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Criminal Law - Hypnotically Refreshed Testimony - The Standard Admissibility in Wyoming - Anything Goes - Chapman v. State

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CRIMINAL LAW—Hypnotically Refreshed Testimony. The Standard of Admissibility in Wyoming—Anything Goes? Chapman v. State, 638 P.2d 1280 (Wyo. 1982).

On October 9, 1980, Washakie county jailer, Ted Logan, returned from work and found a burglar in his home. A struggle ensued and the intruder struck Logan on the head with a hammer and fled. On that same day Logan gave a general description of the intruder to Washakie county investigator, Dan Stewart.[1] In order to obtain a better description, Logan was hypnotized on October 14, 1980, by a Thermopolis city police officer. Because more than one suspect matched the description Logan gave during the first hypnosis session, he was hypnotized a second time.[2]

After the first session, Investigator Stewart considered Robert Chapman to be a suspect and he approached Chapman and made observations of Chapman's personal appearance. At the second hypnosis session, again attended by Stewart, Logan added more details to his previous descriptions of the intruder.[3] The hypnosis sessions were videotaped but the tapes were mostly inaudible.[4] Hours after the second session Chapman was arrested and, shortly thereafter, Logan identified him from a photo line-up.[5] No physical line-up was ever used by the authorities to identify Chapman as the burglar and the first time Logan identified him in person was at the preliminary hearing.[6]

At trial the defendant objected to any identification testimony from Logan because it was enhanced by hypnosis. The district court ruled that the state could not present any hypnosis evidence unless the defendant opened the gate on the subject.[7] The state was to be restricted to Logan's identification of Chapman based upon what the state contended to be Logan's observations at the time he was assaulted. The state presented Logan as a witness and, without referring to the hypnotic session, he identified Chapman

1. Brief for Appellant at 2-3, Chapman v. State, 638 P.2d 1280 (Wyo. 1982), *reh'g denied.*
2. *Id.* at 4-5.
3. Brief for Appellant, *supra* note 1, at 4-8.
4. Chapman v. State, 638 P.2d 1280, 1281 (Wyo. 1982).
5. Brief for Appellant, *supra* note 1, at 8.
6. *Id.*
7. Chapman v. State, 638 P.2d at 1281 (Wyo. 1982).

in court as the intruder. Officer Stewart testified that Logan had previously identified Chapman from a photo lineup.[8]

The defendant "opened the gate" by cross-examining the victim at length about the hypnosis sessions; the defendant also presented his own expert testimony regarding hypnosis. The jury found Chapman guilty of burglary.[9]

On appeal Chapman argued that testimony from a witness whose memory has been hypnotically refreshed is inadmissible unless a foundation for the testimony is laid by demonstrating the procedural safeguards used to ensure the reliability of the hypnotic procedure.[10] The Wyoming Supreme Court affirmed the conviction and rejected the appellant's suggested foundation requirements as improper and unworkable.[11] The court found that testimony from a previously hypnotized witness does not require a foundation relating to the reliability of the procedures involved because it is for the fact-finder to judge the credibility of such testimony.[12]

This note will briefly survey the history of hypnosis, discuss the use of hypnosis in the courts, and review the development of the law concerning hypnotically refreshed testimony. After analyzing the court's holding, the author will suggest that the court failed to heed the call for safeguards raised during the evolution of the law in this area and, therefore, failed to mandate any safeguards at all. The author will argue that, absent certain essential safeguards, hypnotically refreshed testimony should be inadmissible.

I. HYPNOSIS—WHAT IS IT?

The American Medical Association defines hypnosis as a condition of altered attention in which the subject manifests alterations in consciousness and memory, increased

8. *Id.*
9. *Id.*
10. Brief for Appellant, *supra* note 1, at 29-30.
11. 638 P.2d at 1284-85.
12. *Id.* at 1284-85.

susceptibility to suggestion, and the production of responses and ideas atypical of those occurring in the usual state of mind.[13] Webster's dictionary simply defines hypnosis as a "state that resembles sleep but is induced by a hypnotizer whose suggestions are readily accepted by the subject."[14]

Hypnosis is an ancient phenomenon rooted in the practice of artificially induced somnambulism.[15] Very little is known about the practice of hypnosis prior to the late eighteenth century when modern interest and research into the phenomenon was first recorded.[16] Controversy has surrounded hypnosis from then to the present. Periods of intense interest followed periods of condemnation and disrepute, and hypnotism became associated with spiritualism, faith healing, and fakery.[17] Since World War II, however, hypnotism has regained some respectability. During the mid 1950's, the American and British Medical Associations formally approved its medical use and today a minority of psychiatrists use hypnosis to treat mental and emotional conditions.[18] Hypnosis is now an accepted tool for psychotherapy, the treatment of psychosomatic illnesses, anesthesia, and the enhancement of memory recall for medical therapy.[19]

Recently, hypnosis has also been widely used to enhance memory recall of witnesses in pre-trial investigations. Certain characteristics of the hypnotic trance have created unre-

13. COUNCIL ON MENTAL HEALTH, *Medical Use of Hypnosis*, 168 J.A.M.A. 186, 187 (1958).
14. WEBSTER'S NEW COLLEGIATE DICTIONARY, 563 (rev. ed. 1976).
15. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 312, 317-18 (1980) (quoting Rogers, *Egyptian Psychotherapy*, 9 CIBA SYMP. 617, 621 (1947)).
16. The late eighteenth century was the era of Franz Anton Mesmer's "Animal Magnetism". The Viennese physician developed a treatment of illness by touching the patient with supposed transmissions of magnetic influences from the therapist to the patient. Mesmer's disciple, the Marquis de Puysegur, treated a peasant for a toothache and while making his customary "magnetic passes" discovered that his patient fell into a trance-like state but was able to talk and answer questions. This is the first documented case of the induction of artificial somnambulism, later known as hypnotism. Diamond, *supra* note 15, at 318 n.18 (quoting MARQUIS DE PUYSEGUR, MEMOIRES POUR SERVIR A' L'HISTOIRE ET L'ESTABLISSEMENT DU MAGNETISME ANIMAL, 28-33, 390 n.131 (London 1786).
17. Diamond, *supra* note 15, at 318 (quoting J. BRAMWELL, HYPNOSIS; ITS HISTORY, PRACTICE AND THEORY *passim* (2d ed. 1906).
18. Chapman v. State, 638 P.2d at 1288 (Wyo. 1982) (Brown, J., dissenting) (citing 12 ENCYCLOPEDIA BRITANNICA 24 (1964)).
19. COUNCIL ON MENTAL HEALTH, *supra* note 13, at 186.

solved legal issues regarding the reliability of hypnotically refreshed testimony. Most authorities agree that, while hypnosis can sometimes produce remarkably accurate recall and can be a valuable investigative tool, it can just as often yield sheer fantasy, willful lies, or a mixture of fact and fantasy called confabulation. A most serious problem is the impossibility for either the subject or the hypnotist to tell which portions of the recall have been confabulated. For these reasons, the experts largely agree that, as a truth verifying procedure, hypnosis is unreliable.[20]

II. AN OVERVIEW OF HYPNOTICALLY REFRESHED TESTIMONY AND THE COURTS

The use of hypnosis in legal proceedings is a relatively recent development. The rules governing the admissibility of hypnotically enhanced testimony were developed mainly in cases decided within the past twenty years. The issue of admissibility has arisen primarily in two contexts. The first involves efforts by the defendant to introduce exculpatory statements made *while under hypnosis* in order to prove the truth of the matter asserted. The law in this area is well settled: such statements are inadmissible in every jurisdiction where the issue has arisen since it is impossible to determine whether the hypnotized defendant related actual facts or merely invented information.[21] Within the second context are efforts by the prosecution to introduce incriminating testimony by a witness whose memory has been previously refreshed by hypnosis. The law in this area is in a state of flux.[22]

A. The Early Cases—Per Se Admissibility

The first decision concerning the use of hypnosis to refresh the memory of a witness was the 1968 case of *Har-*

20. *See, e.g.*, Diamond, *supra* note 15, at 313, 335; Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 317-18 (1979); Spiegel, *Hypnosis and Evidence: Help or Hindrance?* 347 ANNALS N.Y. ACAD. SCI. 73, 79 (1979); Spector and Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?* 38 OHIO ST. L. J. 567, 584 (1977).
21. People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 782-83, 181 Cal. Rptr. 243 (1982), *cert. denied*, 51 U.S.L.W. 3220 (U.S. Oct. 5, 1982) (No. 82-78).
22. *Id.* 641 P.2d at 783.

ding v. State.[23] The prosecuting witness, a victim of attempted rape and attempted murder, was hypnotized by a psychologist to help restore her memory of the events which transpired after she was shot.[24] Under hypnosis she was able to recall more details concerning the attempted rape.[25] On appeal from his conviction of assault with intent to rape, the defendant argued that the pretrial hypnosis rendered the victim's testimony inadmissible.[26] Based solely on the ground that the witness believed her memory to be accurate, the Maryland Court of Special Appeals affirmed the conviction and summarily dismissed the challenge to the hypnotically refreshed testimony.[27] The court then held that the fact that the witness's memory had been refreshed by pre-trial hypnosis went to the weight and not the admissibliity of the evidence.[28]

During the next ten years, the general rule of admissibility set forth in *Harding* spawned a series of similar decisions permitting witnesses to testify to recollections assertedly refreshed by hypnosis.[29] In *People v. Shirley*, the California Supreme Court reviewed the history of these post-*Harding* cases and concluded that the courts had mechani-

23. 5 Md. App. 230, 246 A.2d 302 (1968).
24. Prior to being hypnotized, the victim was able to recall that she had been with the defendant in his car and that the defendant became angry with her for her refusal to have sex with him and that he shot her. But she could recall very little about the attempted rape after being shot and she related conflicting stories to the authorities concerning the incident. Several weeks later the victim was hypnotized by a clinical psychologist who had been fully briefed concerning the facts of the case. Police officers were present during the hypnosis sessions but the hypnotist denied making any improper suggestions to the subject. *Id.*, A.2d at 304-08.
25. *Id.* at 305.
26. *Id.* at 306.
27. The *Harding* court stated:
> The admissibility of Mildred Coley's testimony concerning the assault with intent to rape case 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.

Id.
28. *Id.*
29. Some of the cases that followed the *Harding* rule include: Kline v. Ford Motor Co., Inc., 523 F.2d 1067, 1969-70 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509-10 (9th Cir. 1974); Clark v. State, 379 So. 2d 372, 375 (Fla. App. 1979); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240, 241 (1974); State v. McQueen, 295 N.C. 96, 244 S.E.2d 414, 427 (1978); State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312, 315 (1971).

cally followed the *Harding* rule with little or no analysis of the issue.[30]

B. The Emergence of Procedural Safeguards

In *People v. Shirley* the California Supreme Court traced the evolution of the law in this area and, specifically, the emergence of safeguards.[31] As the 1970's came to an end many courts began to take notice of the dangers inherent in the use of hypnotically refreshed testimony and began to develop increasingly complex procedural "safeguards" to ensure the reliability of such testimony.[32] In *United States v. Adams*[33] the Ninth Circuit Court of Appeals applied the *Harding* rule to allow for the first time in that jurisdiction the use of hypnotically enhanced testimony in a criminal case.[34] However, in permitting such testimony, the court warned that "investigatory use of hypnosis on persons who may later be called upon to testify in court carries a dangerous potential for abuse."[35] The court warned that great care must be taken to ensure that the witness testified from his own recollections rather than from recall tainted by suggestions received while under hypnosis.[36] The court proposed several safeguards that it apparently believed would eliminate the potential for abuse.[37] The same court reaffirmed

30. 641 P.2d at 785. The *Shirley* court held:
> In the earlier cases, as in *Harding*, the courts engaged in little or no analysis of the issue, and merely reiterated the general proposition that the fact of hypnosis "goes to the weight, not the admissibility of the evidence." If they discussed the point at all, the courts simply noted that the witness believed he was testifying from his own memory and that his credibility could presumably be tested by ordinary cross-examination.

Id.

31. *Id.* at 785-94.
32. *Id.* at 785.
33. 581 F.2d 193 (9th Cir. 1978).
34. *Id.* at 198-99. Previously the Ninth Circuit Court of Appeals had applied the *Harding* rule only in civil cases. *See* Kline v. Ford Motor Co., Inc., 523 F.2d 1067 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974).
35. 581 F.2d at 198-99 (1978).
36. *Id.*
37. The court stated:
> 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' responses can the matter be dealt with effectively. An audio or video recording would be helpful.

Id. at 199 n.12.

its holding in *Adams* in a subsequent case[38] and explained that the purpose of the *Adams* safeguards was "to ensure that post-hypnotic statements are truly the subject's own recollections."[39]

The Illinois Court of Appeals followed the *Harding* rule in *People v. Smrekar*[40] but recognized that the use of hypnosis involves certain inherent problems. The court pointed out that an individual under hypnosis is subject to the hypnotist's suggestions and his own fantasies.[41] The court therefore allowed the testimony of a previously hypnotized witness only because the record demonstrated the presence of certain safeguards which supported the reliability of the testimony. The court emphasized that the hypnotist was a physician with extensive experience with hypnosis; only he and the witness were present during the hypnotic interview; the hypnotist denied that he had suggested the identification to the witness; the identification was corroborated; and the witness had ample time to view the defendant at the time of the crime.[42]

In later cases the required safeguards became more complex. In *State v. Hurd*[43] the New Jersey Supreme Court adopted an intricate set of mandatory procedural safeguards. The court recognized the following dangers inherent in hypnosis: the subject's extreme suggestibility, loss of critical judgment, tendency to confabulate, and excessive confidence in his new "memories".[44] To minimize the risks the court adopted the following procedural prerequisites:

> 1) The trial judge should evaluate both the kind of memory loss suffered and the hypnotic technique used to restore the memory, based on expert testimony from both sides.[45]

38. United States v. Awkard, 597 F.2d 667, 669 (9th Cir. 1979), *cert. denied*, 444 U.S. 885 (1979).
39. *Id.* at 669 n.2.
40. 68 Ill. App. 3d 379, 385 N.E.2d 848, 853 (1979).
41. *Id.*, 385 N.E.2d at 853.
42. *Id.* at 854-55.
43. 86 N.J. 525, 432 A.2d 86 (1981).
44. *Id.*, 432 A.2d at 94-95.
45. *Id.* at 95.

2) The court should then inquire into the subject's amenability to hypnosis since some subjects are more suggestible than others.[46]

3) The party offering the testimony must then prove that he has complied with at least six additional procedural requirements to ensure a "minimal level of reliability[.]"[47]

The six additional requirements[48] were suggested by Dr. Martin T. Orne, an expert on hypnosis. Prior to the *Hurd* case, two New York trial courts adopted an even more intricate set of nine prerequisites to the admissibility of hypnotically enhanced testimony.[49] Recently, the New Mexico Court of Appeals adopted the six-prong *Hurd* test as the proper standard of admissibility in that jurisdiction.[50]

C. Harding Discredited: The Frye Test

Rather than just adopt a set of procedural safeguards, some courts began to judge the admissibility of hypnotically induced testimony in the light of the test set forth in *Frye v. United States*.[51] This test for admissibility of scientific evidence was adopted by courts many years ago to reduce the danger that unproven scientific techniques might mislead or prejudice juries.[52] The *Frye* rule requires that before evidence based on a new scientific method can be admitted, it must be demonstrated that the technique has been generally accepted by authorities in the pertinent scientific field.[53]

46. *Id.* at 96.
47. *Id.* at 96-97.
48. The six requirements may be summarized as follows:
(1) the hypnotist must be a psychiatrist or psychologist experienced in the use of hypnosis; (2) the hypnotist must be independent of the prosecution or defense; (3) all information given to the hypnotist before the session must be recorded; (4) before the session the subject must describe in detail to the hypnotist the facts as he remembers them and the hypnotist must not influence that description; (5) all contacts between the hypnotist and the subject must be recorded, preferably on videotape, and, (6) no one but the hypnotist and the subject can be present during the pre-hypnotic examination, during the hypnosis session, nor during the post-hypnotic interrogation.
Id.; *See also* Chapman v. State, 638 P.2d at 1283 (Wyo. 1982).
49. People v. Lewis, 103 Misc. 2d 881, 427 N.Y.S.2d 177 (County Ct. 1980); People v. McDowell, 103 Misc. 2d 831, 427 N.Y.S.2d 181 (County Ct. 1980).
50. State v. Beachum, 97 N.M. 682, 643 P.2d 246, 253 (1981).
51. 293 F. 1013, 1014 (D.C. Cir. 1923).
52. MCCORMICK, EVIDENCE § 203 (2d ed. 1972).
53. Frye v. United States, 293 F. at 1014 (1923).

The first case to depart from the *Harding* approach and apply the *Frye* analysis was *People v. Hangsleben.*[54] There a defendant sought to introduce evidence at trial that, by virtue of pre-trial hypnosis, he could remember the "real culprit", even though he had previously confessed. The court distinguished *Harding* and held that the hypnotic evidence was properly excluded because the defendant "failed to establish the reliability of hypnosis as a memory-jogging device."[55] The court ruled that the defendant failed to demonstrate the general scientific acceptance of the theory of memory restoration by hypnosis as required by the Michigan version of the *Frye* test.[56]

In *State v. Mena*[57] and *State v. Mack*,[58] the Arizona and Minnesota courts applied the *Frye* test and found that, because hypnosis has not gained general acceptance as a reliable means of obtaining accurate recall of previous events, the testimony of a witness who has been hypnotized to refresh his recollection is *per se* inadmissible in a criminal trial.[59] Both of these cases were reaffirmed in 1982.[60] The Supreme Court of Pennsylvania in *Commonwealth v. Nazarovitch*[61] also applied the *Frye* test but declined to make such testimony inadmissible *per se.* Instead, the court held that hypnotically refreshed testimony was inadmissible in the absence of conclusive proof of the reliability of hypnotically retrieved memory.[62]

Recent cases have continued the trend toward adoption of the *Frye* analysis. In *State v. Palmer*[63] the Nebraska Supreme Court held that the procedural safeguards of *Hurd*[64] were impractical and the court excluded hypnotically enhanc-

54. 86 Mich. App. 718, 273 N.W.2d 539 (1978).
55. *Id.*, 273 N.W.2d at 544.
56. *Id.* at 545.
57. 128 Ariz. 226, 624 P.2d 1274 (1980).
58. 292 N.W.2d 764 (Minn. 1980).
59. State v. Mena, 624 P.2d at 1279-80 (1980); State v. Mack, 292 N.W.2d at 768 (Minn. 1980).
60. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266, 1269 (1982); State v. Blanchard, 315 N.W.2d 427, 430 (Minn. 1982).
61. 436 A.2d 170 (Pa. 1981).
62. *Id.* at 178.
63. 210 Neb. 206, 313 N.W.2d 648 (1981).
64. *See supra* note 46, and accompanying text.

ed testimony because it was not widely accepted enough to satisfy the *Frye* test.[65] And, in *People v. Shirley*, the California Supreme Court "abandoned any pretense of devising workable 'safeguards' " such as those in *Hurd* and held that testimony of witnesses who have been hypnotized to restore their memory is inadmissible *per se* for failure to satisfy the *Frye* analysis.[66]

In *Polk v. State*,[67] 13 years after it first enunciated the simple *Harding* rule making hypnotically enhanced testimony virtually admissible *per se*, the Maryland Court of Special Appeals recognized the potential for abuse of hypnotically enhanced testimony.[68] Following the lead of other jurisdictions[69] the Maryland court rejected the *Harding* rule and adopted the *Frye* analysis as the proper test of admissibility of such testimony and, thereby, joined the growing number of jurisdictions that mandate procedural safeguards.[70]

In *Polk* the victim of a sexual assault, who had no recollection of the incident, was hypnotized on behalf of the prosecution. The defense objected to the testimony of the "unqualified" hypnotist and that of the victim since such testimony was the product of an "inexact and unproven science."[71] Relying on *Harding*, the trial court denied the motion to suppress and held that the hypnotically enhanced nature of the testimony "goes to the weight of the testimony rather than the admissibility."[72] On appeal the Maryland Court of Special Appeals ruled that *Harding* had been undermined when, in 1978, the Maryland Court adopted the *Frye* test for admissibility of scientific evidence.[73] The court reversed the lower court ruling and held that the testimony of the previously hypnotized witness should be excluded be-

65. State v. Palmer, 313 N.W.2d at 655 (1981).
66. 641 P.2d at 786-87, 796 (1982).
67. 48 Md. App. 382, 427 A.2d 1041 (1981).
68. *Id.*, 427 A.2d at 1049.
69. *Id.* at 1047-48 (citing State v. Mack, 292 N.W.2d at 764 (1980); State v. Mena, 624 P.2d at 1274 (1980)).
70. Polk v. State, 427 A.2d at 1048 (1981).
71. *Id.* at 1043-44.
72. *Id.* at 1045.
73. *Id.* at 1046-47.

cause there had yet been no determination by the relevant scientific community that hypnosis is generally acceptable for the purpose of memory retrieval.[74] The court in *Polk* also stated that even if the court had found that the *Frye* test had been satisfied, the testimony was not necessarily admissible. Citing the "dangerous potential for abuse" of hypnosis, the court suggested that certain procedural safeguards be employed by trial judges to determine the admissibility of hypnotically refreshed testimony.[75]

D. Problems With Hypnotically Refreshed Testimony

Since hypnotically enhanced testimony was first held admissible in 1968,[76] awareness of the problems inherent in such testimony has steadily grown. Recently, in deciding the issue of admissibility, the Arizona Supreme Court identified some of the more serious of those problems.[77] A summary of the court's discussion follows:

1. *Suggestion.* A person under hypnosis is subject to "hypersuggestibility and hypercompliance."[78] Being so suggestible the subject can graft onto his memory fantasies or suggestions delibrately or unwittingly placed there by the hypnotist.[79] The previously hypnotized witness may sincerely believe that the events suggested actually occurred.[80]

2. *Confabulation.* Even under hypnosis a subject can experience gaps in memory. However, the subject frequently has a tendency or willingness to "fill in the gaps" or confabulate. This mixture of fact and fantasy is incorporated

74. *Id.* at 1048.
75. *Id.* The Maryland Court of Special Appeals suggested the following tests for admissibility: (1) Was the hypnotist professionally qualified to administer hypnosis? (2) If qualified, was he objective in the application of the technique or did he suggest, by leading questions or otherwise the responses to be made by the subject? (3) Was posthypnotic suggestion used? *Id.*
76. Harding v. State, 246 A.2d at 302 (1968).
77. State *ex rel.* Collins v. Superior Court, 644 P.2d at 1269-73 (1982).
78. Commonwealth v. Nazarovitch, 436 A.2d at 174 (Pa. 1981).
79. Diamond, *supra* note 15, at 314.
80. Margolin, *Hypnosis-enhanced Testimony: Valid Evidence or Prosecutor's Tool?* 17, no.10 TRIAL 42 (Oct. 1981).

into the subject's memory and the subject believes it to be true.[81]

3. *Purposeful Lying.* Contrary to what many laymen believe,[82] a person under hypnosis can willfully lie.[83]

4. *Undue Weight Given by Jury.* To a layperson, hypnosis is "cloaked in a veil of mysticism" and seems to magically produce fantastic recall.[84] Laymen commonly give great credibility to hypnosis and a jury is likely to place undue emphasis on what transpired during a hypnosis session.[85]

5. *Violation of Defendant's Right to Confrontation.* A defendant's right to cross-examination or confrontation may be frustrated by the pre-trial hypnosis of a witness. A previously hypnotized person is subject to confabulation and suggestion and may honestly believe this new memory to be his true recollection.[86] The witness may testify with great conviction, believing he is telling the truth, and thereby deny the jury the opportunity to observe his demeanor and to judge his credibility absent the hypnotic influence.[87]

E. Reaction To The Problems: A Summary

In *Harding* and the early cases, the courts gave very little recognition, if any, to the problems associated with hypnosis and relied on cross-examination of the previously hypnotized witness to test the credibility of hypnotically refreshed testimony.[88] The application of the *Harding* rule and the growing use of hypnosis within the judicial system began to concern experts in the field of hypnosis.[89] In a recent article, Dr. Bernard L. Diamond addressed the problem of the current hypnosis boom within the criminal jus-

81. Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 OHIO N.U.L. REV. 1, 2 (1977) (quoting 9 ENCYCLOPEDIA BRITANNICA *Hypnosis* 133 (1974)).
82. Dilloff, *supra* note 81, at 5.
83. State v. Hurd, 432 A.2d at 92 (1981).
84. State *ex rel.* Collins v. Superior Court, 644 P.2d at 1272 (1982).
85. Dilloff, *supra* note 81, at 9. This is the same type of concern that promoted courts to adopt the *Frye* test. *See supra* note 52.
86. Commonwealth v. Nazarovitch, 436 A.2d at 174 (Pa. 1981).
87. State *ex rel.* Collins v. Superior Court, 644 P.2d at 1274 (1982).
88. *See supra* note 30 and accompanying text.
89. Diamond, *supra* note 15, at 327-49.

tice system and concluded that reliance on cross-examination of previously hypnotized witnesses and direct examination of expert witnesses is a totally inadequate means of ensuring the reliability of hypnotically refreshed testimony.[90] Diamond argued that such testimony should be inadmissible *per se* since there is no way to ensure that the subject has not incorporated into his recollection fantasies or suggestions from the hypnotist, even though "consummate care is taken."[91]

The decisions since 1978 reflect the courts' growing recognition of these problems.[92] The supreme courts of Minnesota, Arizona, and California have held that hypnotically refreshed testimony is inadmissible because the *Frye* test cannot be satisfied.[93] Other high courts in Pennsylvania, Michigan, Nebraska, and Maryland have stopped just short of holding such testimony inadmissible *per se* and have mandated that the *Frye* test must be satisfied before the testimony may be received.[94] Still other courts in New Jersey,

90. *Id.* at 313. Dr. Diamond is a Professor of Clinical Psychiatry and Professor of Law at the University of California. He is a nationally known specialist in the field of hypnosis within the judicial system. People v. Shirley, 641 P.2d at 802 n.45 (1982).

91. Dr. Diamond stated:

> Many courts currently admit testimony from previously hypnotized witnesses without an adequate understanding of the nature of hypnosis and its dangers to truly independent recall. Perhaps influenced by often naive legal scholarship and biased expert testimony, these courts apparently believe that cross-examination and expert witness attacks on the credibility of such testimony will reveal any shortcomings in the hypnosis and get to the truth. This hope is misplaced. Even if the hypnotist takes consummate care, the subject may still incorporate into his recollections some fantasies or cues from the hypnotist's manner, or he may be rendered more susceptible to suggestions made before or after hypnosis. Nor can any expert separate them out. Worse, previously hypnotized witnesses often develop a certitude about their memories that ordinary witnesses seldom exhibit. Further harm is caused by "expert" witnesses (often self-styled and police-oriented) who, testifying in the state's behalf, make extravagant, scientifically unjustified claims about the reliability of hypnotically enhanced testimony. The plain fact is that such testimony is not and cannot be reliable. The only sensible approach is to exclude testimony from previously hypnotized witnesses as a matter of law, on the ground that the witness has been rendered incompetent to testify.

Diamond, *supra* note 15, at 348-49.

92. People v. Shirley, 641 P.2d at 785 (1982).

93. State v. Mack, 292 N.W.2d at 768 (Minn. 1980); State v. Mena, 624 P.2d at 1279-80 (1980); People v. Shirley, 641 P.2d at 804 (1982).

94. *See* Commonwealth v. Nazarovitch, 436 A.2d at 177-78 (Pa. 1981); People v. Hangsleben, 273 N.W.2d at 545 (1978); State v. Palmer, 313 N.W.2d at 655 (1981); Polk v. State, 427 A.2d at 1048 (1981).

New Mexico and New York have mandated procedural safeguards to ensure the reliability of hypnotically refreshed testimony.[95]

Not all jurisdictions have completely departed from the *Harding* analysis. However, among the courts following the *Harding* rule since 1978, many have addressed the problems of hypnotically enhanced testimony. Significantly, there have been other factual circumstances upon which these courts relied in order to admit such testimony. High courts in Georgia, Illinois, Massachusetts, and Tennessee relied on substantial corroboration and other safeguards to admit the testimony.[96] The Ninth Circuit Court of Appeals also addressed the problems of hypnotically refreshed testimony and recommended safeguards.[97] In spite of the trend away from *Harding*, since 1978 at least three jurisdictions have adopted the *Harding* analysis with little or no discussion of safeguards: Missouri, Florida, and Wyoming.[98]

III. THE PRINCIPAL CASE: *Chapman v. State*

A. The Wyoming Supreme Court's Analysis

The issue of admissibility of hypnotically refreshed testimony in *Chapman v. State* was one of first impression for the Wyoming Supreme Court.[99] In upholding Robert Chapman's conviction, the majority adopted the *Harding* analysis and held simply that an attack on credibility is the proper method to evaluate the testimony of a previously hypnotized witness.[100] The majority ruled that the defendant "had ample opportunity" to test the credibility of Logan, the previously hypnotized complaining witness, because the attack on Logan's credibility was "before the jury."[101] Re-

95. *See* State v. Hurd, 432 A.2d at 94-97 (1981); State v. Beachum, 643 P.2d at 253 (1981); People v. Lewis, 427 N.Y.S.2d at 179 (1980); People v. McDowell, 427 N.Y.S.2d at 182-83 (1980).
96. *See* Collier v. State, 244 Ga. 553, 261 S.E.2d 364, 371 (1979); People v. Smrekar, 385 N.E.2d at 854 (1979); Commonwealth v. Stetson, ___ Mass. ___, 427 N.E.2d 926, 932 (1981); State v. Glebock, 616 S.W.2d 897, 904-05 (Tenn. Ct. App. 1981).
97. United States v. Adams, 581 F.2d at 199 n.12 (9th Cir. 1978).
98. *See* State v. Greer, 609 S.W.2d at 423 (Mo. App. 1980), *vacated on other grounds* 451 U.S. 1013 (1981); Clark v. State, 379 So. 2d 372 (Fla. App. 1979); Chapman v. State, 638 P.2d 1280 (Wyo. 1982).

ferring to defendant's cross-examination of the prosecution witness and direct examination of the police hypnotist and the defense hypnosis expert, the majority ruled that the defendant failed to show Logan was testifying from anything other than his own memory or that the hypnotist had given him any improper suggestions.[102] Summarily recounting what it apparently considered to be the pertinent facts, the majority simply stated that the defendant had described the burglar after the episode, was later hypnotized, then identified Chapman first from a photo line-up and again in court.[103] The court rejected as unworkable and improper defendant's suggested six-point foundation requirement[104] and held that "an attack on credibility is the proper method to determine the value of the testimony of a previously hypnotized witness."[105]

B. Critique of the Court's Analysis

Strikingly absent from the majority opinion is any discussion whatsoever of the hypnotist's qualifications, the hypnosis procedures employed, or the recognized unreliability of hypnotically refreshed testimony. In his dissenting opinion, Justice Brown succinctly identified the major flaw in the court's analysis: "The majority has totally failed to recognize, or even consider, the potential for abuse and the unreliability of hypnotically enhanced testimony."[106]

As is evident from the foregoing discussion, various jurisdictions have developed different sets of safeguards while others have relied on the *Frye* test to limit the admissibility of hypnotically enhanced testimony.[107] The author suggests that, stripped to the bone, the various safeguards can be reduced to three basic, but essential, questions that the court should consider prior to admitting hypnotically refreshed testimony:

99. Brief for Appellant, *supra* note 1, at 13.
100. Chapman v. State, 638 P.2d at 1284 (Wyo. 1982).
101. *Id.* at 1282.
102. *Id.* at 1281-82.
103. *Id.* at 1282.
104. *Id.* at 1283.
105. *Id.* at 1284.
106. *Id.* at 1287.
107. *See supra* notes 36, 47, and 69, and accompanying text.

(1) Is hypnosis generally accepted within the scientific community as an accurate means of enhancing recall?

(2) Was the hynotist qualified? and

(3) Were correct procedures used to produce the hypnotically enhanced recall?

In order to put the court's holding in the proper perspective, it is necessary to review the facts in *Chapman* as they relate to these three basic questions.

1. *The Hypnotist.* The hypnotist employed by the Worland authorities was simply not qualified. Logan was the first witness he had ever hypnotized in the course of a criminal investigation and this took place only one month after his hypnosis training. He neither had a degree in psychology nor had he taken any college courses in the subject.[108] Most authorities agree that the hypnotist should be experienced in forensic hypnosis and have a medical background, preferably in psychology or psychiatry.[109]

The hypnotist was a police officer.[110] This raises serious questions as to his "neutrality". Since a person under hypnosis frequently exhibits a desire to please the hypnotist, a neutral hypnotist is vital.[111] Hypnosis is used frequently by authorities where there is little evidence and the victim of the crime is extremely eager to aid the police. Since a subject is so suggestible he may respond according to what he perceives the desired response to be. The hypnotist need not give any direct suggestion in order for the subject to try to please him.[112] In *Chapman* both the hypnotist and his subject were police officers.[113]

2. *Procedural Safeguards.* No adequate record of the hypnosis sessions was made. The sessions were videotaped but the tapes were so inaudible that they were useless.[114]

108. 638 P.2d at 1287 (Brown, J., dissenting).
109. Orne, *supra* note 20, at 338-39.
110. Chapman v. State, 638 P.2d at 1281 (Wyo. 1982).
111. Diamond, *supra* note 15, at 333.
112. Commonwealth v. Nazarovitch, 436 A.2d at 174 (Pa. 1981) (citing Levitt, *The Use of Hypnosis to 'Freshen' the Memory of Witnesses or Victims*, 17 no. 4 TRIAL 57 (Apr. 1981).
113. Brief for Appellant, *supra* note 1, at 2.
114. Chapman v. State, 638 P.2d at 1281 (Wyo. 1982).

Without a record of some kind, it is impossible to determine whether improper suggestions were made to the subject.[115] There was an added risk of improper suggestion due to the fact that the hypnotist and his subject were not alone during the sessions—the investigating officer and others were present.

3. *Foundation.* In an apparent effort to prevent the jury from giving undue weight to Logan's testimony, the district court allowed Logan to testify without informing the jury that his testimony had been hypnotically refreshed. No prior foundation was established regarding the reliability of such testimony.[116] The defendant chose to address the issue on cross-examination and in his case in chief.[117] The Wyoming Supreme Court held that the appellant had "ample opportunity" to test the credibility of the witness.[118]

The prosecution's entire case in chief consisted of Logan's post-hypnosis identification of Chapman.[119] Absolutely no safeguards were employed to ensure the reliability of the induced recall. The majority opinion simply ignored this void. The Worland authorities did not necessarily do anything improper, but such a total lack of safeguards makes the possibility of abuse a real one.

On appeal the defendant urged the Wyoming Supreme Court to adopt the six procedural requirements set out in *State v. Hurd.*[120] The court rejected those safeguards as "unworkable" since hypnosis is fraught with variables.[121] In this, the court is in accord with other jurisdictions.

115. It has been recognized that making a record of the hypnosis session is a procedure that has "clear merit." LOUISELL & MUELLER, 1 FEDERAL EVIDENCE § 106 (1977).
116. Brief for Appellant, *supra* note 1, at 4-8.
117. *Id.* at 9-10.
118. 638 P.2d at 1282.
119. In rebuttal the state offered testimony from one of Chapman's cellmates. He testified that Chapman had made incriminating statements about the burglary. The defendant offered testimony from another cellmate who testified that he was present during the conversation and Chapman had not made such statements. Brief for Appellant, *supra* note 1, at 11, 40.
120. Chapman v. State, 638 P.2d at 1282 (Wyo. 1982); *See also* State v. Hurd, 432 A.2d at 96-97 (1981).
121. 638 P.2d at 1283-85. The court recognized the "differences between subjects in their degree of involvement in hypnosis" and "the potential for role playing". *Id.*

The Supreme Courts of Nebraska and California have also rejected the *Hurd* requirements as impractical and inadequate as safeguards because they do not address all of the problems inherent in such testimony. Both courts, however, have held hypnotically enhanced testimony inadmissible since it is not generally accepted within the scientific community as reliable.[122] While the Wyoming court did not have the benefit of these two recent cases when *Chapman* was decided, it is nevertheless interesting to compare the holdings. All three courts expressed the same reluctance to adopt the *Hurd* safeguards but, while the other courts held the testimony inadmissible, the Wyoming court made hypnotically enhanced testimony virtually always admissible. The court did "suggest" that "complying with some or all of these safeguards" may be advisable, but it declined to "mandate" them.[123] Thus, the court encouraged the use of safeguards but, by rejecting the suggested requirements and failing to adopt safeguards of its own choosing, the court encouraged abuse of the memory-enhancing technique. Due to the complete absence of safeguards in *Chapman* and the court's failure to adopt at least minimum requirements, the apparent result of the holding is that, in Wyoming, the standard for admissibility of hypnotically enhanced testimony is "anything goes".

On the facts, *Chapman* is easily distinguished from the authority on which the court relied. The majority relied on the *Harding* line of cases to support its holding that the credibility of a witness who has been previously hypnotized is a matter for the jury.[124] In every case that the majority cited, at least one or two facts or procedural safeguards made it easier for the courts to follow the precedent that hypnosis "goes to the weight and not the admissibility" of testimony. In *Harding v. State*, where the rule was originally enunciated, the hypnotist was a clinical psychologist experienced in hypnosis and there was overwhelming corrobora-

122. State v. Palmer, 313 N.W.2d at 654, 655 (1981); People v. Shirley, 641 P.2d at 787 (1982).
123. 638 P.2d at 1283.
124. *Id.* at 1282.

tion pointing to the guilt of the defendant.[125] In *United States v. Awkard*[126] the hypnotist was a physician and an internationally respected authority on hypnosis and there was corroborative evidence of defendant's guilt. The court nevertheless recommended that a foundation be laid concerning the reliability of hypnosis.[127] The hypnosis session was videotaped in *United States v. Narciso*[128] and the hypnotist was again a physician and an expert in hypnosis.[129] Even in *Clark v. State,*[130] where there was very little discussion of safeguards, the police officer was an experienced hypnotist.[131] In *Creamer v. State*[132] there was corroboration and the hypnotist was a psychologist.[133] In *People v. Smrekar* the court pointed out that the hypnotist was a physician competent in hypnosis, that there was "substantial corroboration" and that the evidence indicated that there had been no improper suggestion during hypnosis.[134] The majority also cited *People v. Hughes*[135] in which the county court required a "proper foundation" and indicated that procedural safeguards were necessary to ensure reliability. The hypnotist was a clinical psychologist with 10 years experience in hypnosis and the sessions were tape recorded.[136] In *State v. McQueen*[137] the hypnosis sessions were tape recorded and there were other corroborating circumstances.[138] And in the final case that the majority cited, *State v. Jorgensen,*[139] a physician performed the hypnosis and the session again was tape recorded.[140] Due to the complete lack of any safeguards whatsoever in *Chapman,* the court's holding is somewhat of an anomaly.

125. 246 A.2d at 305.
126. 597 F.2d at 667.
127. *Id.* at 669, 671.
128. 446 F. Supp. 252 (D.C. Mich. 1977).
129. *Id.* at 280.
130. 379 So. 2d at 372 (Fla. App. 1979).
131. *Id.* at 375.
132. 205 S.E.2d 240 (1974).
133. *Id.* at 241.
134. 385 N.E.2d at 854-55. *See supra* note 42, and accompanying text.
135. 99 Misc. 2d 863, 417 N.Y.S.2d 643 (County Ct. 1979).
136. *Id.* at 644, 648-49.
137. 295 N.C. 96, 244 S.E.2d 414 (1978).
138. *Id.* at 427, 428.
139. 8 Or. App. 1, 492 P.2d 312 (1971).
140. *Id.* at 315.

CONCLUSION

When the Wyoming Supreme Court decided *Chapman*, the law concerning admissibility of hypnotically enhanced testimony was in a state of flux. Still, the court failed to recognize the concern for safeguards evident even in *Harding* and other early cases and chose not to join the clear movement toward adoption of specific procedural safeguards or tests for admissibility. Since this was a question of first impression for the court, *Chapman* presented a unique opportunity to clearly define a practical standard for the admissibility of hypnotically enhanced testimony in Wyoming. Due to the total absence of safeguards employed in *Chapman* and the court's apparent mistrust of "complex" safeguards, it is surprising that the court did not simply hold the testimony inadmissible or at least define certain minimum procedural requirements. Instead, the court mechanically followed an outdated and severely undermined precedent with no mention whatsoever of the potential for abuse when no safeguards are required. The holding would appear to make hypnotically enhanced testimony admissible *per se* in this state, regardless of safeguards. However, in light of the recent trend in other states toward inadmissibility *per se*, trial courts in Wyoming would be well advised to adopt some basic procedural safeguards prior to admitting such testimony. For the time being, however, they must look to other jurisdictions in developing these safeguards.

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141. The author was employed as a private investigator by Chapman's attorney to investigate Chapman's asserted alibi. The author spent approximately four or five hours interviewing witnesses concerning the defendant's whereabouts at the time of the burglary. At the request of the attorney, the author located an expert on hypnosis. However, the author was not further involved in the preparation of the case nor has he had any contact with anyone concerning the case since the initial alibi investigation.