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SAFEGUARDS AGAINST SUGGESTIVENESS: A MEANS FOR ADMISSIBILITY OF HYPNO- INDUCED TESTIMONY

The primary inquiry in determining the admissibility of testimony obtained by hypnosis is whether hypnosis is a means of acquiring scientifically reliable evidence.¹ In *Frye v. United States*,² the District of Columbia Court of Appeals stated that evidence relating to a scientific principle or discovery is admissible when the principle is established sufficiently to have gained general acceptance in a particular field.³ When ruling on the admissibility of hypno-induced testimony, courts apply the *Frye* standard for assessing reliability.⁴

The medical profession's recognition of the value of hypnosis as a technique for retrieving lost memory⁵ has convinced some jurisdictions

¹ See *Greenfield v. Robinson*, 413 F. Supp. 1113, 1120 (W.D. Va. 1976) (potential unreliability is reason for exclusion of hypnotic evidence); *Rodriguez v. State*, 327 So.2d 903, 904 (Fla. Dist. Ct. App.) (court unconvinced of reliability of statements induced by hypnosis), cert. denied, 336 So.2d 1184 (Fla. 1976); *Jones v. State*, 542 P.2d 1316, 1327 (Okla. Crim. App. 1975) (hypnotic tests excluded for failure to achieve sufficient scientific and psychological accuracy).

² 293 F. 1013 (D.C. Cir. 1923).

³ *Id.* at 1014. In applying the *Frye* test for admission of scientific evidence, the *Frye* court excluded expert testimony explaining the systolic blood test. *Id.* Courts frequently cite the *Frye* case when dealing with the admissibility of scientific evidence. See R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 934 (1977); note 4 *infra* (citing cases). But see *State v. Hall*, 297 N.W.2d 80 (Iowa 1980). The *Hall* court held that the "general scientific acceptance" standard was not a prerequisite to the admission of scientific evidence if the reliability of the evidence is established by independent means. The court applied the standard of whether the probativeness, materiality, and reliability of the evidence outweighed the possible prejudice. *Id.* at 85-86.

⁴ Cf. *State v. Mack*, ___ Minn. ___, ___, 292 N.W.2d 764, 767-69 (1980) (testimony from hypnotically-induced memory does not satisfy *Frye* requirement of scientific accuracy); *State v. Hurd*, 173 N.J. Super. 333, 361, 441 A.2d 291, 305 (1980) (hypnosis fails *Frye* test of reliability as technique for obtaining factually accurate memory).

⁵ L. WOLBERG, HYPNOANALYSIS 308 (1964). The three most common hypnotic techniques for stimulating memory of forgotten events are age regression, hypermnesia and post-hypnotic suggestion. During complete age regression, the subject actually relives the past. In partial age regression, the subject experiences a past incident but is able to understand events from an adult viewpoint. In hypermnesia the subject remembers rather than relives the forgotten event. Post-hypnotic suggestion occurs when the subject awakens from a trance with a restored memory because the hypnotist has suggested during the trance that memory of the forgotten event will return. See D. CHEEK & L. LECRON, CLINICAL HYPNOTHERAPY 47-54 (1968) [hereinafter cited as CHEEK & LECRON]; Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L. REV. 567, 572-74 (1977) [hereinafter cited as Spector & Foster, *Admissibility*]. Hypnosis can provide valuable information into the state of mind of the accused and assist in the accurate determination of criminal intent. W. BRYAN, LEGAL ASPECTS OF HYPNOSIS 33 (1962)

that hypno-induced testimony warrants automatic admission.⁶ In jurisdictions which automatically admit hypno-induced testimony, the effect of hypnosis on the reliability of evidence bears only upon the weight or credibility given the testimony by the trier of fact.⁷ A per se rule of admissibility circumvents the necessity of introducing expert testimony for the purpose of establishing the validity of hypnosis as an analytical tool.⁸ Nevertheless, expert testimony may be helpful to the trier of fact in determining the credibility of the witness' testimony by revealing the presence of suggestive influences in the hypnotic session. The use of hypnosis should be disclosed both to enable the opposing party to impeach the credibility of the witness and to provide the jury with adequate information to make an informed determination of credibility.⁹

In most jurisdictions, however, the admissibility of testimony obtained by hypnosis is within the discretion of the trial judge, who weighs the probative value of the evidence against the danger of prejudice.¹⁰ Judicial reluctance to establish a per se rule of admissibility reflects a concern that the jury will accord undue significance to the weight of possibly unreliable hypno-induced testimony.¹¹ The scientific community acknowledges the possibility that suggestiveness during hypnosis could

⁶ *E.g.*, *United States v. Awkard*, 597 F.2d 667, 669 (9th Cir.) (pre-trial hypnosis to refresh recollection of witness' recollection is admissible), *cert. denied*, 444 U.S. 885 (1979); *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506, 509 (9th Cir. 1974) (civil case permitting testimony of witness whose memory had been refreshed by hypnosis); *United States v. Narciso*, 446 F. Supp. 252, 282 (E.D. Mich. 1977) (resolution of expert disagreement over suggestiveness of hypnotic-induced identification is jury function); *State v. Jorgensen*, 8 Or. App. 1, 9, 492 P.2d 312, 315 (1971) (witness' inconsistent stories prior to and following hypnosis do not affect admissibility but influence jury determination of credibility).

⁷ *See* note 6, *supra*.

⁸ *United States v. Awkard*, 597 F.2d 667, 669 (9th Cir. 1979).

⁹ *United States v. Miller*, 411 F.2d 825, 830-32 (2d Cir. 1969).

¹⁰ *See, e.g.*, *People v. Modesto*, 59 Cal.2d 722, 732-33, 382 P.2d 33, 39, 31 Cal. Rptr. 225, 231-32 (1963) (error for court to fail to exercise discretion in considering exclusion of evidence of tape recordings of statements made while witness hypnotized); *Harding v. State*, 5 Md. App. 230, 236, 246 A.2d 302, 306 (admissibility of testimony obtained through hypnosis rests within discretion of trial judge), *cert. denied*, 395 U.S. 949 (1968). *See generally*, Annot., *Admissibility of Hypnotic Evidence at Criminal Trial*, 92 A.L.R.3d 442, § 2a (1979) [hereinafter cited as Annot.]. The exercise of discretion involves balancing the probative value of the testimony against the dangers of unfair prejudice, confusion of the issues, or misleading the jury. FED. R. EVID. 403.

¹¹ *See State v. LaMountain*, 125 Ariz. 547, 551, 611 P.2d 551, 555, (1980) (*en banc*) (error to admit witness' in-court testimony because record did not reveal possible effect of previous hypnotic identification upon subsequent testimony); *Merrifield v. State*, ___ Ind. ___, ___, 400 N.E.2d 146, 150, (1980) (independent basis for in-court identification rendered testimony of previously hypnotized witness reliable); *State v. Mack*, ___ Minn. ___, ___, 292 N.W.2d 764, 768 (1980) (inquiry into reliability of witness' testimony to determine probative value); *State v. Hurd*, 173 N.J. Super. 333, 338-359, 414 A.2d 291, 294-303 (1980) (scrutinizing entire hypnotic procedure to determine whether testimony sufficiently reliable to warrant admission); *State v. White*, No. J-3665 (Cir. Ct. Milwaukee Cty. 1979) (standard for admissibility based upon reliability under totality of circumstances).

produce an historically inaccurate memory.¹² As a result, the judiciary realizes the impact which the circumstances surrounding the hypnotic session can have upon the reliability of hypno-induced testimony.¹³ Courts are justifiably unwilling to leave the determination of reliability of hypno-induced testimony to a jury that may be unaware of the important considerations in making such a determination. Thus, courts generally review the particular hypnotic procedure used in each case to assess the effect of hypnosis upon reliability before making a decision on admissibility.¹⁴ A case-by-case analysis of the admissibility issue coupled with the establishment of procedural safeguards against unreliability enables the trial court to detect and protect against conditions conducive to rendering the memory inaccurate. Analysis based on the facts of each case is the best means for ensuring that the trier of fact hears only adequately reliable hypno-induced testimony.

An understanding of the nature and effects of hypnosis is essential to an examination of the accuracy of hypnotically-refreshed memory.¹⁵ The American Medical Association (AMA) defines hypnosis as a condition of altered attention in which the subject manifests alterations in consciousness and memory, increased susceptibility to suggestion, and the production of responses and ideas unfamiliar to those occurring in the usual state of mind.¹⁶ Because of the general lack of knowledge about hypnosis as a scientific phenomenon,¹⁷ a definition of hypnosis must focus upon a description of the observable effects of hypnosis upon the subject's mental state.¹⁸

According to the widely-recognized theory of heightened suggestibility during hypnosis, a person in a trance is more willing to adopt

¹² See *State v. Mack*, ___ Minn. ___, ___, 292 N.W.2d 764, 768 (1980) (experts testified that therapeutic value of hypnosis does not rely upon production of historically accurate memory). The Minnesota court noted that the medical community had conducted little investigation into the accuracy of the memory induced by hypnosis. *Id.*; see Spector & Foster, *Utility of Hypno-Induced Statements in the Trial Process*, 10 LOY. CHI. L.J. 691, 695 (1979) [hereinafter cited as Spector & Foster, *Utility*] (hypnosis useful tool for retrieving memory of suppressed events, regardless of factual accuracy of memory).

¹³ See *State v. LaMountain*, 125 Ariz. 547, 551, 611 P.2d 551, 555 (1980) (testimony excluded due to uncertainty of whether suggestiveness in pre-trial hypnotic procedure produced testimony); *State v. Mack*, ___ Minn. ___, ___, 292 N.W.2d 764, 768-69 (1980) (subject's susceptibility to suggestion during hypnosis affected reliability of testimony); *State v. Hurd*, 173 N.J. Super. 333, 362, 414 A.2d 291, 305 (1980) (potential for fabrication during hypnosis militates against automatic admissibility until reliability of hypnotically-induced recall established); *State v. White*, No. J-3665 (Cir. Ct. Milwaukee Cty. 1979) (court must determine whether suggestiveness in hypnotic session rendered in-court testimony unreliable).

¹⁴ See note 13 *supra*.

¹⁵ See text accompanying notes 16-33 *infra*.

¹⁶ Council on Mental Health, *Medical Use of Hypnosis* 168 J.A.M.A. 186, 187 (1958).

¹⁷ Spector & Foster, *Admissibility*, *supra* note 5, at 569. Proficiency in the practical application of hypnosis far surpasses scientific knowledge of the phenomenon. *Id.*

¹⁸ See text accompanying note 16 *supra*.

an idea or suggestion without argument, command, or coercion.¹⁹ One reason for the hypnotic subject's increased responsiveness to suggestion is that the hypnotist must convey a sense of emotional security and absence of threat to ensure the subject's cooperation.²⁰ The close interpersonal relationship which emerges during the hypnotic session creates a desire on the part of the subject to please the hypnotist.²¹ Thus, the subject may be willing to conform responses to the expectations of the hypnotist as perceived by the subject.²² The subject's attempt to comply with hypnotic suggestions often results in a tendency to fabricate events not actually remembered.²³ If the hypnotist suggests that the subject remember what transpired during the hypnotic session, the subject will recall the forgotten events as related during hypnosis and be convinced that the memory of those events is accurate.²⁴ Furthermore, experts recognize the difficulty in determining whether all or any part of a refreshed recollection is truth, falsehood or fantasy.²⁵

The danger that hypno-induced memory may be inaccurate should not require per se exclusion of testimony of a witness who has undergone hypnosis. The factual accuracy of any testimony is not a prere-

¹⁹ E. HILGARD, *HYPNOTIC SUSCEPTIBILITY* 9-10 (1965) [hereinafter cited as HILGARD]; R. REIFF & M. SCHEERER, *MEMORY AND HYPNOTIC AGE REGRESSION* 96 (1959) [hereinafter cited as REIFF & SCHEERER]. See STEDMAN'S MEDICAL DICTIONARY 1360 (4th unabr. ed. 1976) (definition of suggestibility).

²⁰ See M. MILLER, *THERAPEUTIC HYPNOSIS* 42 (1979) [hereinafter cited as MILLER]. An important characteristic of the hypnotic process is a reduction in the subject's emotional control and inhibition. As a result, the subject experiences a heightened degree of sensitivity to emotional stimuli and relief of a repressed emotion by discussion. *Id.* at 33.

²¹ CHEEK & LECRON, *supra* note 5, at 44; REIFF & SCHEERER, *supra* note 19, at 89. The failure of a hypnotist to establish the necessary rapport with a subject contributes to a subject's resistance to hypnotism. CHEEK & LECRON, *supra* note 5, at 21-22.

²² Spector & Foster, *Utility*, *supra* note 12, at 698.

²³ *Id.* at 697. The hypnotic subject experiences a tolerance for accepting distortion of reality as the truth and an arousal of visual imagination which results in a tendency to substitute the actual memory with fantasy. See HILGARD, *supra* note 19, at 8-9. A major problem with the use of hypnosis to obtain factually accurate information is that the subject may fabricate details in order to avoid issues or to please a listener. This tendency is known as "confabulation." E. MONAGHAN, *HYPNOSIS IN CRIMINAL INVESTIGATION* 86 (1980). The risk of confabulation is especially great during post-hypnotic suggestion when the hypnotist suggests that the subject will remember clearly the forgotten event when the subject has no actual memory of the event. *Admissibility of Present Recollection Restored by Hypnosis*, 15 WAKE FOREST L. REV. 357, 361 (1979). The subject may feel pressured to respond to the hypnotic suggestion as a result of desire to please the hypnotist. In addition, the subject tends to respond literally to hypnotic suggestion. See REIFF & SCHEERER, *supra* note 19, at 89. These factors enhance the potential for the hypnotized person to "remember" events that actually did not occur. See *id.* at 91.

²⁴ Spector & Foster, *Admissibility*, *supra* note 5, at 592.

²⁵ See *State v. Mack*, ___ Minn. ___, ___, 292 N.W.2d 764, 768 (1980) (determination whether witness' statements constitute "lies, confabulation, or fantasy" is difficult); *State v. Hurd*, 173 N.J. Super. 333, 349, 414 A.2d 291, 297 (1980) (danger that hypnotically-induced recollection contains falsehoods requires independent verification before recollection is admissible).

quisite for admission into evidence.²⁶ Moreover, the hypnotist can follow certain procedural guidelines for the purpose of detecting and eliminating suggestiveness in the hypnotic process.²⁷ The trial court should take steps to ensure that the hypnotist used a procedure conducive to the restoration of an accurate memory.

One means by which the hypnotist can reduce suggestibility is by controlling the depth of the trance.²⁸ Because the hypnotist's ability to manipulate the subject increases as the trance deepens, the depth of the hypnotic trance affects the potential for suggestion to produce an inaccurate memory.²⁹ Moreover, a positive correlation exists between susceptibility to hypnosis and potential for suggestibility during hypnosis.³⁰ Thus, the individual who is able to attain a deep level of hypnotic trance experiences a heightened degree of suggestibility. Since, in most cases, a light trance is adequate for retrieving memory,³¹ the hypnotist can avoid enhancing the subject's susceptibility to suggestion and still accurately refresh recollection. Personality traits and general social and educational background appear to influence individual variations in susceptibility to hypnosis.³² The hypnotist must be careful to protect against suggestive influences when the subject is highly suggestible. The relationship between the depth of trance, suggestibility, and the subject's personal characteristics necessitates an examination of the effect of the entire hypnotic process upon the reliability of the memory recall in determining whether hypno-induced testimony is admissible.³³

The method of introducing hypno-induced statements into evidence has been an important factor in judicial treatment of admissibility.³⁴

²⁶ Spector & Foster, *Admissibility*, *supra* note 5, at 584. Hypnosis should be regarded as a device for aiding the procurement of testimony that offers no guarantees of factual accuracy. *Id.*

²⁷ See text accompanying notes 93-111 *infra*.

²⁸ CHEEK & LECRON, *supra* note 5, at 13; REIFF & SCHEERER, *supra* note 19, at 50-51. The use of repetitive types of stimulation inhibits intellectual functions which increases suggestibility and intensifies the trance-like state of hypnosis. MILLER, *supra* note 20, at 36. As a result, the hypnotist can employ techniques to reduce suggestibility by avoiding stimulation that increases the level of the trance. In addition, the hypnotist can determine the depth of hypnotic trance by eliciting responses from the subject which indicate the trance level. REIFF & SCHEERER, *supra* note 19, at 92.

²⁹ Dilloff, *The Admissibility of Hypnotic Influenced Testimony*, 4 OHIO N.U.L. REV. 1, 5 (1977) [hereinafter cited as Dilloff].

³⁰ HILGARD, *supra* note 19, at 32.

³¹ CHEEK & LECRON, *supra* note 5, at 20-21.

³² HILGARD, *supra* note 19, at 342-43 (although compilation of personality traits which enhance individual's susceptibility to hypnosis remains elusive, individuals capable of deep involvement in reading, dramatic arts, esthetics, religion and adventure seem more susceptible to hypnosis); MILLER, *supra* note 20, at 41 (education, intelligence, culture, religion, family, and life experience seem to be contributing factors regarding individual's responsiveness to suggestion).

³³ See State v. Hurd, 173 N.J. Super. 333, 361-62, 414 A.2d 291, 305 (1980); text accompanying notes 19-25 *supra*.

³⁴ Courts do not permit the expert to relate the statements made by the subject while under hypnosis if offered as proof of the matter asserted. *E.g.*, Rodriguez v. State, 327 So.2d

Courts have been most receptive to the admission of in-court testimony of a witness who has undergone pretrial hypnosis to stimulate recall.³⁵ The legal analysis for determining admissibility of hypno-induced testimony involves an extension of the evidentiary rule that a witness may use any memorandum or object to induce recollection.³⁶ If a witness uses a writing to refresh memory prior to testifying, the trial court makes a discretionary assessment of the reliability of the means and the accuracy of the recall.³⁷ In addition, the adverse party is entitled to inspect the writing, to cross-examine the witness, and to introduce into evidence those portions of the writing that relate to the testimony of the witness.³⁸ The procedural safeguards assist the trier of fact in evaluating the credibility of the testimony to determine whether a suggestible witness may believe that he remembers a fact because he has read it.³⁹

903, 904 (Fla. Dist. Ct. App.), *cert. denied*, 336 So.2d 1184 (Fla. 1976); *State v. Pierce*, 263 S.C. 23, 30, 207 S.E.2d 414, 418 (1974); *Greenfield v. Commonwealth*, 214 Va. 710, 716, 204 S.E.2d 414, 419 (1974). Under basic evidentiary rules, the hypnotist's transmission of subject's statements is inadmissible as hearsay. *See* FED. R. EVID. 802. Most courts have refused to admit tape recordings of hypnotic sessions on the ground that hypno-induced statements are unreliable. *E.g.* *Connolly v. Farmer*, 484 F.2d 456, 457 (5th Cir. 1973); *People v. Hiser*, 267 Cal. App.2d 47, 61-62, 72 Cal. Rptr. 906, 915-16 (1968); *Shockey v. State*, 338 So.2d 33, 37 (Fla. Dist. Ct. App.), *cert. denied*, 345 So.2d 427 (Fla. 1976); *State v. Pusch*, 77 N.D. 860, 887-88, 46 N.W.2d 508, 522 (1951); *State v. Harris*, 241 Or. 224, 237, 405 P.2d 492, 498 (1965). Courts do not permit a witness to testify in-court while hypnotized. *See* *Greenfield v. Robinson*, 413 F. Supp. 1113, 1121 (W.D. Va. 1976) (potential unreliability is basis for disallowing defendant to testify while under hypnosis); Annot., *supra* note 10, at 454.

³⁵ *E.g.*, *United States v. Awkard*, 597 F.2d 667, 669 (9th Cir. 1979); *United States v. Adams*, 581 F.2d 193, 198 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); *United States v. Narciso*, 446 F. Supp. 252, 281-82 (E.D. Mich. 1977); *People v. Smrekar*, 68 Ill. App.3d 379, 387-88, 385 N.E.2d 848, 854-55 (1979); *Harding v. State*, 5 Md. App. 230, 246-47, 246 A.2d 302, 312 (1968); *State v. McQueen*, 295 N.C. 96, 122, 244 S.E.2d 414, 429 (1978); *State v. Jorgensen*, 8 Or. App. 1, 9, 492 P.2d 312, 315 (1971).

³⁶ FED. R. EVID. 612. Rule 612 states that a witness may use a writing to refresh memory for the purpose of testifying. Because hypnosis serves as a means of aiding memory and not as a means of ascertaining the truth, different legal analysis applies for the admissibility of hypno-induced statements than for the admissibility of results from lie detector or truth serum tests. *See* *People v. Hiser*, 267 Cal. App.2d 47, 61-62, 72 Cal. Rptr. 906, 915 (1968) (unreliability of lie detector test results requiring inadmissibility does not require exclusion of hypnotic statements); *People v. Harper*, 111 Ill. App.2d 204, 209, 250 N.E.2d 5, 7 (1969) (no reason to equate examination under hypnosis to tests using truth serum); *Haward & Ashworth, Some Problems of Evidence Obtained by Hypnosis*, August 1980 CRIM. L.R. 469, 474 [hereinafter cited as *Haward & Ashworth*]. Courts are reluctant to admit results from lie detector tests. *E.g.* *People v. Seipel*, 108 Ill. App.2d 384, 389, 247 N.E.2d 905, 908, *cert. denied*, 397 U.S. 1057 (1969). Results of truth serum tests are inadmissible because there is no guarantee that statements resulting from such tests are truthful. *State v. White*, 60 Wash.2d 551, 568, 374 P.2d 942, 953 (1962), *cert. denied*, 375 U.S. 883 (1963).

³⁷ FED. R. EVID. 612. *Williams v. United States*, 365 F.2d 21, 22 (7th Cir.), *cert. denied*, 385 U.S. 981 (1966); *Beaty v. United States*, 203 F.2d 652, 655 (4th Cir. 1953); *Buckley v. United States*, 33 F.2d 713, 717 (6th Cir. 1929).

³⁸ FED. R. EVID. 612.

³⁹ FED. R. EVID. 612, Advisory Committee's Note; E. CLEARY, MCCORMICK ON EVIDENCE, § 9 (2d ed. 1972).

Judicial application of the memory-refresher rule has expanded the interpretation of the term "writing" considerably beyond its literal meaning.⁴⁰ The analysis for the admission of any testimony stimulated by a memory refresher focuses upon whether the "writing" improperly suggested the expected testimony to the witness.⁴¹ The primary concern in admitting hypno-induced testimony is that suggestiveness during the hypnotic session has rendered the restored recollection inaccurate.⁴² Thus, the memory refresher rule provides both an analysis for admissibility of hypno-induced testimony and a means for assessing credibility.

One standard of admissibility under the memory-refresher rule permits the use of any means to induce recollection as long as the recall functions independently of the actuating cause of the recollection.⁴³ In the case of a memorandum, courts may consider the recall to function independently if the witness need not look at the writing while testifying.⁴⁴ Courts face a greater problem in ascertaining the independence of the recall when hypnosis is used to stimulate recollection because the accuracy of the restored memory is difficult to assess.⁴⁵ Thus, courts cannot rely upon the witness' sworn testimony that hypnosis has restored present recollection in deciding the admissibility issue.⁴⁶ The previously hypnotized witness is convinced that his refreshed memory is accurate despite the fact that some of the events remembered actually may not have occurred. Because the witness subjectively believes the veracity of the memory, cross-examination loses effectiveness as a means of attacking credibility and the accuracy of the recall.⁴⁷ Testimony and cross-

⁴⁰ See *Kline v. Ford Motor Co.*, 523 F.2d 1067, 1069-70 (9th Cir. 1975) (memory revived by hypnosis similar to restoration by reading document); *State v. McQueen*, 295 N.C. 96, 119-20, 244 S.E.2d 414, 427-28 (1978) (court equates memory restoration by reading of document to intervening psychiatric treatment and intervening hypnosis); Spector & Foster, *Admissibility*, *supra* note 5, at 586 (subjecting witness to leading questions equal in validity and legal effect to use of hypnosis as memory refresher); Note, *Refreshing the Memory of a Witness Through Hypnosis*, 5 U.C.L.A.-ALA. L. REV. 266, 268 (1976) (courts are liberal in permitting refreshing of witness' recollection) [hereinafter cited as *Refreshing Memory of Witness*].

⁴¹ *United States v. Riccardi*, 174 F.2d 883, 889 (3d Cir.), *cert. denied*, 337 U.S. 941 (1949).

⁴² See note 11 *supra*.

⁴³ *Jewett v. United States*, 15 F.2d 955, 956 (9th Cir. 1926) (testimony refreshed by notes at witness stand inadmissible because recollection cannot function without notes).

⁴⁴ *Id.*

⁴⁵ See text accompanying notes 19-26 *supra*.

⁴⁶ See text accompanying note 25 *supra*. *But see*, *Harding v. State*, 5 Md. App. 230, 236, 246 A.2d 302, 306 (1968) (since witness testified that present recollection was restored, court found no objection to admissibility of hypno-induced testimony); Comment, *Some Observations on the Law of Evidence—Memory*, 41 HARV. L. REV. 860, 861 (1928) (if witness swears that memory has been restored, court will permit use of anything from photograph to press clipping for memory refresher).

⁴⁷ See *State v. Mack*, ___ Minn. ___, ___, 292 N.W.2d 764, 770 (1980) (because hypnotized person subjectively convinced of veracity of memory, recall not susceptible to attack by cross-examination); Spector & Foster, *Admissibility*, *supra* note 5, at 593 (cross-

examination of the hypnotist may be helpful in acquiring knowledge about the reliability of the particular hypnotic procedure used.⁴⁸ Prior to admitting the hypnotist's expert testimony and of hypno-induced testimony, all jurisdictions require the hypnotist to establish his qualifications as an expert in the field of hypnosis.⁴⁹ As further protection against unreliability, many courts require independent corroboration of the facts asserted during hypno-induced testimony and precautionary instruction to the jury to give such testimony the same weight as any other evidence.⁵⁰

In *Harding v. State*,⁵¹ the Maryland Court of Special Appeals applied

examination virtually ineffective to assure against implementation of false suggestions during hypnotic interview). *But see* State v. Jorgensen, 8 Or. App. 1, 9, 492 P.2d 312, 315 (1975) (adverse party's cross-examination of witness who has undergone hypnosis overcomes objections to admissibility of witness' testimony); *Refreshing Memory of Witness*, *supra* note 40, at 269 (adversary system provides some protection against abuse because cross-examination of witness tests credibility and accuracy of restored memory).

⁴⁸ Spector & Foster, *Admissibility*, *supra* note 5, at 593. The hypnotist's own assertion, however, that no suggestive influences were present during the hypnotic session should not be a decisive factor in determining admissibility. *See* note 103, *infra*.

⁴⁹ *E.g.*, People v. Busch, 56 Cal.2d 868, 876-77, 366 P.2d 314, 319-20, 16 Cal. Rptr. 898, 903-04 (1961) (testimony of psychiatrist excluded for failure to show qualifications as expert on hypnosis); People v. Marsh, 170 Cal. App.2d 284, 287, 338 P.2d 495, 497 (1959) (hypnotist may testify as expert witness upon demonstrating special knowledge, skill, or experience which enables formulation of opinions which laymen unable to assert); State v. Donovan, 128 Iowa 44, 47-48, 102 N.W. 791, 792 (1905) (superintendent of hospital for insane who had witnessed hypnotism experiments by others and surgeon who had practiced hypnotism but had no formal training permitted to testify as experts); State v. Hurd, 173 N.J. Super. 333, 363, 414 A.2d 291, 306 (1980) (licensed psychiatrist or psychologist trained in use of hypnosis should conduct hypnotic session). Courts consider the hypnotist's level of expertise to be an indication that the hypnotist was aware of and, thus, could guard against suggestiveness. *See* Spector & Foster, *Utility*, *supra* note 12, at 701.

⁵⁰ *See*, Greenfield v. Robinson, 413 F. Supp. 1113, 1120 (W.D. Va. 1976) (hypno-related evidence inadmissible because of lack of independent corroboration); Creamer v. State, 232 Ga. 136, 138, 205 S.E.2d 240, 241-42 (1974) (hypnotic session did not taint testimony because witness' relation of principal facts of crime prior to session constituted independent corroboration); Merrifield v. State, ___ Ind. ___, ___, 400 N.E.2d 146, 149 (1980) (victim's positive identification of defendant on two occasions prior to hypnotic session prevented taint to in-court identification).

While the precautionary instruction does not enhance the reliability of hypno-induced testimony, courts often require the instruction to alert the jury to the danger of unreliability. *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506, 510 (9th Cir. 1974) (cautionary instruction to jury regarding use of hypnosis appropriate); *Harding v. State*, 5 Md. App. 230, 244, 246 A.2d 302, 306, (1968) (trial judge cautioned jury not to place greater weight on hypnotically-adduced testimony than upon any other testimony); *Dilloff*, *supra* note 29, at 21 (recent cases indicate judicial willingness to admit hypnotic testimony if accompanied by precautionary instruction); Comment, *Hypno-Induced Statements: Safeguards for Admissibility*, 1970 LAW & SOC. ORDER 99, 119 (precautionary instruction increases admissibility of hypno-induced statements) [hereinafter cited as *Safeguards*]. In jurisdictions which investigate reliability before determining admissibility, the precautionary instruction may not serve an important function. The instruction has a greater impact where the jury determines the reliability of the testimony.

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

a similar set of safeguards in upholding the admission of the testimony of a prosecuting witness who had undergone pretrial hypnosis to restore recall of the events at the scene of the crime.⁵² The witness' in-court recitation of the facts and assertion that the testimony derived from her own recollection was determinative of the admissibility issue.⁵³ The *Harding* court cited four factors that enhanced the reliability of the testimony. First, the court noted that the evidence fully revealed the hypnotic procedure used.⁵⁴ The first factor enabled the court to detect elements of suggestiveness. Second, the hypnotist was a professional psychologist who testified to the absence of any reason to doubt the truthfulness of the witness' statement.⁵⁵ A third factor was the existence of sufficient independent corroboration of the victim's testimony. Finally, the court noted that the trial judge has issued a precautionary instruction warning the jury not to place undue weight on the testimony.⁵⁷ The court maintained that the witness' prior inconsistent account of the events affected only the credibility of the testimony.⁵⁸ The court indicated, however, that in some cases the absence of some indicia of reliability may render hypno-induced testimony so unreliable that a jury should not hear it.⁵⁹

The major shortcoming of the *Harding* analysis is the court's reliance upon the hypnotist's detailed account of the hypnotic interview to detect the presence of improper suggestion.⁶⁰ The requirement of a recording of the hypnotic session would have enabled the court to deter-

⁵² *Id.* at 247, 246 A.2d at 306. The *Harding* court's inquiry focused upon whether the evidence supported the guilty verdict. *Id.* In determining the sufficiency of the evidence, the court quoted the testimony of the hypnotist. The court expressed particular concern over the reliability of information obtained through hypnosis. *Id.* at 237-44, 246 A.2d at 306-10.

⁵³ *Id.* at 236, 246 A.2d at 306.

⁵⁴ *Id.* at 247, 246 A.2d at 313. The *Harding* court apparently meant that the disclosure of the hypnotic session permitted the court to detect factors affecting the reliability of the testimony.

⁵⁵ *Id.* Expert witness was chief clinical psychologist at a state hospital who had four years' experience in the use of hypnosis. *Id.* at 235-36, 246 A.2d at 306. *But see Jones v. State*, 542 P.2d 1316, 1326 (Okla. Crim. App. 1975). In *Jones*, the court did not allow the hypnotist to give an opinion concerning the truthfulness of a defendant's statements made under hypnosis. *Id.*

⁵⁶ *Harding v. State*, 5 Md. App. 230, 247, 246 A.2d 302, 312 (1968).

⁵⁷ *Id.*

⁵⁸ *Id.* at 236, 246 A.2d at 306.

⁵⁹ *Id.* at 236, 247, 246 A.2d at 306, 312.

⁶⁰ *Id.* at 246, 246 A.2d at 311. The major criticism of the *Harding* opinion has been the court's failure to require a more stringent standard for admissibility because of the danger that suggestiveness rendered the witness' recollection inaccurate. Dilloff, *supra* note 29, at 19. Because the police solicited the hypnotist's assistance, the possibility of partiality increased the danger of suggestive influences. The modifications in the witness' story after hypnosis should have alerted the court to the potential for confabulation, or memory alteration or distortion. Finally, the court should have requested more testimony before accepting the validity of the hypnotic procedure used. *Id.*

mine with greater certainty whether suggestiveness rendered the refreshed memory inaccurate. Since the hypnotist may not have been aware of a particular suggestive influence, the court should not rely upon the hypnotist's assessment of the veracity of the hypno-induced memory.

Recent decisions demonstrate growing judicial cognizance of the danger that suggestiveness in the hypnotic procedure may result in inaccurate recall.⁶¹ In *State v. Mack*,⁶² the Minnesota Supreme Court held that the trial court should exclude the testimony of a victim whose memory had been refreshed by pretrial hypnosis.⁶³ After hearing five expert witnesses on the nature and uses of hypnosis, the Minnesota Supreme Court concluded that hypnosis failed to satisfy the *Frye* requirement for admissibility.⁶⁴ In addition, the court held that the evidence lacked sufficient reliability for the probative value to outweigh the prejudicial effects of the testimony.⁶⁵ Although the admissibility ruling focused upon the general reliability of hypno-induced testimony, the court found the particular facts of the case supportive of the holding.⁶⁶ The court noted that suggestiveness in the hypnotic interview may have created an inaccurate recollection of the events surrounding the alleged crime.⁶⁷ The court presumed that the hypnotist's lack of experience and knowledge of hypnotic techniques affected his ability to eliminate suggestive influences from the session.⁶⁸ The presence of the police during the session alerted the court to the danger that the police may have suggested an opinion or theory concerning the actual events. In addition, the absence of any corroboration of the asserted facts contributed to the court's assessment that the victim's testimony was unreliable.⁶⁹

The *Mack* court further found that, in the case at hand, the use of hypnosis was unnecessary to assist the victim in identifying the defendant.⁷⁰ The accused was the only person present in the hotel room with

⁶¹ See note 11 *supra*.

⁶² ___ Minn. ___, 292 N.W.2d 764 (1980).

⁶³ Prior to the determination of probable cause, the trial court certified to the Minnesota Supreme Court the question concerning the use of hypno-induced testimony in a criminal trial. *Id.* at ___, 292 N.W.2d at 765. The victim underwent hypnosis to restore her memory of the events surrounding an alleged assault. The victim could not remember what happened, because she was intoxicated at the time of the alleged attack. *Id.* at ___, 292 N.W.2d at 767.

⁶⁴ *Id.* at ___, 292 N.W.2d at 768; see text accompanying notes 2-4 *supra*.

⁶⁵ ___ Minn. at ___, 292 N.W.2d at 771.

⁶⁶ *Id.* at ___, 292 N.W.2d at 772.

⁶⁷ *Id.* at ___, 292 N.W.2d at 769-71.

⁶⁸ *Id.* at ___, 292 N.W.2d at 772; see text accompanying note 49 *supra*. The hypnotist was a self-taught law hypnotist. Because the police hired the hypnotist, the court noted a possible lack of impartiality and presumed the presence of suggestive influences. ___ Minn. at ___, 292 N.W.2d at 772.

⁶⁹ *Id.*

⁷⁰ *Id.* The *Mack* court looked for corroboration of facts which the witness recalled for the first time under hypnosis and which previously were unknown to the police. The court

the victim when the injury occurred.⁷¹ The victim underwent hypnosis in an attempt to remember whether the accused was responsible for the injury.⁷² In stating that hypno-induced testimony is ordinarily inadmissible, the *Mack* court indicated that such testimony might be admissible under certain circumstances.⁷³ The court implied that the admission of hypno-induced testimony for identification purposes might be acceptable. In addition, if a hypnotist guarded against suggestive influences and independent evidence substantiated the hypno-induced testimony, the court might consider the testimony adequately reliable to warrant admission even though hypnosis fails the *Frye* test of general acceptance.

The *Mack* court's implied approval of the use of hypnosis to assist in identification reflects that hypnotically-refreshed testimony is introduced primarily for identification purposes.⁷⁴ Judicial concern for protection against suggestiveness in the hypnotic session increases significantly in cases involving identification of a criminal defendant. In *Neil v. Biggers*,⁷⁵ the Supreme Court mandated the exclusion of an in-court identification of the accused if an unduly suggestive pretrial procedure renders the identification unreliable.⁷⁶ The Court's ruling focused upon the hazards of unfairness to the accused due to the suggestiveness inherent in the context of the pretrial identification.⁷⁷ Because hypnosis substantially increases the potential for suggestibility in a pretrial identification procedure, courts must investigate closely the problem of suggestiveness in the hypnotic session to satisfy the *Biggers* requirements.

In *People v. Smrekar*,⁷⁸ the Illinois Appellate Court employed the *Biggers* analysis in determining the admissibility of the testimony of a

noted that some of the "remembered" details were factually incorrect. The victim described the accused's motorcycle incorrectly and stated that she had eaten pizza for lunch at a restaurant that did not serve pizza. *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See e.g., *United States v. Narciso*, 446 F. Supp. 252, 280 (E.D. Mich. 1977); *State v. LaMountain*, 125 Ariz. 547, 550-51, 611 P.2d 551 (1980); *People v. Smrekar*, 68 Ill. App.3d 379, 388, 385 N.E.2d 848, 855 (1979); *State v. Hurd*, 172 N.J. Super. 333, 361-62, 414 A.2d 291, 305-06 (1980); *State v. White*, No. J-3665 (Cir. Ct. Milwaukee Cty. 1979).

⁷⁵ 409 U.S. 188 (1972).

⁷⁶ Although *Neil v. Biggers* does not involve an hypnotic pretrial identification, the Supreme Court's primary concern is suggestiveness in any pretrial identification. In *Neil v. Biggers*, the Supreme Court held that suggestiveness alone does not require the exclusion of an in-court identification. *Id.* at 199. The Court applied the test whether the identification was reliable under the totality of the circumstances, even though the confrontation procedure was suggestive. *Id.* Determinative factors included the opportunity of the witness to view the criminal at the scene of the crime, the accuracy of the witness' prior description, the witness' degree of certainty at the pre-trial identification, and the length of time between the crime and the confrontation. *Id.*

⁷⁷ *Neil v. Biggers*, 409 U.S. 188, 201 (1972); see also *United States v. Wade*, 388 U.S. 218, 234-35 (1967).

⁷⁸ 68 Ill. App.3d 379, 385 N.E.2d 848 (1979).

prosecution witness who underwent hypnosis in an effort to identify the person she saw at the scene of the crime.⁷⁹ In ruling the witness' testimony admissible, the court found that the pretrial hypnosis did not render the testimony unreliable.⁸⁰ The hypnotist's established competence in the use and knowledge of hypnosis influenced the court's decision.⁸¹ In the absence of a record of the hypnotic interview, the court relied upon the hypnotist's denial of the presence of any suggestiveness in the pretrial identification.⁸² The court found no evidence demonstrating that the hypnotist made any reference to the defendant during the session.⁸³ Independent evidence, unknown to the witness at the time of the pretrial identification, substantially corroborated the identification.⁸⁴ Furthermore, the witness had adequate opportunity to view the person at the scene of the crime.⁸⁵ These four factors convinced the court that suggestiveness did not taint the pretrial identification and that the identification had an independent origin. Thus, the court found the witness' testimony sufficiently reliable to be of probative value to the jury.⁸⁶

Despite the *Smrekar* court's inquiry into the possibility of suggestiveness in the hypnotic session, the dissent severely criticized the majority for failing to require greater scrutiny of the hypnotic procedure before granting admission.⁸⁷ The dissent argued that a court should require the establishment of both the reliability of hypnosis generally to restore accurate memory and the reliability of the hypnotic procedure followed in the particular case.⁸⁸ The dissent stated that a recording of

⁷⁹ *Id.* at 386, 385 N.E.2d at 853.

⁸⁰ *Id.* at 387, 385 N.E.2d at 855. Although the *Smrekar* court cites to *Stovall v. Denno*, its progeny include *Neil v. Biggers* because in both cases the Supreme Court applies the same test for validity of pretrial identifications. Compare *Stovall v. Denno*, 388 U.S. 293, 301-02 (1966) (whether pretrial identification excluded because so unnecessarily suggestive depends on totality of circumstances) with note 76 *supra* (discussion of *Biggers* analysis). Evidence of impairment of the witness' ability to recall events accurately or that suggestive influences were involved in the witness' recollection bears only upon the weight accorded the testimony. 68 Ill. App.3d at 386, 385 N.E.2d at 853.

⁸¹ *Id.* at 388, 385 N.E.2d at 855. The hypnotist was a doctor who had been using hypnosis regularly for 10 to 15 years. The expert witness offered no showing of certification as a specialist in hypnosis. *Id.* at 387, 385 N.E.2d at 854.

⁸² *Id.* at 388, 385 N.E.2d at 855. The *Smrekar* court noted that reliance upon the hypnotist's version of the conversation during hypnosis was not the best means of detecting suggestiveness. The court mentioned that certification of the hypnotist and a record of the persons present and of the hypnotic interview would provide greater safeguards against suggestion. *Id.* at 387, 385 N.E.2d at 854.

⁸³ *Id.*

⁸⁴ *Id.* at 388, 385 N.E.2d at 855.

⁸⁵ *Id.* After hearing a gun blast, the witness observed for 30 to 40 seconds a man slowly walking in the victims' yard. *Id.* at 382, 385 N.E.2d at 851. The witness lived next door to the victims and watched the man through her window. *Id.* The incident occurred around one a.m. *Id.*

⁸⁶ *Id.* at 388, 385 N.E.2d at 855.

⁸⁷ *Id.* at 394-95, 385 N.E.2d at 859-60 (Craven, J., dissenting).

⁸⁸ *Id.*

the hypnotic interview would be essential to determine whether suggestion had tainted the identification.⁸⁹ The dissent asserted that testimony obtained by hypnosis should be inadmissible if a court has no evidence for determining the reliability of the procedure used in the particular case.⁹⁰

The New Jersey Superior Court in *State v. Hurd*⁹¹ emphasized the importance of investigating the reliability of the hypnotic technique as a prerequisite to admission of hypno-induced testimony.⁹² The court's major concern was that the victim's hypno-induced testimony was a product of suggestion in the pretrial identification.⁹³ The court thoroughly examined the general reliability of hypnosis as a memory refresher and the specific reliability of the procedure used in the case.⁹⁴ As in *Smrekar*, the standard for admissibility was whether the identification procedure was so impermissibly suggestive as to indicate substantial likelihood of misidentification.⁹⁵ The expert witnesses for the defense and prosecution expressed contrary opinions on the reliability of the evidence.⁹⁶ The *Hurd* court relied upon the testimony of a defense witness in concluding that the dangers of heightened suggestibility and fantasizing during hypnosis did not permit admission of hypno-induced testimony absent the establishment of an acceptable level of reliability of the refreshed recall.⁹⁷

The *Hurd* court adopted an extensive set of procedural safeguards as a condition precedent for admitting hypno-induced recollections.⁹⁸

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 173 N.J. Super. 333, 414 A.2d 291 (1980).

⁹² *Id.* at 362-63, 414 A.2d at 305-06.

⁹³ *Id.* at 360, 414 A.2d at 304. The victim in *Hurd* was unwilling or unable to identify the attacker prior to the hypnotic session. *Id.*

⁹⁴ *Id.* at 360-63, 414 A.2d at 304-06.

⁹⁵ *Id.*

⁹⁶ The *Hurd* court heard the testimony of five experts in the field of hypnosis. The hypnotist who induced the hypnosis asserted that the procedure was completely free of suggestion, coercion, or taint and that the victim's recollections were authentic. *Id.* at 343, 414 A.2d at 296. The hypnotist insisted that the subject had the opportunity to remember or not remember and the option to determine what she could remember. *Id.* A defense witness concluded that the questions and conduct of the police during the interview coerced the victim into making the identification of the defendant. *Id.* at 347, 414 A.2d at 298. The experts disagreed upon the witness' susceptibility to hypnosis and potential for suggestibility. *Id.* at 343, 414 A.2d at 296. The hypnotist placed the witness on the mid-range of his scale of susceptibility. *Id.* at 340, 414 A.2d at 294. The defense expert attacked this assessment and stated that the victim appeared to be highly susceptible to hypnosis. *Id.* at 343, 414 A.2d at 295. The dispute was significant to the hypnotist's conclusion regarding the absence of suggestivity in the hypnotic session. *Id.* at 343, 414 A.2d at 296. If the subject were highly suggestible, suggestive influences would be more likely to have an influence upon the accuracy of her recall. Both experts agreed that independent verification of the subject's statements was essential to determining reliability. *Id.* at 349, 414 A.2d at 299.

⁹⁷ *Id.* at 363, 414 A.2d at 305.

⁹⁸ *Id.* at 363, 414 A.2d at 306. In *State v. White*, in response to the recommendations of the same expert witness as in *Hurd*, the Milwaukee County Court adopted a list of

First, the hypnotist should be a licensed psychiatrist or psychologist trained in the use of hypnosis.⁹⁹ In addition, the court emphasized the importance of the hypnotist's independence from the parties involved in the case.¹⁰⁰ Third, prior to the hypnotic session, law enforcement personnel must make a record of all information given the hypnotist,¹⁰¹ and the hypnotist should obtain from the subject a detailed account of the remembered facts.¹⁰² As an additional safeguard, the court required a recording of the hypnotic interview.¹⁰³ The court further stated that only the hypnotist and the subject should be present during any phase of the entire hypnotic process.¹⁰⁴

Applying these safeguards to the facts of *Hurd*, the New Jersey Superior Court held that the absence of substantial compliance with these safeguards indicated the probability that suggestiveness rendered the memory inaccurate and warranted exclusion of the testimony.¹⁰⁵ The hypnotist satisfied the court's requirements for expertise and independence from the prosecutor's office.¹⁰⁶ In the absence of a record of the information given the hypnotist, a detailed statement of the subject's pre-hypnosis recollection, and a recording of the interview, the *Hurd* court was unwilling to assert that the hypnotic session was not unduly suggestive.¹⁰⁷ Moreover, the presence of law enforcement officials during the hypnotic interviews gave rise to an inference that the officials communicated an opinion to the subject/witness regarding the identification sought.¹⁰⁸ Because the available information did not indicate the effect of any possible suggestiveness on the victim's memory,

safeguards almost identical to those enunciated in *Hurd*. Compare *State v. White*, No. J-3665 (Cir. Ct. Milwaukee Cty. 1979) with text accompanying notes 99-104 *infra*. The Milwaukee County Court added the further requirement that the hypnotist should not receive verbal information about the case but should be informed in writing. No. J-3665 at 11. In addition, the subject should undergo a psychological test to determine the subject's ability to comprehend the meaning of the hypnotic session. *Id.* The court advised the hypnotist to be careful not to add any new elements to the subject's description of the events. *Id.* at 12. Finally, the court considered the importance of corroborating evidence. *Id.*

⁹⁹ *Id.* at 363, 414 A.2d at 306.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* The maintenance of a record of information given the hypnotist provides the court with further evidence regarding what the hypnotist could have suggested to the subject.

¹⁰² *Id.* The trial court can compare the memory of the witness prior to hypnosis with the witness' restored memory following hypnosis to detect changes in the recollection.

¹⁰³ *Id.* A recording assisted the court in locating suggestiveness.

¹⁰⁴ *Id.* The safeguard limiting the persons present at the session protects against the presence of suggestive influences. The hypnotic session includes the pre-hypnotic testing and post-hypnotic interview.

¹⁰⁵ *Id.*

¹⁰⁶ The hypnotist in *Hurd* was a psychiatrist and acknowledged authority on hypnosis. *Id.* Although the prosecutor initiated the retainer of the services of the hypnotist, the hypnotist did not exhibit any sense of obligation to the prosecutor. *Id.* at 365, 414 A.2d at 307.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

the court refused to uphold the admission of potentially unreliable testimony.¹⁰⁹

The procedural safeguards delineated by the *Hurd* court provide an effective means of balancing the probative value of the witness' hypno-induced testimony against the danger that the jury will place undue significance on the testimony. The possibility that suggestiveness in the hypnotic session will impair the accuracy of the restored memory and of the subsequent testimony militates against automatic admissibility of hypno-induced testimony. Courts should investigate the entire hypnotic procedure to determine whether the testimony is reliable before allowing a jury to consider the evidence.¹¹⁰ The potential for hypnosis to restore an historically accurate memory, however, weighs against automatic exclusion on the grounds of unreliability.¹¹¹ Thus, courts should be reluctant to exclude hypno-induced testimony of a victim or other witness merely because hypnosis was used as a memory refresher.¹¹²

The safeguards enunciated in *Hurd* establish an adequate procedural guide for determining the effect of suggestiveness upon reliability. In emphasizing the importance of suggestiveness, the court has responded to the medical profession's acknowledgement of the effects of suggestion during hypnosis upon the memory.¹¹³ Courts should require an extensive examination of the hypnotic procedure in order to detect suggestiveness in all cases involving hypnosis as a memory refresher.¹¹⁴ The *Hurd* safeguards not only permit the detection of suggestiveness but also protect against the introduction of suggestive influences which may taint the pretrial identification. Thus, the establishment of extensive guidelines can minimize objections to admissibility on the grounds of unreliability.¹¹⁵ The requirement of a recording of the hypnotic session eliminates the court's need to rely upon the testimony and cross-examination of the hypnotist to locate the presence of suggestive in-

¹⁰⁹ *Id.*

¹¹⁰ The trial court should make the determination of admissibility of the testimony in a hearing out of the presence of the jury. *Id.* at 364, 414 A.2d at 307.

¹¹¹ See text accompanying note 5 *supra*.

¹¹² See, e.g., *United States v. Adams*, 581 F.2d 193, 199 (9th Cir. 1978) (rejecting predicate that in-court testimony of subject who previously had been hypnotized is unreliable as matter of law); *State v. McQueen*, 295 N.C. 96, 119, 244 S.E.2d 414, 427 (1978) (witness' pre-trial hypnosis affected credibility rather than admissibility); *State v. Jorgensen*, 8 Or. App. 1, 9, 492 P.2d 312, 315 (1971) (use of hypnosis prior to testifying not basis for disallowing testimony).

¹¹³ See text accompanying notes 15-25 *supra*.

¹¹⁴ The most thorough investigations of suggestiveness have come from those courts which responded to the constitutional requirement for protection against suggestiveness in pretrial identifications. See *People v. Smrekar*, 68 Ill. App.3d 379, 385 N.E.2d 848 (1979); *State v. Hurd*, 173 N.J. Super. 333, 414 A.2d 291 (1980); *State v. White*, No. J-3665 (Cir. Ct. Milwaukee Cty. 1979); text accompanying notes 78-109 *supra*.

¹¹⁵ See generally *Safeguards*, *supra* note 50, at 117. The presence of safeguards against abuse enhances admissibility of testimony from a hypnotically-restored recollection. *Refreshing Memory of Witness*, *supra* note 40, at 268.

fluences. In addition, by taking a statement of the witness' recollection prior to hypnosis, the court can compare the consistency of the pre- and post-hypnotic statements. Inconsistency should alert the court to the danger of unreliability. Thus, the combination of procedural safeguards, independent corroboration, and precautionary instruction¹¹⁶ can provide a basis for justifying the admission of hypno-induced testimony.

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¹¹⁶ Courts should emphasize to the jury that the validity of hypnotic recall should be equated with that of normal recall. See Haward & Ashworth, *supra* note 36, at 474.