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Hypnosis: An Evidentiary Model for Use of Hypnotically-Enhanced Testimony in Wyoming Criminal Cases

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COMMENTS

Hypnosis: An Evidentiary Model for Use of Hypnotically-Enhanced Testimony in Wyoming Criminal Cases

INTRODUCTION

Courts in the United States have received hypnotically-enhanced testimony with varying degrees of favor.[1] When the Wyoming Supreme Court decided *Chapman v. State*[2] in 1982, it permitted the unrestrained use of hypnotically-enhanced testimony.[3] In deciding *Chapman*, the Court followed what was then the majority rule as set forth in *Harding v. State*.[4] The *Harding* court held that expert testimony "fully informed" the jury about hypnosis, and that hypnotically-enhanced testimony was sufficient evidence to support a jury's verdict of attempted rape.[5] The year after *Chapman* was decided, the Maryland Supreme Court overruled *Harding* in *Collins v. State*.[6] In *Collins*, the court held that the use of hypnosis to restore or refresh the memory of a witness is not accepted by the scientific community and so hypnotically-induced testimony is inadmissible.[7] The majority of state courts, now cognizant of the risks of exposing a witness' memory to hypnotic suggestion, no longer routinely admit hypnotically-enhanced testimony.[8] Wyoming is now among a minority of courts which continue to receive such testimony without restraint.[9]

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1. MCCORMICK ON EVIDENCE, § 206, nn.75, 77 (3d ed. 1984).

2. 638 P.2d 1280 (Wyo. 1982).

3. The court held that a trial court did not err in allowing a victim of an assault to testify as to events recalled through police administered hypnosis. The victim was attacked in his home by an intruder armed with a hammer. The Wyoming Supreme Court relied upon the inability of the defendant to show, by cross examination, that the victim's post-hypnotic testimony was "other than from his own recollection or that impermissible suggestions were made during the hypnotic sessions which added to that actually within the memory of the witness." *Id.* at 1282. The court held that there were too many variables in hypnotism for it to mandate that all use of testimony from previously hypnotized witnesses must be governed by a specific set of safeguards. *Id.* at 1284-85.

4. 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969). The court admitted the hypnotically-enhanced testimony of a victim who had been shot and then raped. Harding was convicted of assault with intent to murder and assault with intent to rape. In addition to the hypnotically obtained evidence, a considerable amount of other physical and circumstantial evidence was presented against Harding, including sperm recovered from the victim. The prosecution's case did not hinge on the hypnotically-enhanced testimony and the victim's testimony did not change after the hypnosis session. *Harding* was widely followed for a time in spite of the court's statement that its holding was "on the facts of this case" and that "[i]n so holding we go no further than is required by those facts." 246 A.2d at 312.

5. *Id.*

6. 52 Md. App. 186, 447 A.2d 1272, 1283 (1982), *aff'd.*, 296 Md. 670, 464 A.2d. 1028 (1983).

7. *Id.* In *Collins*, a prosecution witness in a murder investigation had been hypnotized during the period between the defendant's first trial and a later retrial. The court reviewed the "tortured history" of hypnotic memory enhancement and ruled that a witness would only be permitted to testify as to information related to authorities prior to hypnosis. *Id.* at 1277-83.

8. Prime v. State, 767 P.2d 149, 156 (Wyo. 1989) (Urbigkit, J., dissenting); *See generally* MCCORMICK, *supra* note 1, at § 206.

9. *Prime*, 767 P.2d at 153. "A witness who has been hypnotized is not incompetent and may testify. The circumstances surrounding the hypnosis can be presented to the jury, and the question is one of credibility." *Id.*

The foremost problem which courts have identified with the admission of hypnotically-influenced testimony is a possible deprivation of a criminal defendant's sixth amendment rights to the confrontation and cross-examination of adverse witnesses.[10] The United States Supreme Court has recognized the provision of these rights as obligatory on the states.[11] These rights may be negated by hypnotic alterations to witnesses' memory.[12] A number of courts have found these rights to be threatened when the testimony of a witness is the product of hypnotic suggestion.[13] Other jurisdictions have adopted an exclusionary rule based on a finding that hypnosis lacks general scientific acceptance.[14] Numerous courts have found that allowing the unrestrained use of hypnotically-acquired or enhanced testimony in criminal trials may violate an accused's constitutional rights.[15]

The Wyoming Supreme Court, in January 1989, reaffirmed *Chapman* in *Prime v. State.*[16] Prime was convicted of aggravated rob-

10. McQueen v. Garrison, 617 F. Supp. 633, 638 (D. N.C. 1985) (sixth amendment violated by use of hypnotically-induced testimony); State v. Mena, 128 Ariz. 226, 624 P.2d 1274, 1280 (1981) (hypnotism not established as a reliable memory enhancer and raises barriers to effective cross-examination which violate the confrontation clause of the sixth amendment); People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 493 (1983) (impermissibly suggestive hypnosis would violate a defendant's constitutional rights).

11. Pointer v. Texas, 380 U.S. 400, 403 (1965) (the Supreme Court held that the sixth amendment is made "obligatory on the states by the fourteenth amendment").

12. Note, *The Admissibility of Testimony Influenced by Hypnosis,* 67 VA. L. REV. 1203, 1221 (1981).

13. State v. Martin, 684 P.2d 651, 656 (Wash. 1984) (listing witness' inability to distinguish facts known before hypnotism, and the adverse effect on the jury of the witness' conviction as tending to immunize the witness from meaningful cross-examination); Little v. Armontrout, 835 F.2d 1240, 1244 (8th Cir. 1987) (post-hypnotic identification testimony, when admitted in the absence of a state-provided defense expert, "rendered the trial fundamentally unfair"). *See* Commonwealth v. Juvenile, 381 Mass. 727, 412 N.E.2d 339, 341-42 (1980) for a list of cases discussing the testimony of previously hypnotized witnesses.

14. People v. Gonzales, 415 Mich. 615, 329 N.W.2d 743, 747 (1982); State v. Palmer, 210 Neb. 206, 313 N.W.2d 648, 655 (1981); Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190, 1195-97 (1983).

15. Clay v. Vose, 599 F. Supp. 1505, 1519 (D. Mass. 1984) (the sixth amendment right to confrontation imposes Federal Constitutional constraints on the admissibility of testimony by a previously hypnotized witness). Orndorff v. Lockhart, ___ F. Supp. ___ (D. Ark. 1988) (Westlaw No. 149263) (hypnotically-enhanced evidence should be excluded as violative of a defendant's sixth and fourteenth amendment rights when procured without safeguards, in an haphazard manner, and when the state fails to disclose to the defendant the fact hypnosis was performed). *But see* Chaussard v. Fulcomer, 816 F.2d 925, 929-30 (3d. Cir. 1987) (finding that the memory-hardening effects of hypnosis do not necessarily result in a confrontation clause violation).

16. In *Prime*, the court, speaking through Justice Thomas, noted that the United States Supreme Court review of the status of state law regarding hypnosis, in Rock v. Arkansas, 107 S. Ct. 2704, 2713 (1987), "seems compatible with the position which has been espoused by this court in prior cases." *Prime*, 767 P.2d at 153. This conclusion may be arguable. In dicta, the Supreme Court announced that because "scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy," the Court would not "endorse without qualifications the use of hypnosis as an investigative tool." *Rock*, 107 S. Ct. at 2714. The Court said "[t]he inaccuracies the process introduces can be reduced, although perhaps not eliminated, by the use of procedural safeguards." *Id.* In addition, the Court found that "popular belief that hypnosis guarantees the accuracy of recall is as yet without established foundation . . . ." *Id.* at 2713.

bery.[17] Testimony at his trial came from two eyewitnesses. Both had been hypnotized by police. Before the hypnosis, each described the circumstances of the robbery without specifically describing the robbers. After the hypnosis, one of the witnesses positively identified both of the robbers. The court held that hypnosis does not make a witness incompetent to testify and that a jury can adequately determine the question of the credibility of a previously hypnotized witness.[18]

This comment first discusses scientific knowledge about hypnosis. It then explores case law from several jurisdictions which use various alternatives in handling the admission of hypnotically-procured testimony.[19] Next, it analyzes the present status of Wyoming law regarding hypnosis. Finally, it suggests a reliable procedure for the courts and law enforcement personnel to use in managing the hypnosis of witnesses.

BACKGROUND

Scientific Aspects of Hypnosis

The term hypnosis refers to a sleep-like state that disposes an individual to respond in a submissive, uncritical and automatic way.[20] Memory and awareness may be altered hypnotically, routinely extending the effects into subsequent waking activity.[21] The science of hypnosis has been proven capable of producing beneficial results in certain limited contexts. It has been successfully employed to check compulsive habits, alleviate pain, allow operations without anesthesia,[22] calm nerves, treat mental disorders[23] and effect levitation.[24] In the 1950's, the major medical associations formally acknowledged it as an accepted procedure for medical use.[25] Police and the Federal Bureau of Investigation (FBI)

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17. *Prime*, 767 P.2d at 149. Prime and his accomplice, Haselhuhn, were convicted of robbing the Green River Safeway store. They entered the store and concealed themselves until closing. Then, brandishing a knife and a shotgun, and wearing masks, they bound and blindfolded the manager and a clerk. They were convicted of leaving with the day's cash receipts, but were tied to the crime only by voice print identification and the hypnotically-enhanced testimony of eyewitnesses who saw them earlier around the store. None of the witnesses were actually present during the robbery except the blindfolded manager and clerk. *Id.* at 150-51.

18. *Id.* at 153.

19. *See generally*, Comment, *Hypnotically Refreshed Testimony and the Balancing Pendulum*, 1985 U. ILL. L. REV. 921, 962-63 (1985) (discussing the various views the states take when dealing with hypnotically-enhanced testimony). Judicial opinion on the subject ranges from holding such testimony completely inadmissible, *see, e.g.*, State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266, 1275 (1982), to requiring some amount of procedural safeguards, *see* Quick v. Crane, 111 Idaho 759, 727 P.2d 1187, 1202 (1986), to per se admissibility, as is the present Wyoming law, *see Chapman*, 638 P.2d at 1284.

20. 9 ENCYCLOPEDIA BRITANNICA MACROPEDIA, *Hypnosis*, at 133 (1984).

21. *Id.*

22. Gelman, *Illusions That Heal*, NEWSWEEK, Nov. 17, 1986, at 74.

23. C. HILGARD, HYPNOTIC SUSCEPTIBILITY 4 (1965).

24. F. MONAGHAN, HYPNOSIS IN CRIMINAL INVESTIGATION 29-30 (1980) (various limbs and appendages have been levitated via hypnotic means).

25. Council on Mental Health, *Medical Use of Hypnosis*, 168 J.A.M.A. 186, 187 (1968).

also frequently rely on hypnosis as an investigative tool,[26] much as Wyoming police did in *Prime*.[27]

Hypnosis is a valuable psychogenic tool for the treatment of certain physical and psychological disorders.[28] It has been widely used by physicians, entertainers and investigators. At present, however, scientific understanding of the phenomenon is not well developed.[29] Difficulties with admission of hypnotically-generated testimony arise because it is an inherently suggestive procedure.[30] Researchers have recognized at least five major categories of potential problems which are relevant to the courtroom use of hypnotically-refreshed or acquired evidence.

Confabulation, the first problem, is the subject's inclination to fill in or synthesize those aspects of the topic which the individual cannot remember in an effort to comply with the perceived desire or direct suggestion of the hypnotist.[31] When hypnotized, a subject accepts as real the distortions of perception and memory suggested by the hypnotist.[32] Dr. Martin Orne has termed the condition which is characterized by conscious or unconscious cooperation with suggestions, either implied or expressed, hypermnesia.[33] Orne noted that the danger inherent in subjects with hypermnesia was that they showed a pronounced tendency to confabulate when trying to retrieve minute details.[34]

Suggestion is the mechanism used to induce the hypnotic state and is the basis for its effectiveness. Obstacles to successful prediction of the effects of hypnosis on individuals arise because the power of suggestion does not affect all subjects to the same degree.[35] The individual's desire to participate in the session in harmony with the expectations of others, the place where the procedure is performed, the purpose for conducting

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26. The first police department to use a specially trained hypnosis unit was the Los Angeles Police Department (L.A.P.D.) in 1970. These "Svengali Squads" were used extensively in the 1970's as their number and initial success steamrollered courts. Comment, *Growing Disenchantment with Hypnotic Means of Refreshing Witness Recall*, 41 VAND. L. REV. 379, 380 (1988).

The L.A.P.D. supported its use of the squads in part by its own study which showed that 91 percent of all the testimony obtained from witnesses by hypnosis was verifiable by independent investigation. One author discovered, however, that "less than half of the cases in which hypnosis had been used were able to be included in that study." Levitt, *The Use of Hypnosis to "Freshen" the Memory of Witnesses or Victims*, TRIAL, 56, 58 (April 1981).

27. 767 P.2d at 150-51.

28. MONAGHAN, *supra* note 24, at 53.

29. *Rock*, 107 S. Ct. at 2714.

30. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313, 316, 333 (1980).

31. *Id.* at 316, 327, 335.

32. BRITANNICA, *supra* note 20, at 133.

33. Orne, *The Use and Misuse of Hypnosis in Court*, 27 INTL. J. CLINICAL AND EXPERIMENTAL HYPNOSIS 311, 318-20 (1979). Hypermnesia is defined as "a capacity under hypnosis for immediate registration and precise recall of many more individual items than is thought possible under ordinary circumstances." STEADMAN'S MEDICAL DICTIONARY 674 (5th ed. 1982).

34. Orne, *supra* note 33, at 318-20.

35. *Chapman*, 638 P.2d at 1283. "There are both quantitative and qualitative differences between subjects in the degree of their involvement in hypnosis." *Id.*

it,[36] and the "will to believe" in the subject or in the hypnotist[37] all influence the reaction to suggestion and may suggest or affect the outcome.

The potential for post-hypnosis witnesses to have increased or exceptional confidence in their recollection is related to the confabulation problem. Artificially improved confidence is a proven side effect of hypnotism.[38] In a widely cited law review article on the use of pre-trial hypnosis one author discussed the phenomenon of increased confidence.[39] He concluded that many "courts apparently believe that cross-examination and expert witness attacks on the credibility of such [affected] testimony will reveal any shortcomings in the hypnosis and get to the truth. This hope is misplaced . . . The plain fact is that such testimony is not and cannot be reliable."[40] The memory hardening process may grant to a witness such aplomb and assurance that his belief in the veracity of his testimony becomes unshakable.[41]

Hypnosis can make a witness impervious to cross-examination.[42] In the section of his work on how "to Create an Apparently Reliable Witness,"[43] Orne cites several cases where patently unreliable witnesses were converted into unshakable, unimpeachable testimonial oracles. Even reliable witnesses who were merely unsure became more solid, credible and impressive.[44]

The third problem is hypersuggestibility, or hypercompliance. A hypnotized individual becomes increasingly susceptible to suggestions consciously or unconsciously planted by the hypnotist or others present during the session.[45] Because memory is affected by motivation, confusion and self-delusion, false information or suggestion can become a part of a witness' recollection.[46] A person's "current picture of the past," when produced by hypnosis, can become a mixture of newly recalled and "totally false" information due to the desire to follow the hypnotist's suggestions.[47] It is virtually impossible for either the subject or the hypnotist to distinguish actual memory from that created by the hypnosis. Even the witness himself may be unable to make the distinction between what he

36. Diamond, *supra* note 30, at 333; Orne, *supra* note 33, at 326.

37. *Chapman*, 638 P.2d at 1288 (Brown, J., dissenting) (quoting HILGARD, DIVIDED CONSCIOUSNESS: MULTIPLE CONTROLS IN HUMAN THOUGHT AND ACTION 59 (1977)).

38. Diamond, *supra* note 30, at 339.

39. *Id.* at 339-40.

40. *Id.* at 348-49.

41. *Palmer*, 313 N.W.2d at 653. In *Palmer*, the court held that a witness who had been previously questioned under hypnosis may not testify in a criminal trial as to subject matter adduced during pre-trial hypnosis. *Id.*

42. Note, *Hypnosis and the Prejudice Rule - Your Memories May Not Be Your Own*, 21 J. MARSHALL L. REV. 409, 416 (1988), relying on *Rock*, 107 S. Ct. at 2704. *See Orndorff*, W.L. 149263 at 14 (once a witness has made a recitation under hypnosis, he may have an "imprimatur of absolute confidence" on the witness stand).

43. Orne, *supra* note 33, at 332.

44. *Id.*

45. Diamond, *supra* note 30, at 337.

46. LOFTUS, MEMORY 7, 37 (1980).

47. *Id.* at 55-59.

remembered before the hypnosis session and that which is the product of it.[48] As one researcher on forensic hypnosis has written:

> when the interrogation focuses on some relevant detail . . . there is the greatest likelihood of mischief. A "memory" can be created in hypnosis where none existed before. . . . There is no way, however, by which anyone—even a psychologist or psychiatrist with extensive training in hypnosis—can for any particular piece of information determine whether it is an actual memory versus a confabulation unless there is independent verification.[49]

The fourth problem is the adequacy of the hypnotist's qualifications. Like any scientific procedure, errors can be introduced into the results if the procedure is not performed correctly. When hypnosis is administered by police officers whose training and experience have qualified them to interrogate, they may facilitate the production of unreliable information.[50] The threat that is always present is that "material produced during hypnosis . . . inspired by hypnotic revivification, may or may not be historically accurate."[51] In situations where a poorly trained or biased hypnotist is employed, the potential for historical inaccuracies can be increased.[52] Even "[t]he mere presence of [a person familiar with the investigation] may influence . . . the subject."[53] Since an unqualified hypnotist may be more likely to be ignorant of standard professional procedures than would a qualified mental health professional, the importance of using qualified professionals to minimize distortions of memory is evident. At a minimum, the hypnotist should be trained to avoid using persuasive suggestions or leading questions which can implant inaccurate conclusions in the memory.[54]

The fifth problem is the subject's prior or subsequent contact with the hypnotist. It may become a source of false recollection. Conversation between them about the issues will influence how the subject responds and how the hypnotist acts during hypnosis. Orne has found that the tone and context of the session profoundly alter the result.[55] When details are presented as valid by the hypnotist, they help convince the subject that they are reliable memories.[56]

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48. *State v. Peoples*, 311 N.C. 515, 319 S.E.2d 177, 182 (1984) (absent objective, independent means to verify recall, its accuracy remains both unknown and unknowable); *see also* Diamond, *supra* note 30, at 334 (a witness who has undergone hypnosis can rarely, if ever, recognize that a suggestion implanted intentionally or unintentionally by the hypnotist is not the product of his own mind. This misperception will withstand the most vigorous cross-examination).

49. Orne, *supra* note 33, at 328, 318.

50. Levitt, *supra* note 26, at 56-57.

51. Orne, *supra* note 33, at 318. The subject is able, because of hypnosis, to accept approximations of memory as accurate. *Id.* at 319.

52. Diamond, *supra* note 30, at 324-25 (testimony can be the product or fantasy formulated in response to subtle cues from investigators; unfortunately, some psychologists cooperate with abuses of hypnosis).

53. State v. Hurd, 86 N.J. 525, 432 A.2d 86, 97 (1981).

54. MONAGHAN *supra* note 24, at 78.

55. Orne, *supra* note 33, at 325-37. Verbal reinforcement, lack of criticism, depth of trance, and degree of relaxation all may alter the accuracy of the subject's recall. *Id.*

56. *Id.* at 327.

Hypnosis Case Law

Ironically, it was an accused who made the inaugural attempt to insert hypnosis into the judicial process.[57] In 1897, the California Supreme Court rejected a bid by an accused to use expert testimony to show that, while hypnotized, he had denied his guilt.[58] The trial court emphatically stated that "[t]he law of the United States does not recognize hypnotism."[59]

In 1962, Ohio broke with precedent and became the first state to admit hypnotically-influenced testimony.[60] Since then some courts, including Wyoming's, have used the evidentiary rule of present recollection refreshed as the basis for admitting hypnotically-influenced testimony.[61] However, at least one court has rejected this theory as a vehicle through which to admit hypnotically-altered testimony.[62]

Scientific Bases

In 1982, Wyoming joined what hindsight has proven to have been an ephemeral majority of courts by approving the use of pre-trial hypnosis without safeguards.[63] In *Chapman*, a three-two majority of the Wyoming Supreme Court acknowledged some of the problems associated with hypnosis. In spite of this, the court held that the issue of the admissibility of hypnotically-enhanced recollections was "properly one for the fact finder—as are all issues relative to the credibility of witnesses."[64] Hypnosis is like much scientific evidence in that a jury is likely to view it as an area beyond its knowledge[65] and award it considerable credence.[66] When faced with an admissibility question such as this, many courts have applied a standard first enunciated in *Frye v. United States*.[67] *Frye* provides that scientific evidence will only be admitted at trial if the procedure and results are generally accepted as reliable in the part of the scientific community to which they belong.[68] In a landmark decision, the Minnesota Supreme Court held that hypnosis does not have the indicia of reliability and scien-

57. People v. Ebanks, 117 Cal. 652, 49 P. 1049 (1897).

58. *Id.* at 1053.

59. *Id.*

60. State v. Nebb, No. 39, 540 (C. P. Franklin Co., Ohio 1962) *unreported decision*, as cited in Comment, *Hypnosis - Should the Courts Snap Out of It? - A Closer Look at the Critical Issues*, 44 OHIO ST. L. J. 1053, 1057 (1983).

61. *Chapman*, 638 P.2d at 1282.

62. *Mena*, 624 P.2d at 1278. Another court characterized the problem as "the very process that yields investigative fruits may sow testimonial dangers." Harker v. Maryland, 800 F.2d 437, 440 (4th Cir. 1986).

63. *Chapman*, 638 P.2d at 1282.

64. *Id.*

65. Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170, 173 (1981) (stating that " 'the fear that the trier of fact will accord uncritical and absolute reliability to' a scientific device [such as hypnosis] without consideration of its . . . veracity") (quoting Spector and Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO L. J. 567, 583 (1977)).

66. Levitt, *supra* note 26, at 58. *See also* Diamond *supra* note 30, at 330 (citing Spector and Foster, *supra* note 65, at 596).

67. 293 F. 1013 (D.C. Cir. 1923). *See* People v. Shirley, 31 Cal. 3d 18, 181 Cal. Rptr. 243, 641 P.2d 775, 797 (1982); *Collins*, 644 P.2d 1266 (1982); *Palmer*, 313 N.W.2d at 655.

68. *Frye*, 293 F. at 1014.

tific recognition required by *Frye*.[69] In 1985, the Missouri Supreme Court, citing *Frye*, agreed that hypnotically-enhanced testimony was inadmissible per se.[70] An apparent majority of courts have not yet applied the *Frye* analysis to hypnosis,[71] but that reasoning has been identified as a growing trend.[72]

The Confrontation Clause

Other courts which have rejected or restrained the use of hypnotically-enhanced testimony have done so, not under *Frye*, but on the basis of the sixth amendment. North Carolina was among the states which, like Wyoming in *Chapman*, held that hypnosis of a witness was a consideration relating only to the credibility, rather than to the admissibility, of evidence.[73] However, since *Chapman*, North Carolina has rejected this approach. In 1984, the North Carolina Supreme Court, in *State v. Peoples*,[74] held that hypnotically-refreshed testimony was inadmissible as to any facts not related prior to hypnosis.[75] Among the reasons the court gave was the possibility that hypnosis could prevent effective cross-examination of the subject because of his undue confidence in the accuracy and truthfulness of the post-hypnotic recall.[76] The court found this constitutional right to be "completely frustrated."[77]

Recently other courts have also found this sort of pre-trial immunization against cross-examination objectionable.[78] The Tenth Circuit found that the credibility of an eyewitness' testimony was "undermined" by hypnosis.[79] Justice Thurgood Marshall observed that a witness' "own assessment of the impact of hypnosis on his recollection was inherently unreliable and was not subject to effective cross-examination."[80] He noted that

69. State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980).

70. Alsbach v. Bader, 700 S.W.2d 823, 830 (Mo. 1985) (en banc). The court found that the use of hypnosis did not meet the Missouri version of the *Frye* rule. The court observed that much of the authority used to support the earlier Missouri case which allowed the use of hypnosis, State v. Greer, 609 S.W.2d 423 (Mo. App. 1980), *vacated on other grounds*, 450 U.S. 1027 (1981), had been overruled. *Alsbach*, 700 S.W.2d at 825.

71. *See* Comment, *supra* note 60, at 1061 n.76.

72. *Id.* at 1059-60.

73. State v. McQueen, 295 N.C. 96, 244 S.E.2d 414, 427 (1978), *overruled, State v. Peoples*, 311 N.C. 515, 319 S.E.2d 177, 180 (1984).

74. 311 N.C. 515, 319 S.E.2d 177 (1984). In *Peoples*, an accomplice to a robbery which netted the thieves several buckets of silver was hypnotized by a police detective. The officer had attended a two-week training course in hypnosis. The session produced facts which the witness later testified to in court. 319 S.E.2d at 178-79.

75. *Id.* at 188.

76. *Id.* at 184.

77. *Id.*

78. *Shirley*, 641 P.2d at 803-04; *Mena*, 624 P.2d at 1278, 1280; *Collins*, 644 P.2d at 1275. *See also* Comment, *supra* note 60, at 1067-68.

79. Bowen v. Maynard, 799 F.2d 593, 611 (10th Cir. 1986) (the credibility of an eyewitness' identification of a suspect was undermined by her hypnosis).

80. Bundy v. Florida, 107 S. Ct. 295, 297 (1986) (Marshall, J., dissenting), *denying cert. to*, Bundy v. State, 471 So. 2d 9 (Fla. 1985). After a highly publicized search, Bundy became a suspect in the disappearance of a Florida girl. An eyewitness to the abduction came forward. Initially the witness was unable to positively identify the kidnapper, the girl, or the date of the abduction. After two hypnosis sessions, however, the witness was able to positively identify the kidnapper as Bundy and the girl as Kimberly Leach at the trial. *Id.* at 296.

experts in hypnosis agreed that it raised effective barriers to cross-examination.[81] At least one court has found that memory alteration caused by hypnosis is a denial of the sixth amendment right to confront and cross-examine adverse witnesses.[82] This right is obligatory in its entirety on the states.[83] Courts have excluded hypnotically-produced testimony on sixth amendment confrontation clause grounds, absent independent corroboration.[84] There remains a great diversity of views on the question,[85] however, one court, relying on respected scientific authority, has been convinced that under *Frye* sufficient scientific acceptance exists to support admission when accompanied by adequate safeguards.[86]

Limits on Admissibility

Several courts which admit hypnotically-influenced testimony have taken a variety of measures to protect the integrity of the judicial system.[87] In *People v. Hughes*,[88] the court held that to ensure due process of law, the State bears the burden of demonstrating by "clear and convincing proof" that the hypnosis did not work an impairment of the defendant's right of cross-examination. The victim in *Hughes* was dragged out of her apartment into her yard, choked, beaten and raped. Hospital records showed that she was unable to recall the details of the event, but after hypnosis she identified the defendant. The court reasoned that because the level of scientific knowledge was not such that it could help a trier of fact to identify hypnotically-implanted pseudo-memory,[89] the state has the burden of demonstrating that the witness' testimony of pre-hypnotic recollection is reliable and the defendant's right to cross-examination is unimpaired.[90]

Hughes follows the general principles applied to identification testimony which place the burden of persuasion on the party seeking to introduce the evidence.[91] While excluding evidence from the jury is a drastic sanction, hypnotically-enhanced testimony, garnered without safeguards, may prove to be justifiably suspect. "Short of [justifiable

81. *Id.* (citing Bundy v. State, 471 So. 2d 9, 18 (Fla. 1985)).
82. *McQueen*, 617 F. Supp. at 638; *Mena*, 624 P.2d at 1280.
83. *Pointer*, 380 U.S. at 406.
84. *McQueen*, 617 F. Supp. at 638 (reasoning that there is no effective means of cross-examination unless the hypnotically-enhanced testimony is corroborated).
85. *See generally* Comment *supra* note 60, at 1062.
86. *Hurd*, 432 A.2d at 89-91. For a list of these safeguards, see *infra* note 96.
87. Protective measures taken include exclusion of statements made under the influence of hypnosis, *Mena*, 624 P.2d at 1280; limiting the witness to testimony which can be proven by the proponent to have been recalled independent of, and prior to, the hypnosis, State v. Moreno, ___ Haw. App. ___, 709 P.2d 103, 105 (1985); and imposing a variety of specific safeguards such as videotape recording of the session and use of a qualified hypnotist, *see Harker*, 800 F.2d at 441-43 (holding that permitting a full exploration into the hypnotic event, including the hypnotist's qualifications, protected the defendant's sixth amendment right to confrontation); *Hurd*, 432 A.2d at 89-90; Beck v. Norris, 801 F.2d 242, 244-45 (6th Cir. 1986).
88. 59 N.Y.2d 523, 453 N.E.2d 484, 497 (1983).
89. *Id.* at 495.
90. *Id.* at 497.
91. Pacific Portland Cement Co. v. Food Mach. and Chem. Corp., 178 F.2d 541, 547 (9th Cir. 1949).

suspicion], such evidence is for the jury to weigh . . . for evidence with some element of untrustworthiness is customary grist for the jury mill."[92]

In *State v. Hurd*,[93] the victim, while asleep, was attacked by a man with a knife. Stabbed repeatedly, she had no recollection of the physical appearance of her attacker until six days later during a hypnosis session at which she was prompted by police to identify her ex-husband. Two police officers assigned to the prosecutor's office were present and at one point took over the questioning.[94] The court found the suggestiveness of their acts to be excessive and said the procedure "raise[d] grave doubts about the reliability of the hypnotically refreshed testimony obtained, which render the testimony inadmissible."[95] The court in *Hurd* adopted a group of safeguards designed to allow courts to correctly manage hypnotically-enhanced testimony.[96] Other courts which have excluded or limited this type of testimony have done so because of the potential adverse impact of hypnotically-improved testimony on the criminal defendant's sixth amendment right to confrontation[97] or because it would be impossible to cross-examine affected witnesses in any meaningful way.[98] The Eighth Circuit recently found that because of the problems of confabulation, suggestibility and memory hardening, a defendant had the right to oppose the state's expert with an expert of his own.[99] Absent the appointment of an expert to aid the defendant, such testimony would be inadmissible

92. Manson v. Brathwaite, 432 U.S. 98, 116 (1977) (holding that the due process clause of the fourteenth amendment does not require excluding pre-trial identification evidence obtained by a suggestive police procedure where it is reliable).

93. 86 N.J. 525, 432 A.2d 86 (1981).

94. The detective said "[i]s it [the defendant]," "Yes" replied the victim from her trance. 432 A.2d at 89.

95. *Id.* at 98. *Hurd* was a unanimous decision of the New Jersey Supreme Court. By 1985, the courts in nine jurisdictions enacted procedural safeguards similar to those used in *Hurd*. *See* Comment, *supra* note 19, at 762. Oregon legislatively adopted such safeguards. *See* OR. REV. STAT. § 136.675 (1984).

96. 432 A.2d at 96. *See also* Orne, *supra* note 33, at 335-36. The *Hurd* list includes: (1) a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session; (2) the professional conducting the session should be independent of and not regularly employed by the prosecutor, investigating body, or defense; (3) information given to the hypnotist by law enforcement or the defense prior to the session must be recorded, either in writing or other suitable form; (4) before inducing the hypnosis, the hypnotist should obtain as detailed a recollection of the facts as possible by asking open-ended, non-detailed questions; (5) all contacts between the hypnotist and the subject must be recorded; (6) only the subject and the hypnotist should be present during the session. 432 A.2d at 96-97.

97. *McQueen*, 617 F. Supp. at 638.

98. *See* State v. Valdez, 722 F.2d 1196, 1202 (5th Cir. 1984); *McQueen*, 617 F. Supp. at 638; *see also Mack*, 292 N.W.2d at 769 (noting, in dicta, that "[i]t would be impossible to cross-examine such a witness in any meaningful way").

99. Little v. Armontrout, 835 F.2d 1240, 1244-45 (8th Cir. 1987). The conviction in *Little* was primarily based on the testimony of witnesses who identified the defendant after hypnosis. Little offered several alibi witnesses who placed him 78 miles away at the time of the rape. The Eighth Circuit was presented with a claim by Little that because the public defender's office was denied sufficient funds to hire an expert in hypnosis, the trial was fundamentally unfair. The court agreed and noted that a state appointed expert could have pointed out which questions posed to the victim by a police hypnotist were suggestive or could have caused confabulation. *Id.* at 1244.

in Missouri.[100] It reached this result in spite of the trial court's conclusion that the witness did not act in any way indicative of improper suggestion.[101]

Wyoming Rule of Evidence 401 provides for the admission of all relevant evidence which makes a fact of consequence more or less probable.[102] Taken alone this would imply that courts should admit hypnotically-enhanced testimony when pertinent and material. But Wyoming Rule of Evidence 403[103] requires exclusion of even relevant evidence where the court finds it has a potential to mislead or confuse the jury.[104]

In *United States v. Valdez*,[105] a Texas Ranger could not recall having seen the suspect during a stake-out of a ransom money drop. The Ranger had interviewed the suspect beforehand and knew that the FBI had found the suspect's palm print on a ransom letter, but had no memory of seeing him at the money drop. Then the Ranger was hypnotized.[106] At trial, the Ranger testified to a complete and vivid recollection of the suspect's actions at the drop site.[107] The *Valdez* court found the failure to follow procedural safeguards, when coupled with the absence of corroboration of the Ranger's identification, made the proffered testimony "potentially more prejudicial than probative."[108] Applying Federal Rules of Evidence 402, 403 and 601,[109] the court held that the potential for misleading the jury required "the exclusion of an uncorroborated personal identification, made only after hypnosis, of a person clearly singled out for suspicion."[110]

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100. *Id.* at 1243. The Eight Circuit noted, however, that the issue might not recur since Missouri had, since the defendant's appeal, ruled hypnotically-enhanced testimony inadmissible and because the defendant was at that time paroled. *Id.* (citing *Alsbach*, 700 S.W.2d at 823).

101. *Id.* at 1242.

102. WYO. R. EVID. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This rule is similar to FED. R. EVID. 401.

103. WYO. R. EVID. 403 states that even 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. This rule is identical to FED. R. EVID. 403.

104. Courts in at least three jurisdictions—the Fifth Circuit, Texas, Alaska—have excluded testimony as to matters not recalled independent of hypnosis. *See* Comment, *supra* note 12, at 1205.

105. 722 F.2d 1196, 1198 (5th Cir. 1984).

106. *Id.* at 1199. The Ranger was apparently hynotized under FBI guidelines. Those guidelines permit hypnosis when used as an "investigative aid." The guidelines do not require videotaping of sessions or the use of either a medical or mental health professional. They require the presence of an FBI agent, called a "hypnosis coordinator" to "participate in the hypnotic session." The guidelines also state that "the information obtained through hypnosis cannot be assumed to be necessarily accurate," and that "investigation is needed to verify the accuracy." *Id.* (citing Ault, *FBI Guidelines for the Use of Hypnosis*, 27 INT. J. CLINICAL AND EXPERIMENTAL HYPNOSIS 449, 450 (1979)).

107. *Id.* at 1198.

108. *Id.* at 1203.

109. *Id.* at 1201. The court considered the respective rules' provisions that "all relevant evidence is admissible;" that probative value be balanced against potential dangers; and that "every person is competent to be a witness." *Id.*

110. *Id.* at 1203.

The court characterized as "dubious" the proposition that cross-examination could adequately disclose inaccuracies caused by hypnosis.[111]

ANALYSIS

When courts allow witnesses to testify after the administration of hypnosis without procedural safeguards, an accused may be deprived of constitutionally guaranteed rights. The right to confront adverse witnesses through cross-examination is a basic right of every criminal defendant.[112] The absence of restraining safeguards on the admission of hypnotically-altered testimony leaves trial courts without guidance on the question and opens the door to possible violations of an accused's sixth amendment rights. Any state restriction on the cross-examination of witnesses must be measured against the sixth amendment's confrontation clause.[113] Counsel cannot effectively cross-examine a witness who is immune to cross-examination due to hypnosis. The possibility of loss of these important rights should make courts cautious about admitting hypnotically-effected testimony.

Specific problems with the hypnosis procedures discussed by the most recent Wyoming decision[114] include: the hypnotist was not a mental health professional; the hypnotist was not independent of law enforcement authorities; the hypnotist had minimal training and employed questionable procedures; inadequate records were made of information given to the hypnotist by the authorities; inadequate records were made of pre- and post-session contact between the hypnotist and the subject; inadequate record was made of a pre-session description of facts as the subject remembered them; and last, the session was not videotaped.[115] As more hypnosis cases have been litigated these same difficulties have repeatedly been recognized and considered by courts and commentators. Several procedural safeguards have been formulated.

The danger of confabulation is among the most serious problems with the use of hypnosis as anything more than an investigatory tool in the criminal justice system. Confabulation is often the product of hypnotic suggestion.[116] A suggestive disposition is good if the goal is to stop smoking or to lose weight. However, its risks can outweigh any benefits where the goal is positive suspect identification or producing evidence.

Without an independent corroborative source, a jury may lack a basis on which to judge post-hypnotic testimony.[117] Hypnosis can defeat the

111. *Id.* at 1202 (citing Diamond, *supra* note 30, at 333-34).
112. *Wade*, 388 U.S. at 227.
113. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE, 1348 (1986).
114. *Prime*, 767 P.2d at 149.
115. Appellant's Brief at 4, 20-26, 29, Prime v. State, 767 P.2d 149 (Wyo. 1989) (No. 86-203) [hereinafter Appellant's Brief].
116. Orne, *supra* note 33, at 321.
117. State v. Baykin, 432 N.W.2d 60, 67 (S.D. 1988) (limiting witnesses to testimony corroborated by pre-hypnotic statements); Zani v. State, ___ S.W.2d ___ (Tex. Ct. App. 1989) (Westlaw No. 17229) (the corroboration of hypnotically-enhanced testimony is an important element in determining its admissibility).

skill of cross-examiners and produce incorrect adjudication results.[118] If hypnosis provides a witness with exceptional confidence in his testimony, a record which adequately conveys the session to the jury should be available. Where:

> there is even the vaguest possibility that hypnotically enhanced recall is to be used in court, it is essential that the entire contact of the hypnotist with the subject be videotape-recorded in order to allow an independent assessment of events preceding, during, and following the hypnotic session to determine whether or not the memories might have inadvertently been guided by cues in the situation.[119]

This is especially important in a jurisdiction such as Wyoming which now leaves the jury with the responsibility of determining the weight of hypnotically-enhanced testimony.

The foremost obstacle to fairness may be the potential conflict of interest that occurs when the hypnotist is an employee of a law enforcement agency.[120] The problem was not widely recognized by courts when *Chapman*[121] was decided in reliance on *Harding*.[122] A federal court interpreting the change in Maryland law refused to formulate a per se rule excluding hypnotically enhanced testimony. That court held that expert testimony about the likelihood of corruption of a subject by a police hypnotist sufficiently forewarned the jury.[123]

Two major professional hypnosis organizations disagree.[124] In condemning the use of hypnosis by often biased or ill-trained law enforcement personnel, they view:

> with alarm the tendency for police officers with minimal training in hypnosis and without a broad professional background in the healing arts employing hypnosis to presumably facilitate recall of witnesses or victims privy to the occurrence of some crime. Because we recognize that hypnotically aided recall may produce either accurate memories or at times may facilitate the creation of pseudo memories, or fantasies that are accepted as real by subject and hypnotist alike, we are deeply troubled by the utilization of this technique among the police. It must be emphasized that

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118. *McQueen*, 617 F. Supp. at 638 (noting that hypnotic suggestion may preclude effective cross-examination).

119. Orne, *supra* note 33, at 328.

120. Four of the five Wyoming hypnosis cases involved hypnosis by police or prosecutors. *Prime*, 767 P.2d at 151; Haselhuhn v. State, 727 P.2d 280, 283 (Wyo. 1986); Pote v. State, 695 P.2d 617, 626 (Wyo. 1985); *Chapman*, 638 P.2d at 1281.

121. 638 P.2d at 1284.

122. 246 A.2d at 311-12.

123. *Harker*, 800 F.2d at 442.

124. Resolutions passed by the Society for Clinical and Experimental Hypnosis and the International Society for Hypnosis in October 1978 and August 1979, respectively. 27 INT. J. CLINICAL AND EXPERIMENTAL HYPNOSIS 452, 453 (1979).

> there is no known way of distinguishing with certainty between actual recall and pseudo memories except by independent verification.[125]

Strict measures to protect against undue influence by police hypnotists have been suggested. Because they are "critical identification procedures," hypnosis sessions have been identified as situations at which the right to counsel should be granted.[126] Orne has found that "free narrative recall will produce the highest percentage of accurate information . . . ."[127] Conversely, whenever the hypnotist asks highly detailed questions, the subject may assimilate and adopt an unknown amount of the details. "As a consequence, memories which occurred only during hypnosis may be incorrectly presented in court as though they represented recollections based on original memory traces of the events that actually occurred on the day in question."[128] As pointed out by the court in *McQueen,* cross-examination provides the accused an opportunity to sift the consciousness and test the recollection and demeanor of the witness.[129] This requirement is one of the strengths of our adversary system and has been recognized by the United States Supreme Court as fundamental.[130] When hypnotism is employed in a slipshod manner by those ill trained to use it, this constitutional guarantee is impaired.[131] Thus, if hypnotically-obtained testimony is offered, courts should ensure that the offering party has taken measures to preserve a record of the witness' exposure to hypnosis.

Under the *Chapman* rule,[132] courts may admit hypnotically-enhanced testimony regardless of the technique used to acquire it, with the jury deciding its weight.[133] A defect inherent in this rule is that, without independent corroboration, the jury is as incapable as anyone of verifying a witness' claims or determining if they are a result of hypnotically-enhanced confidence.[134] When the defendant is denied the opportunity to effectively cross-examine, his only recourse is to challenge the credibility

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125. *Id.* at 452, 453.

126. *See generally* Alderman and Barnette, *Hypnosis on Trial,* 18 CRIM. L. BULL. 5, 10-15 (1982).

127. Orne, *supra* note 33, at 321 (citing Hilgard and Loftus, *Effective Interrogation of the Eyewitness,* 27 INT. J. CLINICAL AND EXPERIMENTAL HYPNOSIS 342 (1979)).

128. *Id.* at 320.

129. *McQueen,* 617 F. Supp. at 635.

130. Smith v. Illinois, 390 U.S. 129, 133 (1968) (citing Pointer v. Texas, 380 U.S. 400 (1965)).

131. *See generally* Comment, *supra* note 19, at 932-33.

132. *Chapman,* 638 P.2d at 1284.

133. The determination to leave to the fact-finder alone the question of credibility has been criticized because a previously hypnotized witness may be invulnerable to cross-examination. As one author pointed out, the absence of an adequate video recording in *Chapman* "made it impossible for the defense to attack the specific procedures used or to demonstrate any specific sources of error. In effect, the defense was not able to bring out all of the facts concerning the hypnosis as the [*Chapman*] majority opinion contended, and its ability to cross-examine the witness was seriously impaired." R. UDOLF, FORENSIC HYPNOSIS 87-88 (1983).

134. *McQueen,* 617 F. Supp. at 638 (the subject, court and jury are all incapable of determining when the witness is failing to separate true memory from hypnotic pseudomemory).

of the hypnotically-enhanced testimony.[135] While this may be done by attacking the procedures used to obtain the testimony, the defendant may lack the information and resources to do this effectively.[136] A second problem with the *Chapman* rule is that the question of admissibility of testimony is, under Wyoming Rule of Evidence 104(a),[137] a question which is to be decided by the judge. The *Chapman* "credibility" rule seems to leave it to the jury to decide all questions relating to hypnotically-enhanced testimony.

PROPOSED CHANGES TO THE *CHAPMAN* RULE

Wyoming remains one of a diminishing minority of states which hold that testimony of a previously hypnotized witness is per se admissible. At least twenty-three jurisdictions now employ procedural safeguards on the use of hypnotically-enhanced testimony or exclude it entirely.[138] The courts have frequently agreed with the reasoning of Orne that unless well-defined guidelines are implemented and followed the likelihood of serious miscarriage of justice will proliferate.[139] A revision of the present rule is necessary to protect the fairness of criminal trials which involve hypnotically-obtained testimony.

"When the authority upon which a rule of law is based becomes seriously eroded, the court adopting the repudiated rule should reexamine its position."[140] As shown by the lead of the twenty-three jurisdictions noted above,[141] the authority upon which *Chapman* was based has been eroded. The Colorado Supreme Court has recently said: "[b]ecause we recognize that hypnosis has the potential to produce unreliable testimony, we cannot accept the view that hypnosis affects only the credibility or weight of post-hypnotic testimony . . . ."[142]

In his dissent in *Chapman*, Justice Brown, joined by Justice Rose, collected several groups of procedural safeguards.[143] Justice Brown's compilation included four guidelines from Orne's work,[144] a list proposed by

135. *Prime*, 767 P.2d at 153; *Haselhuhn*, 727 P.2d at 283.

136. As pointed out in *Little*, an indigent defendant who is denied the funds to pay for the services of a state appointed expert is denied the "basic tools of an adequate defense." 835 F.2d at 1243 (quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971)).

137. WYO. R. EVID. 401(a) provides in relevant part that "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . ."

138. As of 1987, sixteen jurisdictions have held that hypnotically-enhanced testimony is per se inadmissible, *Rock*, 107 S. Ct. at 2712 n.14, and seven jurisdictions have established procedural prerequisites for admissibility, *id.* at 2713 n.16.

139. Orne, *supra* note 33, at 312.

140. *Haselhuhn*, 727 P.2d at 288 (Brown, J., dissenting).

141. *See supra* note 138.

142. People v. Romero, 745 P.2d 1003, 1015 (Colo. 1987).

143. *Chapman*, 638 P.2d at 1290-92 (Brown, J., dissenting).

144. *Id.* at 1291 (citing Orne, *The Use and Misuse of Hypnosis in Court*, 27 INTL. J. CLINICAL AND EXPERIMENTAL HYPNOSIS 311, 335-36 (1979)). Orne's suggestions are: (1) hypnosis should be carried out by a psychologist or psychiatrist with special training in its use; (2) all contact between the hypnotist and the individual to be hypnotized should be videotaped; (3) no one other than the psychiatrist or psychologist and the individual to be hypnotized

the California Attorneys for Criminal Justice[145] and a four-point foundation similar to that necessary for admission of any medical or scientific testimony.[146] These were in addition to the New Jersey safeguards,[147] developed by Orne, and cited, but not adopted, by the majority in *Chapman*.[148]

Recent cases have refined and expanded the list of hypnosis safeguards available to Justice Brown. For instance, in *Hughes*, the court held that a pre-trial hearing should be conducted to determine the extent of the witness' pre-hypnosis recollection to establish the boundaries of admissible testimony.[149] Other courts, applying the *Frye* test, have held that unless there is corroboration independent of the hypnosis, any testimony not remembered before hypnosis is inadmissible.[150] At least one court has found hypnosis so dangerous that it has excluded all post-hypnosis testimony.[151]

An ideal rule would be one taking into consideration the merits of all the various efforts to deal with the question of hypnotically-enhanced testimony. The rule should not overreact to the potential dangers, but should provide guidance to courts and law enforcement to help them manage the risks effectively. The following two-step approach is proposed:

1) The trial court will determine, as an initial matter,[152] whether the type of memory loss involved is of a kind which is susceptible to improve-

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should be present in the room before and during the session; (4) tape recordings of prior interrogations of the witness should be made to ensure that the witness has not been cued regarding newly recovered evidence apparently produced by hypnosis. These guidelines are also cited in *Mack*, 292 N.W.2d at 771-72 n.14.

145. *Chapman*, 727 P.2d at 1291. The list includes: (1) that the hypnotist be a mental health professional with special training in the use of hypnosis, preferably a psychiatrist or psychologist; (2) that this person not be informed about the case verbally, but only in writing subject to scrutiny; (3) that the hypnotist be independent and not responsible to the parties; (4) that all contact between the subject and the hypnotist be videotaped from the beginning to the end; (5) that nobody representing either party be present with the hypnotist and the subject during the session; (6) that prior to the session the hypnotist examine the subject to exclude the possibility of physical or mental illness and to establish sufficient intelligence, judgment, and comprehension of what is happening; (7) that the all facts be obtained from the subject prior to the hypnosis; (8) that during the session, the hypnotist strive to avoid adding any new elements to the subject's description, including any explicit or implicit clues; (9) that corroboration be sought for any information elicited during the session.

146. *Id.* at 1290-91. The four-point foundation would require that: (1) hypnosis, as a means of refreshing or enhancing recall, is generally accepted in the scientific community; (2) the hypnotist is qualified; (3) the use of hypnosis is appropriate for the kind of memory loss involved; (4) correct scientific procedures were involved in producing the evidence.

147. *Hurd*, 432 A.2d at 96-97.

148. *Chapman*, 638 P.2d at 1284-85.

149. 453 N.E.2d at 496; *see also* State v. Haislip, 237 Kan. 461, 701 P.2d 909, 926 (1985).

150. *Boykin*, 432 N.W.2d at 67 (limiting witnesses to testimony corroborated by pre-hypnotic statements); *Zani*, ___ S.W.2d at ___ (Westlaw No. 17229) (the corroboration of hypnotically-enhanced testimony is an important element in determining its admissibility); *Mack*, 292 N.W.2d at 772 (noting that "there was no real corroboration after the hypnosis session of any facts [the witness] recalled for the first time under hypnosis").

151. *Shirley*, 641 P.2d at 807-08.

152. Most probably this issue is appropriate for discussion at a pre-trial conference. *See Hughes*, 453 N.E.2d at 496; *Haislip*, 701 P.2d at 926. This would avoid prejudicing the defendant by exposing the jury to information about hypnosis of a witness which could later prove extraneous.

ment under hypnosis. For example, in a case of rape such as *Hughes* where the attack is so violent and despicable that the victim is likely to have suppressed all recollection of the attack, hypnosis would be an appropriate means to obtain the witness' testimony. In such a case the physical evidence of the crime is indisputable and so the danger of fabrication is minimized. When used under the restraint of meaningful safeguards, the effects of hypnosis' drawbacks, such as hypersuggestibility and confabulation, can be controlled by the court or at least made known to the defense.

2) The second step is to apply a checklist comprised of adequate safeguards. The following list is an amalgam of the suggestions from Justice Brown,[153] Orne[154] and other sources.[155]

i) Hypnosis should be carried out by an independent psychiatrist or psychologist with training in hypnosis. This limits the ability of any party to introduce its version of events into the subject's recall. Independence of the hypnotist thereby enhances the admissibility of any information garnered by the procedure.

ii) All contact between hypnotist and subject should be videotaped, or at a minimum, audio taped. Failure to record the session reduces criticism of it to speculation. This restricts the effectiveness of cross-examination and of counsel. When an adequate record exists of all the contact between the hypnotist and the subjects, it allows later independent analysis as to what had or had not transpired before, during and after the sessions.

iii) Access to the session should be restricted to the hypnotist and the subject only. Evidence should be presented to the court indicating who was present at the session. Limiting admission to the session itself to the hypnotist and the subject avoids some sources of hypersuggestibility. Improper suggestion can lead to later sixth amendment problems with cross-examination. This inhibits the guarantee of a fair trial.

iv) All recordings and notes which pertain to contact between the authorities and the witnesses who were hypnotized should be presented to the court so it may evaluate the impact of the contact on them. An untainted, pre-hypnosis record is essential to enable subsequent observers to understand the effect of the hypnosis on the subjects. These records can then form the basis of effective impeachment.

v) Tape recordings of all interactions between the authorities and the subject should be made. This provides an untainted record of the subject's recollections and a record of the communications by others to the subject. Orne notes that suggestions given by others before hypnosis can act as post-hypnotic suggestions. Without this type of record, confrontation of a witness on all the bases of his recollection is not likely.

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153. *Chapman*, 638 P.2d at 1290-91 (Brown, J., dissenting).
154. Orne, *supra* note 33, at 335-36.
155. *See* Comment *supra* note 60, at 1072-74; House v. State, 445 So. 2d 815, 824 (Miss. 1984) (requiring procedural safeguards before introducting hypnotically-enhanced testimony).

The application of these steps to *Prime*, the most recent Wyoming case, would work in the following way:

After presenting evidence on the appropriateness of hypnosis for witnesses such as the store manager and clerk, the trial court would rule on its admissibility. After examining the record, it would appear that no memories were available to be revived by hypnosis and that engaging in the process could implant undesirable pseudo-memories in the witnesses. If that were proven true, then all recollections generated after the session would necessarily be excluded at the pre-trial stage. If there were evidence that showed that the identification of Prime was actually made prior to, and independent of, hypnosis, then the court would proceed to the second step. The checklist of safeguards would be applied to the facts of the case.

In *Prime*, it seems that the hypnotist was not only unqualified in the field of psychology, but was also a part-time employee of the Rock Springs Police Department.[156] This lack of independence and training might necessitate that evidence produced in his sessions be excluded from criminal trials. It could still be used for investigative purposes, however. Justice Brown, speaking in dissent on the issue of expertise, noted that under *Chapman*, a hypnotist need not possess any particular qualifications and that, by Wyoming standards, a "derelict in the county jail" would be qualified to hypnotize a potential witness.[157]

In *Chapman*, recordings of the hypnosis sessions were made, but were inaudible.[158] In *Prime*, some quantity of pre-hypnosis record probably exists, but there is no indication that the prosecutor made it available to the court or the defense. Its disclosure would inform the court, and Prime's counsel, about possible deficiencies in the conduct of the session. Also, because of its potentially exculpatory nature, its disclosure is mandatory. Last, since there is no indication in the record of the existence of recordings of any type of the conversations between investigators and

156. He was also employed as a maintenance man for the Pacific Power and Light Company. Appellant's Brief, *supra* note 115, at 20.

157. Gee v. State, 662 P.2d 103, 106 (Wyo. 1983) (Brown, J., dissenting) (joined by Rose, J.). "There is a man in Oakland, California, who is the dean and lone 'professor' at 'Croaker College.' For the sum of $150 each, this man trains frogs to jump. (Many graduates, after receiving their degrees, go on to compete in the famous jumping contest of Calaveras County.) As part of his rigid training curriculum, the 'professor' claims that he hypnotizes the frogs; while they are in their hypnotic trance, he plays an attitude-improvement tape to them. Under [Wyoming's] present standards the dean of 'Croaker College,' would be over qualified as a hypnotist." *Id.* at 106 n.3.

158. *Chapman*, 638 P.2d at 1287 (Brown, J., dissenting). Ironically, Wyoming is now among a minority of the most liberal of jurisdictions with regard to this subject. The facts in *Chapman* were open to interpretation consistent with *either* a per se admissibility rule *or* a rule requiring safeguards. Authorities on hypnotic memory enhancement often include videotape recording of the session among their criteria for effective after the fact evaluation of the session. This was done by the police in *Chapman*. Also, the type of memory loss involved (trauma induced) was susceptible of hypnotic enhancement. The court thought it was in accord with a comfortable majority of states. 638 P.2d. at 1282. In dicta, the court noted that "[a] few states have rejected testimony of a previously hypnotised witness," and that "[a]lthough there may be *considerable merit* to such holding, appellant does not request we go so far." *Id.* (emphasis added).

the witnesses, the defendant is handicapped. He is probably left unable to determine the substance or effects of suggestions or cues on the witnesses. This information is essential for an effective defense. The court would weigh the absence of this evidence in deciding whether the proffered hypnotic testimony would be inadmissible.

If the use of hypnosis in *Prime* survived the scrutiny detailed above, then admission of the hypnotically-enhanced testimony would not have unfairly prejudiced the rights of the accused. The party offering it would have established the probative value and admissibility of the evidence. The list of safeguards is not exhaustive and admissibility should be determined dependant upon the particular facts of each case.

CONCLUSION

Since *Chapman v. State,* the Wyoming Supreme Court's initial ruling on hypnotically-enhanced testimony, changes in scientific and academic findings about hypnosis have caused a number of jurisdictions to restrict its admissibility. A number of courts and commentators agree that without procedural safeguards, a defendant's right to a fair trial can be denied. Experts recognize that a specific quantum of safeguards is necessary to protect an accused's sixth amendment rights to confront and cross-examine witnesses, although they do not all agree on any particular list. The law in Wyoming should be changed to exclude all hypnotically-tainted testimony which does not conform to the safeguards needed to protect the accused's constitutional rights.

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