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Growing Disenchantment with Hypnotic Means of Refreshing Witness Recall

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RECENT DEVELOPMENT

Growing Disenchantment with Hypnotic Means of Refreshing Witness Recall

I. INTRODUCTION

Society has developed several uses for the psychological phenomenon known as hypnosis.[1] These uses, mostly medical in nature, include substituting for anesthesia and treating pain, anxiety, phobias, and allergies.[2] Not surprisingly, some professional athletes have turned to hypnosis for better success on the playing field.[3] While the scientific and medical communities generally have accepted these uses,[4] controversy has arisen over the use of hypnosis in legal proceedings to refresh the memory of a witness who testifies later in court.[5]

The use of hypnosis for investigating crimes[6] began in the early 1970s when law enforcement agencies and police departments formed the first "Svengali Squads" comprised of specially trained units for hypno-investigative purposes.[7] Despite the early success[8] of this special

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1. As one court has observed, "[t]he exact nature of tbe hypnotic state is not understood." United States v. Valdez, 722 F.2d 1196, 1201 (5th Cir. 1984); *accord* Sprynczynatyk v. General Motors Corp., 771 F.2d 1112, 1119 n.5 (8th Cir. 1985) (observing that "there is no single generally accepted theory of hypnosis, nor a consensus about a single definition"). *Black's Law Dictionary* defines "hypnotism" as "[t]he act of inducing artificially a state of sleep or trance in a subject by means of verbal suggestion by the hypnotist or by the subject's concentration upon some object. It is generally characterized by extreme responsiveness to suggestions from the hypnotist." BLACK'S LAW DICTIONARY 668 (5th rev. ed. 1979). Franz Mesmer (1734-1815), an Austrian physician, is generally credited with the "discovery" of hypnosis in the late eighteenth century. *See* 9 ENCYCLOPEDIA BRITTANICA 134 (15th ed. 1976).

2. Gelman, *Illusions That Heal*, NEWSWEEK, Nov. 17, 1986, at 74-75.

3. Thomas, *Thinking Positive: Hypnotist Peter Siegel Believes He Has Answer for Underachieving Athletes*, L.A. Times, July 26, 1986, § 3, at 8, col. 1.

4. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 206 (3d ed. 1984).

5. Dr. Martin T. Orne, an expert on hypnosis, has stated, "The medical uses of hypnosis are not controversial; what is controversial is the use of hypnosis in questioning suspects and witnesses to solve crimes." *Hypnosis "Useful in Medicine, Dangerous in Court,"* U.S. NEWS & WORLD REPORT, Dec. 12, 1983, at 67 [hereinafter *Hypnosis*].

6. Because most cases concerned with the admissibility of hypnotically refreshed testimony are criminal cases and because "courts generally apply their same reasoning for post-hypnotic testimony in civil cases to criminal trials," McQueen v. Garrison, 619 F. Supp. 116, 128 (E.D.N.C. 1985), *rev'd on other grounds*, 814 F.2d 951 (4th Cir. 1987), this Recent Development will focus on the criminal setting.

7. Serrill, *Breaking the Spell of Hypnosis*, TIME, Sept. 17, 1984, at 62. In 1970 the Los Angeles Police Department became the first to employ a hypnosis team. This team handled approximately 70 cases in its first five years of existence. *The Svengali Squad*, TIME, Sept. 13, 1976, at 56. The squads are named after the hypnotist in the novel *Trilby* who overpowers a helpless woman and thereafter inspires her to musical achievement. *See* G. DU MAURIER, TRILBY (1894).

8. Hypnosis provided a breakthrough in the famous 1975 kidnapping of a bus load of children outside of Chowchilla, California. The bus driver's ability, while under hypnosis, to identify most of the kidnappers' license plate led to the arrest and conviction of three men for the crime. *See* State v. Beachum, 97 N.M. 682, 686, 643 P.2d 246, 250 (N.M. Ct. App. 1981).

investigative technique and its increased use in recent years, state and federal courts are increasingly excluding the hypnotically refreshed testimony of witnesses other than criminal defendants who take the stand.[9] Rather than following the per se admissible approach, once espoused by the Maryland Supreme Court in *Harding v. State*,[10] or the procedural safeguards approach, first articulated by the New Jersey Supreme Court in *State v. Hurd*,[11] state courts are beginning to adopt a rule of per se inadmissibility. Federal courts as well are slowly leaning towards outright inadmissibility of hypnotically refreshed testimony. The leaders of this general shift are the Minnesota and California supreme courts, in *State v. Mack*[12] and *People v. Shirley*[13] respectively, together with the Fifth Circuit in *United States v. Valdez*.[14] Significant indicators of this trend are the exchange by two state supreme courts of

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9. In Rock v. Arkansas, 107 S. Ct. 2704 (1987), the United States Supreme Court, by a five to four vote, vacated a decision by the Arkansas Supreme Court holding that Rock, who was charged witb manslaughter in the death of her husband, could not testify about events discussed during a hypnotic session conducted prior to trial to refresh Rock's memory. The Court addressed "whether Arkansas' evidentiary rule prohibiting the admission of hypnotically refresbed testimony violated petitioner's constitutional right to testify on her own behalf as a defendant in a criminal case." *Id.* at 2706. The Court emphasized "the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right." *Id.* at 2710 n.10. Therefore, while conceding tbat bypnosis may introduce an element of "unreliability," *id.* at 2713, the Court held that Arkansas failed to show "that hypnotically enhanced testimony is always so untrustworthy and so immune to tbe traditional means of evaluating credibility that it sbould disable a defendant from presenting her version of the events for which she is on trial." *Id.* at 2714. Consequently, the Court ruled that "Arkansas' *per se* rule excluding all posthypnosis testimony infringes impermissibly on the right of a defendant to testify on his or her own behalf." *Id.* at 2714-15.

Historically, far more prosecution witnesses than criminal defendants have undergone pretrial hypnosis. Stewart, *Hypnotized Witnesses, Loaded Jurors*, 73 A.B.A. J., Oct. 1, 1987, at 56. In light of this fact, together with the expressly narrow scope of the *Rock* decision—"[t]his case does not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants and we express no opinion on that issue," *id.* at 2712 n.15—the trend as espoused in this Recent Development remains intact if only slightly modified. In fact, at least one state court since *Rock* noted the Supreme Court's decision, but chose not to extend it beyond its narrow circumstances, instead following "the clear majority of otber jurisdictions in this country," wbich does not permit in-court use of hypnotically enhanced evidence because of its inherent unreliability. People v. Zayas, 159 Ill. App. 3d 554, 510 N.E.2d 1125, 1134 (1987). *But cf.* People v. Romero, 745 P.2d 1003 (Colo. 1987) (en banc) (adopting stance admitting such testimony where the hypnotic session complies with certain procedural safeguards).

In light of the *Rock* decision, all general references in this Recent Development to testimony that has been refreshed or enhanced through hypnotic means should be interpreted as referring only to testimony by non-criminal defendants.

10. 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969).

11. 86 N.J. 525, 432 A.2d 86 (1981).

12. 292 N.W.2d 764 (Minn. 1980).

13. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (en banc), *cert. denied*, 459 U.S. 860 (1982).

14. 722 F.2d 1196 (5th Cir. 1984).

their past rules of per se admissibility for per se inadmissible stances.[15] The overall trend is unmistakable. As more courts grapple with whether to admit hypnotically enhanced testimony, the body of decisions reflects a growing consensus that the potential value of this testimony is outweighed by the risks inherent in its admission.

This Recent Development considers whether the trend toward inadmissibility of hypnotically enhanced testimony is a welcome development.[16] Part II reviews the major state and federal cases that have laid the foundation for the current debate. Part III analyzes several recent opinions that reflect a sustained shift away from liberal admission toward per se inadmissibility. Part IV argues that this shift is a positive development for the American legal system. Finally, Part V outlines a proper analytical framework for state and federal courts to follow in deciding this important evidentiary issue.

II. LEGAL BACKGROUND

A. *The Tripartite Regime of State Courts*

In 1897 the California Supreme Court, in *People v. Ebanks*,[17] declared that the "law of the United States does not recognize hypnotism."[18] Since then, however, some courts considering the admissibility of hypnotically induced testimony[19] have been more receptive to hypnosis.[20] State courts generally have split into three groups on whether to admit hypnotically induced testimony. In contrast to *Ebanks*, the first

15. The Maryland Court of Special Appeals decision in Collins v. State, 52 Md. App. 186, 447 A.2d 1272 (1982), overruled its earlier decision in Harding v. State, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969); similarly, the North Carolina Supreme Court in State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984), overruled its earlier decision in State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978).

16. This topic should be contrasted with the issue of whether statements made under hypnosis can themselves be introduced as evidence at trial. That question has been conclusively settled: "It appears to be the rule in all jurisdictions in which the matter has been considered that statements made under hypnosis may not be introduced to prove the truth of the matter asserted because the reliability of such statements is questionable." People v. Blair, 25 Cal. 3d 640, 665, 602 P.2d 738, 753-54, 159 Cal. Rptr. 818, 833-34 (1979).

17. 117 Cal. 652, 49 P. 1049 (1897).

18. *Id.* at 665, 49 P. at 1053. The court refused to admit a hypnotist's testimony concerning an exculpatory statement made by the defendant while under hypnosis.

19. The number of decisions involving this issue has increased dramatically in the last few decades. Until 1968 only eight cases adjudicated the issue; from 1975 to 1980, 22 cases ruled on it. Note, *The Admissibility of Testimony Influenced by Hypnosis*, 67 VA. L. REV. 1203, 1203 n.4 (1981).

20. Receptive courts, *see infra* notes 24-45, reflected an acceptance of hypnosis within the medical and psychological communities. In fact, the British and American Medical Associations issued statements in the mid-1950s formally approving the study and therapeutic use of hypnosis, while in 1960 the American Psychological Association recognized hypnosis as a branch of psychology. *See* E. HILGARD, HYPNOTIC SUSCEPTIBILITY 3-5 (1965).

approach holds that the testimony of a witness whose memory has been hypnotically refreshed before trial is per se admissible, with the fact of hypnosis affecting only the witness' credibility.[21] Under the second approach, courts rule on admissibility of testimony based on whether certain procedural safeguards were followed during hypnosis.[22] Finally, the third approach adopts a per se inadmissibility rule because of the lack of general scientific acceptance of hypnosis to refresh memories for litigation purposes.[23]

1. The *Harding* Approach: Impact Only on Credibility

The 1968 case of *Harding v. State*[24] was the first reported decision to consider the use of hypnosis to enhance a witness' memory for trial.[25] The Maryland Court of Special Appeals permitted a rape victim to testify as to the identity of her attacker based on her hypnotically refreshed memory. Finding in favor of admissibility, the court held that the use of hypnosis affected only on the credibility of the testimony;[26] thus, the trier of fact may decide how much weight to give a witness' recollection revived through hypnosis.[27]

Other courts quickly followed the *Harding* rationale. In *State v. Jorgensen*[28] an Oregon appeals court specifically relied on *Harding* to admit the hypnotically enhanced testimony of two prosecution witnesses in a murder trial. Emphasizing the in-court disclosure of hypnosis as used prior to trial and the opportunity for rigorous cross-examination by the defendant's counsel, the court held that objections to the testimony "go to its weight rather than its admissibility" and that assessing the witnesses' credibility was a decision for the jury.[29]

Several subsequent state rulings on whether to admit hypnotically refreshed testimony have made *Harding* the majority rule among state courts.[30] In effect, the *Harding* rule treats the use of hypnosis to refresh

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21. *See infra* notes 24-32 and accompanying text.

22. *See infra* notes 33-45 and accompanying text.

23. *See infra* notes 46-72 and accompanying text.

24. 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969).

25. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 322 (1980).

26. 5 Md. App. at 235-36, 246 A.2d at 306.

27. *Id.*

28. 8 Or. App. 1, 492 P.2d 312 (1971).

29. *Id.* at 9, 492 P.2d at 315. Oregon has codified the admissibility of hypnotically-induced testimony; the statute requires that "the entire [hypnotic] procedure be recorded either on videotape or any mechanical recording device," and that the videotape or recording be made available to the opposing party. *See* OR. REV. STAT. § 136.675 (1984).

30. *See, e.g.*, Clark v. State, 379 So. 2d 372 (Fla. Dist. Ct. App. 1979); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240 (1974); People v. Smrekar, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979); State v. Wren, 425 So. 2d 756 (La. 1983); State v. Greer, 609 S.W.2d 423 (Mo. Ct. App. 1980); State

a witness' memory much like other memory refreshing devices. Therefore, the resulting testimony presents a type of present recollection refreshed.[31] Central to the underlying rationale supporting the *Harding* rule is the confidence, expressed in *Jorgensen* and elsewhere,[32] that adept cross-examination of the hypnotically refreshed witness will sufficiently test the credibility of the testimony. Courts following *Harding* hold that the use of hypnosis does not bar the admission of the resulting testimony and that hypnosis is merely one relevant factor that the factfinder may take into account in weighing a witness' credibility.

2. The *Hurd* Approach: Procedural Safeguards

Several courts after *Harding* expressed skepticism over a jury's ability to assess the credibility of hypnotically induced testimony.[33] These courts decided that the trial judge must make an initial determination of admissibility based on whether the use of hypnosis complied with certain procedural safeguards. This determination is thought to be a sufficient guarantee of reliability and trustworthiness in the witness' testimony.

State v. Hurd[34] was the first state ruling to impose a specific list of safeguards on hypnotically refreshed testimony. In *Hurd* a stabbing victim was unable to identify her assailant until she was placed under hypnosis, during which she identified her ex-husband as the attacker.[35] The New Jersey Supreme Court adopted the standard for the admissibility of scientific evidence established in *Frye v. United States*.[36] The *Frye* test conditions the admissibility of evidence resulting from a new scientific method on the general acceptance of that method "in the particular field in which it belongs."[37] Finding that the policy reasons underlying the "general acceptance" standard apply to hypnotically refreshed testimony,[38] *Hurd* followed *Frye* and held that, when properly used, hypnosis is a reasonably reliable method of restoring a person's memory.[39]

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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).

31. *See* Note, *The Admissibility of Hypnotically Refreshed Testimony*, 20 WAKE FOREST L. REV. 223, 230 (1984). *See generally* FED. R. EVID. 612.

32. *See, e.g.*, State v. Wren, 425 So. 2d 756, 759 (La. 1983).

33. *See, e.g.*, cases cited *infra* note 44.

34. 86 N.J. 525, 432 A.2d 86 (1981).

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

36. 293 F. 1013 (D.C. Cir. 1923).

37. *Id.* at 1014.

38. *Hurd*, 86 N.J. at 536, 432 A.2d at 91.

39. *Id.* at 538, 432 A.2d at 92. The court continued: "[H]ypnotically-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

After reviewing scientific literature supporting hypnosis,[40] the *Hurd* court set forth specific procedural safeguards to ensure that hypnosis would be administered properly in appropriate cases.[41] The court imposed six procedural requirements with which a party must comply before introducing hypnotically refreshed testimony. These requirements include using an independent hypnotist and recording all contacts between the hypnotist and the subject.[42] Because the prosecution failed to satisfy all of these procedural requirements, the *Hurd* court excluded the proposed in-court identification of the defendant.[43]

Since *Hurd*, several other state courts have adopted the procedural safeguards approach.[44] Oregon has even codified it.[45] This position rep-

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in its accuracy." *Id.*

Ironically, the *Frye* test has been adopted by most courts that follow a per se inadmissibility approach. *See infra* notes 46-72 and accompanying text. The *Hurd* court viewed such use of *Frye* as improper: contrary to those courts' position, the court argued, hypnosis need not "be generally accepted as a means of reviving truthful or historically accurate recall. . . . The purpose of hypnosis is not to obtain truth. . . . Instead, hypnosis is employed as a means of overcoming amnesia and restoring the memory of a witness." *Hurd*, 86 N.J. at 537, 432 A.2d at 92. Later, the court directly opposed the per se inadmissibility approach, claiming that it "is unnecessarily broad and will result in the exclusion of evidence that is as trustworthy as other eyewitness testimony," which the court saw as itself possessing "similar shortcomings" as hypnotically enhanced testimony. *Id.* at 541, 432 A.2d at 94.

40. *Hurd*, 86 N.J. at 538-42, 432 A.2d at 92-95.

41. *Id.* at 545-46, 432 A.2d at 96-97. In addition to the procedural requirements, the court reviewed two merely illustrative factors: (1) "the manner of questioning and the presence of cues or suggestions during the trance and the post-hypnotic period," and (2) "the amenability of the subject to hypnosis." *Id.* at 544-45, 432 A.2d at 96.

42. The court described the guidelines as follows:

> First, a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session. . . .
>
> Second, the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense. . . .
>
> Third, any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or another suitable form. . . .
>
> Fourtb, *before* inducing hypnosis the hypnotist should obtain from the subject a detailed description of tbe facts as the subject remembers them. . . .
>
> Fifth, all contacts between the hypnotist and the subject must be recorded. . . .
>
> Sixth, only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and the post-hypnotic interview.

Id. at 545-46, 432 A.2d at 96-97 (emphasis in original). These guidelines were first suggested by Dr. Martin T. Orne, a leading expert on hypnosis, in an affidavit of amicus curiae filed with the United States Supreme Court in Quaglino v. California, No. 29766 (Cal. Dist. Ct. App.), *cert. denied*, 439 U.S. 875 (1978).

43. *Hurd*, 86 N.J. at 548-49, 432 A.2d at 98.

44. *See, e.g.*, Brown v. State, 426 So. 2d 76 (Fla. Dist. Ct. App. 1983); State v. Iwakiri, 106 Idaho 618, 682 P.2d 571 (1984); House v. State, 445 So. 2d 815 (Miss. 1984); State v. Beachum, 97 N.M. 682, 643 P.2d 246 (N.M. Ct. App. 1981); State v. Weston, 16 Ohio App. 3d 279, 475 N.E.2d 805 (1984); State v. Long, 32 Wash. App. 732, 649 P.2d 845 (1982); State v. Armstrong, 110 Wis. 2d 555, 329 N.W.2d 386, *cert. denied*, 461 U.S. 946 (1983).

45. *See supra* note 29.

resents the middle ground between two opposite per se approaches. Rather than follow a strict rule of admissibility or inadmissibility, these courts assess hypnotically enhanced testimony on a case-by-case basis. The critical factor of admissibility for a court adopting the *Hurd* view is the reliability of the testimony as determined by the procedures used to administer the hypnosis.

3. The Strict *Frye* Approach: General Acceptance by Scientific Community

In contrast to the *Hurd* approach, some courts have held that the use of hypnosis to refresh a witness' memory irrevocably taints the resulting testimony so that no combination of procedures can save it. Like the *Hurd* court, these courts have used the general acceptance test enunciated in *Frye*[46] as a vehicle for their approach. Unlike *Hurd*, however, these courts arrive at a different result after applying the *Frye* test and, thus, preclude admission of hypnotically refreshed testimony in every case.[47]

The 1980 case of *State v. Mack*[48] was the first major ruling to employ *Frye* in excluding hypnotically refreshed testimony. Faced with a rape victim whose ability to recount the assault was induced almost entirely by hypnosis, the Minnesota Supreme Court turned first to the *Frye* rule. Under *Frye* the results of a scientific test are not admissible unless experts in the field generally accept the results as scientifically reliable and accurate.[49] A review of expert testimony[50] informed the *Mack* court that "hypnosis can create a memory of perceptions which neither were nor could have been made."[51] Thus, the lack of confidence by the scientific community in hypnotically refreshed testimony led the court to hold that a witness may not testify in a criminal proceeding to matters that the witness remembered under hypnosis.[52]

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46. 293 F. 1013 (D.C. Cir. 1923); *see also supra* note 37 and accompanying text.

47. One of these courts claimed that the court in *Hurd* adopted the *Frye* standard but then "immediately qualified the rule to require only that in any case the hypnosis produce a recall that is, in effect, no more inaccurate than that of the average witness who has not been hypnotized." People v. Shirley, 31 Cal. 3d 18, 37-38, 641 P.2d 775, 786, 181 Cal. Rptr. 243, 254 (en banc), *cert. denied*, 459 U.S. 860 (1982). *See generally supra* note 39.

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

49. *Id.* at 768.

50. *Id.* at 768-69.

51. *Id.* at 769.

52. *Id.* at 771. The court, however, recognized the use of hypnosis as "an extremely useful investigative tool" to provide new leads to a crime. *Id.* According to the court, hypnosis for this purpose should be accompanied by *Hurd*-like safeguards "to assure the utmost freedom from suggestion upon the hypnotized person's memory recall in the event he or she must later be called to testify to recollections recorded *before* the hypnotic interview." *Id.* (emphasis added).

The California Supreme Court in *People v. Shirley*[53] firmly established the per se inadmissibility approach. Like *Mack*, *Shirley* involved the hypnosis of a rape victim to refresh her memory of the assault.[54] Unlike *Mack*, however, the witness in *Shirley* gained no apparent credibility from the hypnosis.[55] The court, in a lengthy opinion, rejected the *Harding*[56] and *Hurd*[57] alternatives, choosing instead *Frye*'s per se inadmissible approach.[58] The court analyzed relevant scientific literature on the forensic use of hypnosis.[59] This analysis,[60] necessary to the *Frye* test, revealed that many scholars in the scientific community oppose the use of hypnosis to restore the memory of a witness because of the intrinsic unreliability of hypnosis, with or without procedural safeguards.[61] Accordingly, the court concluded that the *Frye* test of admissibility had not been satisfied because the scientific community generally did not accept the use of hypnosis to restore the memory of a witness as reliable.[62] The court held that the testimony of a witness whose memory has been refreshed by hypnosis is inadmissible on all matters relating to the events in issue, from the time of the hypnotic session forward.[63]

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53. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (en banc), *cert. denied*, 459 U.S. 860 (1982).

54. *Id.* at 23-30, 641 P.2d at 777-81, 181 Cal. Rptr. at 245-49.

55. As stated by the *Shirley* court, "the record is replete with instances in which her testimony was vague, changeable, self-contradictory, or prone to unexplained lapses of memory." *Id.* at 23, 641 P.2d at 777, 181 Cal. Rptr. at 245.

56. *Id.* at 35-36, 641 P.2d at 784-85, 181 Cal. Rptr. at 252-53.

57. *Id.* at 37-40, 641 P.2d at 786-87, 181 Cal. Rptr. at 254-55. The court accepted the criticism of the *Harding* approach by the *Hurd* followers, *see supra* note 56, but then exposed the weaknesses of the latter approach:

> To begin with, we are not persuaded that the requirements adopted in *Hurd* and other cases will in fact forestall each of the dangers at which they are directed. Next, we observe that certain dangers of hypnosis are not even addressed by the *Hurd* requirements. . . .
>
> Lastly, even if requirements could be devised that were adequate in theory, we have grave doubts that they could be administered in practice without injecting undue delay and confusion into the judicial process.

Shirley, 31 Cal. 3d at 39, 641 P.2d at 787, 181 Cal. Rptr. at 255.

58. *Id.* at 40, 641 P.2d at 787, 181 Cal. Rptr. at 256.

59. *Id.* at 57-66, 641 P.2d at 798-804, 181 Cal. Rptr. at 266-72.

60. Analysis of scientific literature is critical to applying the *Frye* test. In deciding whether a certain method meets the *Frye* test of general scientific acceptance, "scientists have long been permitted to speak to tbe courts through their published writings in scholarly treatises and journals." *Id.* at 56, 641 P.2d at 797, 181 Cal. Rptr. at 265. In this case, the court held that "if a fair overview of the literature discloses that scientists significant either in number or expertise publicly oppose that use of hypnosis as unreliable, the court may safely conclude there is no such consensus at the present time." *Id.* at 56, 641 P.2d at 797, 181 Cal. Rptr. at 266.

61. *Id.* at 56, 641 P.2d at 798, 181 Cal. Rptr. at 266.

62. *Id.* at 66, 641 P.2d at 804, 181 Cal. Rptr. at 272-73.

63. *Id.* at 66-67, 641 P.2d at 804, 181 Cal. Rptr. at 273.

This ruling extended the holding in *Mack*[64] to disallow any testimony in court about topics covered during hypnosis. In so doing, *Shirley* opened the way for the exclusion of testimony about events that a witness remembered and reported in an interview before the hypnosis.[65] The court, however, did recognize four "limitations" on its ruling, including the right of a defendant to testify despite pretrial hypnosis[66] and the propriety of employing hypnosis for investigative purposes.[67] Finding that none of these exceptions brought the case outside the rule excluding hypnotically refreshed testimony, the court found that the trial court's admission of the victim's testimony constituted prejudicial error and reversed the conviction.[68]

The *Mack* and *Shirley* courts, though in disagreement on the exact parameters of exclusion under *Frye*, created a powerful rule of inadmissibility. Many other state courts have embraced this position since 1980,[69] including the very court that decided *Harding*.[70] In 1982 a Maryland appeals court in *Collins v. State*[71] overruled *Harding* and adopted a per se inadmissibility approach.[72] These courts have con-

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64. *See supra* note 52 and accompanying text.

65. In this vein, one justice concurring in the result noted that "the expansive exclusionary rule fashioned by the majority in this case is considerably broader than the rule adopted by the out-of-state decisions on which the majority purports to rely." *Id.* at 77 n.3, 181 Cal. Rptr. at 279 n.3 (Kaus, J., concurring and dissenting).

66. *Id.* at 67, 181 Cal. Rptr. at 273. The court accepted this limitation to avoid "impairing the fundamental right of an accused to testify in his own behalf." *Id. See generally supra* note 9 and accompanying text.

67. *Id.* at 67, 641 P.2d at 805, 181 Cal. Rptr. at 273. The court warned, however, that in light of its ruling "any person who has been hypnotized for investigative purposes will not be allowed to testify as a witness to the events that were the subject of the hypnotic session." *Id.* at 68, 641 P.2d at 805, 181 Cal. Rptr. at 274.

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

69. *See, e.g.*, State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981); People v. Quintanar, 659 P.2d 710 (Colo. Ct. App. 1982); State v. Atwood, 39 Conn. Supp. 273, 479 A.2d 258 (1984); State v. Davis, 490 A.2d 601 (Del. Super. Ct. 1985); Bundy v. State, 471 So. 2d 9 (Fla. 1985), *cert. denied*, 107 S. Ct. 295 (1986); State v. Moreno, 709 P.2d 103 (Haw. 1985); Peterson v. State, 448 N.E.2d 673 (Ind. 1983); State v. Haislip, 237 Kan. 461, 701 P.2d 909, *cert. denied*, 106 S. Ct. 575 (1985); State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983); Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983); People v. Gonzales, 415 Mich. 615, 329 N.W.2d 743 (1982); Alsbach v. Bader, 700 S.W.2d 823 (Mo. 1985) (en banc); State v. Palmer, 210 Neb. 206, 313 N.W.2d 648 (1981); People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983); Robison v. State, 677 P.2d 1080 (Okla. Crim. App.), *cert. denied*, 467 U.S. 1246 (1984); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981); State v. Martin, 101 Wash. 2d 713, 684 P.2d 651 (1984).

70. 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969).

71. 52 Md. App. 186, 447 A.2d 1272 (1982).

72. The adoption by the Maryland Court of Appeals of the *Frye* test in Reed v. State, 283 Md. 374, 391 A.2d 364 (1978), formed the basis of this court's reversal: "applying the standards explicated in *Frye* for the use of hypnosis to restore or refresh the memory of a witness is not accepted as reliable by the relevant scientific community and such testimony is therefore inadmissible." *Collins*, 52 Md. App. at 205, 447 A.2d at 1283.

cluded that under the *Frye* test, hypnotically enhanced testimony is so tainted by unreliability that it must be automatically excluded.

B. The More Uniform Stance of the Federal Courts

The federal courts have exhibited more unity than the state courts in deciding whether to admit hypnotically refreshed testimony. Like many early state court decisions,[73] federal rulings in the early 1970s demonstrated a policy of liberal admissibility. The issues involved in using hypnosis to refresh a witness' memory related merely to the weight of the evidence.[74] Again, as many state courts did,[75] the federal courts by the late 1970s and early 1980s demonstrated greater caution in admitting hypnotically induced testimony when safeguards were not employed during the hypnotic session.[76]

1. Early Decisions

In assessing the treatment of this issue by the federal courts, the extensive familiarity of the Ninth Circuit[77] with the issue of hypnotically refreshed testimony lends particular significance to that circuit's decisions. In the Ninth Circuit's first case on the issue, *Wyller v. Fairchild Hiller Corp.*,[78] the court established the position that was dominant in the federal courts for many years. The plaintiff, who was the sole survivor of a helicopter crash, underwent hypnosis four years after the crash in order to better recall the events surrounding the incident.[79] Rejecting the defendant's argument that testimony resulting from the hypnosis was inherently unreliable, the court treated the case as one of present recollection refreshed in which the jury must assess the witness' credibility and determine the weight to give his testimony.[80] The court emphasized the defendant's ability to challenge the reliability of the plaintiff's testimony by extensive cross-examination of both the plaintiff and his hypnotist.[81]

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73. *See supra* notes 24-32 and accompanying text.

74. *See infra* notes 77-87 and accompanying text.

75. *See supra* notes 34-45 and accompanying text.

76. *See infra* notes 88-103 and accompanying text.

77. One commentator notes that the "Ninth Circuit has had more experience with the issue of hypnotically refreshed testimony than any other reviewing court." Perry, *The Trend Toward Exclusion of Hypnotically Refreshed Testimony—Has the Right Question Been Asked?*, 31 U. KAN. L. REV. 579, 587 (1983).

78. 503 F.2d 506 (9th Cir. 1974).

79. *Id.* at 509.

80. *Id.* The United States Court of Appeals for the Fifth Circuit generally is credited with being the first federal court to admit hypnotically enhanced testimony in a civil case, though with little discussion of the issue. *See* Connolly v. Farmer, 484 F.2d 456 (5th Cir. 1973).

81. 503 F.2d at 509-10.

The following year the Ninth Circuit confirmed this approach in *Kline v. Ford Motor Co.*[82] In this strict liability action against the automobile manufacturer after an accident, the injured witness used hypnosis to overcome her retrograde amnesia so that she could testify.[83] Relying on *Wyller*, the Ninth Circuit reversed the trial court's exclusion of the plaintiff's testimony and held that the hypnosis used to refresh her memory went to the credibility of her testimony and not to her competence as a witness.[84] According to the court, the witness was fully capable of expressing herself and understanding her duty to tell the truth.[85]

These rulings provided the basis for numerous decisions handed down by other federal courts.[86] *Wyller* and *Kline* fit squarely within the *Harding* rule of per se admissibility based on the concept of present recollection refreshed.[87] Implicit in this approach is the perceived sufficient guarantee of the testimony's reliability because of the opportunity, at least in theory, for thorough cross-examination.

2. Later Decisions

The Ninth Circuit later began to appreciate the potential risks inherent in admitting hypnotically enhanced testimony. In the court's first criminal case involving hypnosis, *United States v. Adams*,[88] the court qualified its approval of hypnosis as a technique to refresh a witness' memory. In affirming the trial court's admission of testimony given by an eyewitness hypnotized to improve recall of a murder and robbery,[89] the court expressed its concern that hypnotizing potential witnesses for investigatory purposes could be abused.[90] The court urged the exercise of great care to insure that statements after hypnosis are the subject's own recollections instead of memories tainted by hypnotic suggestions.[91] While stating disapproval with the hypnotic procedures

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82. 523 F.2d 1067 (9th Cir. 1975).

83. *Id.* at 1069.

84. *Id.* at 1069-70. The court explained that "[a]lthough the device by which recollection was refreshed is unusual, in legal effect her situation is not different from that of a witness who claims that his recollection of an event that he could not earlier remember was revived when he thereafter read a particular document." *Id.*

85. *Id.* at 1069.

86. *See, e.g.*, United States v. Waksal, 539 F. Supp. 834 (S.D. Fla. 1982), *rev'd on other grounds*, 709 F.2d 653 (11th Cir. 1983); United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977).

87. *See supra* notes 24-32 and accompanying text.

88. 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978).

89. *Id.* at 198.

90. *Id.*

91. *Id.* at 198-99. In a footnote, the court suggested that "at a minimum, complete stenographic records of interviews of hypnotized persons who later testify should be maintained. An

followed in the case at hand,[92] the court nevertheless relied on the holding of *Kline* to reject the defendant's challenge to the testimony.[93] The Ninth Circuit confirmed this approach in a later case,[94] which together with *Adams* establishes a powerful precedent for other federal courts to following in adopting *Hurd*'s procedural safeguards approach over the *Harding* approach.[95]

In a landmark ruling against the per se admissibility rule enunciated in *Harding*, the Fifth Circuit in *Unites States v. Valdez*[96] focused on a single type of post-hypnotic testimony: identification by the witness of a known suspect whom the witness had been unable to identify before being hypnotized.[97] After reviewing the relevant scientific literature on hypnosis[98] and the Supreme Court's decision in *Manson v. Brathwaite*,[99] the Fifth Circuit excluded any uncorroborated identification of a suspect made after the witness underwent hypnosis.[100] The court adopted a rule of per se inadmissibility for these post-hypnotic identifications, regardless of the procedures used.[101] The court also stated that, depending on the circumstances, the use of procedural safeguards might favor admissibility of corroborated post-hypnotic testimony.[102] The court espoused a *Hurd*-like procedural safeguards approach, even though the testimony on corroborated, post-hypnotic identification of a person singled out for suspicion, was held to be inad-

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audio or video recording of the interview would be helpful." *Id.* at 199 n.12.

92. *Id.* at 199. The court disapproved because "[a]n uncertified hypnotist conducted the session [and because] [n]o record was made of the identity of those present, the questions asked, or the responses given." *Id.* at 199 n.13. *See generally* United States v. Charles, 561 F. Supp. 694, 697 (S.D. Tex. 1983) (stating that "[t]his Court does not believe [the minimum standards for the admission of hypnotically induced testimony set forth in] the footnote contained in the *Adams* opinion by the Ninth Circuit to be exhaustive").

93. *Adams*, 581 F.2d at 199.

94. *See* United States v. Awkard, 597 F.2d 667, 669 & n.2 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979).

95. *See supra* notes 33-45 and accompanying text; *see also* Clay v. Vose, 771 F.2d 1 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 1212 (1986).

96. 722 F.2d 1196 (5th Cir. 1984).

97. *Id.* at 1202.

98. *Id.* at 1201-03.

99. 432 U.S. 98 (1977). The Supreme Court found that unduly suggestive identification procedures in certain circumstances could deny both due process and a fair trial. *Id.* at 109-14.

100. *Valdez*, 722 F.2d at 1203.

101. *Id.* The procedures used in this case were deficient anyway. The court stated, "[T]he procedures employed during the hypnotic session were unduly suggestive," and "[i]n every particular, they were at variance" with the *Hurd* procedural safeguards. *Id.*

102. The court noted: "In a particular case, the evidence favoring admissibility might make the probative value of the testimony outweigh its prejudicial effect. If adequate procedural safeguards have been followed, corroborated post-hypnotic testimony might be admissible." *Id.* (citation omitted). In addition, "[i]f a sufficiently reliable method exists for the witness to separate pre-hypnotic memory from post-hypnotic pseudo-memory," a court may permit the previously hypnotized witness to testify about matters recalled and discussed prior to hypnosis. *Id.* at 1204.

missible. The Fifth Circuit thus departed, though not expressly, from the traditional *Harding* approacb of per se admissibility.[103]

III. Recent Developments

The state supreme courts of North Carolina, California, and Alaska recently have considered whether to admit testimony enhanced by the pretrial use of hypnosis. North Carolina and California reconsidered the issue in light of previous rulings on the subject. All three concluded, on the basis of scientific evidence, that hypnotically enhanced testimony is inadmissible. In so holding, the North Carolina Supreme Court expressly overruled its prior ruling that the use of hypnosis affected only the credibility and not the admissibility of the witness' testimony.[104] The California Supreme Court confirmed and clarified the position it had established earlier in *Shirley*.[105] Finally, the Alaska Supreme Court found a number of reasons for adopting a per se inadmissibility approach.[106] These rulings demonstrate the unmistakable movement of state courts towards adoption of the per se inadmissibility approach. Moreover, the Eighth Circuit followed the Fifth Circuit's *Valdez*[107] decision by rejecting the rule of per se admissibility and moving toward stricter exclusion of hypnotically induced evidence.

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103. *See also* Wicker v. McCotter, 783 F.2d 487, 492 (5th Cir.), *cert. denied*, 106 S. Ct. 3310 (1986); United States v. Harrelson, 754 F.2d 1153, 1180 (5th Cir.), *cert. denied*, 474 U.S. 908 (1985). This is, of course, a simplistic interpretation of a very complex opinion. In fact, one could posit *Valdez* as a case in limbo, not entirely satisfied with any of the three major approaches exhibited by state courts. The opinion clearly shows displeasure with a rule of per se admissibility and implies that compliance with specific procedural safeguards could make certain hypnotically refreshed testimony admissible. The opinion, however, also accepts the reasoning of the California Supreme Court in People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (en banc), *cert. denied*, 459 U.S. 860 (1982). The court noted, "[I]t is doubtful that safeguards could be administered properly and prevented from becoming the major issue at most every trial. Moreover, no safeguards can prevent all unreliability." *Valdez*, 722 F.2d at 1202. One must therefore concede that *Valdez*'s exact position along the spectrum of state court positions is unclear. This explains one commentator's placement of *Valdez* in a fourth, separate category based on Rule 403 of tbe Federal Rules of Evidence. *See* Note, *Hypnotically Refreshed Testimony and the Balancing Pendulum*, 1985 U. Ill. L. Rev. 921, 948-51 (1985).

104. *See* State v. Peoples, 311 N.C. 515, 398 S.E.2d 177 (1984); *see also infra* notes 108-25 and accompanying text.

105. *See* People v. Guerra, 37 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (en banc), *cert. denied*, 459 U.S. 860 (1982); *see also infra* notes 126-42 and accompanying text.

106. *See* Contreras v. State, 718 P.2d 129 (Alaska 1986); *see also infra* notes 143-65 and accompanying text.

107. *See* Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1263 (1986); *see also infra* notes 166-77 and accompanying text.

A. State v. Peoples

In *State v. Peoples*[108] the North Carolina Supreme Court reassessed its position of admitting hypnotically refreshed testimony.[109] Only six years earlier, in *State v. McQueen*,[110] the court had held that hypnotizing a witness prior to trial bears only on the credibility of that witness' testimony and does not render the testimony incompetent.[111] *Peoples* involved a prosecution of three men for the armed robbery of a chemical plant.[112] One of the participants, upon arrest, agreed to testify against the defendant and underwent hypnosis to enhance his recall of the robbery.[113] The court agreed to review the defendant's conviction by determining whether the post-hypnotic testimony should have been admitted. The court explained that, at the time of its decision in *McQueen*, the court was not fully aware of the problems inherent in hypnosis.[114]

After reviewing the relevant scientific literature,[115] the court emphasized two articles written by leading authorities opposed to admitting hypnotically enhanced testimony because of its unreliability.[116] The court examined the three approaches adopted by other state courts[117] and reevaluated its prior stance of admitting this testimony and allowing the jury to assess its credibility. The court found that a hypnotized person may (1) be extremely susceptible to suggestion; (2) have an overwhelming desire to please the hypnotist; and (3) be unable to distinguish between pre-hypnotic memory and post-hypnotic recall following hypnosis.[118] Scientific evidence also revealed the difficulty in effectively cross-examining a previously hypnotized witness because hypnosis may artificially enhance the witness' confidence in the accuracy of his testimony.[119] The court, therefore, rejected the *Harding*

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108. 311 N.C. 515, 319 S.E.2d 177 (1984).

109. The court agreed to re-evaluate its position due to "recent developments in the understanding of hypnosis as a tool to refresh or restore memory and the judicial trend away from acceptance of hypnotically refreshed testimony." *Id.* at 519, 319 S.E.2d at 180.

110. 295 N.C. 96, 244 S.E.2d 414 (1978).

111. *Id.* at 119, 244 S.E.2d at 427.

112. 311 N.C. at 516, 319 S.E.2d at 178.

113. *Id.* at 517-18, 319 S.E.2d at 179.

114. *Id.* at 519, 319 S.E.2d at 180.

115. *Id.* at 520-24, 319 S.E.2d at 180-82.

116. The court discussed Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311 (1979), *reprinted in* CLINICAL HYPNOSIS: A MULTIDISCIPLINARY APPROACH 497 (W. Wester & A. Smith eds. 1984); and Diamond, *supra* note 25. *See Peoples*, 311 N.C. at 520-24, 319 S.E.2d at 180-82.

117. *Peoples*, 311 N.C. at 524-31, 319 S.E.2d at 182-87.

118. *Id.* at 525-26, 319 S.E.2d at 183.

119. *Id.* at 526, 319 S.E.2d at 184. As stated by the court, "This false confidence may actually nullify the safeguard of cross-examination." *Id.*

credibility approach to hypnotically refreshed testimony as being unsound.[120] Turning to the procedural safeguards alternative, the court expressed similar reservations and concluded that safeguards cannot prevent the witness from confusing hypnotic suggestions with actual memory.[121] The court held that the procedural safeguards approach was not an acceptable means to test the reliability of hypnotically refreshed testimony.[122] Instead, the court, based on its review of the scientific commentary[123] and case law indicating that hypnotically refreshed testimony is too unreliable to be admitted as evidence in a judicial proceeding, embraced the inadmissibility option.[124] North Carolina, therefore, switched from a rule of per se admissibility to per se inadmissibility.[125]

B. People v. Guerra

Like the North Carolina Supreme Court in *Peoples*, the California Supreme Court in *People v. Guerra* re-evaluated its position on hypnotically enhanced testimony.[126] The court had decided *People v. Shirley*[127] two years previously and had adopted the per se inadmissibility approach.[128] In *Guerra* a rape victim could recall only after undergoing hypnosis that sexual penetration had taken place.[129] After the trial court admitted this testimony,[130] the defendants appealed their convic-

120. *Id.* at 527, 319 S.E.2d at 184. The court questioned "the very foundation of the *Harding* approach . . . since hypnotically refreshed testimony may well be completely unreliable." *Id.* at 526, 319 S.E.2d at 183.

121. *Id.* at 529, 319 S.E.2d at 185.

122. *Id.* at 529, 319 S.E.2d at 186.

123. Unlike other jurisdictions basing the per se inadmissibility approach on the *Frye* test, *see supra* notes 46-72 and accompanying text, this court chose to apply only the theory underlying *Frye* because it had "not specifically adopted the *Frye* test in this jurisdiction." *Peoples*, 311 N.C. at 532, 319 S.E.2d at 187. *See generally* Note, *Criminal Procedure—the Admissibility of Evidence Obtained Through Hypnosis*—State v. Peoples, 7 CAMPBELL L. REV. 409, 424-25 (1985).

124. *Peoples*, 311 N.C. at 531-32, 319 S.E.2d at 187. An important factor that influenced this holding was the similar reversal in positions by the Maryland Court of Special Appeals in Collins v. State, 52 Md. App. 186, 447 A.2d 1272 (1982) (overruling Harding v. State, 5 Md. App. 230, 246 A.2d 302 (1968)). *Peoples*, 311 N.C. at 532, 319 S.E.2d at 187.

125. *Peoples*, 311 N.C. at 533, 319 S.E.2d at 188. The court, however, specified two limitations on its adoption of per se inadmissibility. First, a person who has undergone pretrial hypnosis may testify as to facts he related prior to hypnosis. Second, hypnosis may still be used in criminal investigations, although the court suggested that hypnosis for this purpose should comply with the *Hurd* procedural safeguards. *Id.*

126. 37 Cal. 3d 385, 690 P.2d 635, 208 Cal. Rptr. 162 (1984) (en banc).

127. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (en banc), *cert. denied*, 459 U.S. 860 (1982).

128. *See supra* notes 53-68 and accompanying text.

129. *Guerra*, 37 Cal. 3d at 396-97, 690 P.2d at 641, 208 Cal. Rptr. at 168. Her memory apparently was reduced by consumption of alcohol and use of marijuana prior to the alleged rape. *Id.* at 391-94, 690 P.2d at 637-39, 208 Cal. Rptr. at 164-66.

130. *Id.* at 397, 690 P.2d at 641, 208 Cal. Rptr. at 168.

tions on the basis of the *Shirley* decision.[131] The central question confronting the court was whether *Shirley* had retroactive effect to control the case at hand.[132] The court, after answering that question in the affirmative,[133] responded to an attack by the State on the *Shirley* rule itself.

The State argued that developments in the scientific literature after *Shirley* undermined the basis of that decision.[134] This argument assumes that the *Frye* test demands unanimity among the scientific community in order for a new technique to be reliable.[135] The court, however, held that the *Frye* test is satisfied whenever a clear majority of the members of the relevant scientific community support the use of the technique under scrutiny.[136] In any event, the court found that other studies conducted and articles written after *Shirley*[137] confirm the conclusions reached in *Shirley*.[138] The court concluded that this consensus within the scientific community concerning the unreliability of recall enhanced by hypnosis had not changed since its *Shirley* ruling was handed down.[139]

The court also answered the State's argument that many of the courts following the inadmissibility approach permitted testimony pertaining to facts remembered prior to hypnosis. The court refused to depart from its position in *Shirley* excluding pre-hypnotic testimony[140]

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131. *Id.* at 398, 690 P.2d at 642, 208 Cal. Rptr. at 169.

132. *Shirley* itself left open the question of whether its principles would apply to "witnesses hypnotized before the date of this decision [March 11, 1982]." *See* People v. Shirley, 31 Cal. 3d 18, 67 n.53, 641 P.2d 775, 804 n.53, 181 Cal. Rptr. 243, 273 n.53 (en banc), *cert. denied*, 459 U.S. 860 (1982). The rape victim in *Guerra* underwent hypnosis in March of 1979. *Guerra*, 37 Cal. 3d at 395, 690 P.2d at 640, 208 Cal. Rptr. at 167.

133. For the *Guerra* court's analysis on this issue, see *id.* at 399-417, 690 P.2d at 643-56, 208 Cal. Rptr. at 169-82.

134. *Id.* at 419, 690 P.2d at 656-57, 208 Cal. Rptr. at 182-84. The State relied on two articles written after *Shirley*, though not yet published, which purportedly support hypnotically refreshed testimony.

135. *Id.* at 418, 690 P.2d at 656, 208 Cal. Rptr. at 183.

136. *Id.*

137. For the *Guerra* court's discussion of these works, see *id.* at 419-24, 690 P.2d at 657-61, 208 Cal. Rptr. at 184-88.

138. *Id.* at 419, 690 P.2d at 657, 208 Cal. Rptr. at 184. The price to pay for increased recall through hypnosis includes "increased errors and probably also an increase in the subject's misplaced confidence in those errors." *Id.* (discussing the reactions of a number of scientists and psychologists to *Shirley*).

139. *Id.* at 424, 690 P.2d at 661, 208 Cal. Rptr. at 188. Similarly, the court rejected the State's contention that the case law since *Shirley* had demonstrated a shift toward admissibility of hypnotically refreshed testimony. Instead, the court held that the *Shirley* rule was drawing new adherents. *Id.* at 426, 690 P.2d at 662, 208 Cal. Rptr. at 189.

140. As the court noted, however, even *Shirley* recognized one exception to this principle. The victim's prehypnotic testimony at a preliminary hearing would be admissible in place of testimony at trial about topics covered during the hypnotic session. *Id.* at 427, 690 P.2d at 663, 208 Cal. Rptr. at 190.

because this testimony is given after hypnosis, making effective cross-examination more difficult.[141] Accordingly, the court applied the *Shirley* rule, holding that the motions to exclude the victim's testimony were improperly denied by the trial court, and reversed the convictions.[142]

C. Contreras v. State

The Alaska Supreme Court in *Contreras v. State*[143] faced for the first time the issue of admissibility of hypnotically refreshed testimony. The case stemmed from the indictment of Joseph Contreras on charges of kidnapping, assault, and sexual assault. This indictment rested on the post-hypnotic identification of Contreras by the complaining witness.[144] The trial court granted a motion to suppress the complaining witness' testimony, which had been enhanced by hypnosis. The appeals court reversed, finding that hypnosis does not render a witness incompetent to testify.[145] The Alaska Supreme Court reversed the court of appeals decision and gave three reasons why hypnosis renders a witness' subsequent testimony inadmissible.[146]

Initially, the court concluded that hypnosis fails to satisfy the test established by *Frye*.[147] The court viewed the *Frye* standard as two-fold: first, the court must define the relevant scientific community; and second, the court must evaluate whether a general consensus exists in that field on the reliability of the type of scientific evidence in question.[148] The court defined the relevant community as "the academic, scientific, and medical or health-care professions which have studied and/or utilized hypnosis."[149] The literature emanating from those professions convinced the court that, because a consensus had not developed on what

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141. *Id.* The court implied that room exists for future debate over the various subissues in this general area: "It will be time enough to grapple with such questions in a case in which they are presented as dispositive issues on a satisfactory record and after full briefing." *Id.* at 429, 690 P.2d at 664, 208 Cal. Rptr. at 191.

142. *Id.* at 429, 690 P.2d at 665, 208 Cal. Rptr. at 191. Concurring Justice Kaus vigorously argued that a witness who has undergone pretrial hypnosis to improve recall "should generally be permitted to testify at trial as to prehypnosis memories so long as there is satisfactory evidence from which the trial court can determine that the witness did in fact recall and relate the statements before undergoing hypnosis." *Id.* at 432, 690 P.2d at 667, 208 Cal. Rptr. at 194 (Kaus, J., concurring).

143. 718 P.2d 129 (Alaska 1986).

144. *Id.* at 130.

145. *Id.* at 129-31; *see* State v. Contreras, 674 P.2d 792 (Alaska Ct. App. 1983).

146. *Contreras*, 718 P.2d at 133-39.

147. *Id.* at 135.

148. *Id.*

149. *Id.*

hypnosis is or does,[150] hypnosis is "far too underdeveloped" to satisfy the *Frye* standard.[151]

The court also found that, even without *Frye*, hypnotically refreshed testimony must be excluded under Alaska Rule of Evidence 403,[152] which may exclude even relevant evidence when its probative value is outweighed by dangers of unfair prejudice or confusion.[153] Whereas the *Contreras* trial court conducted a balancing inquiry that emphasized the probative value of certain corroborative testimony, the state supreme court was convinced that corroboration, even with strict procedural safeguards during the hypnotic session, did not outweigh the potential dangers inherent in hypnosis.[154] Because expert testimony is an insufficient remedy to minimize the potential of prejudicing the defendant by misleading the jury,[155] the higher court concluded that "the prejudice/probity balance weighs per se in favor of exclusion."[156]

Finally, the supreme court found that the constitutional right of a criminal defendant to confront opposing witnesses precluded admission of hypnotically refreshed testimony.[157] The court explained that the two chief interests underlying this right—the opportunities to cross-examine the witness and to demonstrate the witness' demeanor when confronted by the defendant[158]—were effectively negated by the lasting imprint that hypnosis leaves on a witness' memory.[159] The court analogized hypnotically induced testimony to the category of hearsay in which the declarant must be unavailable[160] and the declarant's statements have adequate indicia of reliability before the evidence would be

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150. *Id.* at 136. The court was quick to point out that in searching for such a consensus, "it is not this court's duty to decide which side of the debate is correct, but rather to determine if there is sufficient consensus on the reliability of hypnotically aided recall to determine whether it is generally accepted." *Id.* at 135-36.

151. *Id.* at 136.

152. *Id.*

153. *Id.* at 136 n.22. Federal Rule of Evidence 403 is identical in this regard. *See infra* notes 241-42 and accompanying text.

154. *Contreras*, 674 P.2d at 138.

155. *Id.*

156. *Id.* The court rejected a case-by-case approach under Rule 403 because such an approach "is time consuming, creates a risk of non-uniform results and requires judges to become hypnosis experts in order to make intelligent determinations about the efficacy of particular procedural safeguards and about whether there is in fact substantial compliance with those safeguards." *Id.* at 137-38.

157. *Id.* at 138; *see also* ALASKA CONST. art. I, § 11.

158. *Contreras*, 718 P.2d at 138; *see* Lemon v. State, 514 P.2d 1151, 1153 (Alaska 1973).

159. As stated by the *Contreras* court: "A witness's natural sincerity may be irreparably altered by hypnosis. Moreover, hypnosis can also affect the witness' normal demeanor in a manner favoring the prosecution." 718 P.2d at 138.

160. A witness is unavailable when a good faith effort fails to obtain the witness' presence at trial. *Id.* at 138-39; *see* Ohio v. Roberts, 448 U.S. 56, 74 (1980).

admissible under the confrontation clause.[161] Just as the State failed to show unavailability by utilizing other investigative tools before resorting to hypnosis,[162] so also did the corroborative statements fail to satisfy the indicia of reliability requirement.[163] Given also that a witness' demeanor can be altered by hypnosis, the court concluded that the defendants were deprived of their constitutional right of confrontation under the Alaska Constitution by the trial court's admission of hypnotically refreshed testimony.[164] Thus, *Contreras* establishes three entirely distinct bases upon which hypnotically refreshed testimony may be excluded.[165]

D. Sprynczynatyk v. General Motors Corp.

The United States Court of Appeals for the Eighth Circuit in *Sprynczynatyk v. General Motors Corp.*,[166] like the Alaska Supreme Court in *Contreras*, decided whether to admit hypnotically enhanced testimony for the first time. The defendant in this products liability and negligence action based its appeal in part[167] on the trial court's admission of hypnotically refreshed testimony. Specifically, the driver of the car in question testified, after hypnosis, that he had applied his brakes just prior to the accident.[168]

The court began its analysis by noting concerns about the forensic use of hypnosis.[169] Next, the court summarized the three approaches adopted by state courts[170] and discussed the Fifth Circuit's ruling in *Valdez*.[171] The court stated that *Valdez* had adopted *Hurd*'s procedural safeguards approach in conjunction with the balancing test of Federal Rule of Evidence 403.[172] The court then opted for a similar hybrid ap-

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161. *Contreras*, 718 P.2d at 138; *see Roberts*, 448 U.S. at 65-66; *see also* FED. R. EVID. 804.

162. *Contreras*, 718 P.2d at 139.

163. *Id.* The court refused to focus on certain allegedly corroborative statements to avoid the danger of "bootstrapping unreliable testimony." *Id.*

164. *Id.*

165. The court concluded its opinion by adopting the position espoused by the North Carolina Supreme Court in *Peoples*, 311 N.C. 515, 319 S.E.2d 177 (1984), regarding both the admissibility of testimony on facts related before the hypnotic session and the permissible use of hypnosis as an investigative tool. *Contreras*, 718 P.2d at 139-40; *see supra* note 125 and accompanying text.

166. 771 F.2d 1112 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1263 (1986).

167. The defendant also claimed error in the trial court's admission of videotapes of the driver's hypnotic session. The court found this contention valid. *See id.* at 1116-18.

168. *Id.* at 1118. Prior to hypnosis, the driver stated that he did not apply the brakes at all. *Id.* at 1115.

169. *Id.* at 1119-20.

170. *Id.* at 1120-22.

171. *See* United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984); *see also supra* notes 96-103 and accompanying text.

172. *Sprynczynatyk*, 771 F.2d at 1122. The court noted:

Although the *Valdez* court held in that particular case that post-hypnosis testimony in which

proach.[173] Reluctant to establish either a per se rule of admissibility or inadmissibility, the court instead adopted a flexible case-by-case approach allowing discretion to the district court.[174]

Accordingly, *Sprynczynatyk* outlines a two-step procedure by which the district court initially must decide whether the hypnotically enhanced testimony is sufficiently reliable to be admissible.[175] First, the district court must determine whether the hypnosis complied with the Eighth Circuit version of the *Hurd* procedural safeguards test.[176] Second, the district court then must assess whether in view of all the circumstances, the probative value of the proposed testimony outweighs its prejudicial effect.[177]

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a hypnotized witness identifies for the first time a person he knew was already under suspicion is inadmissible in a criminal trial, the court stated that if adequate procedural safeguards have been followed, corroborated post-hypnotic testimony might be admissible if the probative value of the testimony outweighed its prejudicial effect.

Id. For the text of Rule 403, see *infra* note 241.

173. *Sprynczynatyk*, 771 F.2d at 1122.

174. According to the court, a rule of per se admissibility "does not cure the risks of undue prejudice and jury confusion," but "[a] rule of per se inadmissibility is impermissibly broad and may result in the exclusion of valuable and accurate evidence in some cases." *Id.*

175. *Id.* at 1122-23.

176. The Eighth Circuit version states:

(1) The hypnotic session should be conducted by an impartial licensed psychiatrist or psychologist trained in the use of hypnosis . . . . Appointment of the psychiatrist or psychologist should first be approved by the trial court. . . . (2) Information given to the hypnotist by either party concerning the case should be noted, preferably in written form . . . . (3) Before hypnosis, the hypnotist should obtain a detailed description of the facts from the subject . . . . (4) The session should be recorded . . . . Videotape is a preferable method of recordation. (5) Preferably, only the hypnotist and subject should be present during any phase of the hypnotic session, but other persons should be allowed to attend if their attendance can be shown to be essential and steps are taken to prevent their influencing the results of the session.

Id. at 1123 n.14.

The court cautioned, however, that the adoption of these *Hurd*-like safeguards does not mean that total compliance results in automatic admissibility or that incomplete compliance results in automatic exclusion. *Id.* at 1123 n.15. Courts also should consider "the appropriateness of using hypnosis for the kind of memory loss involved, and whether there is any evidence to corroborate the hypnotically enhanced testimony." *Id.* at 1123; *see also supra* note 174 and accompanying text.

177. *Sprynczynatyk*, 771 F.2d at 1123. The court summarized this process by stating that "the district court should, before trial, scrutinize the circumstances surrounding the hypnosis session, consider whether the safeguards we have approved were followed and determine in light of all the circumstances if the proposed hypnotically enhanced testimony is sufficiently reliable and not overly prejudicial to be admitted." *Id.* The latter determination is essentially the balancing test embodied in Rule 403. As the court explained, the district court ultimately must decide "whether the risk that the testimony reflects a distorted memory is so great that the probative value of the testimony is destroyed." *Id.; see infra* notes 241-42 and accompanying text. In the event the district court found inadmissible the testimony relating to the application of the brakes, the Eighth Circuit nevertheless would deem admissible any testimony as to pre-hypnosis recollections that is "uncontaminated by hypnosis." *Sprynczynatyk*, 771 F.2d at 1123. In *Sprynczynatyk*, the court reversed and remanded for a new trial, instructing the district court to conduct pretrial proceedings as outlined above.

IV. ANALYSIS

Even after the highest courts in Minnesota and California held in the early 1980s that testimony enhanced by the use of pretrial hypnosis is inadmissible per se,[178] many state courts continued to admit this testimony. Similarly, the 1984 Fifth Circuit decision in *Valdez*, which departed from the per se admissibility rule,[179] was only one case compared to several others favoring liberal admission. However, recent decisions by the state supreme courts of North Carolina, California, and Alaska,[180] together with the Eighth Circuit's ruling in *Sprynczynatyk*,[181] demonstrate a trend away from per se admissibility and a movement toward per se inadmissibility. Per se inadmissibility not only has replaced per se admissibility as the majority rule in the states, but also is becoming more acceptable to the federal courts.[182] The following sections delineate the significant faults inherent in the use of hypnosis for testimonial purposes and suggest two distinct analytical frameworks for state and federal courts to follow in finding hypnotically refreshed testimony inadmissible.

A. *Scientific Discouragement of Improper Forensic Use of Hypnosis*

The scientific community, upon which the *Frye* test of inadmissibility places considerable emphasis,[183] has produced much literature attacking the over-utilization of hypnosis for forensic purposes. Almost all scientists now reject the once accepted "videotape" theory of hypnosis, which holds that memories are "recorded" in the human mind, as if on video tape, and under hypnosis can be "played back" in precise detail to refresh the subject's recall.[184] With few dissenters,[185] the scientific

178. *See supra* notes 48-68 and accompanying text.

179. *See* United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984); *see also supra* notes 96-103 and accompanying text.

180. *See supra* notes 108-65 and accompanying text.

181. *See* Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1263 (1986); *see also supra* notes 166-77 and accompanying text.

182. Even one state court that recently opted for a procedural safeguards approach recognized that "the vast majority of states have ruled that a witness who has been hypnotized is incompetent to testify to the events which were the subject of the hypnosis session." *See* State v. Johnston, No. 412 (Ohio Ct. App. Aug. 6, 1986).

183. *See supra* notes 46-72 and accompanying text.

184. Kingston, *Admissibility of Post-Hypnotic Testimony*, FBI L. ENFORCEMENT BULL., Apr. 1986, at 23.

185. A leading advocate of the videotape theory is Dr. Martin Reiser, director of behavioral science services for the Los Angeles Police Department and director of the Law Enforcement Hypnosis Institute. *See generally* M. REISER, HANDBOOK OF INVESTIGATIVE HYPNOSIS (1980). Dr. Reiser has trained more than 1000 people, mostly police, to perform hypnosis. Stark, *Hypnosis on Trial*, PSYCHOLOGY TODAY, Feb. 1984, at 36. Until People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (en banc), *cert. denied*, 459 U.S. 860 (1982); *see supra* notes 53-68 and accompanying text, Dr. Reiser had been using hypnotically refreshed testimony in court 100 to 200 times per

community follows the "reconstructive" theory. This theory contends that a person's memory constantly changes in response both to external stimuli and that person's own thoughts.[186] Thus, memory is "reconstructive as well as reproductive."[187] This assumption underlies the major articles written and studies conducted by scientists who caution against an overly broad use of potentially unreliable hypnotically enhanced recall.

1. The Primary Articles

Drs. Bernard Diamond[188] and Martin Orne[189] are the leading scientific spokesmen opposing the admission of hypnotically enhanced testimony. Dr. Diamond argues that hypnosis renders a potential witness incompetent to testify by "contaminating" the person's memory.[190] He notes that "insurmountable evidentiary problems" are created by hypnotically refreshed testimony because a hypnotist cannot avoid implanting suggestions in the mind of the subject.[191] The subject of hypnosis usually will not recognize that the hypnotist has implanted a suggestion.[192] More importantly, a hypnotized subject will try to please the hypnotist[193] by confabulation, the fabrication of missing details to fill in gaps of memory loss.[194] Hypnosis also can produce subtle but highly significant distortions of memory that will linger long after the hypnotic session ends.[195] Having resolved doubts and uncertainties,

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year. Hilts, *Psychology Group Seeks to Curb Use of Hypnosis*, Wash. Post, Aug. 29, 1986, at A3, col. 1.

186. Stark, *supra* note 185, at 35. For a good analysis of this overall debate, see *Shirley*, 31 Cal. 3d at 57-62, 641 P.2d at 798-801, 181 Cal. Rptr. at 266-70.

187. Orne, *supra* note 116, at 507. In short, the human mind "is continuously being altered in the interests of the present." Ruffra, *Hypnotically Induced Testimony: Should it Be Admitted?*, 19 CRIM. L. BULL. 293, 294 (1983).

188. Dr. Diamond is a clinical professor of psychiatry at the University of California, San Francisco, and a professor of law at the University of California, Berkeley.

189. Dr. Orne is the director of the Unit for Experimental Psychiatry at the Institute of Pennsylvania Hospital and a professor of psychiatry. Dr. Orne is also the president of the International Society of Hypnosis, the editor of the *International Journal of Clinical and Experimental Hypnosis*, and the senior author of the hypnosis article in 9 ENCYCLOPEDIA BRITTANICA 133-40 (5th ed. 1976).

190. Diamond, *supra* note 25, at 314.

191. *Id.* at 332-33.

192. *Id.* at 333-34. Moreover, according to Diamond, "this misperception will withstand the most vigorous cross-examination." *Id.* at 334.

193. *Id.* at 333.

194. *Id.* at 335. The hypnotically enhanced recall is likely "to be a mosaic of (1) appropriate actual events, (2) entirely irrelevant actual events, (3) pure fantasy, and (4) fantasized details supplied to make a logical whole." *Id.* Furthermore, even "detailed recall can he totally confabulated." *Id.* at 337-38.

195. *Id.* at 336. Moreover, "time, rather than weakening the effects of the hypnotic distortion, tends if anything to fix it into a permanent pattern." *Id.*

hypnosis may lend confidence to the witness' tainted recall.[196] Therefore, Dr. Diamond asserts that hypnotically refreshed testimony is not reliable and should be excluded on the ground that the witness is incompetent to testify.[197]

Dr. Orne similarly argues against broad admission of hypnotically enhanced testimony, preferring instead that hypnosis be used simply for investigative purposes.[198] Emphasizing the dangers of confabulation, Dr. Orne states that typically the subject will become convinced through suggestions that he has experienced total recall.[199] Accordingly, any gaps or uncertainties in the subject's memory are now filled in, and the events as they were relived in hypnosis become the witness' recollection of what actually occurred on the day in question.[200] Thus, the hypnotically refreshed witness is usually unable to distinguish between pre- and post-hypnosis memories,[201] and the witness' testimony is incorrectly perceived by the jury as a reflection of original memory.[202]

Dr. Orne advocates limiting the forensic use of hypnosis to the investigative context.[203] If hypnosis is used for testimonial purposes, however, Dr. Orne insists that safeguards be implemented to minimize the dangers of unreliability.[204] Dr. Orne's suggestions provided the basis for the *Hurd* procedural safeguards,[205] an approach with which Dr. Orne now disagrees.[206] Dr. Orne criticizes *Hurd* by arguing that while proposed safeguards can assist in determining what was done during the hypnotic session, they do not prevent witnesses from confusing distorted hypnotic memories with prior and subsequent nonhypnotic im-

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196. *Id.* at 339.

197. *Id.* at 349.

198. Orne, *supra* note 116.

199. "Under these circumstances, he will typically awaken and confound the hypnotic memories with his waking memories." *Id.* at 506. In other words, "[s]uch suggestions result in the individual's tending to accept the events he relived in hypnosis as if they were what actually happened." *Id.* For a good example of this phenomenon, see *infra* notes 216-19 and accompanying text.

200. Orne, *supra* note 116, at 506-07. "Such a pseudo memory may persist like any other memory even though it can be totally false." *Hypnosis, supra* note 5, at 67.

201. Orne, *supra* note 116, at 507. As Orne stated: "Instead of differentiating between his earlier fragmentary recall and the gaps that have been filled in—perhaps by pseudomemories created during hypnosis—he experiences the totality as his recollection of what bad originally transpired." *Id.* And generally speaking, "it is difficult to disentangle which aspects of hypnotically enhanced memories represent accurate recall and which represent fantasies tbat are confabulated to approximate what might have occurred." *Id.* at 508.

202. *Id.* at 507.

203. It is in this context that hypnotic techniques are most appropriately employed. *Id.* at 513.

204. *See id.* at 521-22.

205. *See supra* note 42 and accompanying text.

206. Orne, Soskis, Dinges & Orne, *Hypnotically Induced Testimony*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 171 (G. Wells & E. Loftus eds. 1984).

pressions or from placing undue confidence in distorted post-hypnotic recollections.[207] Pretrial hypnosis should be permitted only in the limited circumstances of assisting criminal investigations,[208] provided the hypnotic session complies with certain safeguards.[209] Therefore, Dr. Orne clearly has placed himself in line with the increasing number of state supreme courts that have held hypnotically induced testimony inadmissible per se.[210]

2. Recent Scientific Studies

Two recent studies conducted by other members of the scientific community confirm and expand upon the concerns about hypnotically enhanced recall expressed by Drs. Diamond and Orne. The first, a hypnotic hypermnesia experiment,[211] tested both the number of additional items recalled and the accuracy of those recollections.[212] The results were startling: although the hypnotized subjects recalled twice as many items as their unhypnotized counterparts, the hypnotized subjects made three times as many errors.[213] The direct implication is that the use of hypnosis produces more recall but that this recall often is mistaken. One possible explanation for this mistaken recall is that the hypnotized subject is less cautious in reporting memories.[214] The scientists conducting this experiment urge that the results of their study should discourage the use of hypnosis when the truth of information is the primary concern.[215]

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207. *Id.* at 210.

208. *Id.* at 195-96.

209. The authors grouped these recommended guidelines under 10 headings, closely paralleling in certain instances the *Hurd* safeguards. *See id.* at 204-10. In all, the authors argued that it is "crucial to follow procedures that provide a detailed record of precisely what has or has not been discussed in the hypnotic interview, and to show that every effort has been made to minimize the potential effect of hypnosis in distorting memory." *Id.* at 205.

210. *See id.* at 204. "The present state of scientific knowledge is consistent with the rulings of a number of state supreme courts that memories retrieved through hypnosis are sufficiently unreliable that their use is precluded as eyewitness testimony in criminal trials." *Id.* However, Dr. Orne agrees with the Supreme Court ruling in *Rock*, *see supra* note 9 and accompanying text, that a criminal defendant should be able to testify as to topics covered by a hypnotic session. As Dr. Orne has explained, "the judge or jury takes into account that [the defendant] is putting his best foot forward." Stewart, *supra* note 9, at 57.

211. Dywan & Bowers, *The Use of Hypnosis to Enhance Recall*, 222 SCIENCE 184 (1983).

212. This experiment consisted of exposing a group of subjects to certain material and then testing their recall, first normally and then by hypnotizing half of the group. If the hypnotized subjects can recall more than their unhypnotized counterparts, the difference is considered evidence of hypnotic hypermnesia. People v. Guerra, 37 Cal. 3d 385, 418 n.31, 690 P.2d 635, 657 n.31, 208 Cal. Rptr. 162, 184 n.31 (1984) (en banc).

213. *Id.* at 184-85.

214. *Id.* at 185.

215. *Id.*

The second study[216] tested whether a pseudomemory could be implanted successfully through hypnosis. Each member of a group of twenty-seven subjects was asked to select a night on which they could not remember dreaming or anything out of the ordinary. The subjects then underwent hypnosis, during which they were asked whether they had heard any noise loud enough to awaken them during that particular night. Seventeen of the twenty-seven reported, while still under hypnosis, that they did hear such a noise; thirteen of the subjects maintained this position after being dehypnotized.[217] Those thirteen maintained this belief even after being informed that the noise had been merely a hypnotic suggestion.[218] These results support Dr. Orne's position that a witness' memory can be modified unknowingly by means of hypnosis and that an initially unsure witness can become more credible after a hypnotic memory "refreshment."[219]

The articles by Drs. Diamond and Orne, when read in conjunction with these two recent studies, provide scientific justification to reject hypnotically enhanced testimony as thoroughly unreliable. Very few informed psychiatrists or psychologists would advocate hypnosis as a valid means of refreshing a witness' memory to testify in court. Rather, the trend in the medical community is clearly toward exclusion, as evidenced by recent resolutions by the American Medical Association[220] and the American Psychological Association.[221]

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216. Laurence & Perry, *Hypnotically Created Memory Among Highly Hypnotizable Subjects*, 222 SCIENCE 523 (1983).

217. *Id.* at 524.

218. *Id.* Said one subject, "I'm pretty damned certain. I'm positive I heard those noises." *Id.*

219. *Id.* In a real life situation, the authors conclude, when the witness is more emotionally involved and motivated to cooperate, his " 'recall' could lead to a false but positive identification and to all of the legal procedures and penalties that this implies." *Id.*

220. An American Medical Association Council on Scientific Affairs committee, headed by Dr. Orne, declared in December 1984 that "recollections under hypnosis are too shaky for the witness stand." Ritter, *Hypnotized Witnesses Spark Legal Dilemmas*, L.A. Times, Feb. 10, 1985 § I, at 2, col. 6 (quoting the AMA Committee). The committee found "no evidence to indicate that there is an increase of only accurate memory during hypnosis [and that] there is no way for either subject or hypnotist to distinguish between those recollections which may be accurate and those which may be pseudomemories." *Id.* The same committee, in April 1985, similarly concluded that "recall of past events, even ones that are traumatic, does not improve with hypnosis." *Use of Hypnosis To Aid Memory Faulted By AMA*, Wash. Post, Apr. 5, 1985, at A5, col. 1. The panel recommended that hypnosis be limited to investigations and be conducted by qualified psychologists or psychiatrists. *Id.*

221. The American Psychological Association's policymaking council approved a resolution in August 1986 declaring that nonprofessionals should not use or be trained to use hypnosis, a position directly affecting 5000 to 10,000 police officers already trained to use hypnosis. Hilts, *supra* note 185, at A3, col. 1.

B. *Judicial Rejection of Testimony Enhanced by Pretrial Hypnosis*

The evidence accumulated by the relevant scientific community leads to an unmistakable conclusion: The use of hypnosis to enhance a witness' ability to testify in court taints that testimony and renders it inadmissible. The remaining question concerns which legal framework a state or federal court may use to exclude hypnotically refreshed testimony. State courts generally align themselves with one of three distinct approaches when confronted with this issue: the *Harding* credibility position,[222] the *Hurd* procedural safeguards approach,[223] or the *Frye* general acceptance stance.[224] Although federal courts historically have followed the *Harding* credibility approach,[225] they recently have shown a willingness to find hypnotically enhanced testimony inadmissible under certain circumstances.[226] The following analysis (1) supports the trend in state courts toward per se admissibility under *Frye* and its general acceptance in the scientific community and (2) urges the federal courts to move away from *Harding* toward outright inadmissibility by relying on Federal Rule of Evidence 403.

1. The State Courts: Inadmissibility Based on *Frye*

Neither *Harding* nor *Hurd* demonstrates a realistic understanding of hypnosis as a means of refreshing a witness' memory. *Harding*'s treatment of hypnosis as another case of present recollection refreshed ignores the basic fact that refreshing a witness' memory by means of a document is far simpler analytically than attempting to refresh the same witness' memory through hypnosis. This distinction is evident in the two traditional safeguards underlying the present recollection refreshed doctrine: courts (1) may bar certain writings from refreshing a witness' memory and (2) require that opposing parties be allowed to inspect any writing permitted, cross-examine the witness thereon, and introduce into evidence portions of the writing relating to the witness' testimony.[227] Because the hypnotic session is conducted outside of the courtroom and is an ephemeral means of refreshing memory, neither of these safeguards are present to protect the opposing party.[228]

More importantly, hypnosis to refresh a witness' memory calls into question the *Harding* principle itself under which the matter of hypno-

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222. *See supra* notes 24-32 and accompanying text.

223. *See supra* notes 33-45 and accompanying text.

224. *See supra* notes 46-72 and accompanying text.

225. *See, e.g.*, Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974); *see also supra* notes 77-87 and accompanying text.

226. *See supra* notes 88-103 and accompanying text.

227. Note, *supra* note 31, at 233.

228. *Id.* at 244-45.

sis should affect only the credibility of the witness' testimony. A witness who has memory gaps and confabulates during hypnosis may become convinced that any posthypnotic recall is accurate. Moreover, meaningful cross-examination would no longer be available to attack the credibility and the accuracy of the witness' recall;[229] thus, the *Harding* approach obstructs the traditional protections provided by cross-examination.

Hurd also subsists on a faulty premise. The *Hurd* court based its procedural safeguards position on the expectation that, if used properly, hypnosis can restore a witness' memory to a level "comparable to normal recall in its accuracy."[230] The scientific literature, however, reveals that hypnotically enhanced memory is unlike an ordinary eyewitness' memory. The fact that a witness' recall can be influenced so easily and even irrevocably altered by a hypnotist's suggestion reveals the danger that once a person undergoes hypnosis, that person's memory on the topics covered during the session will never again be comparable to normal recall. Thus, the scientific evidence indicates that hypnotically refreshed recall and normal recall are by nature irreconcilable concepts.

Moreover, Dr. Orne, the scientist who first proposed the *Hurd* procedural guidelines,[231] now rejects those safeguards as a means of ensuring the reliability of hypnotically enhanced testimony. Dr. Orne values the guidelines only as an aid in determining exactly what the hypnotic session entailed. These guidelines do not prevent the subject from confusing pre-hypnosis with post-hypnosis memories, the latter having been altered by the procedure.[232] Despite these safeguards, the subject may place "undue confidence" in "distorted recollections."[233] The opinions an inventor has on the effectiveness of his invention should be given considerable weight; likewise, Dr. Orne's concern that his guidelines do not ensure reliability demands special respect and attention by courts considering reliance on these safeguards.

Courts following the *Hurd* approach should join a growing number of state courts that have adopted a per se inadmissibility approach founded on *Frye*'s test of general scientific acceptance. Although some may question whether *Frye* is even relevant to hypnotically refreshed

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229. Note, *Excluding Hypnotically Induced Testimony on the "Hearsay Rationale,"* 20 VAL. U.L. REV. 619, 634 (1986). After hypnosis, "a witness' veracity for his posthypnotic memory may be so strong at trial that ordinary indicia of unreliability brought out during cross-examination are erased." *Id.* at 633. In contrast, "[d]uring cross-examination, most witnesses not subjected to pretrial hypnosis will communicate uncertainties concerning their recall of an event." *Id.*

230. State v. Hurd, 86 N.J. 525, 538, 432 A.2d 86, 92 (1981).

231. *See supra* note 42 and accompanying text.

232. Orne, Soskis, Dinges & Orne, *supra* note 206, at 210.

233. *Id.*

testimony,[234] past application of *Frye* indicates that its use in this context is a logical extension of *Frye*'s purpose—to ensure the reliability of testimony.[235] As the California Supreme Court once noted, *Frye* serves the "salutary purpose of preventing the jury from being misled by unproven and ultimately unsound scientific methods."[236] Although *Frye* imposes a substantial barrier to the admission of potentially relevant evidence,[237] the occasional exclusion of relevant evidence is a small price to pay for ensuring integrity in the confrontational aspect of the legal system. By adhering to a *Frye* threshold test, a court can decide any reliability question quickly and uniformly.[238] This test guarantees that one side will not be prejudiced by the improper admission of evidence derived from an unaccepted scientific technique. All state courts, therefore, should adhere to the *Frye* approach by excluding inherently unreliable testimony produced through hypnotic means of memory refreshment.[239]

2. The Federal Courts: Inadmissibility Based on Federal Rule of Evidence 403

The enactment of the Federal Rules of Evidence, which went into effect in 1975, conceivably prevents the federal courts from adopting a *Frye* test of general scientific acceptance to find hypnotically refreshed

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234. The *Frye* standard technically is concerned with the admissibility of expert opinion deduced from the results of a new scientific technique. *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

235. *See generally* E. CLEARY, *supra* note 4, § 203.

236. People v. Shirley, 31 Cal. 3d 18, 53, 641 P.2d 775, 795, 181 Cal. Rptr. 243, 264 (en banc), *cert. denied*, 459 U.S. 860 (1982). *See generally supra* notes 53-68 and accompanying text.

237. *See* Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 OHIO N.U.L. REV. 1, 21 (1977).

238. As one commentator aptly noted: "When another approach is taken, there exists the danger that the reliability of a particular technique will become the central issue in each case, distracting the fact finder from the underlying merits of the case. In addition, a case-by-case determination would encourage hopeless disharmony in the lower courts. . . ." Ruffra, *supra* note 187, at 316.

239. This Recent Development endorses the four limitations on per se inadmissibility outlined in People v. Shirley, 31 Cal. 3d, 641 P.2d 775, 181 Cal. Rptr. 243 (en banc), *cert. denied*, 459 U.S. 860 (1982), particularly regarding the use of hypnosis for investigative purposes. *See supra* notes 66-67 and accompanying text. The use of hypnosis should be subject, of course, to substantial compliance with the guidelines recently recommended by Dr. Orne and his colleagues. *See supra* note 209 and accompanying text. In this regard, law enforcement officials in jurisdictions which have not established a clear position in this area will face a dilemma. As one commentator noted:

> [I]nvestigators who wish to use hypnosis as an investigative tool are placed in the unenviable position of having to guess whether the testimony of a witness who has undergone hypnosis will be admissible in court. . . .Therefore, law enforcement officials should be selective in their use of hypnosis and should follow procedures that grant them the greatest likelihood of admissibility.

Kingston, *supra* note 184, at 28.

testimony inadmissible per se. According to some commentators, Rule 703, with its "reasonable reliance" standard for certain expert testimony, implicitly abolished the *Frye* standard.[240] Federal courts skeptical about hypnotically enhanced evidence, therefore, should utilize an alternative framework of analysis, Rule 403 of the Federal Rules of Evidence.[241] Under this analysis, as with any other type of evidence, a court would analyze both the probative value of the evidence and the detrimental effects of its admission.[242]

In *Valdez* the Fifth Circuit became the first federal court to adopt this case-by-case approach to hypnotically refreshed testimony.[243] The Eighth Circuit subsequently adopted a similar approach in *Sprynczynatyk*.[244] Both cases reveal a growing reluctance to admit automatically testimony that has been hypnotically refreshed.[245] The *Valdez* court stated a rule of per se inadmissibility limited to certain cases involving personal identification, with the use or nonuse of proper procedures during hypnosis affecting the admissibility of other kinds of testimony. In contrast, the *Sprynczynatyk* court expressly created a hybrid approach, combining *Hurd*'s procedural safeguards and Rule 403's balancing approach.

Clearly, the federal courts are heading in the right direction. Rule 403 is the proper vehicle for this movement.[246] The scientific commu-

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240. Rule 703 permits experts to rely on facts or data not otherwise admissible as long as they are "reasonably relied upon by experts in the particular field." FED. R. EVID. 703; *see also* FED. R. EVID. 702. According to Professor McCormick, "reasonable reliance" is not synonymous with the *Frye* standard of "general acceptance." E. CLEARY, *supra* note 4, § 203, at 607. The commentators also observe that Rule 703 fails to address *Frye*. For a general discussion of this argument, see Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197, 1228-31 (1980). *See also* Hawthorne v. State, 470 So. 2d 770, 782-87 (Fla. Dist. Ct. App. 1985) (Ervin, C.J., concurring and dissenting).

241. FED. R. EVID. 403 reads as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

242. Note, *supra* note 19, at 1220.

243. United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984); *see supra* notes 96-103 and accompanying text.

244. Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1263 (1986); *see supra* notes 166-77 and accompanying text.

245. *See supra* notes 77-87 and accompanying text. It is unfortunate that the federal courts lag behind the states on this issue. The cause of this developmental gap, as explained recently by a New York attorney, is that the federal courts "deal with cases involving hypnosis so infrequently." Coyle, *Use of Hypnosis Still a Puzzle to Nation's Courts*, Nat'l Law J., June 8, 1987, at 1, col. 4 & at 20, cols. 3-4 (quoting Ira Mickenberg, former professor of law, University of Dayton). Regardless, this author shares the attorney's frustration: "I can't see any reason why the federal rule should be any different than the majority rule in the states." *Id.* at 20, col. 4.

246. To the extent that a state has adopted a variation of the Federal Rules of Evidence supplanting *Frye*, the state should analyze the admissibility of hypnotically refreshed testimony

nity has established persuasively that hypnotically refreshed testimony is unreliable. Even though an approach based on Rule 403 does not possess the benefits of a uniform rule of per se inadmissibility based on *Frye*, the rule is the best device available under the Federal Rules of Evidence.[247] If the decisions of the Fifth and Eighth Circuits are any indication, federal courts will apply Rule 403 stringently against hypnotically enhanced testimony. These courts recognized the prejudicial impact that admission of this testimony can have in misleading a jury.[248] Thus, all federal courts should adopt the *Valdez-Sprynczynatyk* approach to exclude on the basis of Rule 403 any testimony tainted by the pretrial use of hypnosis to enhance recall.[249]

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with Rule 403. These states, through a different vehicle, should nevertheless reach the same result as before. As Professor McCormick has opined, the courts that have adopted "a strict exclusionary rule" under *Frye* should "probably" reach the same result "by inquiring directly into the relative costs and benefits of the testimony." E. CLEARY, *supra* note 4, § 206, at 633. The Alaska Supreme Court in Contreras v. State, 718 P.2d 129 (Alaska 1986), *see supra* notes 143-65 and accompanying text, provided a model of how a state court can apply its own Rule 403 to find such testimony inadmissible. Of course, the court refused to interpret the silence regarding the *Frye* test to indicate that *Frye* is no longer good law. The *Contreras* court "believe[d] it unlikely that this silence was meant to overturn long-established rules of admissibility based on *Frye*." 718 P.2d at 136.

247. One commentator would exclude hypnotically enhanced testimony for the same reasons that hearsay testimony is excluded. "This is not to say that hypnotically induced testimony should be excluded as hearsay, but that it should be excluded on the rationale which excludes hearsay testimony." *See* Note, *supra* note 229, at 624. However, it would seem preferable for a judge to exclude such evidence under a specific rule, like Rule 403, rather than refer to nebulous policy grounds more susceptible to attack on appeal. In the alternative, one could base a claim on behalf of a criminal defendant on the confrontation clause of the sixth amendment. *See* U.S. CONST. amend. VI. This kind of claim has succeeded at the state level. *See Contreras*, 718 P.2d at 138; *see also supra* notes 157-64 and accompanying text. Finally, one could argue cogently that admission of hypnotically induced testimony violates due process under either the fifth or fourteenth amendments. *See, e.g.*, Little v. Armontrout, 819 F.2d 1425 (8th Cir.), 835 F.2d 1240 (8th Cir. 1987).

248. *Hypnosis*, *supra* note 5, at 67. The famous hypnotist known as "The Amazing Kreskin" immediately criticized the United States Supreme Court ruling permitting previously hypnotized criminal defendants to testify, *see* Rock v. Arkansas, 107 S. Ct. 2704 (1987); *see also supra* note 9 and accompanying text, by arguing against the effectiveness and the very validity of hypnosis. *"Amazing Kreskin" Challenges Supreme Court Hypnosis Ruling*, UPI wire, June 23, 1987 (available on NEXIS). Stating that his act is not based on hypnotic trances, but rather manipulation of the mind and imagination, Kreskin declared that allowing testimony based on hypnotism "can just open a Pandora's box in the court room . . . My feeling is that, in something as serious as criminal investigations, the business of believing that you can put people into a trance is playing with wildfire." *Id.* Kreskin is offering $100,000 to anyone who can prove that he is wrong and hypnotism is not a sham. *Id.*

249. Since these two cases were decided, there has been further, if somewhat uneven, development along the same line. The Eighth Circuit has itself boosted the *Valdez-Sprynczynatyk* approach. In Little v. Armontrout, 835 F.2d 1240 (8th Cir. 1987), the full court, in a 9-0 decision, held that the denial of a state-provided expert on hypnosis to assist Little, an indigent defendant, rendered his trial fundamentally unfair, requiring his conviction to be set aside. The court thereby extended the protections of indigent defendants first recognized in Griffin v. Illinois, 351 U.S. 12 (1956) and Douglas v. California, 372 U.S. 353 (1963). In the process, the court perceived the dangers in allowing the state to present its own expert at the suppression hearing considering the admissihility of hypnotically enhanced testimony without providing at the state's expense "a simi-

V. CONCLUSION

The trend toward greater inadmissibility of hypnotically refreshed testimony displayed by state and federal courts is a positive outgrowth of increasing scientific criticism of this specific forensic use of hypnosis. State courts using the *Frye* test will find that the use of hypnosis to refresh a witness' recall for subsequent testimony in court has been rejected by the relevant scientific community as being too unreliable, even with the most intricate procedural safeguards. Federal courts, unfortunately, are unable to rely on *Frye* because the Federal Rules of Evidence may preempt the *Frye* test. Rule 403, however, provides a sufficient means to reach the same end sought under *Frye*. By finding that the prejudicial impact inherent in admitting hypnotically enhanced testimony outweighs its probative value, federal courts will reach a result identical to that under *Frye*'s conclusion that the testimony is inadmissible.

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lar weapon to the defendant." Underlying this ruling was the court's concern over the three-fold "perils" of such testimony, namely the potential for confabulation, suggestibility, and memory-hardening. *Little*, 835 F.2d at 1244; *see supra* notes 188-210 and accompanying text.

Unfortunately, other circuit courts of appeal have not come as far as the Fifth and Eighth Circuits, although they do show promise. For example, the Fourth Circuit avoids any per se rules, preferring instead to focus on "whether the in-court testimony of a previously hypnotized witness has a basis which is in fact independent of hypnotic influence." Harker v. Maryland, 800 F.2d 437, 441 (4th Cir. 1986); *accord* McQueen v. Garrison, 814 F.2d 951 (4th Cir. 1987). Similarly, the Seventh Circuit currently gives "careful scrutiny" to whether under the circumstances there was "any likelihood" that "the effect, if any, of hypnosis on the evidence was unfair." United States v. Kimberlin, 805 F.2d 210, 219 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 3270 (1987). Although the Seventh Circuit has declined to adopt the *Hurd* safeguards, it has suggested that more specific rules "may evolve in this circuit." *Id.* The court has laid the groundwork: "We recoguize that adherence to [*Hurd*] standards would be prophylactic against the dangers of the use of hypnosis, and would aid courts in making determinations concerning the reliability of the testimony of persons who had been under hypnosis." *Id.* Similarly, the Tenth Circuit has held that "[a] reviewing court must determine whether safeguards have been employed to insure reliability of the testimony to make it admissible." Robison v. Maynard, 829 F.2d 1501, 1508 (10th Cir. 1987). Finally, the Sixth Circuit, in Beck v. Norris, 801 F.2d 242 (6th Cir. 1986), effectively adopted the Ninth Circuit approach as espoused in United States v. Adams, 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); *see supra* notes 88-95 and accompanying text, by adhering to State v. Glebock, 616 S.W.2d 897 (Tenn. Crim. App. 1981), in which the Tennessee court applied the *Adams* rule. Clearly, then, the federal circuits are shifting away from the rule of per se admissibility, albeit not in lockstep fashion.