Kentucky Law Journal

Volume 70 | Issue 1 Article 6

1981

The Admissibility of Hypnotically Induced Recollection

R. Eberley Davis
University of Kentucky

THE ADMISSIBILITY OF HYPNOTICALLY INDUCED RECOLLECTION

INTRODUCTION

Since the French government first recognized the legal importance of hypnosis nearly two centuries ago,[1] hypnosis has gradually emerged from the "baquets"[2] and dark rooms of mesmerism to have a significant impact on our modern legal system.[3] Hypnotism is currently considered by law enforcement officials as an invaluable investigative[4] and rehabilitative[5] tool. Yet our courts have been reluctant to accept hypnosis as a means of assisting a witness. As stated by the court in *People v. Ebanks*,[6] the first reported American case involving hypnosis, "[t]he law of the

---

[1] In 1784, the French government appointed a commission, headed by Benjamin Franklin, to investigate "mesmerism," the controversial suggestive technique that precursed hypnotism, and its founder, Franz Anton Mesmer. K. BOWERS, HYPNOSIS FOR THE SERIOUSLY CURIOUS 7-8 (1976) [hereinafter cited as BOWERS]. See notes 15 and 16 *infra* and the accompanying text for further discussion of "mesmerism."

[2] "Baquets" were the wooden tubs used by Mesmer to create the magnetic field necessary for his hypnotic cure, "animal magnetism." See note 15 *infra* for a discussion of "animal magnetism."

[3] Evidence of this impact is found in the recent proliferation of cases and literature discussing hypnosis. *See, e.g.*, United States v. Awkard, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); United States v. Adams, 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974); Connolly v. Farmer, 484 F.2d 456 (5th Cir. 1973); United States v. Miller, 411 F.2d 825 (2d Cir. 1969); People v. Modesto, 382 P.2d 33 (Cal. 1963); People v. Busch, 366 P.2d 314 (Cal. 1961); People v. Hiser, 72 Cal. Rptr. 906 (Dist. Ct. App. 1968); Rodriguez v. State, 327 So. 2d 903 (Fla. Dist. Ct. App. 1976); People v. Smrekar, 385 N.E.2d 848 (Ill. App. Ct. 1979); Harding v. State, 246 A.2d 302 (Md. Ct. Spec. App. 1968), *cert. denied*, 395 U.S. 949 (1969); State v. McQueen, 244 S.E.2d 414 (N.C. 1978); State v. Pusch, 46 N.W.2d 508 (N.D. 1950); Jones v. State, 542 P.2d 1316 (Okla. Crim. App. 1975); State v. Harris, 405 P.2d 492 (Or. 1965); State v. Jorgensen, 492 P.2d 312 (Or. Ct. App. 1971); State v. Pierce, 207 S.E.2d 414 (S.C. 1974); W. BRYAN, LEGAL ASPECTS OF HYPNOSIS (1962) [hereinafter cited as BRYAN]; Spector & Foster, *The Utility of Hypno-Induced Statements in the Trial Process: Reflections on* People v. Smrekar, 10 LOY. CHI. L.J. 691 (1978-79); Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567 (1977); Comment, *Refreshing the Memory of a Witness Through Hypnosis*, 5 U.C.L.A.—ALASKA L. REV. 266 (1976).

[4] *See* W. KROGER, CLINICAL AND EXPERIMENTAL HYPNOSIS 113-18 (2d ed. 1977) [hereinafter cited as KROGER]; Holden, *Forensic Use of Hypnosis on the Increase*, 208 SCIENCE 1443 (June 27, 1980).

[5] *See* BRYAN, *supra* note 3, at 266-67.

[6] 49 P. 1049 (Cal. 1897).

United States does not recognize hypnotism."[7]

Hypnotically induced evidence has nevertheless been presented to the courts in several forms.[8] Generally, courts have found testimony by a lay witness hypnotized on the stand, and expert testimony of statements made by a subject while under hypnosis, inadmissible.[9] The propriety of these principles is, however, beyond the scope of this Comment. This Comment will, instead, address the issues surrounding the admissibility of in-court testimony of a lay witness whose memory has been refreshed by a pre-trial hypnotic session.[10] Generally considered admissible, such testimony was found inadmissible in two recent decisions, *State v. Mack*[11] and *State v. Hurd.*[12] This Comment will consider the rationale of those decisions and will recommend that, with proper safeguards, hypnotically induced recall should be admitted into evidence by courts.

I. HYPNOSIS: GENERAL INFORMATION[13]

A. *History of Hypnosis*

---

[7] *Id.* at 1053 (quoting lower court opinion).

[8] The primary evidentiary uses of hypnosis include the assistance of expert testimony by contributing to a more comprehensive psychological evaluation, and the assistance of lay testimony by enabling witnesses to recall seemingly forgotten observations and other information. For a more detailed discussion of the legal uses of hypnosis, see notes 31-34 *infra* and the accompanying text.

[9] *See, e.g.*, Greenfield v. Robinson, 413 F. Supp. 1113 (W.D. Va. 1976) (defendant had no constitutional right to testify while in an hypnotic trance); People v. Busch, 366 P.2d 314 (medical doctor not allowed to testify as to defendant's frame of mind where opinion was based on statements made by defendant while hypnotized); People v. Hiser, 72 Cal. Rptr. 906 (within discretion of trial judge not to admit tape recording of hypnotic interviews); Rodriguez v. State, 327 So. 2d 903 (hypnotist could not testify as to statements made by defendant while hypnotized); Jones v. State, 542 P.2d 1316 (statements made by defendant while hypnotized and expert testimony based on those statements inadmissible); State v. Pierce, 207 S.E. 2d 414 (statements made by hypnotized defendant could not be presented by hypnotist). *See generally* Annot., 92 A.L.R. 3d. 442 (1979).

[10] Though both of the principal cases of this Comment are criminal cases involving testimony of crime victims, as opposed to occurrence witnesses, the author does not feel that it is necessary to treat testimony of the two types of witnesses differently. The possibility of prejudicial testimony by either type of witness does not run to admissibility, but rather bears on the credibility to be afforded the testimony by the jury. Similarly, the author does not distinguish between the use of hypnotic evidence in criminal and civil trials. Though the standard of proof may differ, the same admissibility standard, that is, relevancy, applies in both types of trials.

[11] 292 N.W.2d 764 (Minn. 1980).

[12] 414 A.2d 291 (N.J. Super. Ct. Law Div. 1980), *aff'd*, 432 A.2d 86 (N.J. 1981).

[13] An exhaustive examination of the history and theory of hypnosis is beyond the

While the importance of the power of suggestion can be traced to primitive medicine men, voodoo practitioners, Egyptian ceremonies, Hindu sacred rites and even to the Bible,[14] the modern era of hypnosis did not begin until the eighteenth century. Around 1780, in France, Franz Anton Mesmer began attracting followers and attention with his unusual method of cure, which he called "animal magnetism."[15] As this technique gained recognition, the French government grew suspicious and appointed a royal commission to investigate Mesmer and his work. The commission's findings discredited Mesmer, sending mesmerism underground until the middle of the nineteenth century when it resurfaced under the new title of "hypnotism."[16] With the turn of the twentieth century, and the realization that hypnosis was psychologically rather than physically based, the hypnotic phenomenon slowly began to gain acceptance.[17] Today, hypnosis is recognized chiefly as a therapeutic tool in medicine and psychiatry,[18] but the realm of its use extends to areas such as

---

scope of this Comment. For such an examination, see BOWERS, *supra* note 1; BRYAN, *supra* note 3; KROGER, *supra* note 4.

[14] S. KREBS, THE FUNDAMENTAL PRINCIPLES OF HYPNOSIS 3-4 (rev. ed. 1957); KROGER, *supra* note 4; Pattie, *A Brief History of Hypnosis*, in HANDBOOK OF CLINICAL AND EXPERIMENTAL HYPNOSIS 10 (J. Gordon ed. 1967) [hereinafter cited as GORDON].

[15] "Animal magnetism" was ordinarily performed in "an atmosphere of heavily draped rooms and soft music." BOWERS, *supra* note 1, at 7-8. Metal bars were extended from a wooden tub, or baquet, filled with water, ground glass, iron filings and, supposedly, magnetism. This magnetism presumably flowed through the iron bar into the body of the patient holding it. This process was designed to in some manner realize the person's magnetic imbalances and to have a "benign and healing effect on the body." *Id.* at 7.

[16] *Id.* at 8-9.

[17] Lay acceptance of hypnosis has been retarded significantly by several misconceptions which, although still believed by many, have no basis in fact. First, it is often believed that the hypnotic subject loses consciousness while under hypnosis. This is untrue, however, since all stages of the hypnotic process are characterized by increased attention. Second, it is often believed that the subject is unable to make decisions while hypnotized. Since the capacity to be hypnotized is a subjective experience, however, hypnosis is not accompanied by surrender of willpower. Third, many laymen associate hypnosis with weak-mindedness. This is also a fallacy since people of above average intelligence make the best subjects and even constant hypnotic induction does not weaken the mind. Fourth, many subjects fear that intimate secrets will be revealed while under hypnosis. This fear is unfounded because the hypnotized person will be aware of everything, both while under hypnosis and afterwards, unless amnesia is suggested by the hypnotist. Finally, the fear of remaining under the influence of hypnosis often causes resistance to hypnotism. This fear is also unwarranted since the subject actually induces the hypnosis himself and can therefore readily dehypnotize himself. *See* KROGER, *supra* note 4, at 36-37.

[18] In 1958, the Council of Mental Health of the American Medical Association issued

sports,[19] education[20] and law enforcement.[21]

B. *The Process of Hypnosis*

The phenomenon of hypnosis has never been precisely defined[22] nor adequately explained.[23] Generally, however, hypnosis can be described as a process through which one attains a heightened degree of concentration and suggestibility without a loss of consciousness. The hypnotized subject does not pass into a sharply delineated or static hypnotic state,[24] but passes through several states, or "depths," each having its own characteristics.[25]

---

a qualified endorsement of hypnosis: "The use of hypnosis has a recognized place in the medical armamentarium and is a useful technique in the treatment of certain illnesses when employed by qualified medical and dental personnel." Council on Mental Health, *Medical Use of Hypnosis,* 168 J.A.M.A. 187 (1958). Hypnosis has been used in the treatment of various illnesses and addictions, including: smoking, asthma, burns, chronic pain, grief, impotency, obesity, migraine and tension headaches and warts. *See* BOWERS, *supra* note 1, at 141-51.

[19] *See* Unestal, *Hypnotic Preparation of Athletes,* in HYPNOSIS 1979, at 301 (1979).

[20] *See* PSYCHOLOGY TODAY, Mar. 1980, at 22.

[21] *See* KROGER, *supra* note 4, at 115-17; Holden, *supra* note 4; TIME, Sept. 13, 1976, at 56.

[22] "[T]here are as many definitions of hypnosis as there are definers." KROGER, *supra* note 4, at 26. The American Medical Association has endorsed the British Medical Association's definition of hypnosis, which describes it as:

> [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 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.

Council on Mental Health, *supra* note 18, at 186-87. Hypnosis is defined "operationally as the set of events that a consensus of hypnotists reports are hypnotic." London, *The Induction of Hypnosis,* in GORDON, *supra* note 14, at 44-45.

[23] For a brief discussion of the various theoretical explanations of the hypnotic phenomenon, see KROGER, *supra* note 4, at 26-32.

[24] *Id.* at 32.

[25] A more developed explanation of the various levels of trance follows:

> The hypnotic state may be separable into six depths, or levels, of trance. Each level is distinguishable by a set of characteristic mental and physical acts that the subject is capable of performing at that level. The characteristic acts become more difficult to fake as the depth of the trance increases. In the first and second stages, the so-called "hypnoidal" stage or light trance, only localized catalepsies are demonstrated. For example, if the operator suggests that the subject will be unable to open his eyes, the subject will be unable to open his eyes. At this stage the subject experiences physical relaxation, often accompanied by fluttering of the eyelids, deep and slow breathing, and a progressive deepening

Gradually, the subject becomes more submissive to the suggestions of the hypnotist, but retains his will-power and remains aware of the actions of the hypnotist.[26] Susceptibility to hypnotic suggestion varies from one subject to the next, depending upon such factors as the individual's age, intelligence, ability to restrict attention and motivation.[27]

Among the several methods of hypnotically inducing recall,[28] two techniques, revivification and hypermnesia, are especially useful in refreshing the memory of a witness. Revivification allows the hypnotized person with a complete failure of recall to "relive" earlier events, exactly as they happened, and to describe the events in detail.[29] Hypermnesia, on the other hand, is used to retrieve information at a greater than volitional level when a subject remembers portions of an incident, but is unsure of details.[30]

C. *Hypnosis and the Law*

The use of hypnotically induced recall is very controversial both because of the subject's heightened susceptibility to sugges-

---

of muscular lethargy. In the third and fourth stages, the so-called "medium" trance, the subject experiences various degrees of analgesia: though the sense of touch is retained, the subject feels no pain. Also in the fourth stage the subject will be incapable of remembering that which the operator suggests he will be unable to remember. In the fifth stage, a "deep" or "heavy" trance, the subject is capable of positive hallucinations upon suggestion and experiences neither touch nor pain. Finally, in the sixth stage of hypnosis, the subject is capable of negative hallucination: upon suggestion he is unable to perceive objects that are actually present.

Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, *supra* note 3, at 571-72 (citations omitted).

[26] *See* KROGER, *supra* note 4, at 36-37.

[27] Hilgard, *Individual Differences in Hypnotizability*, in GORDON, *supra* note 14, at 391. In fact, it has been stated that "modern investigators have established beyond any doubt that people differ considerably in their hypnotic susceptibility." BOWERS, *supra* note 1, at 62.

[28] For a discussion of the various techniques used to induce the hypnotic state, see KROGER, *supra* note 4, at 11-22.

[29] Revivification is often confused with age regression. The two concepts are, however, distinguishable. In age regression, sometimes referred to as pseudorevivification, the hypnotized subject plays a role rather than actually reliving the event. Age regression can be further described as a simulated pattern of acting out the past events in the framework of the present. *Id.* at 16.

[30] *Id.*

tion,[31] and because it is possible for the hypnotized person to "misremember" or deliberately fabricate material.[32] While these problems accompany every interrogative procedure to an extent, they are especially troublesome in the case of hypnosis. For this reason, certain safeguards, such as full disclosure of any hypnotic procedures used,[33] and cautionary instructions as to the inherent weaknesses of hypnosis,[34] should accompany any testimony which has been induced by hypnosis. These safeguards would enable a jury to assess the credibility of a witness and to weigh his testimony properly.

II. HYPNOSIS AND PRESENT MEMORY REFRESHED

From 1968 through 1979, twelve cases considered the admissibility of hypnotically enhanced testimony.[35] Each one of the courts reasoned that prior hypnotism of a witness should not render testimony inherently untrustworthy and inadmissible, but should only affect the credibility to be afforded the testimony by the trier of fact.[36] Without exception, the courts viewed the testimony as a product of the present memory of the witness as refreshed by hypnosis.

The principle of present memory refreshed, which allows the

---

[31] In fact, some have argued that "from the point of view of an onlooker, there is no aspect of hypnosis more striking than the heightened suggestibility of a hypnotic subject. Indeed, this characteristic is so salient that hypnosis is frequently defined as a state of hypersuggestibility. . . ." BOWERS, *supra* note 1, at 85.

[32] KROGER, *supra* note 4, at 16-17.

[33] Failure to disclose that the witness had been previously hypnotized led to reversal in two cases, despite the courts' general recognition of the admissibility of hypnotically induced recall. *See* United States v. Miller, 411 F.2d 825; Emmett v. Ricketts, 397 F. Supp. 1025 (N.D. Ga. 1975).

[34] *See* Wyller v. Fairchild Hiller Corp., 503 F.2d 506; Harding v. State, 246 A.2d 302.

[35] United States v. Awkard, 597 F.2d 667; United States v. Adams, 581 F.2d 193; Kline v. Ford Motor Co., 523 F.2d 1067; Wyller v. Fairchild Hiller Corp., 503 F.2d 506; United States v. Miller, 411 F.2d 825; Emmett v. Ricketts, 397 F. Supp. 1025; Creamer v. State, 205 S.E.2d 240 (Ga. 1974); People v. Smrekar, 385 N.E.2d 848; Harding v. State, 246 A.2d 302; State v. McQueen, 244 S.E.2d 414; State v. Brom, 494 P.2d 434 (Or. Ct. App. 1972); State v. Jorgenson, 492 P.2d 312.

[36] *See, e.g.*, 244 S.E.2d at 427-28. In two cases, United States v. Miller, 411 F.2d 825, and Emmett v. Ricketts, 397 F. Supp. 1025, the testimony was rendered inadmissible by the proponents' failure to disclose that the witness had been subjected to hypnosis in preparation for trial. It should also be noted that corroboration of the proffered testimony has been cited as a supporting factor in finding the hypnotically induced recall admissible.

refreshing of the memory of a witness who once had knowledge of a matter, is firmly established in the law of every jurisdiction.[37] Since recollection is one of the essential elements in a properly qualified testimonial statement,[38] some manner of memory refreshment is often necessary in order to introduce testimony. Traditionally, courts have solved this problem by allowing the witness to refer to memoranda or other writings in order to "spark" his memory.[39]

If satisfied that a witness lacks effective recollection,[40] courts are very liberal as to what may be used to refresh the witness' memory.[41] Virtually any writing, admissible or inadmissible,

---

See, e.g., 385 N.E.2d at 855. It would seem, however, that corroboration should be a factor to consider in determining the weight to be given the testimony, and not in determining its admissibility. This is especially true where the testimony of the previously hypnotized witness is the first evidence offered.

[37] *See* 81 AM. JUR. 2d *Witnesses* § 438 (1976).

[38] The three essential elements are observation, recollection and communication. *See* 3 J. WIGMORE, EVIDENCE § 725 (Chadbourn rev. ed. 1970) [hereinafter cited as WIGMORE].

[39] Refreshing memory in this matter is based on a theory of memory known as the "law of association." The recall of any part of a past experience tends to bring with it other parts that were in the same field of awareness, and a new experience tends to stimulate the recall of other like experiences. Thus, given the proper stimulus, the witness will recognize as familiar what he had forgotten, and the gap between observation and communiction will be filled. *See* C. MCCORMICK, THE LAW OF EVIDENCE § 9 (2d ed. 1972) [hereinafter cited as MCCORMICK].

It should be noted that there is an important distinction between the concepts of present memory refreshed and past recollection recorded. Present memory refreshed is "that present *actual* recollection which a witness on the stand may ordinarily be expected to exhibit." 3 WIGMORE, *supra* note 38, at § 725. Past recollection recorded, on the other hand, is "that recollection which *once existed*, but now, having irrevocably vanished, depends on artificial preservation." *Id.* The distinction is recognized in modern evidence law and is therefore important, since, in the former situation, the witness testifies from his memory as refreshed and his testimony is what he *says*, while in the latter, the testimony is the recorded recollection itself. *See* MCCORMICK, *supra*, at § 9. It should also be noted that there is a general preference among the courts for present memory refreshed testimony. This is evidenced by the fact that most courts will admit a memorandum of past recollection into evidence only if the witness has no present recollection. Furthermore, most courts require that the memorandum of past recollection must have been written by the witness or examined and found correct by him and that it was made promptly after the events recorded so that the recollection was fresh when written. *See generally id.* at §§ 299-303; 3 WIGMORE, *supra* note 38, at §§ 734-55.

[40] Before refreshment will be allowed it must be established that the witness is in fact in need of refreshing his memory. 3 WIGMORE, *supra* note 38, § 758, at 126 n.3.

[41] *See, e.g.*, Jewett v. United States, 15 F.2d 955 (9th Cir. 1926). That court stated:

> [I]t is quite immaterial by what means the memory is quickened; it may be a song, or a face, or a newspaper item, or a writing of some character. It is suffi-

original or a copy, may be used to refresh memory,[42] and it matters neither when nor by whom the writing was made.[43]

In contrast to this liberality, a court may limit the use of present memory refreshed in two principal ways. First, it is within the court's discretion to declare a particular writing improper for refreshing a witness' memory.[44] For this purpose, the trial judge must determine whether the nature of an instrument, or the circumstances under which it was created, render its use improper.[45] Second, when a witness refers to a memorandum, the adverse party is entitled to inspect the memorandum, to have it available for his use during cross-examination, and to have it submitted to the jury.[46] This practice allows the adverse party to question, and the jury to weigh, the credibility of the witness' claim that his memory has been refreshed. Both of these safeguards would be available when a witness submits to hypnosis for memory refreshment. The court would still be able to exercise its discretion to avoid abuse of the procedure, and all parties and the trier of fact would have access to the facts and circumstances surrounding the hypnotic session.[47] Only when all parties know who was present at the interview, what questions were asked and what responses were given, can the jury effectively determine the weight to be given the hypnotically induced evidence.

III. HYPNOSIS AND THE *FRYE* RULE

Recently, two state courts have varied from the traditional

> cient that by some mental operation, however mysterious, the memory is stimulated to recall the event, for when so set in motion it functions quite independently of the actuating cause.

Id. at 956.

[42] *See, e.g.*, United States v. Faulkner, 538 F.2d 724 (6th Cir.), *cert. denied*, 429 U.S. 1023 (1976); MCCORMICK, *supra* note 39, at § 9; 3 WIGMORE, *supra* note 38, at §§ 758-61.

[43] *See, e.g.*, Sowders v. Coleman, 4 S.W.2d 731 (Ky. 1928).

[44] 3 WIGMORE, *supra* note 38, § 758, at 126 n.3.

[45] The trial judge may, in fact, reject the testimony by holding that the witness is not lacking in memory, that the writing does not refresh his memory or that the danger of undue suggestion outweighs the probative value of the testimony. *See* MCCORMICK, *supra* note 39, at § 9.

[46] *See id.*; 3 WIGMORE, *supra* note 38, at §§ 762-64. This safeguard is embodied in rule 612 of the Federal Rules of Evidence.

[47] One court suggested that, "at a minimum, complete stenographic records [of the hypnotic interview] should be maintained." United States v. Adams, 581 F.2d at 199 n.12.

"present memory refreshed" approach to find hypnotically induced recollection inadmissible. In *State v. Mack*,[48] and *State v. Hurd*,[49] the courts declined to analogize a pre-trial hypnotic session to a memory enhancing writing. Instead, those courts viewed hypnotically induced recall as data gathered in scientific experiments and, therefore, would require for admissibility that the testimony meet the standard for scientific evidence established in *Frye v. United States*.[50] The *Frye* standard requires that the scientific principle from which the evidence is deduced (in this case, hypnosis) must have crossed "the line between . . . experimental and demonstrable stages" and "be sufficiently established to have gained general acceptance in the particular field in which it belongs."[51] On close analysis, application of the *Frye* rule to hypnotically induced recall in the *Mack* and *Hurd* cases appears inappropriate.

An audio or video recording of the interview would be helpful.

[48] 292 N.W.2d 764 (Minn. 1980).

[49] 414 A.2d 291 (N.J. Super. Ct. Law Div. 1980).

[50] 293 F. 1013 (D.C. Cir. 1923).

[51] *Id.* at 1014. The *Frye* rule has come under recent attack. In State v. Williams, 388 A.2d 500 (Me. 1978), the Supreme Court of Maine rejected the *Frye* court's imposition of an additional, independently controlling standard for determining admissibility above and beyond relevancy and assistance to the trier of fact, and allowed expert testimony based on speech spectrography, or "voice print" analysis. The court stated:

> [T]he presiding Justice will be allowed a latitude, which the *Frye* rule denies, to hold admissible in a particular case proffered evidence involving newly ascertained, or applied, scientific principles which have not yet achieved general acceptance in whatever might be thought to be the applicable scientific community, if a showing has been made which satisfies the Justice that the proffered evidence is sufficiently reliable to be held relevant.

Id. at 504. The *Williams* decision was based on evidentiary rules similar to the Federal Rules of Evidence, which make no reference to "general scientific acceptance" and provide: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702. McCormick also adheres to this inclusionary view and suggests that " '[g]eneral scientific acceptance' is a proper condition for taking judicial notice of scientific *facts*, but not a criterion for the *admissibility* of scientific *evidence*." MCCORMICK, *supra* note 39, at § 203 (emphasis added). Thus, it appears that application of the *Frye* test to hypnotic evidence may be inappropriate regardless of whether the evidence is considered to be the product of the hypnotic procedure or of the witness' memory. For a more thorough discussion of this point, see Note, *Frye Standard of "General Acceptance" for Admissibility of Scientific Evidence Rejected in Favor of Balancing Test*, 64 CORNELL L. REV. 875 (1979); Comment, *Changing the Standard for Admissibility of Novel Scientific Evidence:* State v. Williams, 40 OHIO ST. L.J. 757 (1979).

A. State v. Mack

Mack involved a prosecution for criminal sexual conduct and aggravated assault. The victim of the crime, appearing "quite drunk" and in a "flat emotional state"[52] when she arrived at an emergency room, apparently believed she had been injured in a motorcycle crash, but could remember nothing between the time of the purported accident and the time when she awakened at a motel, accompanied by the defendant.[53] The defendant's assertion that the injury occurred during sexual intercourse was disputed by the medical intern on duty whose examination revealed that the injury could not have occurred during intercourse.[54]

Because of the confusion, the victim agreed six weeks later, at the insistence of the Henamington County police department, to undergo hypnosis in an attempt to recall the cause of her injury. The hypnotic session was conducted by a lay, self-taught hypnotist employed by the police department and witnessed in part by two Minneapolis police officers.[55] While hypnotized, the victim revealed that the defendant had actually attacked her with a switchblade knife.[56] The defendant subsequently was arrested, but before determination of probable cause, the trial court certified to the Minnesota Supreme Court the issue of admissibility of the hypnotically induced recollection.

Rejecting the state's argument that the hypnotically induced evidence was not the result of a scientific device but testimony from human recall, the Minnesota court held that hypnosis affected not only the credibility of the witness but the admissibility

---

[52] State v. Mack, 292 N.W.2d at 766.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 767.

[56] *Id.* The police made an audio tape of the hypnotic session, but it had been lost by the time of the trial. However, a transcript of the session typed by the police stenographer was received into evidence and revealed the following:

> Under hypnosis, Ms. Erickson reported that at the Hi Lo Motel David Mack [the defendant] "told me to get on the bed and take my clothes off. He said, 'I want to get even with you for running out on me.' " As the hypnotist assured her, "[y]ou will see it very plainly in your mind," but "you feel nothing," Ms. Erickson said, "oh, no, no, no. . . . He told me to spread my legs, ... He pulled out this switchblade and told me he was going to kill me . . . he kept sticking the knife up me and I remember screaming and screaming."

Id.

of the testimony as well.[57] Following the rationale of the courts in *People v. Harper*[58] and *Greenfield v. Commonwealth*,[59] the court employed a *Frye* analysis, concluding that hypnosis is a scientifically unreliable procedure and, therefore, that information uncovered through hypnosis is inadmissible.[60]

The *Mack* court's reliance on *Harper* and *Greenfield* is misplaced. While both of those cases did consider the scientific reliability of hypnosis, that approach was necessary since the courts were asked to determine the admissibility of actual *results* of scientific procedures. In *Harper*, an order was granted to suppress evidence elicited from the victim of a crime by both hypnosis and sodium anobarbital ("truth serum"). While the hypnosis produced no useful information in that case and the order suppressing that information was not challenged on appeal,[61] the court noted:

> We see no reason to equate examination under hypnosis and examination while under the influence of a drug having the effect of a so-called "truth serum" except to note that the scientific reliability of neither is sufficient to justify the use of test *results* of either in the serious business of criminal prosecution.[62]

In *Greenfield*, the court held only that the scientific reliability of hypnosis must be established before a *third person* can testify as to what a subject said while hypnotized.[63] In *Mack*, by contrast, the state sought simply to use hypnosis to refresh the witness' memory, and not to introduce the results of hypnosis into evi-

---

[57] *Id.* at 769-72.

[58] 250 N.E.2d 5 (Ill. App. Ct. 1969).

[59] 204 S.E.2d 414 (Va. 1974).

[60] State v. Mack, 292 N.W.2d at 771. It should be noted that the *Mack* court recognized and rejected as "artificial and unprincipled any distinction between hypnotically-induced testimony offered by the defense to exculpate and that offered by the prosecution to make its case." *Id.* However, the applicable cases have not actually made this distinction. It is true that the decisions can be divided along the prosecution-defendant line, but this distinction is the result of the form in which the hypnotic evidence has been presented to the courts by defendants, and not the result of any prejudice toward defendants. To the contrary, it has been held in at least one case that the right to counsel may include the right to a pre-trial conference with an attorney and the use of hypnosis to refresh the defendant's memory. Cornell v. Superior Court, 338 P.2d 447 (Cal. 1959).

[61] People v. Harper, 250 N.E.2d at 6-7.

[62] *Id.* at 7 (emphasis added).

[63] 204 S.E.2d 414. That court concluded that "hypnotic evidence, whether in the

dence through the testimony of an expert hypnotist.

Consistent with the general rule that a witness who is capable of giving testimony with some probative value is allowed to testify, the witness whose memory has been refreshed by hypnosis should also be allowed to testify. Any evidence of impairment of the ability of the witness to accurately recall evidence, or of suggestive procedures used in the hypnotic session, should affect not the admissibility of the evidence, but only the weight given to the witness' testimony by the jury.[64] A requirement of full disclosure of the hypnotic session and the circumstances surrounding it would enable the adverse party to cross-examine the witness effectively and to challenge the hypnotic procedure.[65]

B. State v. Hurd

In *Hurd,* the prospective witness suffered serious knife wounds when attacked while she slept in an apartment she shared with her husband and three sons. Although the victim was unable to identify her assailant, the police considered as sus-

---

form of the subject testifying in court under hypnosis or through another's revelation of what the subject said while under a hypnotic trance, is not admissible." *Id.* at 419. Admittedly, when in-court testimony under hypnosis, or evidence of what the subject said while hypnotized, is in question, establishment of the scientific reliability of hypnosis may be a prerequisite for admissibility. However, where the proffered testimony is the present product of the human memory refreshed through the hypnotic process, the product of a scientific test is not in question and the weight of authority indicates that the *Frye* test is inapplicable. For an analysis of the authority on this point, see notes 35-36 *supra* and accompanying text.

The distinction between testimony from memory refreshed through hypnosis and evidence which is the result of a hypnotic session, and the different treatment to be afforded each, is best exemplified by Creamer v. State, 205 S.E.2d 240. In *Creamer,* statements made while the witness was under hypnosis were found inadmissible because the court felt that the reliability of hypnosis had not been established. However, the in-court testimony offered by the witness was not rendered inadmissible by the hypnotic sessions; the fact that the witness had previously been hypnotized was merely one factor for the jury to consider in determining the weight to be given the testimony. *Id.* at 241-42.

[64] *See* People v. Smrekar, 385 N.E.2d at 853.

[65] *See id.* at 858. In *Smrekar,* defendant's objection to the testimony of the previously hypnotized witness, as well as the court's decision, was based partly on the deprivation of his right to cross-examine the witness effectively. However, the ability to cross-examine the witness is one element which distinguishes the use of testimony from the previously hypnotized witness from the impermissible use of evidence as to what the witness said while under hypnosis. Although hypnosis can affect the witness' mind in a conscious way that the cross-examination cannot reach, all witnesses are subject to similarly obscure stimuli to some extent. *Id.*

pects both the husband, who was at the apartment but asleep in another room at the time of the assault, and the wife's former husband, the defendant.[66]

Shortly after the assault, the Somerset County prosecutor's office arranged for the witness to undergo hypnosis in an attempt to improve her recollection of the event. The hypnotic session was attended by the witness, the two investigating officers and two physicians, one of whom was a licensed psychiatrist.[67] The witness grew extremely emotional as she relived her experience under hypnosis. When asked if the attacker was her current husband she gave a negative response. But when the officer asked if it was her first husband, the witness answered, "Yes."[68] A week later, the witness described her attacker to the police and named the defendant as the guilty party.

At trial, the defendant moved to suppress as unreliable the witness' proposed in-court identification. The New Jersey court, like the court in *Mack*, found the *Frye* analysis controlling.[69] After an extended review of the conflicting expert testimony offered in the case, the court concluded that the hypnotic procedure had been generally accepted as an aid to recollection[70] and thus, in a limited sense, that hypnosis meets the standard imposed by *Frye*.[71] Nevertheless, the court still found the hypnot-

---

[66] 414 A.2d at 293.

[67] *Id.*

[68] *Id.* at 294.

[69] Interestingly, the trial court did note the difference between evidence such as fingerprints or blood samples and hypnotically-induced testimony. Although the court realized the latter should be offered as recollection refreshed, it felt that the process by which recollection was refreshed (hypnosis) must meet the *Frye* standard. *Id.* at 305. It appears inappropriate to apply the *Frye* test once the distinction between refreshed recollection and test results is recognized, especially when courts allow virtually any writing to be used as a memory refresher.

[70] The court specifically stated:

> [W]e are satisfied medical research has established that, to varying degrees, a large portion of the population has the capacity to enter a hypnotic trance and that hypnotized subjects who are directed to do so have the ability to concentrate on a past event and volunteer previously unrevealed statements concerning the event.

Id.

[71] *Id.* at 305. The *Hurd* court's ruling that hypnosis satisfies the *Frye* test as a recollection improvement procedure does not render the "general scientific acceptance" analysis of hypnotically induced recall any more appropriate. In fact, the inconsistent conclusions reached by the courts in *Mack* and *Hurd* exemplify the futility of applying the *Frye*

ically induced testimony in this case inadmissible.[72]

The trial court in *Hurd* apparently found hypnosis sufficiently similar to a confrontation identification procedure to require compliance with the principles of *United States v. Wade*[73] and *Neil v. Biggers*,[74] which addressed the issue of unfairness and prejudice in overly suggestive "line-up" and "show-up" identification procedures. The constitutional safeguards[75] espoused in these two cases require suppression of an in-court identification of the accused if that identification has been tainted by a prior, unduly suggestive confrontation or other type of identification procedure, unless the totality of the circumstances renders the identification reliable. Thus, because the hypnotic session conducted by the state was unduly suggestive,[76] and sufficiently devoid of the safeguards adopted by the court to ensure reliability,[77] the identification testimony was held inadmissible.

---

test to hypnosis. The reliability, or lack thereof, of hypnosis is not subject to conclusive proof. The very nature of the hypnotic phenomenon allows no "general scientific acceptance." Hypnosis involves one inherently ambiguous factor, the human mind, which is not subject to complete explanation. Therefore, the source of the doubt surrounding hypnosis will forever be replenished. *See* London, *Ethics in Hypnosis*, in GORDON, *supra* note 14, at 593-94.

[72] On appeal, the New Jersey Supreme Court affirmed the trial court's holding and agreed that the *Frye* analysis was appropriate. State v. Hurd, 432 A.2d 86 (N.J. 1981). The court also did not demand that hypnosis be generally accepted as a means of obtaining the "truth," but only that it be "able to yield recollections as accurate as those of an ordinary witness," and that in an appropriate case, and if used properly, hypnosis could satisfy this test. *Id.* at 92. The court concluded, however, that the nature of the hypnotic session in the case at bar rendered the testimony inadmissible.

[73] 388 U.S. 218 (1967).

[74] 409 U.S. 188 (1972).

[75] The safeguards of *Wade* and *Biggers* stem from the sixth amendment right to counsel and the fourteenth amendment due process clause.

[76] State v. Hurd, 414 A.2d at 307. The court reasoned that the witness entered the hypnotic session having excluded her present husband as a suspect. It further reasoned that the witness was told, while under hypnosis, that she would be able to identify her attacker, and apparently she accepted that belief. Therefore, when the witness was presented with two suspects, one of whom she had in effect eliminated, the suggestive nature of the questioning dictated that she identify the defendant as her assailant. *Id.* at 308. See the text accompanying note 68 *supra* for a discussion of the line of questioning employed in the hypnotic interview.

[77] The United States Supreme Court in *Biggers* enumerated five factors to be considered in evaluating the reliability of a pre-trial identification: "[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation." 409 U.S. at 199-200. In addition to consideration of the

In view of the reasoning behind *Wade* and *Biggers*, the application of those decisions to testimony consisting of hypnotically induced recall is inappropriate. The *Wade/Biggers* rule was a response to the Supreme Court's recognition of the possibility of unfairness, prejudice and ultimately mistaken identification that is inherent in confrontation identification procedures.[78] Not only are such procedures often suggestive in nature, they also present a serious problem for the defense in convincing a jury of, or even demonstrating to them, the unfairness of the identification procedure.[79] As the court stated in *Wade*, "the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification."[80]

Thus the central problem addressed by the *Wade/Biggers* rule is deprivation of the right of the accused to have the opportunity to cross-examine effectively an identification witness. This is not a problem, however, when hypnosis, rather than a confrontation procedure, is employed to aid the witness in identifying the accused, provided that there is full disclosure of the circumstances surrounding the hypnotic session to the jury and the opposing party. Accordingly, that rule is inapplicable to a hypnotically aided identification, and, with proper safeguards, a witness should be allowed to make an in-court identification based on his prior hypnosis.

CONCLUSION

The general rule for admissibility of evidence is that all relevant facts are admissible, unless a specific rule provides otherwise.[81] The testimony of a previously hypnotized witness, when

---

above factors, the trial court in *Hurd* required compliance with other extensive procedural safeguards as an initial prerequisite for the reliability of an identification stemming from hypnosis. 414 A.2d at 305-06. Thus, in essence, the *Hurd* court adopted an approach which subjects identification testimony to tougher scrutiny if the pre-trial identification involved hypnosis rather than a "line-up" or "show-up" confrontation.

[78] *See* United States v. Wade, 388 U.S. at 228-29.

[79] *See id.* at 230.

[80] *Id.* at 231-32.

[81] 1 WIGMORE, *supra* note 38, at §§ 9-10.

considered in accord with the weight of authority as testimony from present memory refreshed through hypnosis, should not be rendered inadmissible under the *Frye* rule, which prevents the admission of scientific evidence the reliability of which has not been established. Furthermore, the *Wade/Biggers* rule is not applicable to identification testimony stemming from hypnotically induced recollection because full disclosure of the hypnotic procedure would give a defendant the opportunity to cross-examine effectively a witness and to challenge the hypnotic procedure. Thus, provided that the testimony of the previously hypnotized witness is relevant, it should be admitted. Although particular facts and circumstances surrounding the hypnosis interview may, as in *Mack* and *Hurd,* cast doubt upon the reliability of the testimony, these factors should bear only on the weight to be given the evidence by the jury, and not on admissibility.

R. Eberley Davis