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HYPNOTIC EVIDENCE

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In 1897, the California Supreme Court wrote that "the law of the United States does not recognize hypnotism." *People v. Ebanks*, 117 Cal. 652, 665, 49 P. 1049, 1053 (1897). In 1902, a Yale Law Journal article warned against the dangers of hypnotically influenced evidence. Ladd, *Legal Aspects of Hypnotism*, 11 Yale L.J. 173, 187-89 (1902). Nevertheless, the admissibility of hypnotically refreshed testimony is one of the most litigated evidentiary issues currently confronting the courts. The judicial response to this issue has varied. Some courts have upheld admissibility, while others have rejected it. Still other courts have imposed various conditions on admissibility.

This article examines the admissibility of hypnotically influenced statements and testimony.

THE TECHNIQUE

Hypnosis is a state of heightened concentration with a concomitant diminished awareness of peripheral events. See *Encyclopedia Britannica* 133 (15th ed. 1977) (hypnosis "refers to a sleeplike state that nevertheless permits a wide range of behavioral responses to stimulation"). The various techniques of hypnotic induction involve establishing rapport between the subject and hypnotist; inducing a passiveness that makes the subject receptive to suggestion, often by engendering eye fatigue through the focusing on a close object; and inducing a trance-like state through a series of suggestions. One widely employed procedure is called hypnotic age regression, during which the subject relives an event which has occurred in the past.

Hypnosis has been recognized as a legitimate subject of clinical and laboratory research. It is also an accepted medical technique for psychotherapy, the treatment of psychosomatic illnesses, anesthesia, and memory recall. See Council on Medical Health of the American Medical Association, *Medical Use of Hypnosis*, 168 J.A.M.A. 186 (1958).

Distinguishing between the clinical and forensic

use of hypnosis is critical. As one commentator has noted:

The clinical use of hypnosis is very different from the forensic use. The police officer is concerned with establishing facts. Psychiatrists and psychologists use hypnosis in an effort to alleviate distress. Hypnosis helps to build a trusting relationship between doctor and patient which is important in the treatment process. It can help the patient work out symptoms even though his or her beliefs about his or her illness are entirely erroneous. Dentists, obstetricians, and anesthesiologists use hypnosis entirely for the control of pain. Levitt, *The Use of Hypnosis to "Freshen" the Memory of Witnesses or Victims*, Trial 56-58 (Apr. 1981).

Notwithstanding this difference, the use of hypnosis in crime investigation has become widespread in recent years. Two factors may account for this trend. First, the "technique of hypnosis induction is easily learned. A police officer can become a reasonably skilled hypnotist in a few hours of practice, with or without formal instruction." Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 Cal. L. Rev. 313, 314 (1980). Second, a number of books and articles on the subject have advocated its use. See H. Arons, *Hypnosis in Criminal Investigation* (1967); W. Bryan, *Legal Aspects of Hypnosis* (1962); M. Teitelbaum, *Hypnosis Induction Techniques* (1969); Reiser, *Hypnosis as a Tool in Criminal Investigation*, Police Chief 36 (Nov. 1976). The value of these works, however, is suspect. One expert has written: "These books make extravagant claims of the usefulness and reliability of hypnosis for criminal investigative purposes." Diamond, *supra*, at 313 n.3.

THE STANDARD

The initial question in determining the admissibility of hypnotically enhanced evidence concerns the applicable standard. In considering scientific evidence, most jurisdictions follow the general acceptance standard, first set forth in *Frye v. U.S.*, 293 F. 1013 (D.C. 1923). Under the *Frye* test, evi-

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dence derived from a new scientific technique is admissible only if it is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014.

While the *Frye* test is the majority rule, a number of courts have rejected it. See *U.S. v. Williams*, 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979) (voiceprints); *State v. Hall*, 297 N.W.2d 80 (Iowa 1980) (blood tests); *State v. Williams*, 388 A.2d 500 (Me. 1978) (voiceprints). See generally Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 Colum. L. Rev. 1197 (1980); McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 Iowa L. Rev. 879 (1982); Note, *Expert Testimony Based on Novel Scientific Techniques: Admissibility Under the Federal Rules of Evidence*, 48 Geo. Wash. L. Rev. 774 (1980).

Even in those jurisdictions that have adopted the *Frye* test, the question remains whether that test should be applied to hypnotically enhanced evidence. This issue is discussed later in this article in connection with the various cases that have addressed it.

HYPNOTICALLY INDUCED STATEMENTS

Hypnotically influenced evidence can be used in several different ways. For example, statements made by a witness while hypnotized may be offered at trial. In addition, the testimony of a witness whose memory has been "refreshed" by hypnosis prior to trial may be offered.

Courts have uniformly rejected statements made while the subject is hypnotized and offered for the truth of the matters asserted. In the leading case, *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974), the defendant, who claimed no recollection of the charged offense, offered statements about the offense that he made while hypnotized. The Virginia Supreme Court held the statements inadmissible. The court rested its decision on the unreliability of such statements: "Most experts agree that hypnotic evidence is unreliable because a person under hypnosis can manufacture or invent false statements. . . . A person under a hypnotic trance is also subject to heightened suggestibility." *Id.* at 419. In a subsequent habeas corpus proceeding, a federal district court agreed. In rejecting the defendant's due process argument, asserted under the authority of *Chambers v. Mississippi*, 410 U.S. 284 (1973), the court wrote: "[T]he very reason for excluding hypnotic evidence is due to its potential unreliability." *Greenfield v. Robinson*, 413 F. Supp. 1113, 1120 (W.D. Va. 1976).

Other courts have reached the same result. See *Rodriguez v. State*, 327 So.2d 903 (Fla. App. 1976); *Emmett v. State*, 232 Ga. 110, 115, 205 S.E.2d 231, 235 (1974); *Strong v. State*, 435 N.E.2d 969 (Ind. 1982); *State v. Conley*, 6 Kan. App.2d 280, 285, 627 P.2d 1174, 1178 (1981); *State v. Pusch*, 77 N.D. 860, 886-88, 46 N.W.2d 508, 521-22 (1950); *State v. Harris*, 241 Or. 224, 237, 405 P.2d 492, 498 (1965); *People v. Harper*, 111 Ill. App.2d 204, 209, 250 N.E.2d 5, 7 (1969); *People v. Hangsleben*, 86 Mich.

App. 718, 727-30, 273 N.W.2d 539, 543-44 (1978); *Jones v. State*, 542 P.2d 1316, 1326-28 (Okla. Crim. 1975); *State v. Pierce*, 263 S.C. 23, 30, 207 S.E.2d 414, 418 (1974). See also Annot., 92 A.L.R.3d 442 (1979).

In *People v. Blair*, 25 Cal.3d 640, 159 Cal. Rptr. 818, 602 P.2d 738 (1979), the California Supreme Court also held that hypnotic statements were inadmissible. In addition, the court rejected the defendant's constitutional argument that the exclusion of such evidence denied him the right to present defense evidence under *Chambers v. Mississippi*. According to the court, "the trial court's ruling [of exclusion] did not elevate a fastidious adherence to the technicalities of the law of evidence over the right to a fair trial. For here, unlike *Chambers*, there was no solid assurance that the hearsay statements were reliable." 25 Cal.3d at 665. As one commentator has noted, these decisions are supported by scientific data:

[E]xperience with a research design where deeply hypnotized subjects and un hypnotizable subjects instructed to feign hypnosis are seen by hypnotists who are unaware of the subjects' actual status. . . . has shown that it is possible to deceive even highly experienced hypnotists. . . . Not only can individuals fake hypnosis, but even subjects who are genuinely in deep hypnosis are nonetheless able to wilfully lie. . . . Orne, *The Use and Misuse of Hypnosis in Court*, in 3 *Crime and Justice: An Annual Review of Research* 61, 64 (ed. M. Toney & H. Morris 1982).

HYPNOTICALLY REFRESHED TESTIMONY

Harding v. State

The seminal case on the admissibility of hypnotically refreshed testimony is *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969). The witness in that case, Mildred Coley, was found wounded by a roadside, the apparent victim of a sexual assault. She was in a state of shock and could not remember what had occurred. After hypnosis, she provided information incriminating the defendant. The court summarily dismissed the defendant's objection to her testimony, stating:

The admissibility of Mildred Coley's testimony concerning the assault with intent to rape causes no difficulty. On the witness stand she recited the facts and stated that she was doing so from her own recollection. The fact that she had told different stories or had achieved her present knowledge after being hypnotized concerns the question of the weight of the evidence which the trier of facts, in this case, the jury, must decide. 246 A.2d at 306.

During the next decade a number of courts followed the *Harding* precedent and admitted hypnotically refreshed testimony. The federal cases include: *U.S. v. Awkard*, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); *U.S. v. Adams*, 581 F.2d 193, 198 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); *Kline v. Ford Motor Co.*, 523 F.2d 1067, 1069-70 (9th Cir. 1975); *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506, 509-10 (9th Cir. 1974); *U.S. v. Narciso*, 446 F. Supp. 252, 281-82 (E.D. Mich. 1977). See also Annot., 50 A.L.R. Fed. 602 (1980).

The state cases include: *People v. Diggs*, 112 Cal. App. 3d 522, 169 Cal. Rptr. 386 (1980); *Clark v. State*, 379 So.2d 372, 375 (Fla. App. 1980); *Creamer v. State*, 232 Ga. 136, 138, 205 S.E.2d 240, 242 (1974); *People v. Smrekar*, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979); *State v. Greer*, 609 S.W.2d 423, 435-36 (Mo. App. 1980), *vacated on other grounds*, 450 U.S. 1027 (1981); *State v. McQueen*, 295 N.C. 96, 119-22, 244 S.E.2d 414, 427-29 (1978); *State v. Jorgensen*, 8 Or. App. 1, 9, 492 P.2d 312, 315 (1971).

Although admitting hypnotically refreshed testimony, some of these courts began to scrutinize this evidence more critically than did the *Harding* court. For example, the Ninth Circuit in *Adams* noted: "We are concerned, however, that the investigatory use of hypnosis on persons who may later be called upon to testify in court carries a dangerous potential for abuse. Great care must be exercised to insure that statements after hypnosis are the product of the subject's own recollection, rather than of recall tainted by suggestions received while under hypnosis." 581 F.2d at 198-99. The court also suggested several procedural safeguards: "We think that, at a minimum, complete stenographic records of interviews of hypnotized persons who later testify should be maintained. Only if the judge, jury, and the opponent know who was present, questions that were asked, and the witness's responses can the matter be dealt with effectively. An audio or video recording of the interview would be helpful." *Id.* at 199 n.12.

Similarly, the Illinois appellate court in *Smrekar* did not automatically accept the witness' statements that her testimony was based on her own recollection. Rather, the court also considered other factors: "(1) the hypnotist was shown to be competent, (2) the evidence indicated that suggestion was not used in the hypnosis, (3) the identification was corroborated by other substantial evidence unknown to the witness at the time she made positive identification of the defendant, and (4) the evidence showed that at the time of the occurrence, the witness had ample opportunity to view him." 385 N.E.2d at 855.

State v. Mack

One of the first cases to reject the trend toward admissibility of hypnotically refreshed testimony was *State v. Mack*, 292 N.W.2d 764 (Minn. 1980). Mack was charged with criminal sexual conduct and aggravated assault. The alleged victim was initially unable to recall the circumstances under which she was injured. After hypnosis, she recalled the details of Mack's involvement. On appeal, the defendant contended that hypnotically refreshed testimony was inadmissible because it failed to meet the *Frye* general acceptance test. The Minnesota Supreme Court agreed. The court found several problems with such testimony. First, the "hypnotized subject is highly susceptible to suggestion, even that which is subtle and unintended." Second, the "hypnotized subject is influenced by a need to 'fill gaps.'" Third, the subject is influenced by a "desire to please either the hypnotist or others who have asked the person

hypnotized to remember and who have urged that it is important that he or she remember certain events." Fourth, "there is no way to determine from the content of the 'memory' itself which parts of it are historically accurate, which are entirely fanciful, and which are lies." Finally, a memory "produced under hypnosis becomes hardened in the subject's mind. A witness who was unclear about his 'story' before the hypnotic session becomes convinced of the absolute truth of the account he made while under hypnosis." *Id.* at 768-69. See also *State v. Koehler*, 312 N.W.2d 108 (Minn. 1981) (reaffirming *Mack*).

State v. Mena

Following *Mack*, the Arizona Supreme Court considered the issue in *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981). It also rejected admissibility. The court found the reasoning of the cases admitting hypnotically refreshed testimony flawed because those cases relied on two assumptions: (1) that witnesses' statements that they were testifying from their own recollections were reliable and (2) that cross-examination would permit the jury to assess adequately the witnesses' testimony. According to the court, the assumption that a witness is capable of determining that "what he perceives as his recollection actually came from his prior observations as opposed to impressions planted in his memory through hypnosis. . . is contrary to the opinion held by many authorities. . . ." *Id.* at 1278. Moreover, the "faith which. . . courts place in the power of cross-examination also seems misplaced. . . [because the witness] will often be more convinced of the accuracy of such hypnotically induced memories than those recalled due to the witness' actual observations." *Id.*

Accordingly, the court held that hypnotically refreshed testimony failed to satisfy the *Frye* general acceptance test: "[U]ntil hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion or fantasy, we feel that testimony of witnesses which has been tainted by hypnosis should be excluded in criminal cases." *Id.* at 1279.

More importantly, the court also rested its decision on constitutional grounds:

As mentioned above, there is a strong belief among several authorities that hypnotism of a witness renders subsequent cross-examination ineffective. . . . Until the general scientific reliability of hypnosis as an effective and accurate memory enhancer has been established and/or the barriers which it raises to effective cross-examination are somehow overcome, we think the confrontation clause of the Sixth Amendment requires [exclusion of the testimony]. *Id.* at 1280.

As discussed later, *Mena* was modified in one respect in *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982).

State v. Hurd

The next decided case, *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981), is important because the

New Jersey Supreme Court, although recognizing the problems with hypnotically refreshed testimony, did not hold such evidence inadmissible. Instead, the court ruled that hypnotically refreshed testimony may be admissible if the trial court finds that "the use of hypnosis and the procedure followed in the particular case was a reasonably reliable means of restoring the witness' memory." *Id.* at 95.

In addition, the court adopted a number of procedural requirements that had been proposed by Dr. Martin Orne, an expert on hypnosis. *See infra*. 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." Fourth, "before inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them." Fifth, "all contacts between the hypnotist and the subject must be recorded." According to the court, the "use of videotape, the only effective record of visual cues, is strongly encouraged but not mandatory." 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 96-97. These requirements are designed to prevent suggestion, both intentional and unintentional, and to preserve a record for review.

The court also held that the party seeking to introduce hypnotically refreshed testimony must establish its admissibility by clear and convincing evidence. *Id.* at 97. According to the court, the prosecution failed to satisfy this burden in the *Hurd* case. The court was especially concerned about the conduct of a detective who repeatedly encouraged the witness to make an identification and to overcome any doubts that the witness expressed about that identification.

One other point deserves comment. The *Hurd* court held that the use of hypnotically refreshed testimony met the general acceptance test of *Frye*, at least under certain conditions. In this respect, the court specifically rejected the conclusions of the courts in *Mena* and *Mack*. According to the *Hurd* court, the issue was not whether hypnosis is "generally accepted as a means of reviving truthful or historically accurate recall." *Id.* at 92. Instead, the issue is whether hypnosis "is able to yield recollections as accurate as those of an ordinary witness, which likewise are often historically inaccurate." *Id.*

Post-Hurd Cases

The cases decided immediately after *Hurd* fall into three groups. First, several cases adopted the *Hurd* approach, applying procedural safeguards as a precondition to admissibility. *See State v. Beachum*, 97 N.M. 682, 643 P.2d 246, 253-54 (App.

1981); *People v. McDowell*, 103 Misc.2d 831, 427 N.Y.S.2d 181 (1980) (specifying 9 requirements); *People v. Lewis*, 103 Misc.2d 881, 427 N.Y.S.2d 177 (1980). *See also* *People v. Lucas*, 107 Misc.2d 231, 435 N.Y.S.2d 461 (1980).

A second group of cases adopted a *per se* rule of exclusion, rejecting the *Hurd* safeguards as inadequate. For example, the Supreme Court of Pennsylvania rejected the use of hypnotically refreshed testimony in *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981), holding that such testimony did not satisfy the *Frye* general acceptance test. The court commented:

The *Hurd* court's rationale that hypnotically-refreshed recollection might as well be admissible since ordinary eyewitness accounts are also vulnerable to error and inaccuracies does not do full justice to the fact that "the traditional guaranties of trustworthiness as well as the jury's ability to view the demeanor of the witness are wholly ineffective to reveal distortions of memory induced by hypnotic process." . . . It is unchallenged that a jury can more critically analyze a witness' ability to perceive, remember, and articulate his recollections when such testimony has not been hypnotically-refreshed. *Id.* at 177.

See also *People v. Gonzales*, 108 Mich. App. 145, 310 N.W.2d 306 (1981); *Palmer v. State*, 210 Neb. 206, 313 N.W.2d 648 (1981).

Finally, in *Chapman v. State*, 638 P.2d 1280 (Wyo. 1982), the Wyoming Supreme Court upheld the admissibility of hypnotically refreshed testimony. The court recognized the split in other jurisdictions, but followed the "majority" of courts which have held that the influence of hypnosis affects the credibility, not the competence, of the witness. The court specifically declined to adopt the *Hurd* safeguards, although it commented that adherence to these safeguards may be advisable. *Id.* at 1283. *See also* *Commonwealth v. Juvenile*, 412 N.E.2d 339 (Mass. 1980) (remand for findings on reliability of hypnotically aided testimony).

People v. Shirley

The most comprehensive decision on the admissibility of hypnotically refreshed testimony was written by the California Supreme Court in *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982). After discussing the evolution of judicial opinion on the subject, the court found the "safeguards" announced in *Hurd* to be inadequate. According to the court, those safeguards did not protect against many of the dangers associated with hypnotically refreshed testimony:

[W]e observe that certain dangers of hypnosis are not even addressed by the *Hurd* requirements: virtually all of those rules are designed to prevent the hypnotist from exploiting the suggestibility of the subject; none will directly avoid the additional risks, recognized elsewhere in *Hurd*, that the subject (1) will lose his critical judgment and begin to credit "memories" that were formerly viewed as unreliable, (2) will confuse actual recall with confabulation and will be unable to distinguish between the two, and (3) will exhibit an unwarranted confidence in the validity of his ensuing recollection. *Id.* at 255.

The court next held that the *Frye* general accept-

ance test was the applicable standard for determining the admissibility of hypnotically refreshed testimony, rejecting arguments that the *Frye* test applied only to expert testimony or to new techniques involving physical evidence. *Id.* at 263-64. The court also explicitly rejected an earlier California decision, *People v. Diggs*, 112 Cal. App. 3d 522, 169 Cal. Rptr. 386 (1980), which had found that hypnotically refreshed testimony satisfied the *Frye* test. Finally, after canvassing the scientific literature on the subject, the court found that hypnotically refreshed testimony was not generally accepted by the scientific community. *Id.* at 272.

In the course of its opinion, the court enumerated the principal dangers of such evidence:

1. Hypnosis is by its nature a process of suggestion, and one of its primary effects is that the person hypnotized becomes extremely receptive to suggestions that he perceives as emanating from the hypnotist. . . .

2. The person under hypnosis experiences a compelling desire to please the hypnotist by reacting positively to these suggestions, and hence to produce the particular responses he believes are expected of him. . . .

3. During the hypnotic session, neither the subject nor the hypnotist can distinguish between true memories and pseudomemories of various kinds in the reported recall; and when the subject repeats that recall in the waking state (e.g., in a trial), neither an expert witness nor a lay observer (e.g., the judge or jury) can make a similar distinction. . . .

4. Nor is such guarantee [of veracity] furnished by the confidence with which the memory is initially reported or subsequently related: a witness who is uncertain of his recollections before being hypnotized will become convinced by that process that the story he told under hypnosis is true and correct in every respect. *Id.* at 271-72.

The court, however, did outline several limitations on its holding. First, it noted that a "previously hypnotized witness is not incompetent in the strict sense. . . . Accordingly, if the prosecution should wish to question such a witness on a topic *wholly unrelated* to the events that were the subject of the hypnotic session, his testimony as to that topic would not be rendered inadmissible by the present rule." *Id.* at 273. Second, the court did not foreclose the use of hypnosis for "purely investigative purposes." *Id.* Third, the court held that the admission of hypnotically refreshed testimony is not "reversible *per se.*" *Id.* at 274.

Recent Cases

In *People v. Hughes*, 88 A.D.2d 17, 452 N.Y.S.2d 929 (1982), a New York appellate court ruled hypnotically refreshed testimony inadmissible on the grounds that such evidence had not achieved general acceptance under the *Frye* test. Until the issue is settled by the N.Y. Court of Appeals, *Hughes* would appear to overrule a number of N.Y. trial court opinions, cited above, that had permitted the use of such testimony.

In *Collins v. State*, 52 Md. App. 186, 447 A.2d 1272 (1982), the Maryland Court of Special Appeals overruled the *Harding* case, holding that hypnoti-

cally refreshed testimony had not been generally accepted by the scientific community as required by *Frye*. As noted above, *Harding* had been the seminal case admitting such evidence. In the interval between *Harding* and *Collins*, the court had upheld admissibility in *State v. Temoney*, 45 Md. App. 569, 414 A.2d 240 (1980), *vacated on other grounds*, 290 Md. 251, 429 A.2d 1018 (1981), and presaged the *Collins* result in *Polk v. State*, 48 Md. App. 382, 427 A.2d 1041 (1981), when it remanded that case for a trial court determination on the general acceptance issue.

In *Pearson v. State*, 441 N.E.2d 468 (Ind. 1982), the Indiana Supreme Court held that "the fact of hypnosis should be a matter of weight with the trier of fact but not a *per se* disqualification of the witness." *Id.* at 473. Thus, the controversy continues. The courts are divided into three groups: (1) those adopting a *per se* rule of exclusion, (2) those conditioning admissibility on compliance with procedural safeguards, and (3) those holding that hypnosis affects the weight, but not admissibility, of the evidence.

See also *Burnett v. State*, 32 Crim. L. Rptr. 2175 (Tex. Crim. App. Oct. 27, 1982) (en banc) (tape of prehypnotic interview of defendant protected by attorney-client privilege).

EXPERT OPINIONS

Two experts, Drs. Bernard Diamond and Martin Orne, have played influential roles in the court decisions. Indeed, in *People v. Shirley*, 31 Cal.3d 18, 641 P.2d 775, 181 Cal. Rptr. 234, 270 n.45 (1982), the California Supreme Court identified these two experts as the "most persuasive spokesmen for the relevant scientific community." Dr. Diamond's views are set forth in *Diamond, Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 Cal. L. Rev. 313 (1980):

I believe that once a potential witness has been hypnotized for the purpose of enhancing memory his recollections have been so contaminated that he is rendered effectively incompetent to testify. Hypnotized persons, being extremely suggestible, graft onto their memories, fantasies or suggestions deliberately or unwittingly communicated by the hypnotist. After hypnosis the subject cannot differentiate between a true recollection and a fantasy or a suggested detail. Neither can any expert or trier of fact. This risk is so great, in my view, that the use of hypnosis by police on a potential witness is tantamount to the destruction or fabrication of evidence. *Id.* at 314.

Dr. Martin Orne, the second expert, although in agreement with most of Dr. Diamond's positions, does differ in one important respect: he is unwilling to state categorically that hypnotically influenced testimony should never be used at trial. Instead, he has proposed a number of safeguards that should be followed before such testimony is admitted. These safeguards were initially incorporated in an amicus curiae affidavit which was filed in *Quaglino v. California*, *cert. denied*, 439 U.S. 875 (1978), and became the basis for the safeguards eventually adopted by the New Jersey Supreme Court in *Hurd*, *supra*. It is important to note that

these safeguards are minimum requirements. "Orne maintains that the use of these safeguards may not prevent contamination." Note, *The Use of Hypnosis to Refresh Memory: Invaluable Tool or Dangerous Device?*, 60 Wash. U.L.Q. 1059, 1075 (1982).

Dr. Orne has written:

[H]ypnosis may be useful in some instances to help bring back forgotten memories following an accident or a crime while in others a witness might, with the same conviction, produce information that is totally inaccurate. This means that material produced during hypnosis or immediately after hypnosis, inspired by hypnotic revivification, may or may not be historically accurate. As long as this material is subject to independent verification, its utility is considerable and the risk attached to the procedure minimal. There is no way, however, by which anyone—even a psychologist or psychiatrist with extensive training in the field of hypnosis—can for any particular piece of information determine whether it is an actual memory or a fabrication *unless* there is independent verification. Thus, there are instances when subsequently verified accurate license plate numbers were recalled in hypnosis by individuals who previously could not remember them. In the Chowchilla kidnapping case . . . , the license plate number was helpful in the initial investigation of the case (although ultimately not required in the courtroom because of the abundance of other evidence available). On the other hand, a good many license plate numbers that have been recalled under hypnosis by witnesses in other cases in fact belonged to cars and drivers none of which, as it turned out after investigation, could have been involved. Orne, *The Use and Misuse of Hypnosis in Court*, in 3 *Crime and Justice: An Annual Review of Research* 61, 73-74 (ed. M. Toney & N. Morris 1982).

PREHYPNOTIC TESTIMONY

Most of the cases discussed above focus on the admissibility of testimony or statements obtained during or after hypnosis. A related issue involves the admissibility of testimony concerning matters recalled prior to hypnosis. In *People v. Shirley*, *supra*, the California Supreme Court, while not foreclosing the investigative use of hypnosis, made it clear that a hypnotized witness was incompetent to testify about facts discussed in the hypnotic session. The witness, however, could testify about unrelated matters. *Id.* at 273-74.

In *State v. Mena*, discussed above, the Arizona Supreme Court took the same position. That court, however, modified its position in a later case. *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982) (supplemental opinion). In *Collins*, several rape victims had been hypnotized in an attempt to discover more information about the identity of the assailant. No new information developed from this process. The defendant was later apprehended as he approached a police decoy. The defense, citing *Mena*, moved to disqualify the victims as witnesses. The court reaffirmed its earlier position, holding hypnotically influenced testimony inadmissible because of its inherent unreliability and its impingement on the Sixth Amendment right to cross-examination. *Id.* at 1269. The court also rejected admissibility condi-

tioned upon procedural safeguards: "Safeguards cannot render the hypnotically recalled testimony reliable and therefore admissible." *Id.* at 1273. In addition, the court held that the *Mena* holding precluded the testimony of all hypnotized witnesses at trials after *Mena* was decided. *Id.* at 1276. Accordingly, the victims in *Collins* were incompetent.

On a motion for rehearing, the court modified *Mena* and its prior decision in *Collins*. The court again held that hypnotically enhanced testimony failed to satisfy the *Frye* test; it also rejected again the *Hurd* safeguards. Nevertheless, the court modified one aspect of its prior holdings: "[A] witness will be permitted to testify with regard to those matters which he or she was able to recall *and* relate prior to hypnosis. Thus, for example, the rape victim would be free to testify to the occurrence of the crime, the lack of consent, the injury inflicted and the like, assuming that such matters were remembered and related to the authorities prior to use of hypnosis." *Id.* at 1295. This investigatory use of hypnosis, according to the court, must be accompanied by safeguards. *Id.* at 1296. The court also acknowledged that even under this approach, the police "will seldom dare . . . use hypnosis as an investigatory tool because they will thereby risk making the witness incompetent if it is later determined the testimony of that witness is essential." *Id.* at 1295.

The *Collins* position has been accepted by other courts. See *Strong v. State*, 435 N.E.2d 969 (Ind. 1982); *State v. Wallach*, 110 Mich. App. 37, 312 N.W.2d 387 (1981); *State v. Koehler*, 312 N.W.2d 108 (Minn. 1981); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981) (concurring opinion); *People v. Hughes*, 88 A.D. 2d 17, 452 N.Y.S.2d 929, 932 (1982); *Commonwealth v. Taylor*, 439 A.2d 805 (Pa. Super. 1982). See also *State v. Commeau*, 438 A.2d 454, 458 (Me. 1981). This approach appears to differ from the California position set forth in *Shirley*. It also conflicts with Dr. Diamond's position that once hypnotized, the witness' testimony is "contaminated."

REFERENCES

Additional references include:

- C. McCornick, *Evidence* 510 (2d ed. 1972);
- A Moenssens & F. Inbau, *Scientific Evidence in Criminal Cases* 632-38 (2d ed. 1978);
- E. Monaghan, *Hypnosis in Criminal Investigations* (1980);
- Dillhoff, *The Admissibility of Hypnotically Influenced Testimony*, 4 Ohio N.U.L. Rev. 1 (1977);
- Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 Ohio St. L.J. 567 (1977);
- Note, *The Probative Value of Testimony from the Hypnotically Refreshed Recollection*, 14 Akron L. Rev. 609 (1981).
- Note, *Hypnotically Induced Testimony: Credibility versus Admissibility*, 57 Ind. L.J. 349 (1982).