding the witness's memory also fails to address the issues of subject cuing and confabulation. Cross-examination does allow the opposing party to point out possible contradictions between prehypnotic memory and posthypnotic recall as a form of impeachment. However, it does not address the threshold issue of whether hypnotically enhanced recall is sufficiently reliable to justify admissibility in the first place.

If evidence is sufficiently unreliable that it should be inadmissible, then admitting the evidence and allowing the opposition to rebut solves nothing. Admitting the evidence gives the jury the right to find the evidence reliable,

169. Specific guidelines in *Hurd* have also been criticized, in addition to the more general criticism of the guidelines' ineffectiveness in guaranteeing reliability. In *State v. Brown*, 337 N.W.2d 138 (N.D. 1983), the court stated that the first *Hurd* guideline, requiring that only a licensed psychiatrist or psychologist conduct the hypnosis, had been criticized. *Id.* at 150. The court noted Dr. Reiser's opinion that properly trained law enforcement personnel were more likely to avoid improper suggestion during the session than medical professionals. *Id.*

Dr. Reiser also objected to the requirement that the hypnotist be independent of the parties to the litigation. *Id.* He stated that this was a matter of ethics or professional integrity, reasoning that once a party employed a hypnotist, the hypnotist was no longer a neutral party. *Id.*

Dr. Reiser further objected to the requirement that the information given to the hypnotist be in writing. *Id.* He stated that this was simply an attempt to impose "sterile laboratory conditions" that were unrealistic. *Id.*

It should be noted that Dr. Reiser finds the *Hurd* guidelines unnecessary because he believes that hypnotically enhanced recall, conducted properly, is intrinsically reliable.

which sidesteps the issue of whether the evidence should be deemed inadmissible as a preliminary matter by the trial judge. Remember that it is impossible to tell whether hypnotically enhanced recall is accurate. This is the reason such recall should be inadmissible unless there is a reason to find the reliability of the hypnotically enhanced recall has been increased from its normal state of unreliability. Because impeachment does not increase the reliability of evidence, it does not solve the problem of unreliability.

The *Armstrong* court's guideline that the subject be examined in order to ensure that the subject is capable of comprehending what is happening also fails to address the issues of improper suggestion and confabulation. Guaranteeing that the subject understands she is being hypnotized in no way decreases the likelihood of suggestion or confabulation. Therefore, it fails to increase the reliability of hypnotically enhanced recall so as to allow admissibility.

D. Corroboration

There is one last proposed guideline that has been adopted in an attempt to ensure sufficient reliability of hypnotically enhanced recall so as to justify admissibility. A number of jurisdictions adopting¹⁷⁰ some form of *Hurd* have added the requirement that the hypnotically enhanced recall be corroborated by other admissible evidence. The theory underlying the corroboration requirement is that when the hypnotically enhanced recall is corroborated by independent admissible evidence, it is more likely that the recall was indeed reliable.¹⁷¹

While this theory is superficially attractive, deeper analysis shows it to be fatally flawed, both conceptually and as a practical matter. Conceptually, the question of admissibility of hypnotically enhanced recall depends on its intrinsic reliability. Because of the danger of suggestibility and confabulation, hypnotically enhanced recall is intrinsically unreliable. The fact that other evidence corroborates some or all of the testimony does not make it any more reliable. Because the likelihood of suggestion or confabulation has not been reduced or eliminated, corroboration does not increase the trustworthiness of the hypnotically enhanced recall at all.

170. See *People v. Romero*, 745 P.2d 1003 (Colo. 1987); *House v. State*, 445 So.2d 815 (Miss. 1984); *State v. Johnston*, 529 N.E.2d 898 (Ohio 1988); *State v. Adams*, 418 N.W.2d 618 (S.D. 1988); *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988); *State v. Armstrong*, 110 Wis.2d 555, 329 N.W.2d 386 (1983).

171. See *State ex rel. Collins v. Superior Court*, 644 P.2d 1266, 1292 (Ariz. 1982) (quoting D. Herbert Spiegel, *Hypnosis and Evidence: Help or Hindrance?*, 347 ANNALS N.Y. ACAD. SCI. 73, 79 (1980)).

In analyzing the propriety of using corroboration as a means of testing the accuracy of hypnotically enhanced recall, it is important to distinguish between two different aspects of memory—reliability of recall and accuracy of recall. Reliability of the recall deals with the experiential aspect of memory.¹⁷² Accuracy of the recall deals with the correspondent aspect of memory.¹⁷³

Reliability of the hypnotically enhanced recall raises the issue of whether the hypnotically enhanced recall is the same recall that the person would have experienced without hypnosis. Corroborating evidence in no way allows the judge to determine whether the hypnosis affected the subject's experiential recall.¹⁷⁴ It provides no means for determining the effect of suggestion or confabulation on the subject's memory.

What corroborating evidence does allow the judge to do is attempt to gauge the accuracy of the recall; *i.e.*, whether the recall corresponds to what actually occurred. If the hypnotically enhanced recall is sufficiently reliable to be admissible, then it is entirely appropriate for the proponent of the recall to introduce corroborating evidence to verify the accuracy of the recall. Such an approach is no different from any other trial in which the proponent of testimonial evidence attempts to prove that the witness's memory corresponds to what actually occurred.¹⁷⁵

However, if the hypnotically enhanced recall is not reliable, then admitting it simply because there is some corroborating evidence amounts to an improper bootstrapping of the recall on the reliability of other evidence at trial.¹⁷⁶ In other words, the corroborating evidence is effectively put before

172. See *supra* note 5 and accompanying text.

173. *Id.*

174. The Iowa Supreme Court recognized this issue in rejecting the idea of using corroborative evidence as a basis for admitting hypnotically enhanced recall in *State v. Seager*, 341 N.W. 2d 420 (Iowa 1983). Although the court's analysis confuses the concept of reliability with the concept of accuracy, it stated that the "vice which we should guard against is not a departure of the witness's testimony from 'the true facts' which may never be ascertained with absolute certainty, but rather the departure of testimony from that which would have been provided by the witness's memory uninfluenced by the hypnotic process." *Id.* at 431.

175. The Supreme Court recognized this point in *Rock v. Arkansas* when it stated that corroborating evidence may be used to verify that the recall is accurate. *Rock*, 483 U.S. at 61. This statement is correct as long as it is not misunderstood to mean that corroborating evidence can be used to verify the reliability of the recall.

176. The United States Supreme Court dealt with an analogous situation in *Idaho v. Wright*, 110 S.Ct. 3139 (1990). *Wright* is the latest in a series of cases that explore when the introduction into evidence of hearsay statements by the prosecution violates the criminal defendant's Confrontation Clause rights. In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Court held that the introduction of hearsay statements into evidence by the prosecution did not violate the Confrontation Clause when two elements were satisfied. First, the prosecution must produce either the declarant of the statement or demonstrate her unavailability. *Id.* at 65. Second, if the declarant is shown to be

the jury twice—once when it is independently introduced into evidence and a second time when the hypnotically enhanced recall is deemed admissible because of the corroborating evidence.

The reliability of a statement is established solely by the circumstances surrounding its making, not by the existence of other evidence consistent with it.¹⁷⁷ When hypnosis is the basis for the statement, the dangers of suggestibility and confabulation render the statement unreliable. These dangers are not ameliorated by corroboration, and therefore, corroboration should not make the statement admissible.

The impropriety of allowing corroboration to make hypnotically enhanced recall admissible is made clear when one takes a look at the practical effects of the rule. A real and significant danger exists that the subject

unavailable, then the hearsay statement is admissible only when the statement bears adequate "indicia of reliability". *Id.* at 65-66. Where the hearsay statement falls within a firmly rooted exception to the hearsay rule, then adequate indicia of reliability can be inferred. However, when the hearsay statement to be admitted does not fall within a firmly rooted exception, then the statement is inadmissible unless it contains "particularized guarantees of trustworthiness." *Id.* at 66. Thus the question arises as to how to prove that a hearsay statement not falling within a firmly rooted exception has those particularized guarantees of trustworthiness.

In *Wright*, the Court had to determine whether certain hearsay statements which the prosecution wanted to enter into evidence had sufficiently "particularized guarantees of trustworthiness" so that admitting these statements would not violate the criminal defendant's confrontation Clause rights. *Wright*, 110 S.Ct. at 3143. The state argued that these particularized guarantees of trustworthiness could be proved not only by the totality of circumstances surrounding the making of the statement, but also by other evidence at trial that corroborated the hearsay statement. *Id.* at 3148.

The Court rejected this argument, stating that, for purposes of determining whether the Confrontation Clause was satisfied, the trustworthiness of the statement was determined solely by the circumstances surrounding its making. *Id.* The Court rejected the idea that sufficient guarantees of trustworthiness could result from the fact of corroboration. *Id.* at 3150. The Court reasoned that using corroborative evidence to establish guarantees of trustworthiness would allow admission of a presumptively unreliable statement by bootstrapping it on the reliability of other evidence at trial. *Id.* Such an analysis would eviscerate the requirement that only reliable hearsay evidence is admissible under the Confrontation Clause.

Although the Court in *Wright* was concerned with the need for reliability in order to satisfy constitutional requirements and the analysis of reliability of hypnotically enhanced recall deals with non-constitutional requirements of basic evidentiary requirements, the analysis in *Wright* is equally applicable to a discussion of the reliability of hypnotically enhanced recall. First, just as hearsay is presumed unreliable, so is hypnotically enhanced recall because of the problems of suggestion and confabulation. (It is a measure of the degree of unreliability that many jurisdictions have adopted per se inadmissibility policies for hypnotically enhanced recall and allow such evidence only after adopting detailed procedures for doing so.) Therefore, proof of the reliability of the recall must include a showing that the surrounding circumstances guarantee its reliability. Corroborating evidence does not enhance the recall's reliability; admitting the evidence on such a basis merely substitutes the reliability of the corroborating evidence. Thus, corroborating evidence is irrelevant to the reliability of the recall.

177. See *supra* note 176.

will have been made aware of information prior to hypnosis and will then incorporate that information into the hypnotic recall as a result of either subtle, unintentional cuing by the hypnotist or as a result of confabulation.¹⁷⁸ In such an instance, it would appear to the trial judge that the hypnotically enhanced recall was corroborated by independently obtained evidence. However, what in fact might have happened is that the independently obtained evidence was the trigger for the recall. The corroboration is illusory.¹⁷⁹ In most, if not all, cases it will be virtually impossible for the judge to determine whether the subject has been exposed to the existence of information which is then incorporated into the hypnotic recall.¹⁸⁰ Therefore, as a practical matter, it would be impossible for the judge to determine whether there really was corroboration.

Another problem with admitting hypnotically enhanced recall on the basis of corroboration was pointed out by the Illinois Supreme Court in *People v. Zayas*.¹⁸¹ In *Zayas*, a detective was hypnotized in an attempt to help him recall a license plate number. During hypnosis he recalled that the license plate number was NXJ 402. In fact, the license plate of the car the defendant allegedly used the night of the murder was NXJ 240. At trial, the detective testified to his recall of the license plate number. On appeal, the Illinois Supreme Court held that admitting this testimony was error.¹⁸²

The court noted that the trial judge had stated that he was admitting the testimony because he saw no evidence of improper suggestion and because the testimony would be corroborated by another witness. The court ruled that the corroboration did not make hypnotically enhanced recall admissible. The court stated that if recall was admissible when corroborated, then when the detective recalled a number that could be corroborated, the detective could testify to the hypnotically enhanced recall. However, if the detective recalled a number that did not exist, then the hypnotically enhanced recall would be inadmissible for impeachment purposes. The court found such a result incongruous.¹⁸³

178. See Orne, et al., *supra* note 8, at 53-54.

179. *Id.* at 54.

180. This is not a situation where the witness intentionally withholds from the judge the fact that she was exposed to the information. A witness interviewed at a police station may inadvertently see a suspect or evidence which is incorporated into her hypnotic recall without her realizing it. Thus, it would appear that there was corroboration, but in fact it was the evidence that gave rise to the memory. The same problem occurs if a police officer interviewing a victim, a witness, inadvertently gives the person information that is then incorporated into her hypnotic recall.

181. 546 N.E.2d 513 (Ill. 1989).

182. *Id.* at 515.

183. *Id.* at 518.

In conclusion, using corroboration to determine the admissibility of hypnotically enhanced recall is inappropriate. Conceptually, corroboration is no guarantee of the reliability of such recall. Practically, it is difficult to be certain that corroboration actually exists. Last, the rule leads to incongruous results when applied in court.¹⁸⁴

The foregoing makes clear that the *Hurd* guidelines and variations thereof are ineffective guarantors of the reliability of hypnotically enhanced recall. In fact, some courts adopting the *Hurd* guidelines admit that they doubt their effectiveness. Both Kansas¹⁸⁵ and Texas¹⁸⁶ find that the better rule is that of per se inadmissibility. However, after *Rock v. Arkansas*, both jurisdictions believe that a rule of per se admissibility may not apply in certain circumstances; therefore they have adopted guidelines as the best alternative.

Finally, and perhaps most damning, even Dr. Orne, the progenitor of the *Hurd* guidelines, appears to reject them.¹⁸⁷ He agrees that they do not eliminate the dangers of suggestion and confabulation.¹⁸⁸ Further, he has stated that the safeguards were never intended to be criteria for admissibility; they were intended only as the minimum requirements necessary for an

184. There is another reason why hypnotically enhanced recall should be inadmissible, even if corroborated by other evidence. If corroborating evidence exists, then the hypnotically enhanced recall becomes cumulative, lessening its probative value. Because the probative value is significantly lessened, the possible prejudicial effects become substantially greater than the probative value and the recall is inadmissible for that reason.

185. In *State v. Haislip*, 701 P.2d 909 (Kan. 1985), the Kansas Supreme Court held that hypnotically enhanced recall was per se inadmissible, concluding that no set of procedural safeguards can adequately remedy the unreliability of such recall. *Id.* at 925-26. In *State v. Butterworth*, 792 P.2d 1049 (Kan. 1990), the same court noted that it was precluded by *Rock v. Arkansas* from using a per se inadmissibility rule when the witness previously hypnotized was the defendant. *Id.* at 1056-57. As a result, the court adopted a variation of *Hurd*, but expressly stated that the use of *Hurd* guidelines applies only to the situation where the defendant was hypnotized and wished to introduce into evidence his hypnotically enhanced recall. *Id.* at 1057-58. Because the Kansas court limits the use of *Hurd* to the situation required by the Supreme court's decision in *Rock* and continues to use a per se inadmissibility rule in all other cases, it is clear that the Kansas court continues to believe that procedural safeguards are ineffective. *Id.*

186. In *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988), the court stated that were it writing on a clean slate, it would probably adopt a per se inadmissibility rule for hypnotically enhanced recall. *Id.* at 242. The court, noting that such an approach is precluded by *Rock* when the previously hypnotized witness is the defendant, stated that it did not believe it appropriate to adopt a per se inadmissible rule against the state that did not apply to the defendant as well. Therefore, it adopted a version of *Hurd* for all hypnotically enhanced recall. *Id.* at 242-43. The court's language makes it clear that it is doubting at best about the efficacy of procedural safeguards.

187. SCHEFLIN & SHAPIRO, *supra* note 26, at 94.

188. *Id.* (citing *State v. Peoples*, 319 S.E.2d 177, 188 (N.C. 1984)).

expert to make a knowledgeable determination regarding the propriety of the hypnosis session.¹⁸⁹

Not only are the *Hurd* guidelines ineffective, their use may even be affirmatively detrimental. Use of the safeguards "could have the adverse effect of giving hypnotically refreshed testimony, in the eyes of the jury, 'an aura of reliability which, in actuality, it does not possess.'"¹⁹⁰

E. Other Relevance Issues

Hypnotically enhanced recall is intrinsically not as reliable as normal memory; even procedural safeguards cannot guarantee reliability equivalent to normal memory. The question becomes whether there is some other basis for admitting such recall. Some courts take the position that witnesses testifying to hypnotically enhanced recall should be treated as witnesses whose present recollection has been refreshed.¹⁹¹

The rules of evidence allow for refreshing recollection when a witness cannot recall a particular event or occurrence.¹⁹² In such a situation at trial, counsel may tender to the witness something to jog the witness's memory.¹⁹³ If the witness's memory is jogged, then the witness is allowed to testify as to his present recollection of the event in question. Of course, simply because the witness now claims to remember the event, there is no guarantee that the recollection is accurate. All the foibles of human memory come into play, with the resultant danger that the newly recalled recollection is inaccurate.¹⁹⁴ Thus, some courts allowing hypnotically enhanced recall into evidence reason that hypnosis is merely another method of refreshing recollection.¹⁹⁵

This analysis is flawed for a reason similar to the reason that hypnotically enhanced recall is not as reliable as normal recall. When a witness's memory is jogged, there is no danger that the item that jogs the witness's

189. *Id.* Martin Orne, Address to Evidence Section of Association of American Law Schools (1988).

190. *State v. Peoples*, 319 S.E.2d 177, 185 (N.C. 1984) (quoting *People v. Gonzalez*, 310 N.W.2d 306, 313 (Mich. App. 1981)).

191. *See State v. Brown*, 337 N.W.2d 138, 151 (N.D. 1983).

192. *BROWN, ET AL.*, *supra* note 101, at 17-22.

193. Frequently, the item that jogs the witness's memory will be a copy of a statement which he has made earlier. However, anything that jogs the witness's memory is appropriate, such as a map or a picture.

194. *Id.* at 19. "Imagination and suggestion are twin artists ever ready to retouch the fading daguerreotype of memory." *Id.* (quoting Dillard S. Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L. Q. 390, 401 (1933)).

195. *State v. Wren*, 425 So. 2d 756, 758-59 (La. 1983); *Chapman v. State*, 638 P.2d 1280, 1284 (Wyo. 1982).

memory will alter it. To the extent that the refreshed recollection might be inaccurate, opposing counsel can cross-examine the witness.

However, as has already been amply demonstrated, when the witness has been hypnotized, the problems of suggestion and confabulation create a serious danger that the witness's memory has been altered. Just as important, cross-examination of a witness testifying to hypnotically enhanced recall is likely to be ineffective.¹⁹⁶ Thus, it is inappropriate to analogize hypnotically enhanced recall to other forms of refreshing recollection.¹⁹⁷

In conclusion, hypnotically enhanced recall is not sufficiently reliable to be admissible. However, the inadmissibility of hypnotically enhanced recall does not rest on its irrelevance alone. Even if one were to take the position that hypnotically enhanced recall might be accurate in a specific instance, and therefore relevant, the hypnotically enhanced recall should still be deemed inadmissible. This is so because the probative value of the hypnotically enhanced recall is substantially outweighed by such factors as the danger of unfair prejudice, misleading the jury, and confusing the issues.

The primary danger of admitting hypnotically enhanced recall is that the jury will give it undue weight. Hypnosis is often viewed by the public as either being a magical or mystical process,¹⁹⁸ or as a scientific process¹⁹⁹ which has the effect of increasing the accuracy of recall, rather than de-

196. See *infra* notes 234, 256-58 and accompanying text; see *supra* text accompanying notes 67-70.

197. I recognize that when a witness's memory has been jogged by looking at a document, the witness's recollection "often appears remarkably similar to the information contained in the item used to refresh his memory and one sometimes wonders whether the witness' (sic) memory is not in fact limited to what [she] has just read." LEMPERT & SALTZBURG, *supra* note 112, at 438. However, in such circumstances, the item used to refresh recollection must be shown to opposing counsel and may be used by him as a basis for cross-examination. As a result, effective cross-examination is likely. However, when the witness's testimony is based on hypnotically enhanced recall the likelihood of effective cross-examination is unlikely. Therefore, hypnotically enhanced recall is not analogous to other means of refreshing recollection.

198. *State v. Alley*, 776 S.W.2d 506, 515 (Tenn. 1989) (summarizing the testimony of Dr. William Gentry). Although Dr. Gentry's testimony was given in the context of whether or not a jury should be allowed to view tapes of a hypnotic session, his testimony is also applicable to the more general issue of how jurors view hypnosis.

199. See, e.g., *Peoples*, 319 S.E.2d at 184 (N.C. 1985); *State v. Tuttle*, 780 P.2d 1203, 1208-09 (Utah 1989). There is really no conflict between the fact that some experts describe hypnosis as being viewed as mystical while some characterize the public's perception of hypnosis as being unduly deferential to a scientific process. Both descriptions accurately describe the public's reaction to something that is not well understood by the public. In such situations, the public's perception between science and magic blurs. In the words of the noted author, Arthur C. Clarke, "Any sufficiently advanced technology is indistinguishable from magic." KATIE HAFNER & JOHN MARKOFF, *CYBERPUNK: OUTLAWS AND HACKERS ON THE COMPUTER FRONTIER* 11 (1991).

creasing the accuracy of recall as is actually the case.²⁰⁰ Thus, hypnosis has an aura about it that leads jurors to give hypnotically enhanced recall undue credibility.²⁰¹

At the same time that the public's lack of knowledge about hypnosis results in inappropriate glorification of its results, this same lack of knowledge makes lay persons poorly suited to actually determine its accuracy.²⁰² As a result of this public misperception of the nature of hypnosis, there is a serious danger that the typical lay juror will give testimony of hypnotically enhanced recall greater emphasis than it should receive.²⁰³ In fact, one court concluded that a jury might give this erroneous assumption of accuracy so much emphasis that it would render the testimony so prejudicial as to be inadmissible.²⁰⁴

Some courts, while recognizing this problem, have taken the position that opposing counsel can minimize the danger of the jury's placing undue emphasis on the recall through skillful cross-examination or by introducing expert witnesses who can testify to the effects of hypnosis on memory.²⁰⁵ On cross-examination, a skillful attorney may be able to establish that the witness changed her testimony as a result of the hypnosis. If the same counsel also has an expert witness testify that recall induced under hypnosis may not be reliable, then counsel may be able to convince the jury of the unreliability of the hypnotically enhanced testimony. Thus, in theory, the danger of the jury placing undue reliance on the recall is mitigated.

However, the theory does not work. Cross-examination is ineffective in exploring the inaccuracies in hypnotically enhanced recall. Further, if each party is allowed to have an expert testify as to the accuracy or inaccuracy of hypnotically enhanced recall in a trial, then there is a great danger that the this portion of the trial will deteriorate into nothing more than a battle of expert witnesses.²⁰⁶ There is no reason to believe that expert witnesses testi-

200. Council on Scientific Affairs, *supra* note 27, at 1921. *See also* Orne, et al., *supra* note 8, at 25.

201. *Peoples*, 319 S.E.2d at 184.

202. *Id.*; *People v. Zayas*, 546 N.E.2d 513, 516 (Ill. 1989).

203. *Arizona ex rel. Collins v. Superior Ct.*, 644 P.2d 1266, 1272 (Ariz. 1982).

204. *United States v. Valdez*, 722 F.2d 1196, 1203-04 (5th Cir. 1984).

205. *See e.g.*, *Rock v. Arkansas*, 483 U.S. 44, 61 (1987); *State v. Wren*, 425 So.2d 756, 758 (La. 1983); *State v. Brown*, 337 N.W.2d 138 (N.D. 1983).

206. The possibility of a battle in which expert witnesses testify to diametrically opposing views is not merely theoretical. Several cases report such battles. One commentator reports that it is not uncommon for the prosecution in a memory enhancement case to call in a witness who will testify that hypnosis allowed the subject to access memories that were previously inaccessible with the same degree of accuracy as normal eyewitness testimony while the defense counters with an expert who will state that hypnosis leads to inaccurate testimony. *See SCHEFLIN & SHAPIRO, supra* note 26, at 33.

fying to diametrically opposed positions will sufficiently educate the jury so as to help them determine the accuracy of the particular hypnotically enhanced recall. In fact, because of the danger of such a battle, the recall should be inadmissible because it increases the likelihood that the introduction of the evidence will unduly waste time or lead to confusion of the issues.²⁰⁷ Last, given the public's great deference to and misunderstanding of hypnosis, there is no reason to believe that a jury instruction will cure the problem.²⁰⁸ Therefore, these measures do not inadequately justify the admissibility of hypnotically enhanced recall.

In conclusion, hypnotically enhanced recall should be inadmissible at trial. Its unreliability is incurable. The *Hurd* guidelines are ineffective. Further, even assuming arguendo that hypnotically enhanced recall could be reliable in a particular case, its probative value is substantially outweighed by such factors as the danger of unfair prejudice, misleading the jury, and confusing the issues.

If there is no justification for admitting hypnotically enhanced recall, it is natural to question the jurisdictions that nonetheless allow it into evidence. Possible answers are numerous. One answer can be found in the initial treatment of hypnotically enhanced testimony. The first reported case to consider the admissibility of hypnotically enhanced recall was *Harding v. State*.²⁰⁹ In *Harding*, the defendant was charged with assault with intent to rape and assault with intent to murder. The victim of the attack was found in a state of shock and could not recall details of the attack.²¹⁰ Several weeks after the attack, she was hypnotized by a psychologist from a state hospital who had been employed as a consulting psychologist by a number of law enforcement agencies and state's attorneys' offices in Maryland.²¹¹ The police related the details of the case to the psychologist. He then met the victim and told her he was going to get her memory back.²¹² He invited two state troopers to be present during the hypnotic session and hypnotized her.²¹³ Under hypnosis, the victim related certain details that

207. Schefflin and Shapiro, in describing the potential battle of experts, state: "the battle of the experts in a courtroom can become less a battle over justice or the facts of the case than a recapitulation of the split between the positions of behaviorists and analysts, or experimentalists and clinicians, in a new venue." *Id.* Such battles are hardly conducive to aiding the jury in determining how to deal with hypnotically enhanced recall.

208. *Valdez*, 722 F.2d at 1202; see also *The Supreme Court 1986 Term—Leading Cases*, 101 HARV. L. REV. 119 (1987).

209. 246 A.2d 302 (Md. Ct. Spec. App. 1968).

210. *Id.* at 304.

211. *Id.* at 306.

212. *Id.* at 308.

213. *Id.* at 309.

she then remembered had occurred during the attack. The psychologist suggested that she would remember what she recalled while under hypnosis.²¹⁴

At trial, the psychologist testified that the victim's hypnotically enhanced recall was reliable and denied that her recall under hypnosis was the result of any suggestion.²¹⁵ The judge admitted the testimony, giving a cautionary instruction that the jury should not give the recall any greater weight than any other testimony.²¹⁶ The defendant was found guilty.

On appeal, the appellate court affirmed the conviction. The court held that the victim's testimony regarding her hypnotically enhanced recall was admissible, stating that hypnosis went to the weight the trier of fact would give to the testimony rather than to its admissibility.²¹⁷

Although the decision in *Harding* was erroneous,²¹⁸ for the next ten years courts in other jurisdictions followed it, holding under its doctrine that hypnotically enhanced recall was admissible.²¹⁹ These courts so held without sound analysis of the admissibility of hypnotically enhanced recall.²²⁰ They often found the recall to be admissible based on the uncontested opinions of police hypnotists and psychologists, which were often highly biased in favor of the prosecution and scientifically inaccurate.²²¹

By the late 1970s, however, courts had grown dissatisfied with the rule of per se admissibility. *Harding* and other decisions had led to an increasing use of hypnosis as an investigative tool by the police. Many of the police hypnotists were poorly trained, and the courts began to be aware of abuses of hypnosis, leading to unjust results.²²² Further, two professional

214. *Id.*

215. *Id.*

216. *Id.* at 310.

217. *Id.* at 306.

218. There was no serious inquiry into the dangers of suggestibility or confabulation by the trial judge or the appellate court. *Id.* at 308. The only expert who testified as to the reliability of the hypnotically enhanced recall was the psychologist who conducted the hypnosis. *Id.* It is not surprising, therefore, that he denied that he might have suggested the answers to the questions he asked. More amazingly, he denied that hypnosis would lead to suggestibility. *Id.* See also Mickenberg, *supra* note 43, at 952-53.

Ultimately, fifteen years later, the Maryland Supreme Court repudiated *Harding*, stating: "In the light of hindsight we probably should have granted *Harding's* petition for a writ of certiorari. However, since it was the first case, there was at that time no contrary view elsewhere. Moreover, we had our own caseload problems at that time." *State ex rel. Collins v. Superior Court*, 464 A.2d 1028, 1034-35 n.1 (Md. 1983). In *Collins*, the court held that because hypnotically enhanced recall fails to satisfy the *Frye* test, it is per se inadmissible. *Id.* at 1044-45.

219. Mickenberg, *supra* note 43, at 953; *People v. Shirley*, 723 P.2d 1354, 1363 (Cal. 1982).

220. *Shirley*, 723 P.2d at 1364.

221. Mickenberg, *supra* note 43, at 954-55.

222. See SCHEFLIN & SHAPIRO, *supra* note 26, at 71-81.

associations concerned about the increasing improper use of hypnosis passed resolutions urging the use of safeguards ensuring the proper use of hypnosis.²²³ Courts began paying more attention to the scientific literature²²⁴ and began to ban the admission of hypnotically enhanced recall.²²⁵ Nonetheless, some jurisdictions continue to admit hypnotically enhanced recall, based, to some extent, on the inertia of prior supporting cases.²²⁶

While historical practices in part explain the courts' willingness to find a means of admitting hypnotically enhanced recall, there is another, more important reason stated by courts for finding means to admit such testimony. Courts have recognized that there are legitimate compelling reasons for a witness to undergo hypnosis other than to enhance recollection in order to testify at trial.

223. The Society for Clinical and Experimental Hypnosis issued a statement in 1978 condemning the use of police hypnosis. It stated that only trained professionals with experience in the forensic use of hypnosis should conduct the hypnotic session, that all interactions between the hypnotist and the subject must be taped, and that it is "unethical to train lay individuals in the use of hypnosis, to collaborate with laymen in the use of hypnosis, or to serve as a consultant for laymen who are utilizing hypnosis." *Id.* at 801 (quoting INTER. J. OF CLINICAL AND EXPER. HYPNOSIS 452 (1979)). The International Society of Hypnosis adopted the same resolution in 1979. *Id.* at 79-80.

224. It was not only the literature in scientific journals that influenced the courts. In 1980, Dr. Bernard Diamond published an article in the University of California Law Review that played a major role in courts' analysis of admissibility of hypnotically enhanced recall. The gist of Dr. Diamond's article was that because of the inherent problems in hypnosis of suggestibility, confabulation, the subject's inability to distinguish the confabulated and suggested memories from the actual memories, and memory hardening, a witness who has been hypnotized should not be allowed to testify to any subject matter that was raised during the hypnotic session. Diamond, *supra* note 43, at 313.

225. The number of courts banning the admission of memories recalled during hypnosis rose dramatically after 1980. In fact, two jurisdictions, California and Arizona, went so far as to hold that when a witness has been hypnotized prior to trial, the witness cannot testify to any subject discussed during the hypnotic session. See *People v. Shirley*, 723 P.2d 1354, 1375 (Cal. 1982); *People v. Mena*, 624 P.2d 1274, 1280 (Ariz. 1981). Both jurisdictions ultimately changed their rules, allowing the previously hypnotized witness to testify to the witness's prehypnotic recollection, even if it concerned subjects that were discussed during the hypnotic session.

California did so in *People v. Hayes*, 783 P.2d 719, 728 (Cal. 1989) for prehypnotic evidence predating the enactment of § 795 of the California Evidence Code. All other prehypnotic evidence is governed by § 795, which allows the admissibility of prehypnotic recollections assuming certain other safeguards are met.

Arizona now also allows a previously hypnotized witness to testify to the witness's prehypnotic recollection. The rule in *Mena* was changed in *State ex rel. Collins v. Superior Court*, 644 P.2d 1266 (Ariz. 1982) (en banc).

226. See, e.g., *Chapman v. State*, 638 P.2d 1280, 1283-85 (Wyo. 1982) (citing and following precedent admitting hypnotically enhanced recall); *United States v. Awkard*, 597 F.2d 667, 669-70 (9th cir. 1979) (admitting hypnotically enhanced recall and citing other jurisdictions that do so).

Hypnosis is a well established procedure in diagnosis and treatment of medical disorders, and is accepted by major medical associations as an appropriate procedure for medical use.²²⁷ In many cases in which hypnosis is used, the subject is either the victim or a witness suffering from shock or some other type of stress or trauma.²²⁸ It seems cruel and inhumane to tell the victim of or witness to a crime that he cannot seek medical treatment because he might be needed to testify at trial. Alternatively, if witnesses are barred from testifying because they have been hypnotized, the state would lose any eyewitnesses who may obtain medical help to deal with the aftereffects of having been involved in a violent crime. Thus, precluding a witness from testifying to subject matter discussed during hypnosis inescapably leads to a choice of undesirable results.

The other major use of hypnosis is in investigations. As stated earlier, law enforcement agencies have increasingly turned to hypnosis as a means of obtaining leads in criminal investigations.²²⁹ While the efficacy of hypnosis in achieving that end is somewhat disputed,²³⁰ a number of courts have treated this use of hypnosis as an important one, expressly stating that their rules restricting or barring the use of hypnotically enhanced recall is not intended to preclude the use of hypnosis for investigative purposes.²³¹ Given the importance which the courts have attached to the investigative uses of hypnosis, it is understandable that they have been reluctant to preclude testimony pertaining to the subject matter discussed while the subject was hypnotized. If such matters are inadmissible, then the state would have to choose between hypnotizing the witness in order to try to obtain leads to solve the crime or having the witness available to testify at trial.

Given the interests of medical and investigatory uses for hypnosis, it is not surprising that the courts have tried to find ways to ensure the reliability of a witness's testimony and at the same time to permit the use of hypno-

227. *People v. Hughes*, 453 N.E.2d 484, 488 (N.Y. 1983) (citing 9 *ENCYCLOPEDIA BRITANICA*, *MACROPODIA*, *HYPNOSIS* 133 (1981); Council on Mental Health, *Medical Use of Hypnosis*, 168 *JAMA* 186, 187; DAVID B. CHEEK & LESLIE M. LECRON, *CLINICAL HYPNO-THERAPY* 19 (1968)). See also CRASILNECK & HALL, *supra* note 32 (discussing numerous medical and therapeutic uses of hypnosis).

228. The vast majority of cases in which a potential witness for the prosecution is hypnotized involve rape (or some other type of sexual assault) and homicide.

229. *Hughes*, 453 N.E.2d at 488.

230. See *supra* notes 72-78 and accompanying text.

231. Indeed, even the first courts to stringently preclude the admissibility of hypnotically enhanced recall, lambasting its unreliability, stated that the use of hypnosis for purely investigative purposes was valuable. See *People v. Mena*, 624 P.2d 1274, 1279-80 (Ariz. 1981); *People v. Shirley*, 723 P.2d 1354, 1384-85 (Cal. 1982); *People v. Mack*, 292 N.W.2d 764, 771 (Minn. 1980).

sis for concededly valid purposes.²³² Thus, some jurisdictions allow hypnotically enhanced recall into evidence.

V. CONSTITUTIONAL ISSUES

Four constitutional issues arise in the context of admissibility of hypnotically enhanced recall. The first is whether admitting hypnotically enhanced recall into evidence violates the Confrontation Clause of the Sixth Amendment.²³³ The second is whether an identification of the defendant by a witness based on hypnotically enhanced recall violates the Due Process Clause.²³⁴ The third is whether a criminal defendant may introduce into evidence hypnotically enhanced recall to support his or her case under the Compulsory Process Clause of the Sixth Amendment.²³⁵ The fourth is whether, under the Due Process Clause, the state may be compelled to provide indigent defendants with access to an expert on hypnosis if they request such an expert.

A. Confrontation Clause

Courts addressing whether the admissibility of hypnotically enhanced recall violates the Confrontation Clause have split on the issue, with some courts holding that allowing a witness to testify to such recall violates the Confrontation Clause²³⁶ and other courts holding that there is no violation. In order to understand why courts are split on this issue, it is first necessary to explore the Confrontation Clause guarantee.²³⁷

232. This is especially true given the compelling nature of the types of cases in which hypnotically enhanced testimony is used. The Hawaii Supreme Court stated that sexual assault is the most common crime giving rise to this issue. *State v. Moreno*, 709 P.2d 103, 104-05 (Haw. 1985). The other crime most prevalent in generating cases dealing with hypnotically enhanced testimony is homicide. These two categories of crime probably account for ninety percent of cases in which a party tries to introduce hypnotically enhanced testimony. Given the heinous nature of these crimes, it is not surprising that courts struggle to admit what they perceive to be relevant evidence despite its shortcomings.

233. The Sixth Amendment applies to the federal government. The Confrontation Clause has been held to apply to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

234. In federal court, the Fifth Amendment Due Process Clause applies. In state court, the Fourteenth Amendment Due Process Clause applies.

235. Again, the Sixth Amendment applies to the federal government. The Compulsory Process Clause applies to the states through the Fourteenth Amendment Due Process Clause. *Washington v. Texas*, 388 U.S. 14, 18 (1967).

236. *See, e.g., States v. Valdez*, 722 F.2d 1196, 1202 (5th Cir. 1984); *Contreras v. State*, 718 P.2d 129, 138-39 (Alaska 1986); *State ex rel. Collins v. Superior Court*, 644 P.2d 1266, 1273-75 (Ariz. 1982).

237. *See, e.g., Clay v. Vose*, 771 F.2d 1, 4-5 (1st Cir. 1985); *State v. Armstrong*, 110 Wis. 2d 555, 573, 329 N.W.2d 386, 393-94 (1983).

The Confrontation Clause states that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."²³⁸ Most Confrontation Clause issues arise in the context of whether hearsay declarations are admissible as substantive evidence in criminal trials when the declarant of the statement is unavailable for cross-examination.²³⁹ This is because the Confrontation Clause has long been equated with the ability of the criminal defendant to cross-examine the witnesses against him.²⁴⁰ However, in some instances, the Supreme Court has had to explore the applicability of the Confrontation Clause in instances where the declarant of a statement is present in court.²⁴¹ Two particular cases are relevant to a cogent analysis of whether allowing a witness to testify to hypnotically enhanced recall violates a criminal defendant's Confrontation Clause rights.

The first case is *California v. Green*,²⁴² in which the defendant had been convicted of furnishing narcotics to a minor. A witness, Porter, had initially told a police officer that Green had supplied him with narcotics. Porter testified to that effect at Green's preliminary hearing, where Porter was subjected to extensive cross-examination. At trial, however, Porter claimed that at the time he had initially named Green as his supplier of marijuana, he was high on LSD and that the drug kept him from being able to distinguish fact from fantasy. Therefore, Porter claimed that he could not remember whether Green had supplied him with the marijuana.

238. U.S. CONST. amend. VI. There is a great deal of dispute as to the scope of the clause. Many commentators have concluded that the clause was intended to prevent abuses of the sort that occurred at the trial of Sir Walter Raleigh in 1603, at which he was convicted of treason. At the trial, the principal evidence against Raleigh was hearsay and Raleigh was repeatedly denied the opportunity to confront and examine the declarant of the statement accusing him. However, there are other plausible historical interpretations. See GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 7.29, at 311 (2d ed. 1987) for a full discussion of these alternative interpretations.

Wigmore believed that the Confrontation Clause meant nothing more than that the declarant of a statement must be available for cross-examination at trial. LEMPERT & SALTZBURG, *supra* note 112 (citing 5 WIGMORE § 1395, at 150-51 (Chadbourn, ed. 1974)). Other commentators have characterized this position as inaccurate. *Id.* at 551.

239. James E. Beaver, *Memory Restored or Confabulated by Hypnosis—Is it Competent?*, 6 U. PUGET SOUND L. REV. 155, 195 (1983).

240. *United States v. Owens*, 484 U.S. 554 (1988).

241. See, e.g., *Delaware v. Fensterer*, 474 U.S. 15 (1985) (holding that defendant's Confrontation Clause rights were not violated when an expert witness testified to his opinion, but could not recall the basis for the opinion); *Douglas v. Alabama*, 380 U.S. 415, 419-20 (1965) (holding that defendant's inability to cross-examine the declarant about the declarant's prior confession, which was read to the jury, because the declarant exercised his Fifth Amendment right not to incriminate himself, violated the defendant's Confrontation Clause rights).

242. 399 U.S. 149 (1970).

Porter's statements made during the preliminary hearing were read into evidence during direct examination of him in accordance with the California Evidence Code and, with his memory refreshed by the testimony, he said he "guessed" Green had given him the marijuana. However, on cross-examination, Porter stated that he only remembered what he had said at the preliminary hearing and that he could not remember the actual event as to whether or not Green had indeed been his supplier.²⁴³

Green was convicted, but the California District Court of Appeal reversed his conviction and the California Supreme Court affirmed the court of appeals, holding that the use of Porter's testimony at the preliminary hearing violated Green's Confrontation Clause rights.²⁴⁴ The Supreme Court reversed, reinstating the conviction. The Court found that admitting the testimony from the preliminary hearing did not violate the defendant's Confrontation Clause rights because the declarant was testifying as a witness and was available for full and effective cross-examination.²⁴⁵

In so holding, the Court reasoned that there were three purposes in requiring confrontation of witnesses. First, confrontation insures that the witness will make his statements under oath, thus impressing the witness with the seriousness of the matter and deterring the witness from lying because of the penalty for perjury.²⁴⁶ Second, confrontation forces the witness to submit to cross-examination, which the Court characterized as the "greatest legal engine ever invented for the discovery of truth."²⁴⁷ Third, confrontation allows the jury to observe the demeanor of the witness in making his statements, thus permitting the jury to gauge the witness's credibility.²⁴⁸

The Court noted that it did not decide whether Porter's initial statements to the police officer would have been admissible in light of his inability to remember anything about the time at which the statements were made. The Court noted that there was an issue as to whether the lapse of memory so affected the defendant's ability to cross-examine the witness as

243. *Id.* at 152.

244. *People v. Green*, 451 P.2d 422, 429 (Cal. 1969).

245. *Green*, 399 U.S. at 158. The Court also stated that admitting Porter's testimony at the preliminary hearing into evidence would have been constitutional regardless of whether there had been an effective opportunity for confrontation. The Court reasoned that the statements made at the preliminary hearing were given under circumstances closely approximating the surroundings of a typical trial. *Id.* at 165-68.

246. *Id.* at 158.

247. *Id.*

248. *Green*, 399 U.S. at 158.

to make the admission into evidence of those statements a violation of the Confrontation Clause.²⁴⁹

The Court answered this question in *United States v. Owens*.²⁵⁰ In *Owens*, the defendant was charged with assault with intent to commit murder for having allegedly attacked a correctional counselor at the prison in which Owens was incarcerated. The counselor, Foster, had been beaten with a pipe, his skull was fractured, and, as a result of the attack, his memory was severely impaired. While in the hospital, Foster told an FBI agent that Owens had attacked him and identified Owens from an array of photographs.

At trial, Foster testified that he remembered telling the FBI agent that Owens had attacked him. On cross-examination, he stated that he could not remember anything about other visitors to the hospital or whether any of them had suggested that Owens had been his attacker. Owens was convicted and appealed, claiming that admitting Foster's testimony violated Owens' Confrontation Clause rights. Owens argued that he was unable to effectively cross-examine the witness because of the witness's lapse of memory. He argued that this inability to effectively cross-examine the witness deprived him of his right to confront the witness.²⁵¹

The Court rejected this argument, with language especially critical to the issue of whether admissibility of hypnotically enhanced recall violates the Confrontation Clause. The Court noted that the Confrontation Clause had long been deemed satisfied where there was an adequate opportunity to cross-examine adverse witnesses,²⁵² and stated that "[t]he Confrontation clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'"²⁵³ The Court went on to say that this opportunity is not denied just because the witness is unable to recall the basis for his belief.

Further, the Court went on to state that the statement need not have the "indicia of reliability" nor "particularized guarantees of trustworthiness" for the admission of the hearsay into evidence to satisfy the Confrontation Clause.²⁵⁴ The Court stated that such concerns are not implicated where

249. *Id.* at 167-68.

250. 484 U.S. 554 (1988).

251. *Id.* at 556.

252. *Id.* at 557.

253. *Id.* at 559 (emphasis in original) (quoting *Kentucky v. Stincer*, 842 U.S. 730, 739 (1987) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985))).

254. *Id.* at 560. This language comes from earlier decisions discussing whether the admission into evidence of hearsay violated the Confrontation Clause when the declarant was unavailable. In

the declarant of the statement is present at trial and subject to unrestricted cross-examination.²⁵⁵ The Court reasoned that the protections of oath, cross-examination, and ability of the jury to view the witness's demeanor were sufficient to satisfy the Confrontation Clause.²⁵⁶

After *Green* and *Owens*, the question remains whether the admissibility of hypnotically enhanced recall as part of the prosecution's case-in-chief violates of the defendant's Confrontation Clause rights. Although the Supreme Court mentions three purposes of confrontation in *Green*, the dispositive issue is the effect of the witness's prior hypnosis on the ability of the defendant to cross-examine the witness on the subjects discussed during hypnosis. This is because the Supreme Court has long held that the most important guarantor of the confrontation right is cross-examination.²⁵⁷

Prior to *Owens*, a number of state courts had held that admitting hypnotically enhanced testimony violated a criminal defendant's Confrontation Clause rights.²⁵⁸ These courts' rulings were based on two premises. First, it is impossible to effectively cross-examine a witness concerning hypnotically enhanced recall. Second, the right to confrontation means the right to *effectively* cross-examine the witness; the inability to *effectively* cross-examine the witness gives rise to a Confrontation Clause violation.

The first issue, then, is whether it is in fact impossible to effectively cross-examine a witness regarding his hypnotically enhanced recall. When a subject has been hypnotized, there is a great danger the subject will become more confident of the memories adduced under hypnosis,²⁵⁹ even if they are pseudomemories. As a result of this memory hardening, the subject will not recant the hypnotically enhanced recall, even under cross-examination.²⁶⁰ Indeed, researchers have found that in some instances,

such an instance, the Court held that the Confrontation Clause is satisfied where the hearsay statement is sufficiently trustworthy. See *Ohio v. Roberts*, 448 U.S. 66 (1980).

255. *Owens*, 484 U.S. at 560.

256. *Id.*

257. See S. Douglas Borisky, Note, *Reconciling the Conflict Between the Coconspirator Exemption From the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294, 1302 (1985).

258. See *supra* note 234.

259. See *supra* notes 67-70 and accompanying text.

260. Laurence and Perry have summarized the literature regarding memory hardening as follows:

[Hypnosis] increases confidence in the veracity of both correct *and* incorrect recalled material. This is perhaps the most consistent finding to date; virtually every study that has examined the issue of confidence has found this increase. Perhaps, more than any other finding in the scientific literature, this is the particular one that indicates the need for exceptional care in the use of hypnosis in the legal investigative situation. It underlines the possibility that with hypnosis an unshakable witness can be created. This, in turn, means

previously hypnotized subjects have passed polygraph tests while attesting to the truth of statements that researchers know to be completely false.²⁶¹

Because the witness will not recant his testimony, attempts to make him do so through cross-examination are futile. There is no chance of effective cross-examination. Therefore, if effective cross-examination is the linchpin to the confrontation right, then memory hardening results in a violation of the defendant's right to confrontation.

However, the immunity of pseudomemories from being recanted under cross-examination is disputed. One study, summarizing psychological experiments in this area, states that "[e]vidence concerning the effect of hypnotic and non-hypnotic interrogations at 'immunizing' subjects against cross-examination procedures is entirely lacking."²⁶² In fact, the authors of this study, after conducting their own experiments, came to the conclusion that hypnotic subjects had no more confidence in misidentifications than nonhypnotic subjects²⁶³ and that hypnotic subjects were at least as likely to recant their misidentifications as nonhypnotic subjects. Thus, it seems that at present, the most that can be said is that no one knows the extent to which hypnosis renders a witness's testimony immune from effective cross-examination.

In any event, after *Owens*, the ineffectiveness of cross-examining a witness regarding hypnotically enhanced recall seems irrelevant. *Owens* expressly states that it is not the opportunity for *effective* cross-examination that determines whether the Confrontation Clause has been satisfied. Rather, it is the *opportunity* for effective cross-examination that satisfies the Confrontation clause. When a witness is testifying to his hypnotically enhanced recall,²⁶⁴ there is obviously an opportunity to cross-examine the wit-

that a defendant may lose his or her right to confront an accuser who has become immune to cross-examination.

LAURENCE & PERRY, *supra* note 68, at 326-27. See also Diamond, *supra* note 43, at 313, 335-36; Orne, *supra* note 51, at 311, 332-34.

261. State v. Mack, 292 N.W.2d 764, 769 (Minn. 1980).

262. Spanos, et al., *supra* note 76, at 271-72.

263. *Id.* at 280-81. In addition, the psychologists conducted additional experiments showing that the method of hypnosis and the type of cross-examination conducted had differing effects on how effective cross-examination was in inducing subjects to recant their testimony. It must be remembered that these experiments took place in a laboratory and it is not clear how applicable they would be to cross-examination in an actual trial. See *supra* note 75. Nonetheless, for attorneys involved in cases where there has been hypnotically enhanced recollection, these experiments might lend helpful hints as to how best to cross-examine previously hypnotized witnesses.

264. Of course, this assumes that the prosecution has informed the defense that the witness was previously hypnotized. It would appear that the Supreme Court's holding in *Brady v. Maryland*, 373 U.S. 83 (1963), would compel the prosecution to disclose the fact of hypnosis to the defense. *Brady* states that, upon request, the prosecution must disclose to the defense evidence

ness on this issue. Even assuming *arguendo* that the cross-examination must be ineffective because of the nature of hypnosis, this does not mean the Confrontation Clause is violated. It would be enough to bring to the jury's attention the fact of hypnosis and the fact that inconsistencies existed between the witness's prehypnotic and posthypnotic recollections.²⁶⁵

Even the unreliability of hypnotically enhanced recall would not create Confrontation Clause problems. Under *Owens*, so long as the witness is testifying at trial and is subject to unrestricted cross-examination, concerns such as reliability and trustworthiness are not implicated.²⁶⁶ Therefore, it would appear that the cases holding that admitting hypnotically enhanced testimony into evidence violates the defendant's Confrontation Clause rights are no longer valid; their premise regarding the relationship of cross-examination to the Confrontation Clause is invalid.²⁶⁷

favorable to the defense. *Brady*, 373 U.S. at 87. This includes evidence affecting the credibility of the prosecution's witness. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). Because hypnosis affects the witness's credibility, the prosecution should be compelled to disclose this fact to the defense. See *Orndorff v. Lockhart*, 707 F.Supp. 1062 (E.D. Ark. 1988). Failure to do so will violate the defendant's right to due process.

Further, the court in *Orndorff* held that when the prosecution failed to inform the defense of hypnosis, the defendant's Confrontation Clause rights were violated. *Id.* at 1069. The court reasoned that this precluded the defense from being able to cross-examine the witness on this issue. This analysis should withstand *Owens* in that failure to inform the defense of hypnosis denies the defense the opportunity to cross-examine on this issue.

265. The Supreme Court, in *Rock*, discussed how cross-examination may be useful for impeachment, where the witness is testifying to hypnotically enhanced recall. *Rock v. Arkansas*, 483 U.S. 44, at 61 (1987).

266. This is because, in addition to being subject to cross-examination, the witness is testifying under oath and is present for the jury to assess his demeanor.

267. I believe that courts addressing this issue after *Owens* will come to this conclusion. This prediction is buttressed by Professor Jonakait's conclusion that recent Supreme Court decisions have, in effect, allowed evidentiary principles to set the parameters of the Confrontation Clause. See Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 U.C.L.A. L. REV. 557, 571-72 (1988). If this is true, then a finding that hypnotically enhanced recall is admissible would also mean it satisfies the Confrontation Clause.

Nonetheless, I believe that there is still a strong argument that admitting hypnotically enhanced recall violates the defendant's Confrontation Clause rights even after *Owens*. Professor Beaver has argued that none of the three purposes of confrontation listed in *Green* is served when the witness is testifying to hypnotically enhanced recall. See Beaver, *supra* note 239, at 195-202.

The fact that the testimony is given under oath is effectively irrelevant to ensuring the reliability and accuracy of hypnotically enhanced recall. The purpose of requiring testimony under oath is to impress upon the witness the seriousness of giving truthful testimony and deterring the witness from lying. *Id.* at 198-99 (citing 6 J. WIGMORE, EVIDENCE § 1816-1829). However, when a witness is testifying to hypnotically enhanced recall, the witness is testifying to what he believes is the truth. Because of the hypnosis, the witness is unable to tell whether the memory is a result of confabulation. While the oath functions to help ensure that the witness testifies accurately to what he or she now remembers, it cannot ensure that the witness's memory is not the result of confabulation. The critical issue in dealing with hypnotically enhanced recall is not whether there is danger of the witness attempting to mislead the jury, but rather the inability of the jury to

B. Due Process Clause

The second constitutional provision to be explored is whether an in-court identification of the defendant after the witness has been hypnotized violates the Due Process Clause. The problem of an eyewitness identification resulting from hypnosis requires special attention.

Eyewitness identifications have long been recognized as being notoriously unreliable by both the legal and scientific communities.²⁶⁸ Notwithstanding the unreliability of this testimony, juries often give it enormous weight, and an unequivocal, positive eyewitness identification will often be dispositive in a case.²⁶⁹ When the unreliability of hypnotically enhanced recall is added to these factors, the possibility of a misidentification and erroneous conviction as a result of admitting a post-hypnotic identification

determine whether the post-hypnotic recall is reliable and accurate. Inasmuch as the witness cannot tell a pseudomemory created by suggestion or confabulation from an actual memory, and honestly believes he or she is testifying to an actual memory, the fact that he or she is testifying under oath in no way ensures the accuracy of his testimony. See Diamond, *supra* note 43, at 337. Thus, this function of confrontation is effectively useless with respect to hypnotically enhanced recall.

The jury's ability to view witnesses' demeanor is another function of confrontation seriously compromised by hypnosis. Witnesses' demeanor is critical to whether a jury believes testimony. Often, witness credibility determines the outcome of a trial. The problem with witnesses testifying to hypnotically enhanced recall arises from "memory hardening." As a result of hypnosis, the witnesses are more confident of their memories, both accurate and confabulated, than they would otherwise be. Because juries tend to associate witness confidence with accuracy of testimony, witnesses' strong subjective confidence makes it impossible for the jury to accurately assess the credibility of witnesses' memories. Therefore, the demeanor function of confrontation is seriously undermined when the witness is testifying to hypnotically enhanced recall. See Beaver, *supra* note 239, at 201.

It remains in dispute whether pseudomemories created by hypnosis are immune to cross-examination. Thus, no one really knows whether this function of confrontation is effective. Given that the other two functions of confrontation are ineffective, that the efficacy of cross-examination is in question, and that protection of defendants' constitutional rights is of utmost importance, the preclusion of hypnotically enhanced recall is appropriate; doubt clearly exists as to the satisfaction of the confrontation functions.

268. In the 1920s, Justice Frankfurter vigorously attacked the reliability of the eyewitnesses' testimony in the infamous *Sacco and Vanzetti* case. FELIX W. FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* 30-32 (1927). The unreliability of eyewitness identification has been recognized by the Supreme Court in cases such as *United States v. Wade*, 388 U.S. 218 (1967), in which the Court tried to maximize the reliability of in-court identification by ensuring that pre-trial identifications procedures minimized the possibility of improper suggestion.

Similarly, numerous scientific articles demonstrate the unreliability of eyewitness testimony. See, e.g., Robert Buckhout, *Eyewitness Testimony*, 231 SCI. AM. 23 (1974). Publications such as these often detail experiments demonstrating the unreliability of eyewitness testimony.

269. EDWARD B. ARNOLDS, ET AL., *EYEWITNESS TESTIMONY STRATEGIES AND TACTICS* 5 (1984).

into evidence increases greatly.²⁷⁰ Therefore, such identifications should be scrutinized carefully.

In *Stovall v. Denno*,²⁷¹ the Supreme Court stated that due process requires that an in-court identification be excluded when it follows a pretrial identification procedure that is unnecessarily suggestive and conducive to an irreparable mistaken identification.²⁷² In *Manson v. Braithwaite*,²⁷³ the Court enunciated a test for determining whether such an irreparable, mistaken identification has occurred. The Court stated that reliability of the identification is the "linchpin" in determining whether admitting an in-court identification into evidence would violate due process.²⁷⁴ Therefore, if an in-court identification is sufficiently reliable, its admission into evidence will not violate due process, even if the pretrial identification was unnecessarily suggestive.

In order to determine whether the identification is sufficiently reliable, the Court stated that the trial court should weigh "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."²⁷⁵ The trial court should then weigh the corrupting effect of the suggestive identification procedure against these factors.²⁷⁶

In the context of the admissibility of hypnotically enhanced recall, the question is whether the admission of either an out-of-court or an in-court identification of the defendant violates due process when the witness identifies the defendant for the first time after having undergone hypnosis.²⁷⁷ In most instances where this issue arises, the courts look to the witness's prehypnotic description of the assailant, compare it to the description of the person subsequently identified, and attempt to determine their consistency. The court then examines the hypnotic session to determine whether it was

270. This possibility becomes even greater in cases where hypnosis of a witness is likely. The majority of cases in which witnesses are hypnotized are sexual assault cases or homicides. Prosecutions for crimes such as these are usually decided on the basis of identification evidence. Joseph D. Grano, *A Legal Response to the Inherent Dangers of Eyewitness Identification Testimony*, in EYEWITNESS TESTIMONY 315 (Gary L. Wells & Elizabeth Loftus eds., 1984).

271. 388 U.S. 293, 301-02 (1967).

272. *Id.* at 301-02.

273. 432 U.S. 98 (1977).

274. *Id.* at 114.

275. *Id.*

276. *Id.*

277. This situation is different from one in which the witness identifies the defendant as the perpetrator before being hypnotized and then repeats identification after hypnosis. In that situation, the in-court identification may be the fruit of the prehypnotic identification.

improperly suggestive or whether confabulation took place. The court then determines whether under the totality of the circumstances, the post-hypnotic identification of the defendant is sufficiently reliable that its admission into evidence does not violate due process.

This procedure seems to comport with the Supreme Court's directive in *Braithwaite*.²⁷⁸ Where the prehypnotic description is quite detailed, the witness had a sufficient opportunity to view the perpetrator, and the post-hypnotic description or identification is highly consistent with the prehypnotic description, then under *Braithwaite* the identification would seem to be sufficiently reliable to satisfy due process concerns—even if the hypnotic session was somewhat suggestive. In fact a number of courts have so held.²⁷⁹

Nonetheless, courts should be warier of admitting post-hypnotic identifications than identifications arising from other sorts of suggestive procedures. As Professor Mickenburg points out, the traditional methods of cross-examination and impeachment, which allow the jury to evaluate the flaws in the identification process, are ineffective against hypnotically enhanced recall.²⁸⁰ Where, for example, the suggestive pretrial identification results from a suggestive lineup, on cross-examination defense counsel can inquire into such issues as the physical description of the other participants in the line-up, the clothing worn, remarks made by and to the witness, and police reports relative to the investigation.²⁸¹

No such analogous areas of cross-examination exist when the source of the pretrial identification is a hypnotic session.²⁸² The witness is unable to distinguish suggested or confabulated memories from his actual memories. Nor can the hypnotist be aware of whether they inadvertently suggested the identification. Further, because of memory hardening, the witness is convinced of the accuracy of the identification. Therefore, cross-examination seeking to expose uncertainty or hesitancy will be fruitless.²⁸³ As a result,

278. Indeed, several cases utilizing this procedure expressly refer to *Braithwaite* as authority. See, e.g., *Harker v. State*, 800 F.2d 437, 443 (4th Cir. 1986); *Chamblee v. State*, 527 So. 2d 173, 175-76 (Ala. Crim. App. 1988); *State v. Hurd*, 432 A.2d 86, 97 (N.J. 1981); *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386, 394-6 (1983).

279. See, e.g., *Harker*, 800 F.2d at 443; *Chamblee*, 527 So.2d at 175-76.

280. Mickenburg, *supra* note 43, at 956-59.

281. *Id.* at 956.

282. *Id.*

283. *Id.* at 956-57. Further, in the case of a line-up, the defendant has a constitutional right to have his attorney present. The presence of counsel ensures that any suggestiveness is noted and preserved for cross-examination at trial. See *United States v. Wade*, 388 U.S. 218 (1967). In contrast, counsel for defendant is unlikely to be present at the hypnotic session inasmuch as often the defendant will not have been identified at the time of the hypnosis. Indeed, the purpose of the hypnotic session may very well be to obtain an identification that the subject could not otherwise make. Even if the hypnotic session is videotaped, made available to opposing counsel and perhaps

courts should be especially wary of admitting post-hypnotic identifications at trial.

Special attention must also be given to the situation in which the witness can recall no details concerning the crime before hypnosis and identifies the assailant post-hypnosis. There are two variations of this situation.

The first is where the subject is aware that the defendant is a suspect in the case at the time of hypnosis, although he is unable to identify the defendant as the perpetrator prior to hypnosis. Where the witness identifies the defendant as the perpetrator after hypnosis, then as a matter of law, the identification should be inadmissible. In such a case, it is impossible to determine the reliability of the witness's identification prior to the hypnosis, because no description of the perpetrator even exists. Weighed against this is the extremely suggestive hypnotic procedure in which the witness knows that the defendant is a suspect and then identifies him under hypnosis. This creates a great danger that the witness's identification is the result of suggestion or confabulation. Thus, the suggestiveness of the procedure outweighs the non-existent reliability factors. Under *Braithwaite*, the identification should be inadmissible.²⁸⁴

The second variation is that in which the defendant is not a suspect at the time of the hypnosis and the witness identifies or describes the defendant for the first time after undergoing hypnosis. *Hurd* suggests that in such a situation, if the hypnotic session satisfies the procedural requirements in-

even to the jury, this will not provide an effective means of cross-examination. This is because even experts would have a difficult time identifying impermissible suggestiveness on videotape. See *supra* text accompanying notes 163-64.

Of course, there are other sorts of potentially suggestive identification procedures during which the defendant is not entitled to have counsel present, such as the use of photographic arrays. *United States v. Ash*, 413 U.S. 300 (1973). However, these other methods do not contain the danger of altering the defendant's memory in the same way hypnosis does.

Professor Mickenburg also suggests that because confabulation leads a hypnotized subject to fill in gaps in memory in a consistent manner, cross-examination at trial will be ineffective in attempting to impeach the witness with respect to inconsistencies in testimony. See Mickenburg, *supra* note 43, at 964-65. This is too strong a claim to make. While it may be true that the testimony gained as a result of the hypnosis will be consistent, it may still be inconsistent with prior versions of the story told by the witness. Defense counsel can point out those inconsistencies. Further, even if the posthypnotic story is consistent with prehypnotic testimony, defense counsel can bring additional details related during hypnosis to the attention of the jury, and can then stress the unreliability of hypnotically enhanced recall.

Of course, in these instances it is unlikely that the jury will properly assess the impact of hypnosis on accuracy. See *supra* notes 197-207 and accompanying text. Therefore, while Professor Mickenburg's statement that there exists no opportunity to show inconsistent testimony is not entirely accurate, he is correct in his assertion that cross-examination would not prove useful to defense counsel.

284. *United States v. Valdez*, 722 F.2d 1196, 1203 (1984) (citing *Manson v. Braithwaite*, 432 U.S. 98, 102-114 (1977)).

tended to guarantee the reliability of the hypnosis, then the identification should normally be admissible. The *Hurd* court reasoned that if the guidelines were met, then the hypnotically enhanced testimony is sufficiently reliable to be admissible. If the recall is that reliable, then admitting a posthypnotic identification cannot be so unreliable as to violate due process.²⁸⁵

The flaw in the reasoning is that, contrary to the court's conclusion, following the *Hurd* guidelines does not ensure the reliability of the hypnotically enhanced recall. The guidelines are not capable of preventing suggestion and confabulation.²⁸⁶ There is still a danger that the post-hypnotic identification is the result of unintended suggestion or confabulation. Thus, there is no way of knowing whether the witness's recollection corresponds to what actually happened. Eyewitness identification is notoriously unreliable even in the best of circumstances. When this is combined with the suggestibility and confabulation, it becomes even more unreliable. It should be deemed violative of due process to admit into evidence a post-hypnotic identification which is grounded solely in a procedure as inherently unreliable as hypnosis.²⁸⁷ In such an instance, there are no factors demonstrating

285. *State v. Hurd*, 432 A.2d at 86, 97-98. The *Hurd* court did state that the defendant would still have the right to prove that the identification was so unreliable that it violated due process. *Id.* at 98. However, this right appears meaningless. The defendant would have the burden of proving undue suggestiveness resulting from hypnosis after the court had already found that the hypnotically enhanced recall was reliable.

286. *See supra* notes 186-88 and accompanying text.

287. There is an important variation on this issue. Suppose that prior to hypnosis the witness does not remember seeing the defendant before, but identifies the defendant as the perpetrator for the first time after hypnosis. Assume further that corroborating evidence indicates that the defendant committed the crime. One might be tempted to argue that the corroborating evidence is proof of the reliability of the hypnotically enhanced recall. After all, if the defendant did not commit the crime, then how could the witness have known about the defendant?

This argument is fallacious. Admitting the identification on the basis of the corroborating evidence results in the identification being bootstrapped onto the reliability of the corroborating evidence. The corroboration does not make the post-hypnotic identification any more intrinsically reliable. *See supra* notes 171-78 and accompanying text.

The following example illustrates how admitting the testimony could result in injustice. Suppose the defendant was not the perpetrator of the crime, but rather was coincidentally in the vicinity of where the crime occurred. Now, as a result of confabulation, the witness identifies the defendant as the perpetrator. Corroborating evidence places the defendant in the vicinity of the crime. The corroborating evidence does not prove the defendant committed the crime. However, if the witness is allowed to identify the defendant at trial as the perpetrator, it is quite likely that the jury will convict an innocent person.

I am aware that, on occasion, hypnosis might lead to accurate information. However, it is impossible to tell when the information is accurate; corroboration alone does not provide proof of accuracy. To risk convicting someone primarily on the basis of a post-hypnotic recall strikes me as being violative of due process. If the corroborating evidence is sufficiently strong to convict the defendant, then the identification is not truly necessary and should still be inadmissible inasmuch

reliability of the identification and thus, under *Braithwaite*, the identification should be inadmissible.

In sum, although a post-hypnotic identification might satisfy the *Braithwaite* test and meet due process requirements under certain circumstances, there are other circumstances in which such an identification would not meet due process requirements. One commentator has stated that “[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.”²⁸⁸ Given the high degree of suggestibility in hypnosis, courts should be wary when deciding which post-hypnotic identifications satisfy due process.

C. Compulsory Process Clause

The Confrontation and Due Process Clauses shield the criminal defendant from improper government prosecution. In contrast, the Compulsory Process Clause acts as a sword. The Compulsory Process Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.”²⁸⁹ This clause has been interpreted as guaranteeing the accused the right not only to compel the attendance of witnesses favoring him, but also the right to present his defense.

Thus, in *Washington v. Texas*,²⁹⁰ the Supreme Court held invalid a Texas law that precluded the defendant’s accomplice, previously convicted of the same crime, from testifying on the defendant’s behalf. The Court stated that under the Compulsory Process Clause, states may not establish a standard of competence for witnesses that arbitrarily excludes a witness in the defendant’s favor who was capable of testifying to events personally

as it is unreliable. No injustice will occur, because by hypothesis the corroborating evidence is sufficient to convict the defendant. But if the corroborating evidence is not strong enough to convict, then it is inappropriate to, in effect, convict someone on the basis of an identification whose reliability cannot be established.

The critical aspect in analyzing the corroboration argument is to remember that corroboration does not increase the reliability of the post-hypnotic identification. Therefore, when a witness first identifies the defendant as the perpetrator after being hypnotized, then under *Braithwaite*, the identification should be inadmissible, even if there is corroborating evidence. This is so because there are no factors to prove reliability, and there is a very suggestive procedure of identification.

288. PATRICK M. WALL, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 26 (1965).

289. U.S. CONST. amend. VI. For an exhaustive analysis of the Compulsory Process Clause, see Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974) and Peter Westen, *Compulsory Process II*, 74 MICH. L. REV. 191 (1975).

290. 388 U.S. 14 (1967).

observed²⁹¹ and whose testimony would have been relevant and material to the defense.²⁹²

The critical word is "arbitrarily". The court found the Texas law to be arbitrary because its means—disqualifying an entire category of witnesses—were too drastic to achieve the state's ends of avoiding perjury.²⁹³ The state had been concerned that convicted accomplices might lie to aid their fellow criminals. However, not every convicted accomplice would lie. Some might give reliable testimony.²⁹⁴

The Court found that the state could satisfy its interest in avoiding perjury without disqualifying this category of witnesses by merely allowing the jury to determine how much weight and credibility to give to the accomplice's testimony.²⁹⁵ Thus, the state had no basis for excluding testimony that might have been reliable and whose reliability could be judged by the jury. As a result, this exclusion was arbitrary.

However, the Court stated that it was not invalidating state rules disqualifying witnesses who were incapable of observing events or testifying about them, such as infants or people with mental infirmities.²⁹⁶ The Court stated that these rules were not arbitrary.²⁹⁷ Categories such as these were justified because all people falling within them would be unable to give meaningful testimony.²⁹⁸

The Compulsory Process Clause encompasses more than simply the competence of a witness to testify on a defendant's behalf. It also includes the right to have the witness's testimony admitted into evidence.

The seminal case so holding is *Chambers v. Mississippi*.²⁹⁹ In *Chambers*, the defendant was charged with murdering a police officer. The defendant wished to have three witnesses testify that another man, McDonald, had confessed to killing the officer. However, Mississippi state law mandated that even though the witnesses were competent to testify, their testimony was inadmissible because it was hearsay. Further, because Mississippi re-

291. There is a question as to whether the compulsory process guarantee applies only to eyewitnesses or to other witnesses who would testify in favor of the defense. Professor Westen says that the Court's description of the guarantee in terms of eyewitnesses is intended as descriptive of the facts in *Washington* and concludes that the guarantee should apply to any witness who is testifying in the defendant's favor. See Westen, *Compulsory Process II*, *supra* note 289, at 204.

292. *Washington*, 388 U.S. at 23.

293. *Id.*; see also Westen, *Compulsory Process*, *supra* note 289, at 115.

294. *Washington*, 388 U.S. at 22.

295. *Id.*

296. *Id.* at 23 n.21.

297. *Id.*

298. See Westen, *Compulsory Process II*, *supra* note 289, at 200-03.

299. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

quired parties to "vouch" for their witnesses, the defendant was unable to cross-examine McDonald, whom defendant had to call to the stand when the state did not have him testify.

The Supreme Court ruled that failure to allow the defendant to cross-examine McDonald and to introduce the hearsay deprived the defendant of due process. The Court recognized that the voucher rule was a long-standing one. However, the Court found that it bore little relationship to the present realities of criminal trials and that the state had failed to give any rationale for the rule. Refusing to allow the defendant to cross-examine McDonald "plainly interfered" with the defendant's right to defend himself. Thus, the state was hindering the defendant's ability to defend himself for no good reason.³⁰⁰

At the same time, the state would not allow the defendant to introduce the hearsay statements that would exonerate him. The Court stated that the statements were made under conditions that provided "considerable assurance of their reliability."³⁰¹ The Court went on to stress that the right to present witnesses on his own behalf was a fundamental right. It concluded that where the hearsay bore "persuasive assurances of trustworthiness," the hearsay rule "may not be applied mechanistically to defeat the ends of justice."³⁰²

The Court ultimately held that because the court held reliable evidence to be inadmissible with respect to both the voucher rule and to hearsay, this interference with the defendant's ability to present a defense violated the defendant's due process rights.³⁰³ In other words, the state cannot allow the defendant's witness to take the stand and then to arbitrarily³⁰⁴ exclude

300. *Id.* at 294-98.

301. *Id.* at 300.

302. *Id.* at 302.

303. Although the Court relied on due process, its reasoning would more appropriately arise from the Compulsory Process Clause in that it focuses on the defendant's inability to present a defense. Commentators have recognized this and speculated as to why the Court relied on the Due Process Clause rather than the Compulsory Process Clause.

Professor Westen speculated that the Court did so for two reasons. First, Justice Powell, the author of the opinion, opposed incorporating the specifics of the Bill of Rights into the Fourteenth Amendment Due Process Clause. Second, the defendant failed to mention the Compulsory Process Clause as the provision underlying his argument. Westen, *Compulsory Process*, *supra* note 289, at 115. Professors Lempert and Saltzburg speculated about two further reasons. First, they stated that the only precedent for using the Compulsory Process Clause was *Washington*, which the Court may have found was inapposite; Mississippi's rule was not arbitrary in the way Texas's rule was. See LEMPERT & SALTZBURG, *supra* note 112, at 625-26. Second, the court may have feared creating an over broad rule for invalidating state evidence rules. The Due Process Clause allowed for tailoring the *Chambers* holding to its specific facts. See *id.*

304. "Arbitrarily" has the same meaning within the context of exclusion of a competent witness's testimony as it does in the context of rules rendering a witness incompetent to testify. The

material portions of the witness's testimony³⁰⁵ from being admitted into evidence. To do so would have the same effect of improperly precluding the jury from considering testimony material to the accused's defense.³⁰⁶

The question thus arises as to whether the Compulsory Process Clause prohibits a state from adopting a rule that per se excludes a witness testifying on the defendant's behalf from testifying to hypnotically enhanced recall. The Supreme Court partially answered this question in *Rock v. Arkansas*,³⁰⁷ holding that the state could not per se exclude hypnotically enhanced recall of the defendant testifying in her own behalf.

In *Rock*, the defendant was charged with manslaughter in her husband's death. Her attorney suggested she undergo hypnosis in an attempt to refresh her memory and she was hypnotized twice by a licensed neuropsychologist with training in hypnosis. The doctor interviewed her prior to the hypnosis and the hypnotic sessions were taped. Although the hypnotic sessions did not yield any new information, after the hypnosis, the defendant remembered information that exculpated her.

The court granted the prosecution's motion to exclude Rock's testimony on the ground that, under Arkansas law, hypnotically enhanced recall was per se inadmissible; *Rock* was limited to testifying to her prehypnotic recollections. Pursuant to a writ of certiorari, the Supreme Court held that the rule of per se inadmissibility for a criminal defendant's testimony was unconstitutional.

The Court based its conclusion on a number of factors. Initially, it found that a criminal defendant has the right to take the stand and testify in her own defense, saying that this right is grounded in several provisions of the Constitution.³⁰⁸

One of these provisions is the Compulsory Process Clause.³⁰⁹ The Court reasoned that the right to call witnesses in the defendant's favor logically includes the right to call herself as a witness.³¹⁰ It noted that in many cases, the most important defense witness is the defendant and that, like any

state may not prohibit the defendant from introducing reliable, material testimony on the basis of an *a priori* categorization that all such evidence is unreliable unless all such testimony in the category is indeed unreliable. This is essentially the same concept as contained in *Washington*.

305. See *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); Westen, *supra* note 289, at 150.

306. See Westen, *Compulsory Process*, *supra* note 289, at 150.

307. 483 U.S. 44 (1987).

308. *Id.* at 49. The Court cited *Ferguson v. Georgia*, 365 U.S. 570, 582 (1961), in which the Court concluded that there was no rational justification for not allowing the defendant to testify in his own behalf. It also cited *Faretta v. California*, 422 U.S. 806 (1975), wherein it had stated that due process included a person's right to be heard in his own defense if he so chose.

309. *Rock*, 483 U.S. at 52.

310. *Id.*

other witness,³¹¹ the defendant's veracity can be tested adequately through cross-examination.

Having concluded that the defendant had a right to testify on her own behalf, the Court phrased the question before it as whether this right could be restricted by a state rule that requires exclusion of post-hypnotic recollection. In answering this question, the Court looked to *Washington* and *Chambers*. It noted that a state could not arbitrarily find a criminal defendant incompetent to testify on her own behalf, nor could it arbitrarily exclude material portions of her testimony.³¹² Thus, the question became whether a per se exclusion of hypnotically enhanced recall was in fact arbitrary.

Limiting the defendant to her prehypnotic recollections significantly adversely affected her ability to testify.³¹³ Under the analysis in *Washington* and *Chambers*, this restriction would be appropriate if all post-hypnotic recollections were unreliable. However, if such recall could be reliable, then precluding the defendant from testifying to it would violate the Compulsory Process Clause.

The Court therefore addressed the question whether hypnotically enhanced recall could be sufficiently reliable so that a defendant would be allowed to introduce this evidence. The Court reviewed the literature on hypnosis and ultimately concluded that the inaccuracies resulting from hypnosis can be reduced, even if they cannot be altogether eliminated.³¹⁴ It further concluded that traditional means of assessing the accuracy of the defendant's testimony, such as corroboration, cross-examination, and jury instructions, would be available.³¹⁵ Therefore, the Court concluded, some hypnotically enhanced recall may be reliable.

As a result, the state had no legitimate interest in barring all hypnotically enhanced recall, although it could establish guidelines to determine the reliability of the hypnotically enhanced recall in any given case. Certainly, if the defendant's hypnotically enhanced recall was unreliable in a given case, the state could preclude its admission into evidence without violating the Compulsory Process Clause. However, if it was reliable, then the Compulsory Process Clause would require the state to let the defendant testify to these recollections. In any event, because the Court found that hypnotically enhanced recall could be reliable, it concluded that a per se

311. *Id.*

312. *Id.* at 53-55 (citing *Washington v. Texas*, 388 U.S. 14 (1967), and *Chambers v. Mississippi*, 410 U.S. 284 (1973)).

313. *Id.* at 56-57.

314. *Id.* at 58-61.

315. *Id.* at 61.

exclusion of such testimony was an arbitrary restriction on the defendant's right to testify on his own behalf and violated the Constitution.

While the Court's application of precedents to the Arkansas rule was appropriate, its conclusion that hypnotically enhanced recall can be sufficiently reliable as to require a state to make a case-by-case determination is highly suspect. The Court's conclusion rests on two dubious premises. The first is that inaccuracies in such recall can be reduced to a level where the recall becomes sufficiently reliable to be admissible. The second is that traditional means of assessing its accuracy are effective.

The Court's determination that hypnotically enhanced recall can be made sufficiently reliable is questionable. The Court concludes that inaccuracies can be sufficiently reduced so as to make hypnotically enhanced recall sufficiently reliable through the use of procedural safeguards, similar to the ones in *Hurd*.³¹⁶ While the Court is undoubtedly correct in stating that these safeguards would control overt suggestiveness,³¹⁷ the Court never addresses the fact that these guidelines completely fail to control unintentional suggestion and confabulation.³¹⁸ As a result, even if guidelines such as the ones the Court suggests are followed, there is no way to ensure that the hypnotically enhanced recall is reliable.

The Court also completely fails to address the danger that a defendant may abuse the hypnotic procedure. It is well established that individuals may fool even experienced hypnotists and successfully feign being hypnotized.³¹⁹ Of perhaps even greater consequence, it is possible for people under hypnosis to lie.³²⁰

If hypnotically enhanced recall were not admissible at trial, the danger of willful prevarication would not be of great consequence. If the defendant was hypnotized for investigative purposes and lied, there would be no helpful new leads to investigate. Further, this falsehood would never be introduced into evidence for the jury to hear. However, after *Rock*, it is possible for a defendant to lie while under hypnosis, and then testify to those willful lies at trial. It is true that states may require a showing of reliability as a prerequisite to admitting the defendant's hypnotically enhanced recall. But, guidelines such as those enunciated in *Hurd* are ineffective for de-

316. *Id.* at 60-61.

317. *Id.*

318. *See supra* notes 152-61 and accompanying text.

319. Orne, *supra* note 51, at 313.

320. *Id.* This possibility has long been recognized by courts, including those making influential decisions in this area. *See, e.g.,* *People v. Shirley*, 723 P.2d 1354, 1361 (Cal. 1982); *State v. Hurd*, 432 A.2d 86, 92 (N.J. 1981); *People v. Hughes*, 453 N.E.2d 484, 491 (N.Y. 1983).

testing willful lies. Therefore, inaccurate testimony could be admitted into evidence.

Nor is the Court correct in stating that traditional means of assessing the accuracy of hypnotically enhanced recall are effective. The Court states that corroborating evidence can verify that the recall is accurate, that cross-examination is effective for revealing inconsistencies and that juries can be educated to the risks of hypnosis. All these statements are made without any authority and all are doubtful.

The use of corroboration is inappropriate to establish the admissibility of hypnotically enhanced recall.³²¹ The effectiveness of cross-examination to reveal inconsistencies is denied by some experts and at best, the most that can be stated is that there is serious dispute as to its efficacy.³²² Resting the admissibility of such recall on the possible effectiveness of cross-examination is unwise. Last, there is serious doubt that jury instructions will sufficiently educate juries as to the accuracy of hypnotically enhanced recall.³²³

Given the dubiety of the premises underlying the Court's decision, its conclusion that Arkansas' rule of per se inadmissibility of hypnotically enhanced recall is arbitrary is questionable. There is a strong argument that hypnotically enhanced recall is never sufficiently reliable to justify admitting it into evidence and that the jury is not capable of properly assessing it. If that is so, then Arkansas' rule should not be considered arbitrary within the context of the Compulsory Process Clause and the Court should not have struck down the rule.

Nonetheless, the Court's willingness to strike down Arkansas' rule despite the fact that most experts disagree with the Court's premises indicates the importance it attaches to the defendant's right to testify on his own behalf.³²⁴ However, *Rock* expressly stated the issue as the defendant's right to testify to hypnotically enhanced recall on her own behalf and left unresolved the issue of whether a state could impose a rule that per se excludes a witness other than the defendant from testifying to hypnotically enhanced recall on the defendant's behalf.

Most of the Court's reasoning would apply to this situation as well as when the defendant is testifying. The major thrust of *Rock* is that hypnotically enhanced recall can be made sufficiently reliable that a per se exclusion of it is arbitrary. Such an analysis rests primarily on the Compulsory

321. See *supra* notes 17-82 and accompanying text.

322. See *supra* notes 255-58 and accompanying text.

323. See *supra* notes 201-07 and accompanying text.

324. See *Leading Cases*, *supra* note 207, at 125.

Process Clause³²⁵ and is equally applicable to any witness testifying on behalf of the defendant. Regarding hypnotically enhanced recall, there is nothing unique about the defendant as a witness that makes such recall more reliable for the defendant than any other defense witness. Therefore, it would follow that the state may not adopt a per se rule prohibiting the admissibility of hypnotically enhanced recall when any witness is testifying on behalf of the defense.³²⁶

Inasmuch as the wisdom of the holding in *Rock* is questionable, it seems undesirable to extend its holding even further. However, given the Court's reasoning, so long as the Court follows *Rock*, the holding in *Rock* should apply to all witnesses testifying on the defendant's behalf, and not just defendants testifying as witnesses.

D. Expert Assistance

The admissibility of hypnotically enhanced testimony into evidence raises one more issue of constitutional dimension. That is the issue of whether due process requires that an indigent criminal defendant be entitled to expert assistance at the state's expense regarding hypnosis.

In *Ake v. Oklahoma*,³²⁷ the Supreme Court held that in cases where an indigent defendant has made a preliminary showing that his sanity at the time he committed an offense will be a significant factor in his trial, the state is constitutionally mandated to provide the defendant access to a competent psychologist who will conduct an examination and assist in the evaluation, preparation and presentation of the defense.³²⁸ The Court reasoned that when the state brings criminal charges against an indigent person, it must

325. This reasoning partly rests on *Chambers* which is ostensibly a due process case; however, *Chambers* is most appropriately characterized as pertaining to compulsory process. See *Chambers*, 410 U.S. at 284.

326. The Court did heartily emphasize the defendant's right to testify on her own behalf. However, this analysis was the context of the defendant's right to present a defense. Thus, although the Court grounded this portion on the Due Process Clause, just as it did in *Chambers*, the analysis more appropriately belongs to the Compulsory Process Clause, which supports the position that defense witnesses other than the defendant should be allowed to testify.

327. 470 U.S. 68 (1985). Ake was charged with murdering a couple in Oklahoma. Ake's attorney decided to raise an insanity defense. To raise an insanity defense it was necessary to have a psychiatrist examine Ake concerning his mental condition at the time he committed the offense. Thus, the attorney requested the court to arrange to have a psychiatrist perform such an examination or to provide the funds to allow the defense to do so. The trial court denied the request. Ake was convicted of murder and sentenced to death. On appeal, the Oklahoma Court of Criminal appeals found no error in the denial of the request and affirmed the conviction and sentence. *Ake v. State*, 663 P.2d 1 (Okla. Crim. App. 1983). The Supreme Court granted certiorari. *Ake v. Oklahoma*, 465 U.S. 1099 (1984).

328. *Ake*, 470 U.S. at 83.

ensure that the indigent has a fair opportunity to present his defense. The Court characterized this principle as “elementary”, stating that it is “grounded in significant part on the Fourteenth Amendment’s due process guarantee of fundamental fairness.”³²⁹

Taking this as a given, the Court then explored the issue of when the participation of a psychiatrist is sufficiently important to the preparation of a defense that the state must provide indigents access to one and determined that three factors were relevant to this decision. The first was the individual’s interest in the accuracy of the criminal proceeding. The Court described this interest as “uniquely compelling” and stated that it weighs heavily in the analysis.³³⁰

The second factor was the governmental interests that would be affected if the state were compelled to provide psychiatrists to indigents. One interest was financial. Oklahoma alleged that if it were compelled to provide all criminal defendants in positions similar to Ake’s with a psychiatrist, the resultant financial burden would be “staggering.”³³¹ The Court rejected this argument, noting that several states and the federal government already made psychiatric assistance available to indigent criminal defendants and that these jurisdictions did not find the burden intolerable.³³² The Court concluded that there were no other governmental interests that weighed against providing access to a psychiatrist. It further noted that the state had a compelling interest in the fair and accurate adjudication of criminal trials, which weighed in favor of providing access to a psychiatrist.³³³ As a result, the Court concluded that the governmental interest in denying defendants access to a psychiatrist was insubstantial.³³⁴

The third factor the Court looked at was the probable value of the assistance sought and the risk of error in the trial if the assistance was not provided.³³⁵ The Court concluded that the assistance of a psychiatrist may well be crucial to a defendant’s ability to present an effective defense when that defense is based on his mental condition.³³⁶ The Court noted the assistance a psychiatrist can give to a jury when testifying as an expert witness. It stated that insanity defenses are inevitably “complex and for-

329. *Id.* at 76.

330. *Id.* at 78.

331. *Id.*

332. *Id.*

333. *Id.* at 79.

334. *Id.*

335. *Id.*

336. *Id.* at 80.

eign”³³⁷ and that testimony of psychiatrists is a “virtual necessity” if such a defense is to be successful.³³⁸ A psychiatrist’s ability to make these complex issues comprehensible to a jury enables the jury to make the most accurate determination of the truth on this issue.³³⁹ As a result, the Court concluded that without access to a psychiatrist, the danger of an erroneous decision would be extremely high.³⁴⁰

Finally, the Court concluded that, weighing the three factors together, access to a psychiatrist was so crucial to the criminal defendant in formulating a defense that the constitution mandated the state to provide access to a psychiatrist. The analysis in *Ake* has important ramifications in trials when the prosecution is allowed to introduce hypnotically enhanced testimony. In such an instance, is an indigent defendant entitled to an expert witness at the state’s expense who would testify at trial on the effects of hypnosis and otherwise aid in preparing a defense based on this issue?

Ake and subsequent cases suggest that the indigent defendant is entitled to access to the expert witness if he or she can show that denial of access would materially affect the ability to prepare a defense. The first factor analyzed in *Ake* applies in exactly the same way to a determination of whether a state must grant an indigent defendant access to an expert in hypnosis.³⁴¹ The defendant has the same compelling interest in the accuracy of the criminal proceeding and, therefore, this factor should weigh heavily.

The state’s interest in avoiding an onerous financial burden would not seem to be great. Given that access to an expert in hypnosis would be mandated in relatively few situations, there would not likely be any major expenditure of state funds for this purpose. At the same time, the state has a compelling interest in assuring that the outcome of the criminal proceedings

337. *Id.* at 81.

338. *Id.*

339. *Id.*

340. *Id.* at 82.

341. *Ake* dealt with the assistance of a psychiatrist in a capital case. The absence of either or both of these factors does not affect the application of *Ake*. It makes no difference whether the expert to be consulted is a psychiatrist or a nonpsychiatrist. Nothing in *Ake* limits its application solely to psychiatrists. In fact, cases have held that indigent defendants have a right to access to experts other than psychiatrists where such access is necessary to present a defense. *See, e.g., State v. Coker*, 412 N.W.2d 589 (Iowa 1987) (holding indigent defendant entitled to appointment of expert regarding intoxication defense to robbery); *State v. Bridges*, 385 S.E.2d 337 (N.C. 1989) (holding indigent defendant entitled to appointment of fingerprint expert at public expense).

Similarly, the fact that a case may not be a capital case does not affect the analysis. Although the defendant’s interest in life may be greater than and different from his liberty interest in avoiding prison, the liberty interest is also protected by the Due Process Clause. *See Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987).

is an accurate one. Thus, the state's interest in denying the assistance of an expert in hypnosis is not substantial.

The third factor requires measuring the probable value of the assistance sought and the risk of error if access to the expert is not granted. The weight of this factor will be case specific. The greater the role hypnotically enhanced testimony plays in the trial, the stronger the argument will be that the state must grant the defendant access to an expert in hypnosis.

The strongest role hypnotically enhanced testimony can play in a trial will be when a person previously hypnotized identifies the defendant as the assailant. Given the tremendous emphasis juries place on eyewitness identification,³⁴² in these cases the accuracy of the eyewitness identification will be of paramount importance. Thus, the ability of the defendant to explore the effect of hypnosis on the eyewitness's testimony will be highly material to the defendant's capacity to mount a defense. At the same time, because of the dangers inherent in hypnosis, there is a substantial risk that the trier of fact will make an erroneous decision if the defendant is incapable of exploring the possible effects of hypnosis on the identification.

Therefore, under the *Ake* factors, in cases where a previously hypnotized eyewitness makes an in-court identification, an indigent defendant should be granted access to an hypnosis expert to determine the effect of hypnosis on the identification.³⁴³ This conclusion helps to ensure that the indigent defendant receives a fair trial.

342. See ARNOLDS, ET AL., *supra* note 269, at 4-12.

343. The Eighth Circuit reached a similar conclusion in *Little v. Armontrout*, 835 F.2d 1240, 1245 (8th Cir. 1987), in which it held that the state's refusal to provide the defendant access to an expert on hypnosis violated due process. In *Little*, the defendant was accused of burglary and rape. *Id.* at 1246. The victim stated that she had a clear view of her assailant for between two and sixty seconds. *Id.* Two days after the attack, the victim was hypnotized by a police officer in an attempt to enhance her memory of the assailant. *Id.* at 1241.

At trial, the only substantial issue was the victim's identification of her assailant. She identified the defendant, Little, as her assailant. The defendant had challenged the validity of the identification, claiming that the hypnotic session had been suggestive. He claimed that the only reason he was unable to establish such suggestiveness was that the public defender's office could not afford to hire an expert in hypnosis. *Id.* at 1242.

Defendant was convicted, and brought a writ of habeas corpus. On appeal, the Eighth Circuit held that the writ must be granted. The court stated that it was "clear" that an expert in hypnosis would have aided the defendant to prepare and present his defense. The expert could have explored whether the questions asked during hypnosis were suggestive or could have caused confabulation. The expert could also have explained to the judge and jury what the limitations of hypnosis are and its effects on memory. *Id.* at 1244. The court further noted that the state had its own expert on hypnosis testify at the suppression hearing.

The court concluded that denying the defendant access to an expert had a material impact on the trial. *Id.* at 1245. Therefore, it found that defendant had been denied due process. *Id.*

In cases where a previously hypnotized eyewitness makes an in-court identification of the defendant, justice will usually be better served if the trial judge grants the defendant access to an expert in hypnosis.³⁴⁴ The expert will inform the judge of his or her conclusions in testimony on behalf of the defense. As a result, the judge will be able to make a more knowledgeable determination as to whether or not the hypnotically enhanced testimony should be suppressed.³⁴⁵

There is one caveat to the above mentioned conclusion. Some courts, in trying to decide whether the defendant is entitled to access to an expert hypnotist, have denied the request on the grounds that there was no reason to believe that the hypnosis resulted in a distortion of the witness's memory.³⁴⁶ If, indeed, the hypnosis had no effect on the witness's memory, then the trial judge would be correct in denying the indigent defendant access to an expert in hypnosis.

The reason for this is that if the hypnosis caused no change in the witness's memory, then the fact of hypnosis would no longer be a material factor at trial. Similarly, if the hypnosis had no effect on the witness's memory, then denial of access to an expert would not increase the likelihood of an erroneous decision by the trier of fact. Therefore, under *Ake*, there would be no deprivation of due process.

While this analysis is logically correct, courts should nonetheless be extremely wary of denying indigent defendants access to experts in hypnosis on this basis. Most judges are not themselves experts in hypnosis. There-

344. The reason for this qualification is that, although eyewitness testimony is usually of critical importance at trial, there may be instances where it is not. For example, if there are several eyewitnesses who will identify the defendant, only one of whom has been hypnotized, then the issue of hypnotically enhanced testimony regarding that one witness is immaterial.

Of course, one could make a strong argument that such a witness's testimony should be suppressed because it is merely cumulative. However, there would be no need to consult an expert in hypnosis to properly decide this issue.

345. This is the exact rationale underlying the rule allowing expert testimony at trial. Expert witnesses are allowed to testify because in certain instances the intelligent evaluation of facts by a lay person is impossible without the application of some specialized knowledge beyond his ken. In order to allow the lay person to intelligently evaluate the facts, expert testimony is allowed to supply this specialized knowledge. FED. R. EVID. 702 advisory committee's note.

Therefore, when the judge determines the admissibility of hypnotically enhanced testimony, and when this determination may jeopardize the defendant's constitutional rights, it is appropriate to set a policy requiring the judge to consult expert information regarding hypnosis. Such expertise can best be obtained by appointing an expert who becomes familiar with the case.

Therefore, it is logical and efficient to allow the defendant access to an expert in hypnosis. In this way, the defendant's constitutional rights are guaranteed to be protected while the judge gains sufficient expertise to make a knowledgeable determination regarding the admissibility of the hypnotically enhanced testimony.

346. See, e.g., *Stafford v. Love* 726 P.2d 894 (Okla. 1986).

fore, they may not be competent to determine the extent of the effect hypnosis had on the witness's memories. Where constitutional rights are in jeopardy, as will often be the case where there has been an in-court identification, judges should err on the side of caution and grant the defendant's request if there is any serious question as to whether hypnosis could have affected the eyewitness's memory. Further, appellate courts must closely scrutinize denials of a defendant's request³⁴⁷ rather than somewhat cursorily determining that there was no abuse of discretion in the denial.³⁴⁸

The reason for focusing on trials where hypnosis affects an eyewitness identification is that in those cases the issue of hypnotically enhanced testimony is most likely to be of sufficient importance to the defense as to mandate access to an expert. In other cases, the importance of the issue of hypnosis will be a factual question about which there are no easy generalizations. However, it would appear that the defendant would have the burden of proving that the admission into evidence of hypnotically enhanced testimony is a "pivotal, factual issue" requiring the testimony of an expert.³⁴⁹

In conclusion, constitutional concerns present no insuperable barriers to the admission into evidence of hypnotically enhanced testimony in criminal trials, although concerns over its reliability may require certain safeguards.³⁵⁰ In fact, in *Rock*, the Supreme Court expressly sanctions its use for defendant witnesses.

347. This is what the appellate court did in *Little*. *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987). In *Little*, the trial court denied the defendant's request for access to an expert in hypnosis, saying that it found no evidence of improper suggestion during the hypnotic sessions. The Eighth Circuit refused to defer to this finding. *Id.* at 1245.

348. This is not to suggest that appellate courts should engage in *de novo* review of these decisions. It is rather an exhortation to appellate courts for their close scrutinizing of facts in applying the abuse of discretion standard.

349. This is the standard used in *Stafford v. Love*, 726 P.2d 894 (Okla. 1986). It is consistent with the tenor of the opinion in *Little*, which focused on how crucial the eyewitness identification was to the prosecution's case and how hypnosis might have affected it.

350. This statement is presently accurate. However, changes in analysis of the clauses in the Constitution could certainly result in the inadmissibility of hypnotically enhanced testimony. If the Confrontation Clause were once again read as requiring an opportunity for *effective* cross-examination, then the phenomenon of memory hardening might result in the inadmissibility of hypnotically enhanced testimony in the prosecution's case-in-chief.

If the Court were to find that hypnotically enhanced testimony is so unreliable that a state's decision to bar its admissibility would not be arbitrary, then the defendant might not be able to admit it in his case-in-chief. Nonetheless, nothing presently creates insuperable problems of a constitutional nature for a party wishing to present hypnotically enhanced testimony into evidence in a jurisdiction that permits it.

VI. ADMISSIBILITY OF PREHYPNOTIC RECOLLECTION

Although there are presently no constitutional bars to the use of hypnotically enhanced testimony, admitting it into evidence is unwise. As I previously discussed, hypnotically enhanced testimony is inherently unreliable, and its unreliability is incurable.

Nonetheless, because of the valid uses of hypnosis for medical and investigatory purposes, courts have tried to find ways to ensure the reliability of the witness's testimony while at the same time permitting the use of hypnosis for concededly valid purposes.³⁵¹ One attempt to resolve this conflict, resulted in the procedural safeguard approach first espoused in *Hurd*.³⁵² The predominant approach today, however, holds that while hypnotically enhanced recall is inadmissible, a witness may still testify to his prehypnotic recollections. The proponent of the evidence bears the burden of proving that the recall is prehypnotic, but if this burden is met, then the witness may testify to those recollections.

In theory, this is a neat solution to the problem of hypnotically enhanced testimony. The witness will not be testifying to hypnotically enhanced recall. Rather, he will be testifying solely to those recollections present prior to undergoing hypnosis. Thus, there is no problem regarding memories distorted by suggestibility or resulting from confabulation. The witness's prehypnotic recollection should be as reliable as any other witness's memory and the prehypnotic memories should be admissible.

At the same time, allowing the use of prehypnotic recollections obviates the dilemma that a valid use of hypnosis might lead to a key witness being unable to testify at trial. A victim of a crime who would benefit from therapy involving hypnosis need no longer be afraid to be hypnotized for fear of disqualifying himself as a witness at the assailant's trial. So long as adequate precautions are taken to preserve the witness's prehypnotic recollections, he or she can receive therapy to help him or her recover from the trauma of the crime without jeopardizing the prosecution's case. He or she will still be able to testify as an eyewitness (although his or her testimony will be limited to his or her prehypnotic recollections). Similarly, law enforcement agencies can use hypnosis as a means of investigating a crime without running the danger that the witness will be unable to testify as a result of the hypnosis.

Although allowing a witness to testify to prehypnotic recollections seems to be an elegant theoretical solution to the aforementioned problems,

351. See *supra* notes 224-29 and accompanying text.

352. See *supra* notes 120-69 and accompanying text.

it raises two practical problems. The first is how to determine whether the witness's memories are prehypnotic or posthypnotic memories. The second is how to deal with the phenomenon of memory hardening.

The means of determining whether a witness's recollections are pre- or posthypnotic will, of course, vary from case to case. However, there are means by which this determination can be facilitated.

Before any hypnosis is conducted, the witness should be thoroughly interviewed by the hypnotist in order to obtain a detailed description of the incident as they remember it.³⁵³ The hypnotist should be independent of the prosecution, defense, or law enforcement agency and ideally should be a psychiatrist or psychologist trained in hypnosis with experience in the investigative use of hypnosis.

There are several reasons for these requirements. Initially, having an independent interviewer minimizes the possibility that the interviewer will have a bias that will lead him to unconsciously (or perhaps even consciously) cue the witness as to desirable answers that would help develop that side's case. To further ensure against this possibility, the prehypnotic interview should occur solely between the hypnotist and the witness, with no representatives of any interested parties present at the interview who might somehow suggest responses.³⁵⁴

This would not preclude any of the aforementioned parties from independently interviewing the witness for their own purposes. In fact, one would normally expect that each interested party would want an opportunity to conduct a pretrial interview with the witness.³⁵⁵ If the interview conducted by an interested party was recorded, the interview might be presented to the judge to help the judge determine the boundaries of the witness's prehypnotic recollections. In other words, the requirement that an impartial person interview the witness before the hypnotic session is in

353. Theoretically, any impartial interviewer skilled at extracting information could conduct the interview. It need not be the hypnotist. However, in the interests of efficiency, it makes sense to have the hypnotist conduct the interview.

354. Because the witness is not hypnotized, the danger of improper suggestion from unconscious cuing is not as great as exists during hypnosis. However, there is still a significant danger of improper suggestion where, during what will almost always be a stressful experience, the witness starts looking to a person he trusts for clues as to how he should answer a particular question.

355. Of course, there is always the danger that if an interested party interviews a witness before the hypnotist, the party may influence what the witness recalls in a later, impartially conducted interview. The possibility that an interview with an interested party will affect the witness's recall is always a danger—even if the witness is not about to be hypnotized. *See supra* notes 4-23 and accompanying text. However, the present system of trials compensates for this danger. Methods of exploring the accuracy of a witness's testimony, such as cross-examination, are available. If the witness is testifying solely to prehypnotic memory, then these mechanisms should operate to allow the jury to determine the accuracy of the witness's testimony.

no way intended to restrict any party's access to the witness. The requirement should not change pretrial procedures in any other manner.

However, where the witness is to be hypnotized—a procedure with grave risks of altering the witness's memory—and the witness will be allowed to testify to her prehypnotic memories, it is appropriate to take an extra measure to ensure that the court will be able to determine that the recollections the witness testifies are truly prehypnotic ones. An experienced, impartial interviewer, such as the hypnotist, will best be able to objectively extract the witness's recollections.

The requirement that the hypnotist be a professional trained in hypnosis conforms to the recommendation of the Council on Scientific Affairs of the American Medical Association.³⁵⁶ The Council so recommended because it was concerned that hypnotism performed by non-professionals could result in serious harm to the person hypnotized.³⁵⁷ If the witness is to be hypnotized caution dictates that the hypnotist be a professional.

This requirement also furthers the goal of effectively determining the witness's prehypnotic recall. To be effective, the interview must be conducted by an individual skilled at extracting information. Experts in counseling who are experienced in the investigative use of hypnosis will have the requisite skill to do a thorough job while still protecting the mental health of the witness.

Finally, the prehypnosis interview between the witness and the hypnotist, the hypnotic session itself, and the posthypnosis interview should all be recorded. Recording allows the court to directly compare the prehypnotic recollections against the witness's statements made during hypnosis and the witness's posthypnotic recollections, facilitating an effective determination as to which recollections are truly prehypnotic. While a transcription or audiotape might suffice, videotaping should be the preferred method. Videotaping will not only allow for the memorialization of the witness's words, but also allow the court to determine the witness's demeanor as she is relaying her recollections. This will be important in later determining the extent to which any memory hardening occurred as a result of the subsequent hypnosis. It will also enable the court to establish whether the interviewer gave the witness any visual cues.

356. See Council on Scientific Affairs, *supra* note 27, at 1921-22. Two major hypnosis associations, the Society for Clinical and Experimental Hypnosis (1978) and the International Society of Hypnosis (1979), have also passed resolutions recommending that forensic hypnosis be conducted only by psychologists or psychiatrists trained in hypnosis. SCHEFLIN & SHAPIRO, *supra* note 26, at 79-80.

357. Council on Scientific Affairs, *supra* note 27, at 1921-22.

By now it should be clear that the procedures recommended as a means of helping the court make a knowledgeable determination of the extent of the witness's prehypnosis recollections embody most of the *Hurd* guidelines—the same guidelines I rejected as a means of guaranteeing the reliability of hypnotically enhanced testimony.

The *Hurd* guidelines³⁵⁸ were inappropriate for guaranteeing the reliability of hypnotically enhanced testimony because they were ineffective in guarding against subtle, unintentional cues to a highly suggestive subject or confabulation. However, they are effective as a means of establishing a record of the witness's prehypnotic memories and allowing the judge to contrast them with the witness's posthypnotic memories.

The *Hurd* guidelines guarded against overt suggestion by the hypnotist during hypnosis. They are also effective guidelines against overt suggestion during the prehypnosis interview. Because they also establish a record of the witness recollections pre- and posthypnosis, they should be very effective in allowing the judge to determine the extent of the witness's prehypnotic recall.

The proponent of a previously hypnotized witness's testimony has the burden of proving that the witness is testifying to prehypnotic memory. This burden can best be met by substantially complying with these recommendations. However, courts should be flexible in applying them. The courts should not lose sight of the fact that the issue is whether there is satisfactory proof that the witness is testifying to prehypnotic memories,³⁵⁹ not simply whether these standards have been substantially followed. Nonetheless, requiring compliance with these standards is desirable because it helps the court determine the extent of the witness's prehypnotic recollections, and it also helps the court determine whether memory hardening has occurred.

When a witness is allowed to testify to her prehypnotic recollections, there is a danger that the hypnosis may have resulted in memory hardening—the unwarranted increase in a witness's confidence that her recall is accurate.³⁶⁰ If hypnosis has resulted in memory hardening, the defendant's right of cross-examination may be significantly impaired. This problem can be especially acute in circumstances where the hypnotist suggests to the witness, while she is under hypnosis, that she will recall everything when

358. See *supra* notes 122-34 and accompanying text.

359. The prosecution should have to prove by clear and convincing evidence that the witness is testifying to prehypnotic recall. See *supra* note 354 and accompanying text.

360. See *supra* notes 65-66 and accompanying text.

she is no longer hypnotized.³⁶¹ Other factors that can affect the witness's posthypnotic confidence include the individual's belief that hypnosis yields the truth, the depth of the hypnotic trance, and the degree to which the hypnotist has conformed to recommended standards.³⁶²

In an attempt to measure the extent to which memory hardening takes place in a given case, the New York Court of Appeals has set forth seven factors to be considered in determining whether the defendant's ability to cross-examine the witness has been substantially impaired. They are: (1) the degree of confidence the witness had in her initial recollections before being hypnotized; (2) the extent of the witness's belief that hypnosis yields the truth; (3) the degree to which the witness was hypnotized; (4) the length of the hypnotic session; (5) the type and nature of the questions utilized during the hypnotic session; (6) the effectiveness of the hypnosis in yielding additional details; and (7) any other factors the court deems important based upon the specific facts and nature of the case.³⁶³

In essence, these factors allow the court to determine the extent to which the witness's confidence in her memories has increased and whether the hypnotic session is responsible for the increase. If hypnosis has indeed significantly increased the witness's confidence to the extent that the defendant's ability to meaningfully cross-examine has been substantially impaired, then the judge may refuse to allow the witness to testify to her prehypnotic memories.

It is not clear from the court's opinion whether the court deems the requirement that the defendant's ability to meaningfully cross-examine the witness not be substantially impaired to be mandated by the federal constitution as a result of the Confrontation Clause or whether it is simply an issue of policy. *Hughes* and *Tunstall*, which establish this rule, were both decided prior to *Owens*. Inasmuch as *Owens* probably compels the conclusion that the Confrontation Clause does not preclude the introduction of hypnotically enhanced testimony as to which memory hardening has occurred,³⁶⁴ then *a fortiori*, the Confrontation Clause probably does not preclude the introduction of testimony as to prehypnotic memories, even if memory hardening has occurred.

Nonetheless, this requirement is sound for policy reasons. Simply because the witness is testifying to prehypnotic memories does not mean those memories are accurate. The ability to cross-examine a witness to expose

361. See *People v. Hughes*, 453 N.E.2d 484 (N.Y. 1983).

362. *Id.* (citing *Orne*, *supra* note 51, at 311).

363. *People v. Tunstall*, 468 N.E.2d 30, 34 (N.Y. 1984).

364. See *supra* notes 260-63 and accompanying text.

inaccuracies or inconsistencies in her testimony is an essential foundation of our legal system.³⁶⁵ Where this ability is rendered substantially useless, then the danger of an unjust verdict increases greatly. Therefore, if the prosecution wishes to introduce testimony where there is a danger of this happening, the prosecution should have the burden of proving that the defendant's ability to meaningfully cross-examine has not been substantially impaired.

Hypnotizing a witness to a crime before trial creates significant dangers. These dangers are lessened when the witness is limited to testifying solely to prehypnotic recollections, but the dangers still exist. To ensure that these dangers are minimized to the greatest extent possible, the court must be sure that the witness is testifying solely to prehypnotic recall. Therefore, the prosecution should have the burden of establishing by clear and convincing evidence that the witness is testifying to prehypnotic recall and that the defendant's right to meaningfully cross-examine has not been substantially impaired.³⁶⁶ It will be easiest for the prosecution to satisfy this burden if it adheres to the standards mentioned above. Further, if the witness is allowed to testify, then the defendant should be allowed to introduce evidence of the hypnotic procedures actually utilized as well as expert testimony concerning the effect of these procedures on the witness's memory. The judge should also charge the jury to the effect that hypnosis can result in memory hardening if such a request is made.³⁶⁷

There are valid reasons for trying to harmonize the need for potential witnesses to be hypnotized with the need to allow them to testify at trial. Restricting witnesses to their prehypnotic recollections is such an attempt. Nonetheless, the fact of prior hypnosis creates dangers that inaccurate testimony will be given with no chance for the defendant to meaningfully challenge that testimony. The measures recommended above may restrict the extent to which a previously hypnotized witness will be able to testify to prehypnotic recollections. However, they are necessary to minimize the likelihood that an injustice will occur.

VII. CONCLUSION

Admitting hypnotically enhanced testimony into evidence creates grave dangers that miscarriages of justice will occur. The problems that arise from this practice are so great that hypnotically enhanced testimony should never be admissible. Experts agree that hypnotically enhanced recall is un-

365. BROWN, ET AL., *supra* note 101, at 47.

366. This is the standard adopted in New York. *Hughes*, 453 N.E.2d at 490.

367. *Id.*

reliable; there is no way of knowing whether the memories obtained during hypnosis are accurate recollections. Nor is there any way of effectively increasing the reliability of such testimony. Conviction or acquittal on the basis of testimony that may well be a fabrication is unjust.

While the majority of jurisdictions no longer admit hypnotically enhanced testimony into evidence, there are still a large number of jurisdictions that do allow it into evidence or have not yet decided the issue. Those jurisdictions should establish a *per se* rule precluding the admission into evidence of hypnotically enhanced testimony.

Of course, the one exception to this rule involves the instance where the defendant is the witness. In that situation, the Supreme Court's ruling in *Rock* requires the state to allow the defendant an opportunity to establish the reliability of the testimony. In such instances, courts should be very leery of allowing such testimony into evidence. Because of its unreliability, it should be an extraordinary circumstance when such testimony by the defendant is admissible.

While those jurisdictions admitting only prehypnotic recollection into evidence have found a theoretical solution, its practical application is still a matter of concern. Determining the extent of the witness's prehypnotic recollection as well as the extent to which memory hardening has occurred may be difficult to ascertain with precision. Courts need to be especially careful in making these determinations.

Recently there has been rising concern over the admissibility of testimony based on what has been known as "junk science". Admitting evidence based upon false principles or upon inappropriate application of those principles adversely affects the entire justice system. To admit hypnotically enhanced testimony into evidence when the relevant scientific community overwhelmingly agrees that it is unreliable is the epitome of "junk science".³⁶⁸

Depriving a person of his liberty on the basis of "junk science" is especially egregious. It is imperative that each jurisdiction make sure this does

368. PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991); see, e.g., Mintz, *Science in the Court*, *NEWSDAY*, Sept. 3, 1991 at 59, 63. Most of the present attacks on the admissibility into evidence of testimony based on junk science is concerned over civil liability resulting from pseudoscientific theories. The most notorious case involves a Philadelphia jury that awarded \$986,000 to a psychic who claimed that a hospital CAT (computerized axial tomography) scan caused her to lose her psychic powers. Among the witnesses on the psychic's behalf were a doctor and police department experts. (The judge later reversed the verdict and ordered a new trial.)

While this article is not concerned with civil liability, the admissibility of hypnotically enhanced evidence in criminal trials involves the same issues regarding the danger of allowing spurious testimony into evidence based on fallacious or misapplied scientific principles.

not happen. Hypnotically enhanced testimony should not be admissible into evidence.

