EVIDENCE—HYPNOSIS—UNCONSTITUTIONAL FOR STATE TO APPLY *Per Se* RULE TO EXCLUDE CRIMINAL DEFENDANT'S HYPNOTICALLY ENHANCED TESTIMONY. *Rock v. Arkansas*, 107 S. Ct. 2704 (1987).

Attempts to introduce hypnotically adduced testimony into criminal proceedings are not a recent phenomenon. As early as 1898, in *People v. Ebanks*,[1] a defendant on trial for murder attempted to prove his innocence by calling a hypnosis expert to the stand.[2] The hypnotist testified that the defendant had categorically denied his guilt while in a hypnotic trance.[3] The trial court refused to admit the testimony on the ground that this would constitute an "illegal defense" because the "law of the United States does not recognize hypnotism."[4]

Since the decision in *Ebanks*, the use of hypnosis as a scientific method of proof has been debated extensively in courts throughout the United States.[5] Unlike the circumstances in *Ebanks*, the debate has focused on the admissibility of the hypnotically refreshed recollection of crime victims and witnesses.[6] Pro-

---

[1] 117 Cal. 652, 49 P. 1049 (1897).

[2] *Id.* at 665, 49 P. at 1053.

[3] *Id.*

[4] *Id.*

[5] *See generally* Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313 (1980); Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLIN. & EXP. HYP. 311 (1979); Putnam, *Hypnosis and Distortions in Eyewitness Memory*, 27 INT'L J. CLIN. & EXP. HYP. 437 (1979) (articles dealing with the use of hypnosis as a method of proof). *See also infra* notes 91-160 and accompanying text for an in-depth discussion of the use of hypnosis as a method of proof in court.

[6] More often than not, the prosecution attempts to introduce the hypnotically-refreshed recollection of a crime victim or a witness to a crime. *See, e.g.*, State v. Hurd, 86 N.J. 525, 530, 432 A.2d 86, 88 (1981); People v. Hughes, 59 N.Y.2d 523, 529, 466 N.Y.S.2d 255, 257, 453 N.E.2d 484, 486 (1983); State v. Glebock, 616 S.W.2d 897, 903 (Tenn. Crim. App. 1981); State v. Armstrong, 110 Wis.2d 555, 559-60, 329 N.W.2d 386, 389 (1983); Haselhuhn v. State, 727 P.2d 280, 281 (Wyo. 1986); Chapman v. State, 638 P.2d 1280, 1281 (Wyo. 1982).

However, there are a number of cases that deal with the question of whether a criminal defendant may call an expert hypnotist to the stand in order to have the expert attest to the defendant's innocence. *See, e.g.*, Jones v. State, 542 P.2d 1316 (Okla. Crim. App. 1975). In that case, a defendant had been found guilty of first-degree murder and sentenced to death. *Id.* at 1319. As part of his defense, the defendant introduced the testimony of a licensed medical doctor who specialized in hypnosis. *Id.* at 1326. The trial court established that the doctor, if allowed to take the stand, would testify that he believed that the defendant had been telling the truth when he professed his innocence while under hypnosis. *Id.* The trial court refused to allow the testimony to be introduced. *Id.* In upholding the trial court's decision, the Oklahoma Court of Criminal Appeals stated that attempts to introduce the hypnotist's testimony as a method of establishing the truth of statements

ponents argue that hypnosis is an effective and proven method of restoring a witness' memory loss.[7] Opponents contend, however, that hypnosis is inherently unreliable because of the possibility of inaccurate results produced by hyper-suggestibility,[8] confabulation,[9] and increased confidence in the recall (whether genuine or invented) which occur during the hypnotic process.[10] These divergent views have resulted in courts adopting four distinct approaches in deciding whether hypnotically adduced testimony is admissible.[11] This article traces these various approaches, culminating in the 1987 United States Supreme Court decision in *Rock v. Arkansas*,[12] which invalidated a state's adoption and application of a rule of per se inadmissibility of hypnotic evidence when used by a criminal defendant.[13]

Vickie Lorene Rock did not want her husband Frank to die.[14] She begged the officers who arrived at the apartment to "please save him."[15] In a distraught state, Mrs. Rock told the investigat-

---

offered by the defendant was comparable to admitting the results of lie detectors or truth serum tests. *Id.* at 1326-27.

See also Warner, *The Use of Hypnosis in the Defense of Criminal Cases*, 27 INT'L J. CLIN. & EXP. HYP. 417 (1979) (survey of cases dealing with the admissibility of hypnotically-adduced evidence when offered by criminal defendants).

7 *See* State v. Hurd, 86 N.J. 525, 537, 432 A.2d 86, 92 (1981).

8 Hyper-suggestibility refers to the fact that a person under hypnosis is very susceptible to suggestions made either consciously or unconsciously by the hypnotist or others who participate in the process. People v. Hughes, 59 N.Y.2d 523, 534-35, 466 N.Y.S.2d 255, 260, 453 N.E.2d 484, 489 (1983).

9 Confabulation is a process "whereby a person who is under substantial pressure to remember a perception, such as details of the appearance of an assailant, but in fact had no perception to remember, is encouraged to unconsciously manufacture those details from her other experiences or her imagination." Contreras v. State, 718 P.2d 129, 132 n.8 (Alaska 1986) (quoting State v. Contreras, 674 P.2d 792, 808 (Alaska Ct. App. 1983)). *See also* Orne, *supra* note 5, at 318, 333-34; Putnam, *supra* note 5, at 437 (experimental study illustrating the problems of inaccurate recall in criminal investigations).

10 In State v. Peoples, 311 N.C. 515, 523, 319 S.E.2d 177, 182 (1984), the North Carolina Supreme Court asserted that it was "virtually impossible for the subject or even the trained professional hypnotist to distinguish between true memory and pseudo memory." *Id.*

The New York Court of Appeals, relying on the results of several experiments conducted by scientists, found that hypnotized persons exhibited convincing recall of events that "happened" in the future. People v. Hughes, 59 N.Y.2d 523, 535, 466 N.Y.S.2d 255, 260, 453 N.E.2d 484, 489-90 (1983).

See also Diamond, *supra* note 5, at 339-40.

11 *See infra* notes 91-97 and accompanying text for a detailed discussion of these four approaches.

12 107 S. Ct. 2704 (1987).

13 *Id.* at 2714-15.

14 *Id.* at 2706.

15 *Id.*

ing officers how and why she shot her husband.[16] According to the testimony of one officer, Mrs. Rock explained that she and her husband had argued.[17] She tried to leave the apartment, but he choked her.[18] She picked up a gun and pointed it at the floor.[19] When he hit her again, she shot him.[20] Mr. Rock died from the bullet wound to the chest.[21] Mrs. Rock was charged with manslaughter.[22]

Faced with a client who was unable to recall specific details of the shooting, Mrs. Rock's attorney suggested hypnosis to refresh Mrs. Rock's memory.[23] Dr. Betty Back, a neuropsychologist, interviewed Mrs. Rock for one hour before hypnosis.[24] Mrs. Rock related all that she could remember of the shooting and Dr. Back carefully recorded her narrative in a notebook.[25] The account added nothing new to Mrs. Rock's statement at the site of the killing.[26] However, after two sessions under hypnosis, both recorded on tape, Mrs. Rock remembered crucial details about the shooting.[27] She remembered that while her thumb held the gun's hammer, she had not held a finger on the trigger.[28] Equally important, she remembered that "the gun had discharged when her husband grabbed her arm during the scuffle."[29] As a result of these details, Mrs. Rock's counsel engaged a gun specialist to examine the weapon.[30] The specialist found the gun defective: the gun had a tendency to fire, "when hit or dropped, without the trigger[] being pulled."[31]

When the prosecuting attorney learned about the results of

---

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* A second officer gave a slightly different version of Mrs. Rock's statement at the scene. *Id.* at 2706 n.1. According to him, Mrs. Rock stated that she grabbed the gun during the struggle with her husband, and that "the gun went off" after she told him to leave her alone. *Id.* Mrs. Rock also purportedly stated that "it was an accident and she didn't mean to shoot him." *Id.*

21 *Id.* at 2706.

22 *Id.*

23 *Id.*

24 *Id.* Dr. Back testified that she was a licensed neuropsychologist with training in the field of hypnosis. *Id.*

25 *Id.*

26 *Id.* at 2706-07.

27 *Id.* at 2707.

28 *Id.*

29 *Id.*

30 *Id.* The handgun was a single action Hawes .22 Deputy Marshal. *Id.*

31 *Id.*

the hypnosis, he filed a motion to exclude the new details from Mrs. Rock's testimony.[32] In the pre-trial order, the judge acknowledged that Dr. Back had not used leading questions to exact biased responses from Mrs. Rock while under hypnosis.[33] Despite this finding, the trial judge ruled that all testimony resulting from Mrs. Rock's hypnotically refreshed recollection would be excluded.[34] Specifying the "inherent unreliability" of hypnosis as a rationale, the trial judge also stated that testimony given as the result of hypnosis "eliminated meaningful cross-examination on those matters."[35]

At trial, the defense established the gun's defect by calling the weapons expert.[36] Mrs. Rock also took the stand, but, because of the pre-trial order, she was interrupted by the prosecutor's objections every time she said more than a few words.[37] The judge limited Mrs. Rock's testimony to a "reiteration of the sketchy information in Dr. Back's notes."[38] A jury found Mrs. Rock guilty of manslaughter and she was sentenced to a ten-year prison term with a $10,000 fine.[39]

On appeal, the Supreme Court of Arkansas affirmed the trial court's ruling.[40] Following other jurisdictions which have held that hypnotically adduced evidence from a witness other than the criminal defendant is inadmissible per se, the court concluded that the danger of admitting such evidence outweighs its protected probative value.[41] While recognizing Mrs. Rock's fundamental right to testify on her own behalf, the court decided that the exclusion of hypnotically induced details did not conflict with this constitutional guarantee.[42] In conclusion, the Arkansas Supreme Court held that any prejudice or deprivation suffered by Mrs. Rock was slight and the product of her own actions rather than the result of any error committed by the trial court.[43]

The United States Supreme Court granted certiorari[44] to de-

---

[32] *Id.*
[33] *Id.* at 2707 n.3.
[34] *Id.* at 2707.
[35] *Id.* at 2707 n.3.
[36] *Id.*
[37] *Id.* at 2707 n.4.
[38] *Id.* at 2707.
[39] *Id.*
[40] Rock v. State, 288 Ark. 566, 568, 708 S.W.2d 78, 79 (1986).
[41] *See id.* at 575, 708 S.W.2d at 83 (citing People v. Shirley, 31 Cal.3d 18, 181 Cal. Rptr. 243, 641 P.2d 775 (1982)).
[42] *Id.* at 578-80, 708 S.W.2d at 84-86.
[43] *Id.* at 580, 708 S.W.2d at 85-86.
[44] 107 S. Ct. 430-31 (1986).

termine the constitutional validity of the Arkansas per se rule excluding hypnotically refreshed recollection from the testimony of a criminal defendant.[45] In a five to four decision authored by Justice Blackmun, the majority invalidated the Arkansas per se rule.[46]

The right of a person to testify in his own defense was not part of the early common law.[47] Older modes of trial, most notably compurgation and wager of law, relied on the witnesses produced by the civil or criminal defendant to swear that the defendant was telling the truth.[48] When oaths of decision were replaced by jury trials, "the [defendant] was naturally deemed incapable of being such a witness."[49] Between 1859 and the end of the nineteenth century, however, every state except Georgia had enacted statutes affording criminal defendants the right to testify under oath.[50] This reform was based on the supposition that giving the accused an opportunity to take the stand would lead to the detection of guilt and the protection of innocence.[51]

The Georgia statute, passed in 1866, expressly retained the incompetency rule as to persons "charged in any criminal proceeding with the commission of any indictable offense or any offense punishable on summary conviction."[52] The effect of this incompetency rule was somewhat mitigated in 1868 when Georgia passed a statute allowing a defendant the opportunity to make an unsworn statement to the court and jury.[53] The United

---

[45] *Rock*, 107 S. Ct. at 2706.

[46] *Id.* at 2714-15. Justice Blackmun was joined in his opinion by Justices Brennan, Marshall, Powell and Stevens. *Id.* at 2706.

[47] Ferguson v. Georgia, 365 U.S. 570, 573-74 (1961).

[48] *Id.* at 573. Wager of law is defined as:

> the giving of gage or sureties by a defendant in an action of debt that at a certain day assigned he would *make his law*; that is, would take an oath in open court that he did not owe the debt, and at the same time bring with him eleven neighbors (called "compurgators"), who would avow upon their oaths that they believed in their consciences that he said the truth.

BLACK'S LAW DICTIONARY 1416 (5th ed. 1979) (emphasis in original).

[49] 2 J. WIGMORE, EVIDENCE § 575, at 682 (3d ed. 1940).

[50] *Ferguson*, 365 U.S. at 577.

[51] *Id.* at 581.

[52] *Id.* at 570-71 (quoting GA. CODE ANN. § 38-416 (1866)).

[53] *Id.* at 571 (quoting GA. CODE ANN. § 38-415 (1868)). This statute provided:

> In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be compelled to

States Supreme Court reviewed the constitutionality of this statute in light of a due process challenge in *Ferguson v. Georgia*.[54]

In 1960, Ferguson, a criminal defendant on trial for murder, was called to the stand by his lawyer.[55] The trial court refused to allow his counsel to elicit his unsworn statement through questioning.[56] Ferguson argued that this denial was in violation of the requirement of due process imposed on the states by the fourteenth amendment.[57] The Georgia Supreme Court, in sustaining the trial court's ruling, held that a defendant's constitutional right to the assistance of counsel included only those actions that were sanctioned by state law.[58] The United States Supreme Court disagreed, holding that Georgia's refusal to allow a criminal defendant's counsel the opportunity to question his client on the stand was a violation of the due process clause of the fourteenth amendment.[59]

The *Ferguson* Court did not address whether the rights conferred by the compulsory process clause of the sixth amendment applied to state criminal proceedings through the fourteenth amendment.[60] It was not until 1967, six years after *Ferguson*, that the Supreme Court settled the incorporation issue in *Washington v. Texas*.[61] In that case, Jackie Washington, the defendant, received a fifty-year jail term after being convicted of murder with malice.[62] At trial, Washington testified that Charles Fuller fired the shotgun that killed a teenage boy.[63] The defendant also

---

answer any questions on cross-examination, should he think proper to decline to answer.

Id.

54 365 U.S. 570 (1961).

55 *Id.* at 571.

56 *Id.*

57 *Id.*

58 *Id.* at 571-72.

59 *Id.* at 596. Ferguson did not challenge the constitutionality of the Georgia "incompetency" statute. *Id.* at 572. He raised only the question of Georgia's application of its "sworn statement" statute preventing his lawyer from questioning him on the stand. *Id.* For this reason, the Supreme Court did not invalidate Georgia's "incompetency" statute. *See id.* at 572 & n.1, 596. Justices Frankfurter and Clark, in two concurring opinions, asserted that the Court should hold the incompetency statute unconstitutional under the mandates of the due process clause. *Id.* at 598-603 (Frankfurter, J. & Clark, J., concurring opinions).

60 The compulsory process clause of the sixth amendment provides the right to be heard and to offer testimony, the right to remain silent and the right to representation. U.S. CONST. amend. V, VI.

61 388 U.S. 14 (1967).

62 *Id.* at 15.

63 *Id.* at 15-16.

claimed that he tried to dissuade Fuller from pulling the trigger and that he fled the scene before the gun was fired.[64] Fuller, already serving a jail term for the murder, was willing to corroborate Washington's story and testify on his behalf.[65] The prosecution objected on the basis of two state statutes which prevented "persons charged as principals, accomplices or accessories in the same crime" from testifying on behalf of each other.[66] The Texas trial court, sustaining the state's objection, ruled that Fuller could not testify.[67] The Texas Court of Criminal Appeals affirmed.[68]

The United States Supreme Court reversed.[69] Holding that state criminal proceedings are controlled by the sixth amendment, the Court rejected the common law presumption that a state's interest in preventing perjury outweighed the right of a defendant to present witnesses.[70] Under Texas law, an accused accomplice could not testify on behalf of the defense, but could testify for the state.[71] The Court decided that this double standard encouraged perjury because an accomplice would have a good reason to cooperate with the state and testify against the interest of his partner.[72] Further, the Court noted that Texas law permitted an accused accomplice to testify on behalf of the defense only if he was acquitted at his own trial.[73] He could then exonerate his comrade knowing full well that he could incriminate himself without any fear of reprisal.[74] For these reasons, the Supreme Court held that the state of Texas had arbitrarily prevented a competent witness from giving testimony that was "relevant and material to the defense."[75]

Several years later, in *Chambers v. Mississippi*,[76] the Supreme Court settled another controversy that matched the state's rules

---

64 *Id.* at 16.

65 *Id.*

66 *Id.* at 16 & n.4. The two statutes at issue in this case, Article 82 of the Texas Penal Code and Article 711 of the Texas Code of Criminal Procedure were repealed in 1965. *Id.* at 17-18 n.4.

67 *Id.* at 17.

68 *Id.*

69 *Id.* at 23.

70 *Id.* at 20-21.

71 *Id.*

72 *Id.*

73 *Id.* at 23.

74 *Id.*

75 *Id.* The Court did note, however, that their decision did not affect statutes governing testimonial privileges or mental infirmity or infancy. *Id.* at 23 n.21.

76 410 U.S. 284 (1973).

of evidence against the right of a criminal defendant to offer relevant testimony.[77] Chambers was brought to trial for the murder of a police officer, despite repeated confessions by a man named Gabe McDonald.[78] McDonald, however, repudiated his confession both before and during the trial.[79] Chambers filed a pretrial motion asking that he be allowed to question McDonald as an "adverse" witness should the prosecution fail to call him as a witness.[80] The trial judge agreed that McDonald should be required to appear, but reserved his right to rule on Chambers' motion.[81]

At trial, Chambers called McDonald as a witness when the state failed to put him on the stand.[82] McDonald admitted to the out-of-court confession, but on cross-examination the state also elicited his repudiation.[83] Chambers then renewed his motion to cross-examine McDonald as an adverse witness.[84] The trial judge denied Chambers' motion on the basis of the Mississippi "voucher" rule that precluded a party from impeaching his own witness.[85] Chambers then attempted to introduce the testimony of three men to whom McDonald had admitted the murder on separate occasions.[86] The judge held that the hearsay rule excluded their testimony despite Chambers' argument that McDonald's statements were an exception to the hearsay rule as declarations against interest.[87] Chambers was found guilty of

---

77 *See id.* at 294.

78 *Id.* at 287-88.

79 *Id.* at 288.

80 *Id.* at 291.

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.* The State of Mississippi argued that an "adverse" witness would be someone testifying *against* the interests of the defendant. *Id.* at 297. The Supreme Court rejected this argument, holding that McDonald's testimony, while exculpating him, incriminated Chambers. *Id.*

85 *Id.* at 291-92, 294. The "voucher" rule is a common law rule that precludes a party from impeaching his own witness. *Id.* at 295. The rule stems from an English trial practice of selecting witnesses to vouch for one's own veracity. *Id.* at 296. Therefore, it was expected that a defendant "would stand firmly behind" that witness' testimony. *Id. See* 3 J. WIGMORE, EVIDENCE § 876, at 658-60 (1970); C. MCCORMICK, EVIDENCE § 38, at 75-78 (2d ed. 1972). The "voucher" rule is rejected by the Federal Rules of Evidence. Fed. R. Evid. 607.

86 *Chambers*, 410 U.S. at 292-93.

87 *Id.* at 293, 298-303. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to provide the truth of the matter asserted." FED. R. EVID. 801.

As noted by the *Chambers* Court, a declaration against interest is one of the most common exceptions to the hearsay rule. *Chambers*, 410 U.S. at 299. Missis-

murder.[88] The United States Supreme Court reversed and held that the application of the Mississippi voucher rule under these circumstances deprived Chambers of a trial in accordance with due process.[89] The Court further asserted that state rules of evidence could not be applied mechanically to defeat the fundamental right of a defendant to present witnesses.[90]

Whether the inclusion or exclusion of hypnotically induced testimony affronts the guarantees of the sixth amendment has led to a body of decisions by state and federal courts that is both complex and diverse.[91] The approaches adopted by these courts can be divided into four categories.[92] The majority of state and federal courts hold post-hypnotic testimony admissible per se and leave the issue of credibility to the trier of fact.[93] A smaller, but growing number of states have adopted a per se rule of inadmissibility which excludes all post-hypnotic testimony as untrustworthy.[94] No federal court seems to have adopted this approach.[95] Several state and federal courts have developed pro-

---

sippi, however, recognized this exception only when a pecuniary interest was at risk. *Id.* When the penal interest of a declarant was at issue, Mississippi refused to apply the exception to the hearsay rule. *Id.*

[88] *Id.* at 285.

[89] *Id.* at 302-03.

[90] *Id.* at 302.

[91] *See infra* notes 113-60 and accompanying text for a discussion of the various approaches that have been adopted by state and federal courts in deciding whether to include or exclude post-hypnosis testimony.

[92] *See Rock*, 107 S. Ct. at 2712-13 nn.14-16.

[93] *See* Harding v. State, 5 Md. App. 230, 246 A.2d 302 (Md. Ct. Spec. App. 1968), *cert. denied*, 395 U.S. 949 (1969) (establishing view that post-hypnosis testimony is admissible per se); *see also infra* notes 98-112 (discussing *Harding*); *see generally* State v. Brown, 337 N.W.2d 138 (N.D. 1983); State v. Glebock, 616 S.W.2d 897 (Tenn. Crim. App. 1981); Chapman v. State, 638 P.2d 1280 (Wyo. 1982) (holding post-hypnosis testimony admissible per se).

[94] *See* State v. Mack, 292 N.W.2d 764 (Minn. 1980) (the leading case holding post-hypnosis testimony inadmissible per se); *see also infra* notes 113-118 (discussing *Mack*).

See also Contreras v. State, 718 P.2d 129, 139 (Alaska 1986); *see, e.g.*, People v. Shirley, 31 Cal. 3d 18, 22-23, 641 P.2d 775, 776, 181 Cal. Rptr. 243 (1982); Rodriquez v. State, 327 So.2d 903, 904 (Fla. Dist. Ct. App. 1976); State v. Haislip, 237 Kan. 461, 482, 701 P.2d 909, 925 (1985), *cert. denied*, 474 U.S. 1022 (1985); People v. Nixon, 421 Mich. 79, 88, 364 N.W.2d 593, 598 (1984); People v. Hangslebaen, 86 Mich. App. 718, 728, 273 N.W.2d 539, 543-44 (1978); People v. Hughes, 59 N.Y.2d 523, 548, 453 N.E.2d 484, 497, 466 N.Y.S.2d 255, 268 (1983); Jones v. State, 542 P.2d 1316, 1326-27 (Okla. Crim. App. 1975) (recently adopting a per se rule of inadmissibility).

One court recently observed that states adopting rules of per se inadmissibility represent a new majority view. *See* Haselhuhn v. State, 727 P.2d 280, 288 (Wyo. 1986) (Brown, J., dissenting), *cert. denied*, 107 S. Ct. 1321 (1987).

[95] The federal courts, like the state courts, have adopted various approaches in

cedural guidelines that must be applied in answering the question of admissibility.[96] Finally, a few jurisdictions have promoted a strict case-by-case approach where the trier of fact determines to what extent, if any, hypnosis has affected the witness' ability to testify and to be cross-examined.[97]

In *Harding v. State*,[98] the Maryland Court of Special Appeals set the precedent for the per se rule of admissibility in criminal cases when it affirmed a trial court's decision to allow post-hypnosis testimony.[99] Mildred Coley was shot in the chest and her body dumped on a deserted road.[100] Later, her assailant returned, moved her by car to another location, raped her, and then left.[101] The victim remembered the details up to the time of the shooting very clearly.[102] She was, however, confused about what followed and her memory was restored only after hypnosis.[103] The trial court allowed in as evidence the victim's hypnotically induced testimony and Harding, the defendant, was subsequently convicted of "assault with intent to rape and assault with intent to murder."[104]

On appeal, Harding argued that the testimony concerning the rape was inadmissible because it was hypnotically induced.[105] The court initially ruled that the question of admissibility caused

---

deciding whether to admit post-hypnosis testimony. *See, e.g.*, McQueen v. Garrison, 814 F.2d 951 (4th Cir.), *cert. denied*, 108 S. Ct. 332 (1987) (Fourth Circuit adopting a strict case-by-case approach). *See also infra* notes 147-160 and accompanying text (discussing McQueen v. Garrison).

See also United States v. Awkard, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979) (Ninth Circuit following jurisdictions that hold hypnosis effects the credibility, not the admissibility of evidence); *cf.* Wicker v. McCotter, 783 F.2d 487 (5th Cir.), *cert. denied*, 478 U.S. 1010 (1986); Beck v. Norris, 801 F.2d 242 (6th Cir. 1986); Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir. 1986), *cert. denied*, 475 U.S. 1046 (1986) (federal circuit courts adopting other approaches).

[96] *See* State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981) (leading case establishing procedural guidelines). *See also infra* notes 121-46 and accompanying text (discussing *Hurd*).

[97] *See* McQueen v. Garrison, 814 F.2d 951 (4th Cir.), *cert. denied*, 108 S. Ct. 332 (1987) (Fourth Circuit adopting a strict case-by-case approach). *See also infra* notes 147-160 and accompanying text (discussing McQueen v. Garrison). *See generally* Wicker v. McCotter, 783 F.2d 487 (5th Cir.), *cert. denied*, 478 U.S. 1010 (1986); State v. Iwakiri, 106 Idaho 618, 682 P.2d 571 (1984) (adopting case-by-case approach).

[98] 5 Md. App. 230, 246 A.2d 302 (Md. Ct. Spec. App. 1968), *cert. denied*, 395 U.S. 949 (1969).

[99] *See id.* at 247, 246 A.2d at 312.

[100] *Id.* at 232-33, 246 A.2d at 304.

[101] *See id.* at 233, 235, 246 A.2d at 304, 305-06.

[102] *See id.* at 233-34, 246 A.2d at 304-05.

[103] *Id.* at 234-35, 246 A.2d at 305.

[104] *Id.* at 232, 246 A.2d at 304.

[105] *Id.* at 235-36, 246 A.2d at 306.

no difficulty.[106] The court noted that Coley's testimony on the stand was from her own recollection.[107] The Maryland court stated that the fact that her present knowledge was the product of hypnosis should be a concern to the trier of fact who will ultimately decide how much weight the testimony should be assigned.[108]

The Maryland Court of Special Appeals affirmed the trial court's ruling.[109] Without evaluating the reliability of hypnosis, the court held that the facts on the record supported the jury's finding of guilt on the rape charge.[110] In listing the evidence adduced below, the court noted that "there was sufficient corroboration of the witness' testimony" to affirm the conviction.[111]

The majority of state and federal jurisdictions which have considered the issue of whether to admit hypnotically enhanced testimony have followed *Harding*.[112] The leading criminal case rejecting the *Harding* approach was *State v. Mack*.[113] In *Mack*, as

---

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

107 *Id.*

108 *Id.* In a precautionary instruction, however, the trial judge advised the jury that the post-hypnosis testimony should not be given any greater weight than any other testimony. *Id.* at 244, 246 A.2d at 310.

109 *Id.* at 246-47, 246 A.2d at 312.

110 *Id.* at 247, 246 A.2d at 312. The appellate court added that an expert performed the hypnosis procedure and testified that in his opinion "there was no reason to doubt the truth of the witness' statement." *Id.*

111 *Id.*

112 Wyoming, for example, adopted the *Harding* rule in Chapman v. State, 638 P.2d 1280 (Wyo. 1982). In *Chapman*, a victim of an assault from a burglary was unable to give a satisfactory description of the assailant until after submitting to hypnosis on two occasions. *Id.* On the basis of the description elicited under hypnosis, the victim identified Chapman in a photograph as his assailant. *Id.*

The Wyoming court, following *Harding*, held that the testimony of the previously hypnotized witness was properly admitted and that the value of such evidence could be impeached through cross-examination of the witness and hypnosis, an attack on credibility of the evidence and expert testimony. *Id.* at 1284-85. The court concluded that there was no abuse of discretion in the trial court's decision to admit the hypnotically enhanced testimony. *Id.* at 1286.

Although Maryland set the precedent for holding post-hypnosis testimony admissible per se, the Maryland Court of Special Appeals eventually qualified *Harding* in Polk v. State, 48 Md. App. 382, 427 A.2d 1041 (Md. Ct. Spec. App. 1981). In that case, the Maryland court noted that it had not assessed the *Frye* rule when it rendered its opinion in *Harding*. *Id.* at 392, 427 A.2d at 1047. As a result, the court instructed each trial court to apply the *Frye* rule and to determine on a case-by-case basis whether the hypnotically refreshed testimony should be admitted. *Id.* at 395, 427 A.2d at 1048-49. Later, in Collins v. State, 52 Md. App. 186, 447 A.2d 1272 (Md. Ct. Spec. App. 1982), the Maryland Court of Special Appeals expressly overruled *Harding*, and adopted a per se rule of inadmissibility. *Id.* at 205, 447 A.2d at 1283.

113 292 N.W.2d 764 (Minn. 1980). In *Mack*, Marion Erickson met David Roy

in most other cases included in this second category, the State of Minnesota adopted a per se rule of inadmissibility.[114] Relying on *Frye v. United States*, which held that "scientific evidence" should not be admitted unless the appropriate scientific community acknowledged the technique as generally reliable,[115] the Minnesota Supreme Court concluded that hypnosis, as a method of refreshing a witness' memory, is not scientifically reliable.[116] Faced with the question of whether to admit or exclude post-hypnosis testimony, the Minnesota court found that "[a]lthough hypnotically adduced 'memory' is not strictly analogous to the results of mechanical testing, we are persuaded that the *Frye* rule is equally applicable in this context."[117] The Minnesota court, therefore, held such testimony inadmissible as a matter of law.[118]

While jurisdictions adopting per se rules of inadmissibility are a growing minority, there are a few jurisdictions taking a very different approach.[119] These courts have developed procedural safeguards to be applied on a case-by-case basis.[120] The leading opinion in this third line of cases is *State v. Hurd*.[121] In *Hurd*, Jane

---

Mack in a bar and eventually accompanied him to a motel. *Id.* at 766. Erickson was taken by ambulance to a hospital for a single deep cut found in her vagina. *Id.* She was, however, unable to remember anything about that night. *Id.* Six weeks later, under hypnosis, she accused Mack of stabbing her. *Id.* at 767. Mack was charged with aggravated sexual assault. *Id.* The trial court, following Minnesota procedure, stayed the prosecution and certified the question of admissibility of post-hypnosis testimony to the state supreme court. *Id.* at 765 n.1.

[114] *Id.* (citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).

[115] 293 F. at 1014. In *Frye*, the United States Court of Appeals for the District of Columbia Circuit concluded that the results of a polygraph test were inadmissible evidence. *Id.*

[116] *Mack*, 292 N.W.2d at 768-69.

[117] *Id.* A few courts have held that *Frye* does not apply to the testimony of previously hypnotized witnesses. *See, e.g.*, United States v. Valdez, 722 F.2d 1196, 1200-01 (5th Cir. 1984); Brown v. State, 426 So.2d 76, 85-90 (Fla. Dist. Ct. App. 1983); State v. Seager, 341 N.W.2d 420, 429 (Iowa 1983); State v. Brown, 337 N.W.2d 138, 148-49 (N.D. 1983); State v. Armstrong, 110 Wis.2d 555, 567-68, 329 N.W.2d 386, 393, *cert. denied*, 461 U.S. 946 (1983).

[118] *Id.* at 772.

[119] *See* State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981) (leading case developing procedural guidelines that allow courts to decide on a case-by-case basis whether hypnotically-adduced testimony may be admitted). *See infra* notes 121-46 and accompanying text.

[120] *See, e.g.*, Sprynczynatyk v. General Motors Corp., 771 F.2d 1112, 1122-23 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986); House v. State, 445 So.2d 815, 826-27 (Miss. 1984); State v. Beachum, 97 N.M. 682, 689, 643 P.2d 246, 253 (N.M. Ct. App. 1981); State v. Weston, 16 Ohio App. 3d 279, 287, 475 N.E.2d 805, 813 (1984); State v. Armstrong, 110 Wis. 2d 555, 570, 329 N.W.2d 386, 394, *cert. denied*, 461 U.S. 946 (1983).

[121] 86 N.J. 525, 432 A.2d 86 (1981).

Sell was sexually assaulted and repeatedly stabbed in her bedroom.[122] Unable to identify her assailant, she underwent hypnosis.[123] A trained psychologist induced the hypnosis, but two detectives, present throughout the session, also questioned Sell.[124] One detective asked a series of blatantly leading questions which resulted in Sell identifying Paul Hurd, her former husband, as the attacker.[125] Following this recall, the detective also encouraged Sell, who expressed doubts, to accept the identification she had made and to sign a statement naming Hurd as her assailant.[126]

Hurd argued that Sell's hypnotically refreshed recollection must be excluded because it failed to meet the reliability standards demanded by the *Frye* rule.[127] The trial court agreed that *Frye* applied.[128] However, unlike the approach taken in *Mack* and its progeny, the trial court rejected the contention that *Frye* required the court to find consensus among the experts certifying the general reliability of hypnotically enhanced recall.[129] Instead of adopting a per se rule for or against the exclusion of post-hypnosis testimony, the trial court devised a two-part test to determine admissibility.[130] The first part required the application of six procedural safeguards: (1) the hypnosis must be conducted by a licensed psychiatrist or psychologist; (2) the licensed professional must be independent of the prosecution, investigation or defense; (3) pre-hypnotic information offered by the witness must be in writing; (4) the witness must give a full account of his

---

122 *Id.* at 529, 432 A.2d at 88.

123 *Id.* at 530, 432 A.2d at 88.

124 *Id.* at 530-31, 432 A.2d at 88-89.

125 *Id.* at 531, 432 A.2d at 89. The court reported the dialogue between the detective and Mrs. Sell as follows:

> "Jane, I want you to think very, very hard of what you are seeing right now. It's up to you to help me. It is up to you now to describe for me what you see. Is it somebody that you know, Jane?" Mrs. Sell answered, "Yes." "Is it David, Jane?" "No," Mrs. Sell cried. "Is it Paul?" "Yes." Mrs. Sell responded emotionally.

Id. "David" referred to David Sell, Jane Sell's husband at the time of the attack. *Id.* at 530, 432 A.2d at 88. Mr. Sell was considered a suspect. *Id.*

126 *Id.* at 531-32, 432 A.2d at 89.

127 *Id.* at 532, 432 A.2d at 89.

128 *Id.*

129 *Id.* at 537, 432 A.2d at 92.

130 *Id.* at 532-33, 432 A.2d at 89-90. The trial court established the two-part test because it found that "the potential for the production of fantasy and confabulation" mitigated against a rule of per se admissibility. *Id.* The procedural safeguards adopted by the New Jersey court were suggested by Dr. Martin Orne, an expert witness for the defense. *Id.* at 533, 432 A.2d at 89.

or her memory to the hypnotist prior to hypnosis; (5) all sessions between the hypnotist and the witness must be recorded, ideally on videotape; (6) no other individuals may be permitted to observe or participate in the hypnosis.[131] The second part of the test required the state to establish by "clear and convincing evidence" that these standards had been met.[132] After applying these safeguards to the facts on record, the trial court granted Hurd's motion to suppress the testimony.[133]

In affirming the trial court's opinion, the Supreme Court of New Jersey rejected a per se rule of inadmissibility as unnecessarily broad.[134] Finding that the "use of hypnosis to refresh memory satisfies the *Frye* standard in certain instances," the court reasoned that hypnosis, unlike a polygraph, was not intended to exact the truth.[135] Instead, hypnosis induced a person to "concentrate on past events and volunteer previously unrevealed statements concerning the event."[136] Because hypnosis can be deemed reasonably reliable if it yields recollections "as accurate as those of an ordinary witness," the New Jersey court held that the *Frye* standard was satisfied.[137]

The court also reasoned that hypnotically adduced testimony was as reliable as other eyewitness testimony.[138] Accepting the testimony of expert witnesses produced at the trial below, the court found that hypnosis was generally as reliable as ordinary recall when used in "appropriate cases and where properly conducted."[139] The New Jersey court held that post-hypnosis testimony was admissible in a criminal proceeding provided that the

---

131 *Id.* 432 A.2d at 89-90 (quoting State v. Hurd, 173 N.J. Super. 333, 363 (1980)).

132 *Id.*, 432 A.2d at 90.

133 *Id.* at 532, 432 A.2d at 90.

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

135 *Id.* at 537-38, 432 A.2d at 92. Justice Pashman stated that the purpose of hypnosis is to "overcom[e] amnesia and restor[e] the memory of a witness." *Id.* at 537, 432 A.2d at 92.

136 *Id.* (quoting State v. Hurd, 173 N.J. Super. 333, 361, 414 A.2d 291, 305 (Law Div. 1980)).

137 *Id.* at 538, 432 A.2d at 92. The New Jersey Supreme Court stated:

> If [hypnosis] is conducted properly and used only in appropriate cases, hypnosis is generally accepted as a reasonably reliable method of restoring a person's memory. Consequently, hypnotically-induced testimony may be admissible if the proponent of the testimony can demonstrate that the use of hypnosis in the particular case was a reasonably reliable means of restoring memory comparable to normal recall in its accuracy.

Id.

138 *See id.* at 541, 432 A.2d at 94.

139 *Id.* at 543, 432 A.2d at 95.

trial court determines "that the use of hypnosis in the particular case was reasonably likely to result in recall comparable in accuracy to normal human memory."[140] Although the court would allow an opponent to challenge the application of the procedural safeguards, it would not permit a challenge on the general reliability of hypnosis.[141] Finally, the court directed the trier of fact to determine the amount of weight that should be assigned to the hypnotically enhanced testimony.[142]

The Supreme Court of New Jersey also agreed with the trial court's decision to require that the admissibility of post-hypnosis testimony be established by clear and convincing evidence.[143] Although this standard imposed a heavy burden on the use of hypnosis, the court reasoned that it was justified.[144] Given the risks associated with hypnosis, the court wanted to "assure strict compliance with the procedural guidelines" set forth in its opinion.[145] In short, the court wanted post-hypnosis testimony introduced into evidence only when it could be shown to be reasonably accurate.[146]

Despite the varied approaches represented by the three lines

---

140 *Id.*

141 *Id.* Justice Pashman explained that an opponent could challenge the hypnotically enhanced testimony by examining the reliability of the procedures used through expert testimony. *Id.*

142 *Id.*

143 *Id.* at 546, 432 A.2d at 97-98. The New Jersey court imposed a clear and convincing standard only when a party was attempting to introduce hypnosis into a criminal proceeding. *Id.* at 547 n.6, 432 A.2d at 97 n.6. The court did not decide whether the same standard would be imposed in a civil proceeding. *Id.* The court also expressly refused to decide whether the procedural guidelines would have to be met in a civil trial. *Id.* At minimum, the court stated that it would require a recording of the hypnotic session. *Id.*

144 *Id.* at 547, 432 A.2d at 97. This burden, according to the court "is justified by the potential for abuse of hypnosis, the genuine likelihood of suggestiveness and error, and the consequent risk of injustice." *Id.*

145 *Id.*

146 *Id.* The supreme court, however, disagreed with one portion of the trial court's holding concerning the burden of proof. *Id.* at 548, 432 A.2d at 97. Usually, the criminal defendant bears the burden of proving that a pre-trial identification was "so suggestive as to result in a substantial likelihood of misidentification," and a violation of due process. *Id.* The trial court, however, because of the problems associated with hypnosis, imposed the clear and convincing standard on the state, holding that it should bear the burden of proving that the hypnotically adduced recall was generally reliable under the totality of the given circumstances. *Id.* The New Jersey Supreme Court disagreed, holding that since the state would be held to a clear and convincing standard for proving the general reliability of the hypnosis in each specific situation, the burden would remain on the defendant to demonstrate any showing of suggestiveness resulting in a constitutional violation. *Id.*, 432 A.2d at 98.

of cases presented above, yet another strategy was adopted by the Fourth Circuit in *McQueen v. Garrison*.[147] In that case, McQueen was convicted of multiple murders in a North Carolina state court when the key prosecution witness testified as to having seen McQueen commit the murders.[148] Initially, the witness claimed to have heard the shots, but not to have seen the shootings.[149] Under hypnosis, however, the witness related very specific details of the murders and remembered watching McQueen execute two women.[150] McQueen was convicted and the Supreme Court of North Carolina affirmed.[151]

McQueen then requested a writ of habeas corpus in the District Court for the Eastern District of North Carolina, contending that the inclusion of the hypnotically enhanced testimony breached his rights under the sixth and fourteenth amendments.[152] The district court, finding that McQueen had received a fundamentally fair trial, dismissed the fourteenth amendment claim.[153] The district court, however, granted the writ on the ground that the inclusion of the hypnotically enhanced testimony had impinged impermissibly on McQueen's sixth amendment right to confront the witness.[154] The Court of Appeals for the Fourth Circuit reversed.[155]

The Fourth Circuit found none of the approaches adopted by other jurisdictions satisfactory.[156] According to the circuit court, both per se rules were inadequate because they gave no discretion to the courts.[157] The procedural approach taken by the New Jersey Supreme Court in *State v. Hurd* was better, but still deficient, according to the circuit court because testimony, shown trustworthy and probative, could still be excluded if the hypnosis was found procedurally faulty.[158] As an alternative, the Fourth Circuit offered a strict case-by-case approach that re-

---

147 814 F.2d 951 (4th Cir.), *cert. denied*, 108 S. Ct. 332 (1987).
148 *Id.* at 953.
149 *Id.*
150 *Id.*
151 *Id.* at 952 n.2.
152 *Id.* at 952.
153 *Id.*
154 *Id.*
155 *Id.*
156 *See id.* at 956-59.
157 *See id.* at 958.
158 *See id.* at 959. Judge Sprouse posited that "[i]n our view, however, the reliability of the hypnosis procedure does not assure admissibility, nor does demonstrated unreliability necessarily mean the hypnotically enhanced testimony is not admissible." *Id.*

quired a balancing test.[159] The circuit court concluded that based on the specific facts in a case, a court could decide whether a witness' memory and ability to testify had been impaired by the hypnotic experience.[160]

In *Rock v. Arkansas*,[161] Justice Blackmun, writing for the majority of the Supreme Court, did not invalidate any of the various approaches adopted by courts throughout the United States in their efforts to decide whether to admit or exclude hypnotically adduced testimony in criminal proceedings.[162] The Court, however, did invalidate Arkansas' per se rule of inadmissibility as applied to a criminal defendant.[163] The Court, by first stressing the holdings in *Washington*[164] and *Chambers*,[165] emphasized that state criminal proceedings must honor the dictates of the sixth and fourteenth amendments.[166] The majority also acknowledged that a defendant's right to offer relevant testimony was not absolute since a state retained a legitimate interest in regulating its criminal trial process;[167] but the State could not apply these evidentiary rules in an arbitrary or disproportionate way.[168] The Court required states to consider whether their legitimate interests outweighed the constitutional right of defendants to offer testimony.[169]

The *Rock* majority held that the Supreme Court of Arkansas

---

159 *Id.* at 958. The district court relied on its holding in Harker v. State of Maryland, 800 F.2d 437 (4th Cir. 1986). *Harker*, while adopting a "middle ground," protected a defendant against the problems associated with hypnosis (i.e., suggestibility, confabulation and "memory hardening") by requiring courts to conduct a balanced inquiry to determine that the hypnotically refreshed recollection be free of these dangers. *See Harker*, 800 F.2d at 440-43.

160 *See McQueen*, 814 F.2d at 958.

161 107 S. Ct. 2704 (1987).

162 *See id.* at 2708-15. Justice Blackmun was joined in his opinion by Justices Brennan, Marshall, Powell and Stevens. *Id.* at 2706.

Until *Rock*, the Supreme Court had consistently denied certiorari in cases that challenged a court's rule concerning post-hypnosis testimony, whether the rule be one of per se admissibility, per se inadmissibility, or where procedural safeguards have been adopted. *See, e.g.*, Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986); State v. Haislip, 237 Kan. 461, 701 P.2d 909, *cert. denied*, 474 U.S. 1022 (1985); Harding v. State, 5 Md.App. 230, 246 A.2d 302 (Md. Ct. Spec. App. 1968), *cert. denied*, 395 U.S. 949 (1969); State v. Armstrong, 110 Wis.2d 555, 329 N.W.2d 386, *cert. denied*, 461 U.S. 946 (1983).

163 *Rock*, 107 S. Ct. at 2714-15.

164 *See supra* notes 61-75 and accompanying text.

165 *See supra* notes 76-90 and accompanying text.

166 *See Rock*, 107 S. Ct. at 2710-11.

167 *Id.* at 2711.

168 *Id.*

169 *Id.*

had minimized impermissibly the right of a criminal defendant to testify in her own defense.[170] According to the Court, although a state could legitimately advance an interest in barring unreliable evidence, the sixth amendment required compelling justification for any rule which totally excluded a criminal defendant's testimony.[171] The Justice reasoned that Arkansas could not arbitrarily invalidate all post-hypnosis testimony of a criminal defendant unless it could clearly demonstrate that all such recollections are invalid.[172] According to the Court, Arkansas had failed to make any such showing.[173] In fact, the majority concluded that Arkansas had done little more than rely on the rationale and decisions of other jurisdictions that had adopted a per se rule of inadmissibility.[174]

In finding the Arkansas per se rule unconstitutional, the Supreme Court acknowledged that the use of hypnosis in criminal proceedings is still a controversial subject among the medical and legal communities.[175] Noting that the debate continues over the typical individual's response to hypnosis, the Court found that most experts agree that the technique usually increases "both correct and incorrect recollection."[176] Justice Blackmun opined that incorrect recollection, usually the product of suggestibility, confabulation, and "memory hardening," sometimes renders hypnotically enhanced testimony unreliable and undermines effective cross-examination.[177] On the other hand, the

---

170 *Id.* at 2714.

171 *Id.*

172 *Id.*

173 *Id.*

174 *See id.* Arkansas claimed to have relied on the findings and rationale of People v. Shirley, 31 Cal. 3d 18, 181 Cal. Rptr. 243, 723 P.2d 1354, *cert. denied*, 459 U.S. 860 (1982) in adopting its per se rule of inadmissibility. *See Rock*, 107 S. Ct. at 2712 n.15. The *Shirley* court adopted a per se rule of inadmissibility however, it is limited to witnesses and not to criminal defendants. *See Shirley*, 31 Cal.3d at 67, 181 Cal. Rptr. at 273, 723 P.2d at 1384.

Initially, courts that barred all post-hypnosis testimony usually prohibited the witness from testifying at all. *See, e.g.*, State v. Mena, 128 Ariz. 226, 232, 624 P.2d 1274, 1280 (1981) (holding all testimony of a witness was barred from the moment hypnosis occurred). Mena later was reversed in part by Collins v. Superior Court, 132 Ariz. 180, 209-10, 644 P.2d 1266, 1295-96 (1982) (holding disqualifying witnesses who clearly remembered details prior to hypnosis would foster injustice). *Id. See also* Contreras v. State, 718 P.2d 129, 139-40 (Alaska 1986) (holding a witnesses competent to testify to facts remembered prior to hypnosis, despite the court's decision to adopt a rule of *per se* inadmissibility).

175 *See Rock*, 107 S. Ct. at 2713 (citing Counsel on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 J.A.M.A. 1918, 1918-19 (1985)).

176 *Id.* (footnote omitted).

177 *Id.*

Court also acknowledged that hypnosis has been found to be a valid and reliable technique in obtaining investigative leads and identifications.[178]

The *Rock* Court also noted that many jurisdictions eschewed a per se rule and allowed hypnotically enhanced testimony despite the known risks.[179] Focusing on jurisdictions that have adopted procedural safeguards, the Court found that although these safeguards did not eliminate the problems, they did reduce them.[180] According to the Court, the most noteworthy of these safeguards included using a trained psychiatrist or psychologist independent of the investigation, conducting the hypnosis in a neutral setting, and recording all sessions on audio or video tapes.[181] In addition to these specially formulated safeguards, the Court stressed that the traditional means of assessing accuracy remained applicable to post-hypnosis testimony.[182] These included corroborating evidence, cross-examination, expert testimony explaining the problems associated with hypnosis and cautionary instructions to the jury.[183]

Applying these factors to the case at bar, the Supreme Court concluded that Arkansas had impermissibly prevented Mrs. Rock from taking the stand in her own defense.[184] The majority observed that the credentials of the psychologist, the finding that no leading questions were asked during hypnosis, the taping of all sessions and the corroborating evidence from the gun expert were circumstances that should have been considered by the trial court in deciding whether Mrs. Rock's post-hypnosis testimony was reliable and admissible.[185] Arkansas' per se rule of inadmissibility, however, prevented the trial court from considering these factors.[186] For these reasons, the Court held that "Arkansas' per se rule excluding all post-hypnosis testimony infringe[d] impermissibly on the right of a defendant to testify on his or her

---

178 *Id.* at 2713-14. *See also* Korger & Douche, *Hypnosis in Criminal Investigation*, 27 INT'L J. CLIN. & EXP. HYP. 358 (1979) (discussing how hypnosis has been utilized to solve major crimes).

179 *Rock*, 107 S. Ct. at 2713 n.16.

180 *Id.* at 2714.

181 *Id.* (citing Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLIN. & EXP. HYP. 311, 335-36 (1979)).

182 *Id.*

183 *Id.*

184 *Id.* at 2714-15.

185 *See id.* at 2714.

186 *Id.*

own behalf."[187]

The dissent, authored by Chief Justice Rehnquist, stressed the majority's finding that no set of procedural safeguards could consistently ensure the reliability of post-hypnosis testimony.[188] Despite this recognition, the majority, in Justice Rehnquist's view, was forcing trial courts to engage in a case-by-case scientific assessment of reliability each time they confronted the question of whether to admit hypnotically enhanced testimony.[189] Noting that the Court's deference to states had been traditionally strong in the administration of justice, Chief Justice Rehnquist argued that the Court should show even more deference in a situation where "scientific understanding . . . is still in its infancy."[190] In Chief Justice Rehnquist's view, the Arkansas per se rule was a legitimate response to a novel and difficult problem.[191]

The dissent also rejected the majority's holding that the Arkansas rule infringed impermissibly on a defendant's constitutional right to testify in her own defense.[192] Chief Justice Rehnquist asserted that the cases cited by the majority clearly maintained that a criminal defendant's right to present evidence was not absolute either under the due process clause of the fourteenth amendment or under the compulsory clause of the sixth amendment.[193] These cases also demonstrated that a criminal defendant's right to present evidence must often bow to a state's legitimate interests in managing the criminal trial process.[194] According to the Chief Justice, the Constitution does not exempt a criminal defendant from following rules designed by a state "to assure both fairness and reliability in the ascertainment of guilt or innocence."[195] Since hypnotically induced testimony was considered inherently suspect, the Arkansas per se rule of inadmissibility was a valid attempt to ensure a trustworthy result in a criminal proceeding.[196] The Chief Justice asserted the Constitu-

---

187 *Id.* at 2714-15.

188 *Id.* at 2715 (Rehnquist, J., dissenting). Chief Justice Rehnquist was joined by Justices White, O'Connor and Scalia. *Id.*

189 *Id.*

190 *Id.* at 2716 (Rehnquist, J., dissenting) (quoting *Rock*, 107 S. Ct. at 2714 (majority opinion)).

191 *Id.*

192 *Id.* at 2715 (Rehnquist, J., dissenting).

193 *Id.* at 2716 (Rehnquist, J., dissenting) (citing Chambers v. Mississippi, 410 U.S. 284, 295 (1973); Washington v. Texas, 388 U.S. 14, 22 (1967); In re Oliver, 333 U.S. 257, 273, 275 (1948)).

194 *Id.*

195 *Id.* (quoting Chambers v. Mississippi, 410 U.S. 289, 302 (1973)).

196 *Id.*

tion does not authorize the Supreme Court to dictate how this issue should be handled by the individual states.[197]

The *Rock* decision acknowledges that the reliability of hypnosis as a scientific method of proof in criminal proceedings is still widely debated. The majority of the Court, however, also recognizes that hypnosis has the potential to contribute significantly to the truth-seeking function of trials, i.e., the detection of guilt and the protection of innocence. In accounting for both the benefits and liabilities of hypnosis, the Supreme Court rendered a decision that encourages courts to allow hypnotically adduced testimony when it seems reliable and to repudiate the testimony when it seems untrustworthy. The *Rock* decision, at least in the way that it effects a criminal defendant, seems to fit neatly into a legal system that confidently and deliberately protects the criminally accused while concomitantly preserving state authority.

The *Rock* Court, however, declined the opportunity to adopt a rule that would apply equally to all hypnotically adduced testimony in criminal cases, whether offered by the prosecution or the defense.[198] Instead, the Court, by relying on cases like *Ferguson*, *Washington*, and *Chambers*, preserved the rights of a criminal defendant by reminding the state that its criminal proceedings must honor the dictates of the sixth and fourteenth amendments. On the other hand, the *Rock* Court, by rendering a narrow holding made it equally clear that the Supreme Court has no desire to interfere with a state's sovereignty. Clearly, this holding raises the question as to whether *Rock* prohibits a state from applying a per se rule of inadmissibility to a criminal defense *witness*. If the fundamental purpose of the trial process is to ascertain the truth, then the answer to this question should be "yes," and there can be no valid distinction made between a criminal defendant and a criminal defense witness. By expressly refusing to settle this question, however, the Court implied that the answer is "no." As the *Rock* opinion demonstrates, the Court, in criminal proceedings, has historically balanced the rights of a defendant against the interests of the state. While the balance may tip in favor of the defendant when the issue is whether she will be allowed to testify, it seems equally clear that the balance will tip toward the

---

197 *Id.*

198 The majority noted that *Rock* "does not involve the admissibility of previously hypnotized witnesses other than criminal defendants and we express no opinion on that issue." *Id.* at 2712 n.15.

state when a mere defense witness is prevented from taking the stand.

Furthermore, as a result of the Court's balancing approach, the *Rock* holding sanctions each of the distinct and varied rules that have been adopted by courts throughout the United States in their efforts to decide whether to admit or exclude hypnotically refreshed recollection in criminal proceedings. More important, the *Rock* holding does not forbid a state from adopting a per se rule of inadmissibility; the state is simply prohibited from applying such a rule to a criminal defendant.

While the *Rock* decision may be a step in the right direction, it will not have any significant impact on the criminal justice system. For example, nothing in the *Rock* decision prevents the Arkansas court on remand from excluding the defendant's hypnotically refreshed recollection on the ground that the hypnotic sessions were procedurally faulty.[199] For states that have adopted mandatory procedural guidelines, the problem of a court's prejudice against hypnosis is inconsequential. For states that have decided on a per se rule of inadmissibility, the temptation to find all hypnosis procedurally defective may prove too hard to resist.[200]

Diane C. Nardone

---

[199] In fact, on remand, the question of how Arkansas would deal with the Supreme Court opinion became a moot issue when Mrs. Rock changed her plea from not guilty to guilty, on February 18, 1988. Mrs. Rock was sentenced to three years in the Arkansas Department of Correction and received a $2,500 fine. State v. Rock, No. CR-83-338-1 (Ark. Cir. Ct. Feb. 18, 1988).

[200] The *Rock* Court did not explicitly state whether the prosecution or the defense should bear the burden of proof for establishing whether the hypnotically-adduced testimony is reliable or not. *See* Note, *Rock v. Arkansas: Hypnosis and the Criminal Defendant's Right to Testify*, 41 ARK. L. REV. 425, 464-72 (1988) for a detailed discussion of the evidentiary considerations raised by the *Rock* decision. The note proposes a model rule of evidence for regulating the admissibility of post-hypnosis testimony. *Id.* at 483-86.