10-1986

Rock v. Arkansas

Lewis F. Powell, Jr.

PRELIMINARY MEMORANDUM

September 29, 1986 Conference
Summer List 23 , Sheet 2

No. 86-130

ROCK (hypnotized defend.)	Cert to Ark. S.Ct (Hays)	
v.		
ARKANSAS	State/Criminal	Timely

1. SUMMARY: Petr asserts she was denied the fundamental due process right to testify on her own behalf when her direct examination was limited by the tc because her memory had been enhanced by hypnosis.

2. FACTS AND DECISION BELOW: Petr was involved in a scuffle with her husband. During the altercation, petr's husband was shot. Petr all along maintained that the shooting was an

I agree that a CFR is probably appropriate to evaluate exactly what petr was prevented

accident, but she was unable to recall any specific details as to how the gun was discharged. Petr was charged with manslaughter and found guilty by a jury.

In preparation for trial, petr's atty hired a psychiatrist to aid petr's recollection of the details of the shooting. Before hypnotizing petr, the psychiatrist interviewed petr for approximately an hour. No recording was made of this interview or the hypnotic session, but the psychiatrist took handwritten notes of what petr recalled about the shooting before undergoing hypnosis. During hypnosis, according to petr, petr recalled certain facts about the gun which prompted an examination of it. This examination showed that the gun was susceptible of being discharged without pulling its trigger. Petr also recalled that the gun in fact discharged without the trigger being pulled.

At trial, the tc made the following pre-trial order:

> Defendant cannot be prevented by the Court from testifying at her trial on criminal charges under the Arkansas Constitution, but testimony of matters recalled by Defendant due to hypnosis will be excluded because of inherent unreliability and the effect of hypnosis in eliminating any meaningful cross-examination on those matters. Defendant may testify to matters remembered and stated to the examiner prior to being placed under hypnosis. Testimony resulting from post-hypnotic suggestion will be excluded.

App. to Petn. A-17.

The practical effect of this order is not entirely clear from reviewing the petn and the Ark. S.Ct.'s opinion. Petr claims that during her direct examination, she was prevented from doing little more than paraphrase what was contained in her psychiatrist's notes concerning what she recalled prior to hypnosis.

This limitation, according to petr, continued during cross-examination, which resulted in petr appearing devious and unresponsive to the the prosecutor's questions. Petr also asserts that she was prevented from telling the jury "the most direct reason why she was innocent, that her finger was never on the trigger." Petn. 7.

According to the Ark. S.Ct., petr was allowed to testify as to the following facts:

> She testified that she and her husband were quarreling, that he pushed her against the wall, that she wanted to leave because she was frightened, and her husband wouldn't let her go. She said her husband's behavior that night was unusual, and the shooting was an accident, that she didn't mean to do it and that she would not intentionally hurt her husband.

App. to Petn. A-13.

The Ark. S. Ct. affirmed petr's conviction, adopting the rule that hypnotically refreshed testimony is per se inadmissible. Relying on a number of cases which have followed the same approach, see especially People v. Shirley, 31 Cal.3d 18, cert. denied, 459 U.S. 860 (1982), the Ark. Ct. ruled that hypnotically refreshed testimony effectively renders a witness incompetent to testify. The Ark. Ct. followed the scientific view that memory is not enhanced by hypnosis. Rather, the witness confabulates, that is, the witness, while under hypnosis, makes up facts to make the story related while under hypnosis logically complete. The witness, then, after hypnosis, cannot tell the difference between what he or she recalls independent of hypnosis and what

he or she confabulates. Accordingly, hypnotically enhanced testimony is irreparably tainted.

The Ark. S.Ct. briefly evaluated petr's constitutional right to testify on her own behalf. The Ark. Ct. ruled, however, that petr's right to testify was limited in this case. The Ct. relied upon two cases: Greenfield v. Robinson, 413 F. Supp. 1113 (W.D. Va. 1976) and State v. Atwood, 479 A.2d 258 (Conn. Super. 1984).[1]

3. CONTENTIONS: Primarily relying upon Chambers v. Mississippi, 410 U.S 284 (1973), petr argues that limiting her direct examination violates her due process right to testify on her own behalf. Petr also argues that even if the state could limit her testimony because she underwent hypnosis, the tc here went too far, abusing its discretion.

4. DISCUSSION: Petr's contention may well deserve plenary consideration by this Court. First, there is a split among three states. Ark., in this case, and Conn., in Atwood, have adopted the view that a criminal defendant's right to testify is

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[1] Greenfield involved a habeas challenge of a state conviction, inter alia, on the basis that the petr in that case was denied the right to present an adequate defense when the state refused to allow him to testify while under hypnosis. In Atwood, the Conn. Super. Ct. ruled that a criminal defendant did not have the right to have his memory hypnotically enhanced. In Atwood and Greenfield, unlike the present case, the defendants requested court approval before they underwent hypnosis, but were denied the right to do so.

not implicated by preventing that person from testifying as to facts recalled as a result of hypnosis. The Cal. S.Ct., on the other hand, in the very case primarily relied upon by the Ark. Ct. here, made the following observation recognizing an exception to its per se inadmissibility rule to hypnotically enhanced testimony:

> "[W]hen it is is the defendant himself - not merely a defense witness - who submits to pretrial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. In that case, the rule we adopt herein is subject to a necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf."[2]

The one CA decision I could find dealing extensively with this area discusses the divergence of views among the state courts in dealing with all forms of hypnotically enhanced testimony. United States v. Valdez, 722 F.2d 1196 (1984). CA5, in this case, did not deal with a defendant's right to testify, but rather with the more common situation: CA5 held that a prosecution witness could not testify after having his memory enhanced through hypnosis, when the person identified was known by the witness to be under suspicion, and when the witness had previous-

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[2] 31 Cal.3d, at 67. The Ark. S. Ct. did not mention this exception to Cal.'s general rule. There is, it turns out, a somewhat bizarre explanation for this oversight other than the fact that the Ark. S. Ct. rejected this exception. The Pacific Reporter version of this case omits the paragraph, quoted in the text here, that is included in both the official reporter and the CAl. Rptr version. Compare 31 Cal.3d, at 67 and 181 Cal. Rptr., at 273 with 641 P.2d, at 805. The opinion was modified on rehearing, but the P.2d version apparently does not reflect this change.

ly been unable to make an identification before hypnosis. 722 F.2d, at 1202.

In my view, there is a strong possibility that petr was denied the opportunity to fully explain her account of how the gun discharged. By being forced to comply with the tc's limiting order, I can see how petr may well have appeared to the jury to be evasive and uncooperative. Such an impression, in turn, could seriously have undermined her credibility, the essential element of her defense given the nature of this case.

A reversal in this case would be an extension of Chambers v. Mississippi, because the state's interest here in preventing "tainted" testimony appears to be much stronger than the wrote application of the hearsay and "voucher" rules at issue in Chambers. See Shirley, supra (describing in great detail why hypnotically enhanced testimony is unreliable). Moreover, some limitations on a defendant's right to testify are acceptable. For example, a defendant does not have the right to commit perjury. Harris v. New York, 401 U.S. 222, 225 (1971).

Nevertheless, Ark. here appears to have imposed a substantial limitation on the fundamental right to testify. A CFR appears to be in order to better determine to what extent petr was limited in her ability to tell her side of the story. If the limitation was substantial, I think a grant is in order to address whether the state's interest in keeping potentially unreliable, hypnotically enhanced testimony from being admitted is sufficient to warrant the burden the state placed on the petr's right to testify.

5. RECOMMENDATION: I recommend CFR.

There is no response.

September 10, 1986 Westfall Opin in petn.

October 31, 1986

Court..... *Voted on*....., *19*.....

Argued....., *19*..... *Assigned*....., *19*..... No. 86-130

Submitted....., *19*..... *Announced*....., *19*.....

ROCK

vs.

ARKANSAS

Grant
Relist
for
B.R.W

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Rehnquist, Ch. J.			✓										
Brennan, J.		✓											
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.					Join 3								
Powell, J.			✓										
Stevens, J.		✓											
O'Connor, J.			✓										
Scalia, J.			✓										

November 7, 1986

Court..... *Voted on*....., *19*.....

Argued....., *19*..... *Assigned*....., *19*..... No. 86-130

Submitted....., *19*..... *Announced*....., *19*.....

ROCK

VS.

ARKANSAS

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
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Blackmun, J.		✓											
Powell, J.			✓										
Stevens, J.		✓											
O'Connor, J.			✓										
Scalia, J.			✓										

File

lsg 02/20/87 Reversed 2/26 - Thorough & persuasive.

Const. does not require admission in evidence in a criminal case of testimony ~~which~~ based on "memory" induced by hypnosis.

Three lines of cases. See Resp's Brief for excellent summary.

I'm tentatively inclined to approve the intermediate view. Not per se inadmissible. But reliability is questionable. ~~P's~~ should have some latitude to adopt procedural protections.

BENCH MEMORANDUM

To: Justice Powell February 20, 1987

From: Leslie → E.g. request test be video taped

No. 86-130, Rock v. Arkansas (found hypnosis test. is inherently untrustworthy)

Cert. to Ark. Sup. Ct. (Hayes)

Monday, March 23, 1987 (third argument)

I. Summary

The question presented in this case is whether petr's due process rights were violated by the TC's order that she could not testify as to information she recalled during hypnosis.

II. Background

Petr's husband died from a gunshot wound he received while trying to prevent his wife from leaving their apartment. Petr was charged with manslaughter for the shooting

of her husband. Petr could not remember everything about the shooting and without consulting the court nor informing the prosecutor, her attorney hired a psychiatrist to use hypnosis to induce recollection. Before hypnosis was begun, the psychiatrist, Dr. Bettye Back, interviewed petr for an hour. Included in that interview was petr's recollection of the shooting prior to hypnosis. No video or sound recording was made of the prehypnotic session, but Dr. Back made handwritten notes of the session. As a result of the second hypnotic session, petr was later able to recall that she did not put her finger on the trigger of the gun, and that the gun discharged by accident or mechanical failure of the safety as her husband grabbed her hand during the scuffle.

The TC ruled testimony of matters recalled by petr due to hypnosis inadmissible because of its unreliability and because of the effect of hypnosis on cross-examination. Petr was allowed to testify about things she remembers prior to being subjected to hypnosis. Petr was convicted and sentenced to 10 years imprisonment and fined $10,000. The Ark. Sup. Ct. affirmed, as follows:

Petr makes two arguments relating to the court's ruling: the hypnotically refreshed testimony should have been admitted, and in the alternative, even assuming that such testimony is inadmissible, the TC was unduly restrictive of petr's testimony.

Divergence of Opinion on Admissibility. Most courts agree that there is some inherent unreliability in hypnoti-

cally refreshed testimony, but disagree how that affects admissibility. Jurisdictions have taken three views. The first view is that such testimony is generally admissible, with the fact of hypnotic induction going to its credibility, not its admissibility. The second view is to admit the testimony when it has been obtained pursuant to certain procedures designed to ensure its reliability. The third view is that such testimony is inherently unreliable and is inadmissible per se.

Current Trend Toward Exclusion. The more recent trend is toward exclusion of such testimony. See McCormick on Evidence §206 (3d ed. 1984). Typical of this trend is Maryland, which in 1968 admitted such testimony but reversed its position in 1982. Courts adopting the rule of exclusion often rely on the test announced in Frye v. United States, 293 F. 2d 1013 (CADC 1923), that an expert witness "may not testify on the basis of scientific methodology unless the principles on which he relies have achieved general acceptance within the scientific community." We need not decide if the Frye test is the sole test of admissibility, because we would find it inadmissible even under the rules of evidence.

Expert Opinion. While hypnosis may have gained recognition as an aid to therapy, it has not gained general acceptance as a means of ascertaining truth in the field of forensic law. Cases comprising the recent trend toward exclusion of hypnotically refreshed testimony have examined

extensively the expert opinions in this field and have concluded that it is inherently unreliable and without sufficient acceptance to allow it in the courtroom. The dangers of hypnosis in memory retrieval are summed up in People v. Guerra, 690 P. 2d 635 (Cal. 1984): the subject's capacity to judge the reality of his memories is impaired; he is apt to recall "memories" that never existed, yet be convinced those memories are real; he will produce on demand a recollection of an event which may be a compound of actual facts, irrelevant matter and highly plausible "confabulations"; hypnosis artificially increases the subject's confidence in both his true and false memories and may enhance his credibility as a witness due to an attendant ability to increase dramatically the amount of detail, or the emotion with which those details are reported, though they may be simply "artifacts of the hypnotic process." There is also a likelihood that juries will place greater emphasis on testimony produced by hypnosis.

Courts rejecting hypnotically refreshed testimony have been equally concerned with the effects on cross-examination, where the difficulties in memory retrieval and fabrication are compounded. The conviction on the part of the subject that he or she is stating the truth affects the truth finding process traditionally tested by cross-examination.

Conditional Admissibility. Petr urges that if we do not allow hypnotically refreshed testimony unconditionally,

we should adopt the guidelines of State v. Hurd, 432 A. 2d 86 (N.J. 1981). These guidelines are as follows: whenever a party seeks to introduce a witness who has undergone hypnosis to refresh memory, the party must inform the opponent of his intention and provide him with the recording of the session and other pertinent material. The TC rules on the admissibility, considering the facts and circumstances to determine whether the procedure followed in the particular case was a reasonably reliable means of restoring the witness' memory. These considerations should include the reason for the loss of memory and the possible motivation to recall a certain version of the events. Certain procedures should be followed: (1) a doctor experienced in the use of hypnosis should conduct the session; (2) the doctor should be independent, not regularly used by the attorney; (3) any information given to the hypnotist before the session should be recorded; (4) before hypnosis, the hypnotist should obtain from the subject a detailed description of the events recalled; (5) all contacts between the hypnotist and the subject must be recorded; and (6) only the hypnotist and the subject should be present during the session.

We note that petr has not fully followed the Hurd guidelines, but are disinclined to follow it in any case. As other courts have noted, the Hurd guidelines do not fully address the dangers of hypnosis. To adopt the guidelines would simply burden the pretrial process further without ensuring reliability.

Petr's Testimony Restricted. The general response of courts has been to allow testimony proved to have been recalled before hypnosis. The DC in this case chose this route. Petr has not demonstrated how the DC strayed from this ruling. The burden was on petr to establish a reliable record of her prehypnotic memory. She cannot now claim error because the DC restricted her to the record she offered. The DC limited its restrictions to the day of the shooting. Petr argues that it should have been limited to the shooting itself. The record reveals that the session covered the day of the shooting as well as other times, so if anything the order was generous. Petr suggests that a better record of her prehypnotic memory would be her own memory as opposed to the doctor's notes. This would be circumventing the very danger of hypnosis.

Constitutional Right To Testify. Petr maintains that the rule of excluding hypnotically refreshed testimony should not be applied to defendants because it violates their constitutional right to testify on their own behalf. But even a defendant's right to testify is not without limits. Even defendants are subject to the rules of procedure and evidence.

In Greenfield v. Robinson, 413 F. Supp. 1113 (1976) the same argument was made by a defendant who had no recollection of the crime, a murder. He argued that hypnotic testimony was the only evidence he could offer in his defense, that it would be a violation of his constitutional

rights to deny him the right to testify, citing Chambers v. Mississippi, 410 U.S. 284 (1973). The cases are distinguishable. Chambers primarily found a hearsay exception for evidence offered by the defense because of reliability. The Greenfield court pointed out that it was excluding the hypnotically induced testimony for the very reason that it was unreliable: "This court knows of no rule that requires a judge to accept evidence of uncertain value to go to a defense that is otherwise completely uncorroborated. The mere fact that a crime has no witnesses or direct evidence does not warrant a court to accept evidence that may be able to tell the trier of fact something about the crime, but may be of dubious quality."

We adopt the same rule. Petr's testimony was restricted only by what, in effect, are standard rules of evidence. The probative value of the proffered testimony is questionable, but in any case, it is substantially outweighed by the other considerations discussed. Here, petr was able to relate to the jury her version of the shooting, that it was an accident. In reality nothing was excluded that would have been of much assistance to petr, or would have enlarged on her testimony to any significant degree. Yet given the available information on the effect of hypnosis and the attendant difficulties of such testimony, the state's desire to confine petr's testimony to the prehypnotic memories is warranted.

Petr's Out-of-Court Statement. Petr alleges error in the TC's exclusion of a statement in a police officer's report, attributed to petr, that she "had the gun in her hand and it went off." The statement was excluded as hearsay. Petr relies on Fed. R. Evid. 801(d), which provides that a statement is not hearsay if "consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." The statement does not come within the exception. For the rule to apply, the prior consistent statement must be made before a motive to falsify has arisen. Petr's motive in describing the shooting as an accident at the time of arrest was the same as it would be when giving the testimony at trial. The TC was thus correct in excluding it as hearsay.

III. Analysis

A. Due Process

The Ark. Sup. Ct. correctly identified three views that the lower courts have taken on the admissibility of hypnotically induced testimony. These views, and the courts that have adopted them are:

CA6 & CA9, plus several DC

1. Complete Admissibility. These courts view hypnotic refreshment just like any other type of refreshment of testimony, e.g., refreshment by showing the witness a writing to stimulate the witness' memory. Under this view, the fact that hypnosis was used goes to credibility, not admissibility. The courts adopting this view are: CA6 1986 (ap-

plying Tenn. law); CA9 1978; S.D. Fla. 1982; E.D. Mich. 1977; Ill. App. 1979; La. 1983; N.D. 1983; Or. App. 1971; Tenn. Crim. App. 1981; Wyo. 1982.

2. Procedural Safeguards. The leading case in this line is Hurd (N.J. 1981), noted by the Ark. Sup. Ct. in this case. Other courts that have adopted the Hurd safeguards are: CA8 1985; CA5 1984; military CA 1984; Idaho 1984; Ind. 1982; Ohio App. 1984; N.M. App. 1981; Miss. 1984; Wisc. 1983.

3. General Admissibility. These courts generally apply the Frye test and determine that hypnosis as a scientific process has not become generally accepted as reliable and therefore its products must be excluded per se. These courts are: Alaska 1986; Ariz. 1982; Ark. 1986; Cal. 1985; Colo. App. 1982; Conn. 1984; Del. 1985; Fla. 1985; Hawaii 1985; Kan. 1985; Md. 1983; Mass. 1983; Mich. 1982; Minn. 1984; Mo. 1985; Neb. 1981; N.Y. 1983; Okla. Crim. App. 1984; Pa. 1981; Wash. 1984. 20 state cts

1. Per Se Inadmissibility

Arkansas has taken the strictest of three views of the admissibility of hypnotically refreshed testimony. The court analyzed the scientific literature and the trend of the lower courts and determined that testimony obtained through hypnosis is inherently unreliable. The court is correct that this view is the trend. The trend relies primarily on literature by two experts, Dr. Martin Orne and Dr. Bernard Diamond, both of whom have published articles on the

There is trend

value of hypnotically refreshed testimony. Both conclude that testimony obtained through hypnosis is unreliable because of the very process of hypnosis. That is, procedural safeguards cannot prevent the inherent problems. These problems are that the witness is very susceptible to suggestion under hypnosis -- either suggestion by the hypnotist or a suggestion by the lawyer or someone else before hypnosis; that subjects feel compelling to comply with the request that they remember the events in question, so that memory may be distorted to please the hypnotist or someone else; that subjects are likely to confabulate, e.g., fill in the gaps in their memory with fantasy. After the subject has engaged in any of these techniques, however, he is not aware of it, but instead is convinced of the truth of his memory. Given these authorities and the utter lack of rebuttal authority offered by petr, the Ark. Sup. Ct.'s conclusion that such testimony is unreliable appears reasonable.

Because she does not try to establish the reliability of hypnotically refreshed testimony, petr's real argument seems to be that a defendant must be allowed to testify as to anything that might help her defense. Viewed more narrowly, her argument could be that any doubt as to reliability must be resolved in favor of a defendant. In Chambers v. Mississippi, 410 U.S. 284 (1973), you, writing for the Court, found that state rules of evidence violated due process by preventing a defendant from presenting his defense. You noted:

> The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. ... Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interest in the criminal trial process. E.g., Mancusi v. Stubbs, 408 U.S. 204 (1972). But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined. Berger v. California, 393 U.S. 314, 315 (1969).

Id., at 295. In that decision, you implied that a procedural rule could be justified as "serv[ing] some valid state purpose by excluding untrustworthy testimony." Id., at 300.

In this case, the Ark. Sup. Ct. has found that the testimony sought to be offered is inherently untrustworthy. If this determination is accepted, then its exclusion actually aids the "integrity of the fact-finding process" rather than detracts from it. In this situation, the untrustworthiness of the statements is compounded by the fact that cross-examination cannot reveal the weaknesses in the testimony because after hypnosis a subject tends to believe that what he recalls is the truth. The state interest is in limiting the presentation of evidence to that which is trustworthy. The defendant's interest is in presenting evidence that will help her defense. But her only legitimate interest can be in presenting truthful evidence in support of her defense, because she does not have a constitutional right to commit perjury. The state court has determined that the testimony to be offered is not trustworthy. To the extent that the judgment that all hypnotically enhanced tes-

timony is untrustworthy is reasonable, the balance struck by the Ark. Sup. Ct. between the interests of the state and the defendant appears reasonable.

2. Case-by-case/Procedural Safeguard Approach

The CA8 in Sprynczynatyk v. General Motors Corp., 771 F. 2d 1112 (1985) makes the best argument in favor of adopting a variation on the middle position -- that of procedural safeguards:

> A per se rule [either of admissibility or inadmissibility] would remove the question from the discretionary realm of the district court. If we were to establish a per se rule of inadmissibility, relevant, reliable testimony would in some instances be automatically disallowed and would hamper the truthfinding function of our system. A rule of per se inadmissibility is impermissibly broad and may result in the exclusion of valuable and accurate evidence in some cases. ... On the other hand, if we adopt a per se rule of admissibility, in some circumstances, evidence that was unreliable because of the methods used in hypnosis and prejudicial because the jury may be overly influenced by testimony obtained from hypnotic recall would be admitted and that too would have an undesirable effect on our judicial system. ... A per se rule of inadmissibility does not cure the risks of undue prejudice and jury confusion. Accordingly, we adopt a flexible rule on the admissibility of hypnotically enhanced testimony that enables the district court to determine the question on a case-by-case basis. We are satisfied that, if the hypnosis session is properly conducted in appropriate cases, the hypnotically enhanced testimony does not run afoul of the Frye test to the extent it is applicable.
>
> We adopt a rule which requires the district court, in cases where hypnosis has been used, to conduct pretrial hearings on the procedures used during the hypnotic session in question and assess the effect of hypnosis upon the reliability of the testimony before making a decision on admissibility. The proponent of the hypnotically enhanced testimony bears the burden of proof during this proceeding. In addition, we adopt a version of the Hurd safeguards to the extent that the dis-

> trict court should consider whether and to what degree the safeguards were followed when making its determination that the hypnotically enhanced testimony is sufficiently reliable. Other factors the district court should take into account are the appropriateness of using hypnosis for the kind of memory loss involved, and whether there is any evidence to corroborate the hypnotically enhanced testimony. The district court must then determine whether in view of all the circumstances, the proposed testimony is sufficiently reliable and whether its probative value outweighs its prejudicial effect, if any, to warrant admission. Ultimately the district court must decide whether the risk that the testimony reflects a distorted memory is so great that the probative value of the testimony is destroyed.
>
> By out ruling today we place this hypnosis evidentiary problem directly within the control of the district court. We think the better approach is for the district court and not the jury to make the preliminary determination of admissibility as is the case with other evidentiary questions. See Fed. R. Evid. 104(a). It is our hope that this case-by-case method of determining the admissibility of hypnotically enhanced testimony will guard against the problems of hypnosis, especially undue suggestiveness and confabulation, but also allow for the inclusion of reliable refreshed memory which hypnosis can at times under certain circumstances produce. In sum, we hold that the district court should, before trial, scrutinize the circumstances surrounding the hypnosis session, consider whether the safeguards we have approved were followed and determine in light of all the circumstances if the proposed hypnotically enhanced testimony is sufficiently reliable and not overly prejudicial to be admitted.

control of DC - not jury

Id., at 1122-1123.

The analysis of the CA8 is convincing and raises the question of whether a state court can declare all hypnotically refreshed testimony inadmissible regardless of the indicia of reliability in the particular case. As noted above, the general rule that such testimony is untrustworthy is supported by scientific authority. Therefore, its exclu-

sion is supported by the state interest in ensuring the accuracy of the truth-finding process at trial. Nevertheless, the Court may find that where a criminal defendant's rights are at stake, a more exacting case-by-case analysis is required. By making an individual determination of reliability according to the facts and circumstances of the particular case, the court could more precisely safeguard both the state's and the defendant's interests in accurate truth-finding.

3. Recommendation

In sum, whether state courts should have the discretion to declare a rule of per se inadmissibility of hypnotically enhanced testimony is a close question. On the one hand is the fact that the rule is supported by scientific authority, and that state courts should have broad leeway in establishing rules of evidence to ensure the reliability of criminal trials. On the other hand is the fact that authority on the question of hypnotically enhanced testimony is divided. The rule in this case, applied to criminal defendants, limits their constitutional right to testify in their own defense. A per se rule would exclude some relevant and reliable information. Unlike a hearsay exception, which depends on the fact that there exists a more reliable means to introduce the evidence, there is no other means to introduce evidence of a witness' recall. The importance to criminal defendants of certain testimony in certain cases, and the fact that a case-by-case determination would protect the

government's asserted interest in accurate fact-finding, support the modified procedural safeguard rule adopted by the CA8.

But here the Court is faced with an area of the law where scientific opinion is divided and strong state interests are at stake. If faced with the question as a trial court, the best view would probably be the modified view of the CA8. Yet this Court is faced with the question of what limits the Constitution imposes on the state courts' discretion. Where there is such uncertainty, it may be better to allow the lower courts broad leeway to evaluate the worth of the technique of hypnosis and fashion appropriate rules. This is not really a question of the state versus the defendant, because this rule of exclusion may often cut against the state. Police departments often use hypnosis as an investigative tool, and in these cases it would be to the state's advantage to introduce the testimony gained thereby. Thus, it seems that the lower courts can be trusted to keep in touch with the development of the hypnosis technique and to fashion rules designed to promote fair trials. Affirming the decision of the court in this case would mean only that state courts are free to adopt the per se rule of exclusion, not that they must do so. Other lower courts can keep the rules that they have adopted and all courts are free to re-evaluate their decisions in light of developing scientific evidence.

4. Other Questions Raised

The State argues that even if an error is found in this case, it was harmless. This determination, if necessary, is properly made by the lower court on remand.

Note also that amicus the State of California identifies a fourth position taken on the introduction of hypnosis by the Cal. Sup. Ct. in People v. Shirley, 31 Cal. 3d 18, cert. denied, 459 U.S. 860 (1982). This position is that "the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward." Id., at 66-67. Criminal defendants are exempt from this rule. Amicus wants the Court to find this fourth approach unconstitutional. While the Cal. Sup. Ct.'s holding may be questionable as applied in certain cases, there appears to be no need to reach the issue in this case since the Ark. Sup. Ct. has not gone so far, and not even the Cal. Sup. Ct. applies the rule to criminal defendants.

B. Right to Counsel — need not address

As a related argument, petr contends that the TC's order denied her due process because it limited petr's right to effective assistance of counsel. This argument was not raised before the Ark. Sup. Ct. and was not raised in the cert petition to this Court. To the extent that it is incorporated in the general due process argument, its resolution would appear to be the same. She argues that hypnosis

is an important investigative tool and that she should be able to testify to anything discovered through the aid of counsel. But by its terms, the TC's order only applied to her recall through hypnosis. Any evidence discovered through any other means was admissible. Moreover, petr alleges that she was prompted to investigate the firing mechanism of the gun after her recall in hypnosis. This evidence was admitted at trial. Since this argument appears to be only an adjunct to the primary due process argument and was not raised below, this Court should decline to address it separately.

C. Limitation to Prehypnotic Statements as Arbitrary

Petr argues that the TC arbitrarily limited her prehypnotic testimony to exactly what was in the hypnotist's notes. This claim also was not raised before the Ark. Sup. Ct. and therefore is not properly before the Court. In any event, petr's description of the limitation of the order is highly questionable. The Ark. Sup. Ct. found that the order was generous, and allowed her ample leeway to explain her prehypnotic recollection.

Petr seems to be rearguing the evidentiary ruling by the court that a statement in a police officer's report could not be admitted as a hearsay exception. First, this is a state evidentiary question that does not warrant this Court's review. Second, the contested statement was read into evidence at least 5 times, so any allegation of prejudice is untenable. Third, the court properly found that the

hearsay exception for consistent statements to rebut recent fabrications applied only to statements made before the motive to fabricate occurred. Petr implicitly argues that the fact that the statement occurred before hypnosis is enough. But hypnosis has the inherent danger of incorporating prior motives to fabricate, so the court's holding appears correct. Certainly the ruling is not so arbitrary as to deny petr due process.

D. Effect of Numerous Objections

Petr finally argues that the application of the TC's order was arbitrary because of the numerous clarifications required while petr was on the stand. Again, this argument was not raised below or in the cert petition and is best ignored. On the merits, it appears that the TC was making a genuine attempt to ensure that petr's rights were protected by making a decision whether numerous different statements in different contexts should be admissible. Although this may have been confusing to the jury, it does not appear to be a cause for a constitutional complaint.

IV. Conclusion

1. The Ark. Sup. Ct. determined, after examining the trend of lower court authority and expert viewpoints, that hypnotically refreshed testimony is generally untrustworthy. This determination appears reasonable. This Court has held that although defendant's trial rights are important, they may yield to substantial state interests. Here, the state interest is in presenting reliable information to

the jury. It seems that the balance of interests would at least allow the state to exclude testimony found to be untrustworthy.

2. The real question is whether a state can make an across-the-board determination that all hypnotically induced testimony is unreliable per se. This is a close question. Scientific evidence supports the state court's conclusion. But the right of the defendant to present his defense is crucial. The Due Process Clause may require that when the reliability of certain testimony is uncertain, at least a case-by-case determination of its trustworthiness is required. However, the better view appears to be that where the scientific evidence is so uncertain, state courts should be left the maximum freedom to form rules of evidence. It is difficult to say that the Constitution requires the admission of evidence of dubious scientific validity. Affirming the Ark. Sup. Ct. in this case does not disturb the ability of other lower courts to retain or adopt rules of broader admissibility.

I could not say this

3. Petr's other arguments were not raised below and are merely extensions of her due process argument. She claims that exclusion of the hypnotically induced testimony unconstitutionally burdened her right to prepare a defense, that the TC arbitrarily limited her prehypnotic testimony to the notes of the hypnotist, and that the numerous objections be the state during her testimony were confusing and thereby

violated due process. (not one) None of these claims appear to have merit.

L.F.P.

Notes – 2/26

86-130 Rock v. Ark (Ark. S/Ct)

1. The case. Petr. was charged w/ manslaughter for shooting her husband. She claimed she could not ~~not~~ remember everything about the shooting, & hired a psychiatrist to use hypnosis to induce recollection. After hypnosis, Petr claimed she remembered the gun discharged by accident. (Unlikely!)

TC excluded testimony of Petr & her psychiatrist as unreliable. (This accords with generally scientific opinion.)

2. Three lines of authority:

(a) Generally admissible w/ the fact of hypnotic inducement going to its credibility – not admissibility.

(b) Admit subject to certain procedures thought to ensure reliability (such as?)

(c) Exclusion as inherently unreliable.

This is majority view, & current trend ~~of~~. Even with experts, hypnosis is not generally ~~accepted~~ accepted as a reliable means of ascertaining the truth.

Ark. per se rule ✓

3. My tentative view. Vacate ~~Affirm~~ generally, but do not ~~adopt~~ adopt a per se rule.

I'm not sure we should go beyond holding that Const. does not require admission

(i) Hold that Const. does not require admission of ev. of dubious scientific reliability.

(ii) In aff'ming Ark, leave the Q of admissibility generally to the States w/ a ~~caution~~ caution that reliability of ~~the~~ hypnotic induced testimony is doubtful & a TC – if it admits such test. ~~of~~ – should caution the jury ~~to~~ as to weight & credibility.

TC ~~shd~~ & opposing counsel should be advised in advance of trial.

Procedural Safeguards

As ~~Ark~~ Ark. has per se Rule, possibly I Vacate & Remand – under this case (a diff. unclear events)

Leslie

86-130 ROCK v. ARKANSAS

Argued 3/23/87

Luffman (Petr)

Argues weight of hypnotic evidence
is for jury, & not excluded by TC
Analogous to using notes & documents
to refresh recollection.

Clark (AG of Ark)

Ark S/Ct did not say Petr. couldn't
testify. The rule is that portions of
testimony based on hypnosis is inadmissible

lsg 03/24/87

MEMORANDUM

To: Justice Powell March 24, 1987

From: Leslie

No. 86-130, Rock v. Arkansas

Attached is the CA8's decision in Sprynczynatyk discussing the admissibility of hypnotically induced testimony. The CA8 adopted the middle position between per se admissibility and per se inadmissibility. This position leaves the admissibility within the DC's discretion after holding a pretrial hearing on the nature of the testimony. Viewed de novo, this appears to be the best approach. The question is whether state supreme courts should be allowed the discretion to adopt the rule of per se inadmissibility if they determined that it is warranted. Petr argues that the Due Process Clause prohibits states from adopting a per se rule of admissibility, at least as applied to evidence

offered by a criminal defendant, because such a broad rule necessarily excludes some reliable testimony and therefore infringes on the defendant's right to call witnesses and testify on his own behalf. The problem is that the scientific literature is mixed, so it is difficult to tell how likely it is that testimony is reliable. But, as I recall, even the state conceded at oral argument that some hypnotically induced testimony will be reliable. It's argument is that it is difficult to tell if any particular testimony is reliable and the jury function should not be reduced to "guess work."

A reasonable holding would be that since a certain amount of hypnotically induced testimony is likely to be reliable, it violates due process to exclude it all. Instead, trial courts should have the discretion to examine the circumstances of each case to determine the degree of reliability of the particular testimony. Only that deemed sufficiently reliable would be presented to the jury. Then, the jury's task would be no more "guess work" than in any other type of case in which it must evaluate testimony. Thus, the case-by-case method would better protect both the interests of the state and the defendant by allowing some reliable testimony in, but excluding testimony without sufficient indicia of reliability.

It seems that the DC would have reached the same result even if it had applied the CA8's suggested procedures. Nevertheless, the proper result if the Court adopts a different rule would appear to be to remand for proceedings consistent with the opinion.

known and identifiable persons. To support this position, they cite an article written by Professor Ronald Polston, the author of the original draft of the Act, a modified version of which the legislature enacted. Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles*, 7 Land & Water L.Rev. 73 (1972). In his article, Polston stated that the purpose of the Act was to facilitate the development of mineral resources by eliminating stale claims of persons who have left the area and are no longer locatable. *Id.* In this case, appellants argue, any person interested in developing their mineral interest could have located them and arranged to purchase or lease that interest.

We conclude, for two reasons, that the Mineral Lapse Act should apply to appellants. First, nothing in the language of the statute itself indicates that the legislature intended to exempt known and locatable mineral interest owners from the Act's coverage.[5] Second, the intent of the Act, as interpreted by the Indiana Supreme Court, is broader than that suggested by Polston in his article. The intent of the Act, according to the court, is "to remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources." *Short v. Texaco, Inc.*, 273 Ind. at 526, 406 N.E.2d at 630–31. We agree with the district court that the elimination of stale claims by identifiable, as well as unidentifiable, mineral interest owners furthers the development of mineral resources. Any owner who fails to make an active use of his or her interest, whether known or unknown, diminishes the potential for the exploitation of mineral resources.

[4] At oral argument, appellants styled their contention that the Act should not apply to them as a constitutional claim. Regardless of whether we construe their argument as an equal protection claim or as a due process claim, their contention lacks merit. Their equal protection claim fails for two reasons. First, the Act contains no classification scheme distinguishing between identifiable and unidentifiable owners. Second, because the Act makes no such distinction, appellants cannot prove that they received disparate treatment under the Act. Their due process claim fails because the Supreme Court has already declared, in a case in which the owners were locatable, that the Act does not unconstitutionally deprive mineral interest owners of due process by providing for an automatic lapse of their interests, if unused, after twenty years. *Texaco, Inc. v. Short*, 454 U.S. at 538, 102 S.Ct. at 796.

V. Conclusion

For the foregoing reasons, we conclude that appellants' mineral interest has lapsed. Accordingly, we AFFIRM the district court's order quieting title in appellee.

Vivian SPRYNCZYNATYK and Paul Sprynczynatyk,
Appellees/Cross-Appellants,

v.

GENERAL MOTORS CORPORATION,
Appellant/Cross-Appellee.

Nos. 84–1566, 84–1611.

United States Court of Appeals, Eighth Circuit.

Submitted Jan. 14, 1985.

Decided Aug. 16, 1985.

Rehearing and Rehearing En Banc Denied Sept. 17, 1985.

In automobile product liability and negligence action, the United States District Court for the District of North Dako-

5. The Illinois legislature, by comparison, exempted known and locatable persons from coverage under the Severed Mineral Interest Act. Ill.Rev.Stat. ch. 96½ §§ 9201–9217 (1983).

ta, John B. Jones, J., entered judgment on jury verdict in favor of plaintiffs, and cross appeals were taken. The Court of Appeals, Ross, Circuit Judge, held that admission of videotapes of driver's hypnosis session during plaintiffs' case in chief without a proper cautionary instruction constituted prejudicial error.

Reversed and remanded.

1. Evidence ⇐359(6)

Generally, a videotape offered to prove truth of matter asserted constitutes inadmissible hearsay. Fed.Rules Evid.Rule 801(c), 28 U.S.C.A.

2. Federal Civil Procedure ⇐2173
Federal Courts ⇐896, 911

In automobile products liability action, trial court's limiting instruction concerning videotapes of driver's hypnosis session, which told jury that the tapes were being received on ultimate issue of credibility of driver's recall and that the purpose was to permit jury to evaluate opinions they would hear but which failed to warn against their prohibited use to prove the truth of the matters asserted on the tapes, was erroneous and insufficient to prevent prejudicial use of the evidence; furthermore, under the circumstances of the case, showing of the videotapes of driver's hypnosis session, without a proper cautionary instruction and during plaintiffs' case in chief was highly prejudicial to automobile manufacturer and not harmless. Fed.Rules Evid.Rule 105, 28 U.S.C.A.

3. Federal Courts ⇐638

Ordinarily a motion in limine does not preserve error for appellate review.

4. Federal Courts ⇐638

In automobile product liability action, automobile manufacturer's failure to object during driver's direct examination to admission of driver's hypnotically enhanced testimony did not preclude appellate review of the issue where trial court made a definitive pretrial ruling denying manufacturer's motion in limine after the matter was fully briefed and argued and, in denying motion in limine, implicitly denied manufacturer's alternative request that plaintiffs be required to establish before trial reliability of driver's hypnotically enhanced testimony; under the circumstances, requiring an objection when driver testified on grounds raised in the motion in limine would have been in the nature of a formal exception and thus unnecessary. Fed.Rules Evid. Rule 103(a)(1), 28 U.S.C.A.; Fed.Rules Civ. Proc.Rule 46, 28 U.S.C.A.

5. Federal Courts ⇐416

In a federal court action, questions such as burden of proof, presumptions, competency and privileges are generally questions of state law but issues of admissibility of evidence are questions of federal law.

6. Witnesses ⇐257.10

District court, in cases where hypnosis has been used, must conduct pretrial hearings on procedures used during the hypnotic session in question and assess effect of hypnosis upon reliability of the testimony before making a decision on admissibility and proponent of the hypnotically enhanced testimony has burden of proof during that proceeding; additionally, district court should consider whether and to what degree *Hurd* safeguards were followed when making its determination that the hypnotically enhanced testimony is sufficiently reliable and court should also take into account the appropriateness of using hypnosis for the kind of memory loss involved, and whether there is any evidence to corroborate the hypnotically enhanced testimony and must then determine whether, in view of all the circumstances, proposed testimony is sufficiently reliable and whether its probative value outweighs its prejudicial effect, if any, to warrant admission.

7. Evidence ⇐150
Federal Courts ⇐823

Admissibility of evidence of experimental tests rests largely in discretion of trial judge and his decision will not be overturned absent a clear showing of an abuse of discretion.

8. Federal Civil Procedure ⇐2011

In automobile products liability action, trial court did not abuse its discretion in excluding videotapes, pictures and summaries of tests which automobile manufacturer performed on the accident car where such evidence would have been cumulative.

9. Products Liability ⇐83.5

Considering hypnotically enhanced testimony of driver, evidence in automobile products liability and negligence action was sufficient to support verdict in favor of plaintiffs.

10. Federal Civil Procedure ⇐828
Federal Courts ⇐817

Disposition of a motion to amend is within sound discretion of district court and to warrant reversal there must be some abuse of discretion.

11. Federal Civil Procedure ⇐840

In automobile product liability and negligence action, trial court did not abuse its discretion in denying plaintiffs' motion to amend complaint to include a claim for punitive damages on ground that the motion was untimely.

12. Federal Courts ⇐952

An amendment can be proper after remand to district court even if the claim had not been presented to district court in a timely fashion.

Christine Hogan, Bismarck, N.D., for appellant/cross-appellee.

Windle Turley, Dallas, Tex., for appellees/cross-appellants.

Before HEANEY, ROSS and FAGG, Circuit Judges.

ROSS, Circuit Judge.

Appellant and cross-appellee General Motors Corporation (GM) appeals from a final judgment entered in the United States District Court for the District of North Dakota based upon a jury verdict in an automobile product liability and negligence action brought by appellees and cross-appellants, Vivian Sprynczynatyk and her husband Paul Sprynczynatyk (Sprynczynatyks or plaintiffs). The Sprynczynatyks were awarded $5,025,000 in actual damages from GM. We reverse and remand with directions to the district court to conduct further proceedings consistent with this opinion.

FACTS

On July 16, 1980, at approximately 8:00 p.m. a one car accident occurred on a gravel road near Bismarck, North Dakota. Fourteen-year-old Rodney Sprynczynatyk (Rodney) was driving the family-owned 1980 Chevrolet Citation X-car. Rodney, who had obtained his learner's permit 2 or 3 weeks earlier, was accompanying his mother, Vivian Sprynczynatyk (Vivian) on some errands that evening. During the return trip to their house, Vivian, who had been driving, stopped and let Rodney drive the car. Rodney had driven the Citation a number of times before.

After Vivian turned the operation of the car over to Rodney, he drove approximately one mile on paved Highway 1804 and then turned north onto a gravel road. As Rodney started down a hill (approximately 11% grade), he encountered difficulties controlling the car. At some point the car left the road on the right (east) side, overturned, and came to rest on its top with the front of the car facing south. Vivian sustained injuries which rendered her quadriplegic.

Vivian and her husband Paul filed this action in district court against GM, the manufacturer of the 1980 Citation. The plaintiffs brought this action based upon theories of negligence and strict liability. They alleged that the Citation had either defectively and unreasonably dangerous or negligently designed brakes or both. The Sprynczynatyks contended that the rear brakes on the Citation locked causing the car to spin around 180° and roll as it tipped over into the east ditch. GM denied the alleged brake defect and disputed plaintiffs' theory of how the accident occurred. GM contended that Rodney did not apply the brakes, and even if he did they didn't lock, but that Rodney merely panicked as a

young inexperienced driver and oversteered the car off the road.

Vivian sought actual damages for her personal injuries and Paul sought actual damages for loss of consortium and lost services. Two months before trial the plaintiffs sought leave to amend their complaint to include a request for punitive damages. Plaintiffs' motion was denied as untimely.

Rodney was not a named party to the lawsuit. The Sprynczynatyks' insurance carrier had paid them $25,000, the policy limits, and the Sprynczynatyks had executed a release in favor of the named insured, Paul, his "heirs" and "all others," which arguably ran to Rodney.

Prior to trial Rodney was hypnotized by a trained psychologist, Dr. Robert Gordon, at the request of the plaintiffs' counsel. The hypnotic session was videotaped. While hypnotized Rodney recalled applying his right foot to the brakes as hard as he could before the car spun and left the gravel road. Prior to the hypnosis session, Rodney's recollection was different. On July 28, 1980, he gave a statement to an insurance agent that he didn't apply the brakes at all, and during his September 16, 1982 deposition he testified that he could have used the brakes but his best recollection was that he did not apply them.

During the hypnotic session, after Dr. Gordon put Rodney in a trance, he told Rodney his mind could reach back and recollect things that he never thought were possible. Dr. Gordon then led Rodney back to the events of the day of the accident. Rodney recounted his actions throughout the day and then what happened during the accident. The two critical passages relating to his application of the brakes are as follows:

RODNEY: I get back into the right tracks and start going down and the car went over to the left.

GORDON: It's going to the left?

RODNEY: Um-hum. And I see that I'm gonna go in the ditch and hit the fence.

GORDON: You see you're gonna hit it. What are you going to do? Where is your right foot?

RODNEY: On the brake.

GORDON: Where's your left foot?

RODNEY: Over the clutch.

GORDON: What are you doing with your right foot and how much pressure are you putting on the brake?

RODNEY: Pushing.

GORDON: How hard?

RODNEY: Hard.

GORDON: As hard as you can?

RODNEY: Um-hum.

GORDON: Are you pumping it or pushing it?

RODNEY: No. I'm holding it steady.

GORDON: Holding it steady. What's happening now?

RODNEY: Car is sliding.

GORDON: What are you going to do?

RODNEY: Screaming, the car turns around.

GORDON: Where's your foot?

RODNEY: Still on the brake.

* * * * * *

GORDON: What happens now?

RODNEY: The car spins all the way around. I'm looking the other way.

GORDON: Where's your left foot?

RODNEY: Over the clutch now.

GORDON: Where's your right foot?

RODNEY: On the brake.

GORDON: What happens now?

RODNEY: I look over and I see the ditch coming closer to me. I keep screaming. I take my hands off the wheel and I feel the car tipping and I put them on the ceiling and shut my eyes.

GORDON: When do you shut your eyes?

RODNEY: Right when the car is tipping over. I feel it tipping. I put my hands on the ceiling and I close my eyes.

GORDON: Where are your feet?

RODNEY: On the floor.

After undergoing hypnosis, Rodney testified at his November 14, 1983 deposition that he recalled applying the brakes hard just before the car started to spin.

GM filed a motion in limine to limit Rodney's trial testimony to his pre-hypnosis statements or to require plaintiffs to establish the reliability of Rodney's post-hypnosis testimony prior to allowing him to testify at trial. The plaintiffs opposed the motion and after oral argument the district court denied GM's motion in full.

The liability issues of the case were tried to the jury first. As part of plaintiffs' case-in-chief, following Vivian Sprynczynatyk's testimony, Dr. Gordon testified regarding Rodney's hypnosis session. During the direct examination of Dr. Gordon, plaintiffs offered the videotapes of Rodney's hypnosis session as evidence and sought to play the videotapes for the jury. GM objected on the grounds that the tapes were not admissible to prove the facts that were recited on the tapes. The court overruled the objection at which time GM orally requested that the court give a cautionary instruction that the matters that were related on the tapes were not to be taken as proof of the facts recited.[1] The court gave the following oral instruction:

> THE COURT: Ladies and gentlemen, the tapes that you are about to see are being received on the issue of—the ultimate issue of the credibility of the recall of the witness, Rodney Sprynczynatyk, and we aren't here—the purpose of them is to permit you to see it and you will be receiving other evidence on this subject both on the part of the plaintiff and contrary evidence from the defendant. And the purpose of viewing the tapes is to permit you to evaluate the opinions that you will subsequently hear.

The videotapes of the entire 56 minute hypnosis session were then viewed by the jury.

Rodney testified after Dr. Gordon without objection from GM. On direct examination Rodney testified that when the car was going toward the left ditch he started applying pressure to the brakes, the car kept going and then he hit them all the way and the car spun. On cross-examination Rodney testified that he now remembered things differently about the application of the brakes during the course of the accident than he did before hypnosis.

As part of its defense GM presented the expert witness, Dr. Martin Orne, a leading specialist in the field of hypnosis. Dr. Orne testified in general to the unreliability of hypnosis as a memory refresher and in particular to the absence of certain procedural safeguards in Rodney's hypnosis. Dr. Orne viewed Dr. Gordon's repeated questions regarding the location of Rodney's feet in relation to the brakes as a fatal flaw that was too suggestive and opined that Rodney's "new memory" was a creation of hypnosis and unlikely to be true.

The jury returned a verdict in favor of the Sprynczynatyks on both the strict liability and negligence counts. Following a trial on the damages, the jury awarded Vivian $4,500,000 and her husband Paul $525,000. The trial court entered judgment in accordance with the verdicts and denied GM's post-trial motions.

GM then filed this appeal. For reversal GM argues that the trial court erred 1) in admitting the videotapes of Rodney's hypnosis session; 2) in admitting Rodney's hypnotically enhanced testimony; 3) in excluding certain evidence of GM's post-crash tests of the accident car; 4) in failing to instruct on comparative fault; and 5) that there was not substantial evidence to support the verdict.

The Sprynczynatyks cross-appeal, arguing that the trial court abused its discretion when it denied them leave to amend their complaint to include a claim for punitive damages two months before trial. We discuss each of these issues in turn.

DISCUSSION

I. Admission of the Videotapes

The first issue we address is GM's contention that it was prejudicial and reversible error for the trial court to admit the

1. During the instruction conference GM requested a written cautionary instruction to the same effect, which was also denied by the court.

videotapes of Rodney's hypnosis session, and to permit the jury to view them during plaintiffs' case-in-chief without a specific instruction warning against their prohibited use to prove the truth of the matters asserted on the tapes. Plaintiffs contend the district court did not abuse its discretion in admitting the videotapes because they were admitted as a demonstrative aid to help the jury understand the expert testimony about the hypnotic process. We disagree.

[1] In general a videotape offered to prove the truth of the matter asserted constitutes inadmissible hearsay. FED.R. EVID. 801(c). *United States v. Dorrell*, 758 F.2d 427, 434 (9th Cir.1985). In particular, courts have held that the contents of actual hypnotic interviews are inadmissible for the purpose of proving that the facts recounted by the hypnotized witness actually occurred. *State v. Brown*, 337 N.W.2d 138, 153 (N.D.1983) (en banc); *State v. Beachum*, 643 P.2d 246, 254 (N.M.App. 1981). Thus a videotape is inadmissible as evidence unless it comes within an exception to the hearsay rule, *see, e.g., Grimes v. Employers Mutual Liability Insurance Co.*, 73 F.R.D. 607, 611 (D. Alaska 1977), or unless it is offered for some other permissible purpose which would remove it from the definition of hearsay.

When evidence can be admitted for one purpose but cannot be admitted for some other purpose, it has limited admissibility and is governed by Rule 105 of the Federal Rules of Evidence. Rule 105 provides in relevant part that:

> When evidence which is admissible * * for one purpose but not admissible * * * for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 105 makes it the duty of the judge to restrict the evidence to its proper scope and entitles the opponent to a binding instruction that alerts the jury to the possibility of the forbidden use and tells them not to use it for that purpose. Since the videotapes of Rodney's hypnosis session are inadmissible to prove the truth of the matters asserted, but arguably admissible for the purpose of explaining the hypnotic procedure to the jury, the question is whether the court's limiting instruction was sufficient.

[2] In this case GM requested in the presence of the jury a specific instruction stating the prohibited use, namely, that the videotapes were not offered to prove the truth of the facts recounted. Instead of adopting GM's proffered instruction, the district court told the jury that the tapes were being received on the ultimate issue of the credibility of Rodney's recall and that the purpose was to permit the jury to evaluate the opinions they would hear. Having viewed the videotapes and having reviewed the record in this case, we are convinced that the instruction given before the videotapes were shown was erroneous and insufficient under Rule 105 to prevent the prejudicial use of this evidence for the following reasons.

First, the court's oral instruction told the jury that the videotapes were being received on "the ultimate issue of the credibility of the recall of the witness, Rodney * * *." This was clear error in the sense that the jury was directed to consider the videotapes for the purpose of assessing Rodney's credibility. Here the videotapes were admitted as probative of the truth of what Rodney said on those tapes and that was error. Second, in the latter part of the instruction the court stated the permissible use of the tapes, namely for explanatory purposes, but failed to warn of the prohibited use. The instruction did not "restrict the scope" of the evidence. In fact, that part of the court's instruction gave a negative signal to the jury when considered in light of GM's specific request that the videotapes not be considered as truth of the matters asserted. By rejecting the prohibited use language as just articulated by GM's counsel, and utilizing only permissible use language, the jury was improperly led to think GM's proffered instruction was incorrect. Although we do not hold that Rule 105 requires all limiting instructions to contain the prohibited use language, we

do state that in this case it was necessary in light of GM's specifically worded proposed request that was made in the presence of the jury. The inference that GM's requested instruction was wrong, when coupled with the erroneous issue-directing statement at the beginning of the instruction, renders the district court's instruction legally inadequate.[2]

Further, we find that under the circumstances of this case the showing of the videotapes of Rodney's hypnosis session without a proper cautionary instruction and during plaintiffs' case-in-chief was highly prejudicial to GM and not harmless. The issue of whether Rodney ever applied the brakes was central to the lawsuit and hotly contested. It was on the videotapes that the jury saw and heard Rodney, *for the first time*, state that he applied the brakes during the accident. The jury could not reasonably be expected to disregard the provocative nature of this inadmissible evidence and only consider what they saw as an aid to understanding the process of hypnosis. Other relevant evidence was available to accomplish this didactic purpose. In addition the jury could not reasonably be expected to overlook the fact that the videotapes were shown during plaintiffs' case-in-chief before GM ever challenged Rodney's hypnosis session and hypnotic recall. Because of the insufficient limiting instruction, the highly prejudicial nature, and premature presentation of the evidence, we conclude the district court abused its discretion in admitting the videotapes and that GM is entitled to a new trial.

Since this case must be retried, we turn to the other issues which are likely to arise anew, and upon which we feel compelled to comment.

II. Admission of Hypnotically Enhanced Testimony

The second hypnosis-related issue presented in this case is whether the trial court erred, as GM contends, in admitting Rodney's testimony at trial relating his post-hypnosis recollection that he applied the brakes during the accident.

As a preliminary matter the court must determine whether GM has preserved this point for appellate review. The plaintiffs contend that GM's failure to object during Rodney's direct examination precludes this court's review because FED.R.EVID. 103(a)(1) requires a timely objection be made in order to preserve an issue for appeal. GM responds that the district court's denial of its motion in limine was sufficient to preserve the issues raised in the motion.

[3, 4] Ordinarily in this circuit a motion in limine does not preserve error for appellate review. *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1333 (8th Cir. 1985). However, we find that requiring a formal objection when Rodney took the witness stand at trial was not necessary under the circumstances of this case for two reasons.

First, we adhere to the Third Circuit's approach that Rule 103(a)(1) should be read in tandem with Federal Rule of Civil Procedure 46 which states that formal exceptions are unnecessary and that the test is whether an objection at trial would have been more in the nature of a formal exception or in the nature of a timely objection calling the court's attention to a matter it need consider. *American Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324 (3d Cir.1985). In the instant case the district court made a definitive pre-trial ruling that affected the entire course of the trial. The district court's denial of the motion was not made conditionally or with the suggestion that the matter would be reconsidered. It was not a typical motion in limine situation where a hypothetical

2. If the district court determines on retrial that the videotapes are admissible (see p. 1123 *infra*), a legally adequate instruction would be: The videotapes you are about to view are admitted for a limited purpose and you may not consider them for any other purpose. The videotapes are admitted for the sole purpose of aiding you in your understanding of the hypnotic process. You are specifically cautioned to avoid considering the videotapes as evidence of the truth of the matters recounted on them.

question is posed whose nature and relevance is unclear before trial. The matter was fully briefed and argued. Under these circumstances requiring an objection when Rodney testified on the grounds raised in the motion in limine would have been in the nature of a formal exception and thus unnecessary under FED.R.CIV.P. 46. Second, we note that when the district court denied the motion in limine it implicitly denied GM's alternative request that the plaintiffs be required to establish before trial the reliability of Rodney's hypnotically enhanced testimony. There can be no question that the propriety of refusing to conduct such a preliminary hearing on the reliability issue is squarely before this court and is not contingent upon the making of any objection during the trial.

We now turn to the merits of the issue of whether Rodney's hypnotically enhanced testimony is admissible. Stated in general terms, the issue is whether the testimony of a witness who has undergone hypnosis to refresh his or her recollection is admissible, and, if so, under what circumstances. This question, previously undecided in this circuit,[3] has been the subject of much discussion and disagreement.[4]

Before discussing the various legal approaches to this question it will be helpful to explain the phenomenon of hypnosis and to note the problems it creates in the legal context.

Hypnotism has been defined as "[t]he act of inducing artificially a state of sleep or trance in a subject * * * generally characterized by extreme responsiveness to suggestions from the hypnotist." [5] In a typical hypnotic session the hypnotist leads the subject to focus his or her attention, suspend critical judgment, follow the suggestions of the hypnotist, concentrate on a past event and then recount the past event. Hypnosis has been recognized by the American Medical Association as a valid therapeutic technique since 1958.[6] However, more recently hypnosis has been utilized for law enforcement investigative purposes in an attempt to aid witnesses and victims to remember forgotten details regarding an event that is the subject of a criminal or civil suit. It is when these previously hypnotized victims or witnesses take the stand to testify at trial that hypnosis becomes a legal issue. For although its use is generally accepted as therapy, the reliability of hypnosis as a truth-exacting device is controversial.[7]

There are many problems inherent in the hypnosis process that affect the degree in which it can be, if ever, an accurate memory restorer. Hypnosis is characterized by hypersuggestibility and hypercompliance of the subject. *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266, 1269 (1982); *State v. Long*, 32 Wash.App. 732, 649 P.2d 845, 848 (1982) (Swanson, J., concurring). The hypnotist can consciously

3. *United States v. Harvey*, 756 F.2d 636, 644–45 (8th Cir.1985).

4. *See, e.g.*, Ruffra, *Hypnotically Induced Testimony: Should It Be Admitted?* 19 Crim.L.Bull. 293 (1983); Note, *A Survey of Hypnotically Refreshed Testimony in Criminal Trials: Why Such Evidence Should be Admitted in Iowa*, 32 Drake L.Rev. 749 (1982–83); Comment, *Hypnosis: A Primer for Admissability*, 5 Glendale L.Rev. 51 (1983) [hereinafter cited as Comment, *Hypnosis*]; Note, *Hypnotically Induced Testimony: Credibility versus Admissibility*, 57 Indiana L.J. 349 (1982); Note, *The Admissibility of Testimony Influenced by Hypnosis*, 67 Va.L.Rev. 1203 (1981); and Note, *Safeguards Against Suggestiveness: A Means For Admissibility of Hypno-Induced Testimony*, 38 Wash. & Lee L.Rev. 197 (1981).

5. BLACK'S LAW DICTIONARY 668 (rev. 5th ed. 1979). We acknowledge that there is no single generally accepted theory of hypnosis, nor a concensus about a single definition. *See* Council on Scientific Affairs, American Medical Association, "Scientific Status of Refreshing Recollection by the Use of Hypnosis" 253, The Journal of the American Medical Association 1918 (April 5, 1985) [hereinafter cited as *Council on Scientific Affairs*]. We use the definition for discussion purposes only.

6. *Council of Scientific Affairs, supra*, note 4, at 1918. For example, psychologists and psychiatrists use it to alleviate stress and doctors and dentists use it to control pain. Comment, *Hypnosis, supra*, note 3, at 57–58.

7. See Comment, *Hypnosis, supra*, note 3, at 51–58.

or unconsciously lead the subject. "[A] hypnotized subject is highly susceptible to suggestion, even that which is subtle and unintended." *State v. Mack*, 292 N.W.2d 764, 768 (Minn.1980). A second problem associated with hypnosis is that the hypnotized witness may be influenced by the need to "fill in the gaps" in their memory, that is, to confabulate.

> The hypnotic suggestion to relive a past event, particularly when accompanied by questions about specific details, puts pressure on the subject to provide information for which few, if any, actual memories are available. This situation may jog the subject's memory and produce some increased recall, but it will also cause him to fill in details that are plausible but consist of memories or fantasies from other times. It is extremely difficult to know which aspects of hypnotically aided recall are historically accurate and which aspects have been confabulated * * *.

State v. Hurd, 86 N.J. 525, 432 A.2d 86, 92–93 (1981) (quoting Orne, *The Use and Misuse of Hypnosis in Court*, 27 Int'l J. Clinical & Experimental Hypnosis 311, 317–318 (1979)).

Another concern over the use of hypnosis is the impact that it has on the hypnotized person's memory. After hypnosis neither the hypnotist nor the subject can distinguish between actual memories and those psuedo-memories confabulated under hypnosis. After hypnosis the subject has one memory of the past event, the hypnotic memory, and that becomes hardened in the subject's mind. *State v. Mack, supra*, 292 N.W.2d at 769.

Thus the basic problem for the courts is that hypnosis does not insure the accuracy of the witness' recall. Quite often hypnotized persons produce more information following hypnosis, but it may be accurate or inaccurate and there is no scientific technique that can reliably discriminate between true or false details recounted during hypnosis.[8]

Largely because of the scientific uncertainty as to the reliability of hypnotic recall, courts have taken at least three different approaches to the issue of the admissibility of testimony enhanced by hypnosis. Some jurisdictions allow such testimony to go to the jury viewing hypnosis as affecting credibility, not admissibility.[9] Other courts exclude such testimony as inadmissible *per se*.[10] Another group of courts admit hypnotically induced testimony, but only if detailed procedural safeguards are followed.[11]

8. *Council on Scientific Affairs, supra*, note 4, at 1920.

9. *See United States v. Awkard*, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885, 100 S.Ct. 179, 62 L.Ed.2d 116 (1979); *United States v. Adams*, 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006, 99 S.Ct. 621, 58 L.Ed.2d 683 (1978); *United States v. Waksal*, 539 F.Supp. 834 (S.D.Fla.1982), *rev'd on other grounds*, 709 F.2d 653 (11th Cir. 1983); *United States v. Narciso*, 446 F.Supp. 252 (E.D.Mich.1977). The following states have taken the same approach: *Creamer v. State*, 232 Ga. 136, 205 S.E.2d 240 (1974); *State v. Wren*, 425 So.2d 756 (La.1983); *State v. Greer*, 609 S.W.2d 423 (Mo.Ct.App.1980), *vacated on other grounds*, 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981); *State v. Brown*, 337 N.W.2d 138 (N.D.1983); *State v. Glebock*, 616 S.W.2d 897 (Tenn.Cr.App.1981); and *Chapman v. State*, 638 P.2d 1280 (Wyo.1982).

10. *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982) (en banc); *People v. Shirley*, 31 Cal.3d 18, 181 Cal.Rptr. 243, 641 P.2d 775, *cert. denied*, 459 U.S. 860, 103 S.Ct. 133, 74 L.Ed.2d 114 (1982); *People v. Quintanar*, 659 P.2d 710 (Colo.App.1982); *Bundy v. State*, 471 So.2d 9 (Fla.1985); *Collins v. State*, 52 Md. App. 186, 447 A.2d 1272 (1982); *People v. Gonzales*, 415 Mich. 615, 329 N.W.2d 743 (1982); *State v. Mack*, 292 N.W.2d 764 (Minn.1980); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981); *People v. Hughes*, 59 N.Y.2d 523, 466 N.Y.S.2d 255, 453 N.E.2d 484 (1983); *State v. Peoples*, 311 N.C. 515, 319 S.E.2d 177 (1984); *Com. v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981). Some of these courts do permit the witness to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, or is substantially the same as before hypnosis. *See, e.g., State v. Seager*, 341 N.W.2d 420 (Iowa 1983).

11. *People v. Smrekar*, 68 Ill.App.3d 379, 24 Ill. Dec. 707, 385 N.E.2d 848 (1979); *State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571 (1984); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (1981); *State v. Long*, 32 Wash.App. 732, 649 P.2d 845

The courts that automatically permit hypnotically enhanced testimony view the testimony as the witness' present recollection of events, refreshed by hypnosis, and conclude that the witness is competent to testify. *State v. Brown, supra,* 337 N.W.2d at 151; *Chapman v. State,* 638 P.2d 1280, 1282–84 (Wyo.1982). That the witness' memory may have been impaired by hypnosis or that suggestive material may have been used to refresh his or her recollection is considered to be a matter affecting credibility, not admissibility. *Id.* It is expected that cross-examination, expert testimony on the inherent risks of hypnosis and cautionary instructions to the jury will enable the jury to accurately assess the proper weight to be given to the evidence. *Id.*

The second approach to determining admissibility adopted by some jurisdictions is to apply the test of general acceptance by the scientific community first enunciated in *Frye v. United States,* 293 F. 1013 (D.C. Cir.1923). In *Frye* the court stated that the 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. *Id.* at 1014. Courts that have followed this approach have imposed a *per se* rule of inadmissibility to post-hypnotic testimony after finding that the process of hypnosis is not generally accepted as reliable by the scientific community. *See, e.g., People v. Shirley,* 31 Cal.3d 18, 181 Cal. Rptr. 243, 641 P.2d 775, *cert. denied,* 459 U.S. 860, 103 S.Ct. 133, 74 L.Ed.2d 114 (1982); *People v. Gonzales,* 415 Mich. 615, 329 N.W.2d 743 (1982); and *State v. Mack, supra,* 292 N.W.2d at 768. In general these courts reviewed the scientific research on hypnosis, focused on the problems inherent in it as an accurate memory restorer and concluded that hypnosis has not received sufficient general acceptance in the scientific community to give reasonable assurance that the results produced will be sufficiently reliable to outweigh the risks of abuse or prejudice. *People v. Gonzales, supra,* 329 N.W.2d at 748.

As an example, in *State v. Mack, supra,* the court held that the results of hypnosis used to produce hypnotically induced "memory," like the results of mechanical or scientific testing, are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate. *Id.* at 768.

The third line of authority allows for the admissibility of hypnotically induced testimony if certain safeguards are followed to insure the reliability of the testimony. The leading proponent of this "procedural safeguard" approach has been the Supreme Court of New Jersey as articulated in *State v. Hurd, supra.* In *Hurd* the court held hypnotically induced testimony was admissible if the proponent of the testimony could demonstrate that the use of hypnosis in the particular case was a reasonably reliable means of restoring memory comparable to normal recall in its accuracy. The New Jersey court also held that in reviewing admissibility of hypnotically refreshed testimony, the trial court should evaluate the kind of memory loss that hypnosis was used to restore and the specific technique employed, based on the expert testimony presented by the parties. The court also laid down specific requirements [12] which must be met before a party may introduce

(1982); *State v. Armstrong,* 110 Wis.2d 555, 329 N.W.2d 386, *cert. denied,* 461 U.S. 946, 103 S.Ct. 2125, 77 L.Ed.2d 1304 (1983). Oregon has adopted similar procedural requirements by statute. OR.REV.STAT. § 136.675 (1981).

12. Those requirements are: (1) the hypnotist must be a qualified psychiatrist or psychologist who has experience in the use of hypnosis; (2) the hypnotist should be working independently of either side involved in the litigation; (3) all the information given to the hypnotist prior to the hypnosis session must be recorded; (4) the subject must describe the facts to the hypnotist as he remembers them before hypnosis; (5) all contact between the hypnotist and the witness must be recorded, preferably on videotape; and (6) no person besides the hypnotist and the subject should be present during any contact between the two. *State v. Hurd, supra,* 432 A.2d at 89–90. These safeguards were first proposed by Dr. Martin Orne, GM's expert.

hypnotically refreshed testimony in a criminal trial. Therefore under the "procedural safeguard" approach the testimony may or may not be admissible depending upon the trial court's determination whether such testimony is reliable under the particular circumstances.

The Fifth Circuit has recently followed an approach similar in effect to the *Hurd* approach. In *United States v. Valdez*, 722 F.2d 1196 (5th Cir.1984) the court held that post-hypnosis testimony may or may not be admissible under FED.R.EVID. 403.[13] Although the *Valdez* court held in that particular case that post-hypnosis testimony in which a hypnotized witness identifies for the first time a person he knew was already under suspicion is inadmissible in a criminal trial, the court stated that if adequate procedural safeguards have been followed, corroborated post-hypnotic testimony might be admissible if the probative value of the testimony outweighed its prejudicial effect. *Id.* at 1203.

[5] In the instant case the district court permitted Rodney to testify as to his post-hypnotic memory because North Dakota is one of the jurisdictions which has held that hypnosis affects credibility but not admissibility. *See State v. Brown, supra*, 337 N.W.2d at 151. Federal courts are not bound by state law on this issue. Questions such as burden of proof, presumptions, competency, and privileges are generally questions of state law, but issues of admissibility of evidence are questions of federal law. *Warner v. Transamerica Insurance Co.*, 739 F.2d 1347, 1351 n. 6 (8th Cir.1984); *Sturm v. Clark Equipment Co.*, 547 F.Supp. 144, 145 (W.D.Mo.1982), *aff'd*, 732 F.2d 161 (8th Cir.1984). Quite simply, we do not view this issue as a competency question but as an evidentiary problem within the control of the district court and governed by federal law. *See United States v. Valdez, supra*, 722 F.2d at 1201.

GM urges this court to follow the *Frye* approach and in essence establish a *per se* inadmissibility rule *or* to adopt the "procedural safeguard" approach. Plaintiffs, on the other hand, advocate the credibility approach which is, for all practical purposes, a *per se* rule of admissibility of such evidence. We are reluctant to establish a *per se* rule of inadmissibility or admissibility and we decline to do so.

A *per se* rule would remove the question from the discretionary realm of the district court. If we were to establish a *per se* rule of inadmissibility, relevant, reliable testimony would in some instances be automatically disallowed and would hamper the truthfinding function of our system. A rule of *per se* inadmissibility is impermissibly broad and may result in the exclusion of valuable and accurate evidence in some cases. *See State v. Hurd, supra*, 432 A.2d at 94; *State v. Beachum, supra*, 643 P.2d at 252. On the other hand, if we adopt a *per se* rule of admissibility, in some circumstances, evidence that was unreliable because of the methods used in hypnosis and prejudicial because the jury may be overly influenced by testimony obtained from hypnotic recall would be admitted and that too would have an undesirable effect on our judicial system. *State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571, 577 (1984). A *per se* rule of admissibility does not cure the risks of undue prejudice and jury confusion. Accordingly, we adopt a flexible rule on the admissibility of hypnotically enhanced testimony that enables the district court to determine the question on a case-by-case basis. We are satisfied that, if the hypnosis session is properly conducted in appropriate cases, the hypnotically enhanced testimony does not run afoul of the *Frye* test to the extent it is applicable.

[6] We adopt a rule which requires the district court, in cases where hypnosis has been used, to conduct pretrial hearings on the procedures used during the hypnotic session in question and assess the effect of hypnosis upon the reliability of the testimony before making a decision on admissibili-

13. A similar approach was adopted by the Court of Appeals of Alaska. *State v. Contreras*, 674 P.2d 792 (Alaska App.1983).

ty. The proponent of the hypnotically enhanced testimony bears the burden of proof during this proceeding. In addition, we adopt a version of the *Hurd* safeguards [14] to the extent that the district court should consider whether and to what degree the safeguards were followed when making its determination that the hypnotically enhanced testimony is sufficiently reliable.[15] Other factors the district court should take into account are the appropriateness of using hypnosis for the kind of memory loss involved, and whether there is any evidence to corroborate the hypnotically enhanced testimony. The district court must then determine whether in view of all the circumstances, the proposed testimony is sufficiently reliable and whether its probative value outweighs its prejudicial effect, if any, to warrant admission. Ultimately the district court must decide whether the risk that the testimony reflects a distorted memory is so great that the probative value of the testimony is destroyed.

By our ruling today we place this hypnosis evidentiary problem directly within the control of the district court. We think the better approach is for the district court and not the jury to make the preliminary determination of admissibility as is the case with other evidentiary questions. *See* FED.R. EVID. 104(a). It is our hope that this case-by-case method of determining the admissibility of hypnotically enhanced testimony will guard against the problems of hypnosis, especially undue suggestiveness and confabulation, but also allow for the inclusion of reliable refreshed memory which hypnosis can at times under certain circumstances produce. In sum, we hold that the district court should, before trial, scrutinize the circumstances surrounding the hypnosis session, consider whether the safeguards we have approved were followed and determine in light of all the circumstances if the proposed hypnotically enhanced testimony is sufficiently reliable and not overly prejudicial to be admitted.

Upon retrial of this case, the district court should determine before trial the admissibility of Rodney's hypnotically enhanced testimony using the approach set forth in our discussion. In the event the district court finds that as a result of the hypnotic session Rodney's testimony on the application of the brakes has been tainted, by suggestion or confabulation, and is unreliable, Rodney will not be permitted to testify as to that matter based upon his post-hypnosis recollection. However, where it is clear that other parts of his memory of the events of the accident were present before hypnosis, and remain uncontaminated by hypnosis, the court can determine that Rodney may testify as to those events. *See State v. Seager*, 341 N.W.2d 420 (Iowa 1983).

In the event that the trial court finds that Rodney's post-hypnosis testimony is reliable and that its probative value outweighs its prejudicial effect, Rodney will be permitted to testify to his present recollec-

14. (1) The hypnotic session should be conducted by an impartial licensed psychiatrist or psychologist trained in the use of hypnosis and thus aware of its possible effects on memory so as to aid in the prevention of improper suggestions and confabulation. Appointment of the psychiatrist or psychologist should first be approved by the trial court. (Since this would be impossible in this case the trial court should not give controlling weight to the failure to secure court approval in the retrial of this matter.) (2) Information given to the hypnotist by either party concerning the case should be noted, preferably in written form, so that the extent of information the subject received from the hypnotist may be determined. (3) Before hypnosis, the hypnotist should obtain a detailed description of the facts from the subject, avoiding adding new elements to the subject's description. (4) The session should be recorded so a permanent record is available to ensure against suggestive procedures. Videotape is a preferable method of recordation. (5) Preferably, only the hypnotist and subject should be present during any phase of the hypnotic session, but other persons should be allowed to attend if their attendance can be shown to be essential and steps are taken to prevent their influencing the results of the session.

15. In adopting this approach we do not hold that if the safeguards were followed the testimony is always admissible, nor do we interpret the rule to mean that if some of the safeguards were not followed the testimony is never admissible.

tion without reference to the fact of hypnosis. Plaintiffs will not present evidence of his hypnosis in their direct case-in-chief. If GM wishes to impeach Rodney's testimony because he was hypnotized, it may cross-examine concerning the hypnosis and both parties may then bring in experts to testify to the problems and benefits of hypnosis as rebuttal to the other party's assertions. Then and only then would the videotapes of the actual hypnosis session be considered for possible admission, subject to the district court's Rule 403 balancing test and if deemed more probative than prejudicial, subject to a limiting instruction as discussed in Part I *supra*.

III. Exclusion of Videotapes, Photographs, and Summaries of Post-crash Tests

GM also argues that the district court abused its discretion when it excluded videotapes, pictures and summaries of the tests it performed on the accident car in 1983. The court permitted GM's witnesses Newsock and McCarthy to talk about the tests, but the court excluded videotapes, photographs and summaries because they would not have been particularly helpful, would have been cumulative, and possibly prejudicial.

[7, 8] The admissibility of evidence of experimental tests rests largely in the discretion of the trial judge and his decision will not be overturned absent a clear showing of an abuse of discretion. *Hale v. Firestone Tire & Rubber Co., supra*, 756 F.2d at 1333; *Randall v. Warnaco, Inc.*, 677 F.2d 1226, 1233 (8th Cir.1982). We have read the testimony of GM's experts who fully described the tests and results and find that the tapes, photographs and summaries would, indeed, have been cumulative. We find no abuse of discretion in the district court's decision to exclude this series of cumulative evidence under those circumstances. *See Borough v. Duluth, Missabe & Iron Range Railway Co.*, 762 F.2d 66, 70 (8th Cir.1985).

IV. Instructions on Comparative Fault

GM also contends that the district court committed reversible error when it failed to instruct on comparative fault on either the strict liability or negligence counts. Since this case was tried, the Supreme Court of North Dakota has decided at least four cases which have some bearing on this issue. *See Mauch v. Manufacturers Sales & Service, Inc.*, 345 N.W.2d 338 (N.D. 1984); *Day v. General Motors Corp.*, 345 N.W.2d 349 (N.D.1984); *Andersen v. Teamsters Local 116 Building Club, Inc.*, 347 N.W.2d 309 (N.D.1984); and *Kaufman v. Meditec, Inc.*, 353 N.W.2d 297 (N.D. 1984). Because of these new cases and our decision to remand for a new trial on other grounds, we need not decide whether it was error for the district court to refuse to instruct on comparative fault. However, upon retrial, the district court is free to reconsider its previous decision in light of the above cases.

V. Sufficiency of the Evidence

As a final assignment of error GM asserts that there was not substantial evidence to support the verdict.[16] GM maintains that plaintiffs' theory of the accident is a collection of false premises at odds with the physical facts and that the accident could not have occurred the way plaintiffs contend whether or not Rodney applied the brakes. Thus for purposes of our discussion of this issue GM's attack on the verdict is two-fold. First, GM contends that without Rodney's testimony that he applied the brakes, there was insufficient evidence to support plaintiffs' theory that a rear brake design defect caused the accident. Second, GM argues that even with Rodney's testimony that he applied the brakes, there was insufficient evidence to support plaintiffs' theory that a rear brake design defect caused the accident.

In view of our decision to reverse on the videotape issue and to leave to the district

16. We construe GM's argument to be that the district court erred in denying its motions for directed verdict and judgment notwithstanding the verdict or new trial.

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court, upon retrial, the question of whether Rodney's hypnotically enhanced testimony is admissible, we need not determine the hypothetical question of whether the evidence, without Rodney's post-hypnosis recollection, is sufficient to support the verdict. Consequently we do not address GM's argument that there is not substantial evidence to support the verdict without Rodney's hypnotically enhanced testimony. To do so would be premature and, perhaps, unnecessary speculation on our part.

[9] As for our assessment of the evidence that was presented to the jury in this case we hold that there was substantial evidence from which the jury could infer that the accident occurred in the manner suggested by the plaintiffs. Plaintiffs' theory was that Rodney applied the brakes, that the rear brakes locked before the front brakes causing the car to spin 180° on the road and then roll off and flip into the ditch. The following evidence was before the jury: (1) Vivian's testimony that the car spun before it left the road; (2) Rodney's testimony; (3) accident reconstructionist Arndt's opinion based on the physical damage to the car that the car swapped ends before it left the road and that the spin occurred as a result of an application of the brakes which caused the rear wheels to lock up momentarily; and (4) expert witness Matos' opinion based on the position of the marks that the rear wheels on the car locked up. Admittedly GM proffered evidence to the contrary, but in considering the sufficiency of this evidence we must consider all facts which the plaintiffs' evidence tends to prove and all reasonable inferences fairly deducible from the facts must be drawn in the plaintiffs' favor. *Barge Lines, Inc. v. Anderson Clayton & Co.*, 745 F.2d 1188, 1192 (8th Cir.1984); *see Ozark Air Lines, Inc. v. Cessna*, 352 F.2d 9, 11 (8th Cir.1965). Under this standard of review we cannot say that the evidence supporting the jury's verdict for the plaintiffs was not substan-

VI. Punitive Damages Claim

[10–12] Plaintiffs' only issue on cross-appeal is their contention that the trial court erred in refusing to allow an amendment to the complaint to include a claim against GM for punitive damages. The disposition of a motion to amend is within the sound discretion of the district court and to warrant reversal there must be some abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). In this case the district court denied the motion mainly because it was untimely in the sense, we assume, that it would have been disruptive to the trial schedule and potentially prejudicial to GM. We find no abuse of discretion in that ruling. However on retrial the district court's rationale for refusing the amendment is no longer as strong a consideration. So, while we see no abuse of discretion in the previous ruling, we direct the district court to reconsider the amendment on retrial. "An amendment can be proper after remand to the district court even if the claim * * * had not been presented to the district court in a timely fashion." *City of Columbia v. Paul N. Howard Co.*, 707 F.2d 338, 341 (8th Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 238, 78 L.Ed.2d 229 (1983) (citations omitted).

CONCLUSION

We conclude that the admission of the videotapes of Rodney's hypnosis session during plaintiffs' case-in-chief without a proper cautionary instruction constituted prejudicial error. Accordingly we reverse and remand for a new trial at which time the district court is directed to conduct pretrial proceedings consistent with this opinion to determine the admissibility of Rodney's hypnotically enhanced testimony and to consider plaintiffs' request to amend their complaint to include a claim for punitive damages.

Vacate & Remand

No. 86-130 Rock v. Arkansas 6-3 Conf. 3/25/87

The Chief Justice Aff in

Cases are divided.

The Rule of per se exclusion

A State in an undeveloped area like

this should be allowed

Justice Brennan Reverse & Remand

Here we have Q of a defendant's right to testify. Rt is inherent in 5th Amend. Denial of D/P

Ark. rule is too restrictive.

The burden should be on the State to show that testimony was unreliable. A D's may properly rely on their testimony

Justice White Aff in.

Pet was allowed to testify as to everything she told the psychiatrist & only relied on hypnosis to support her view as to not pulling the trigger.

Test. can be excluded

hypnosis

Justice Marshall Rev.

Agree with W.J.B.

Justice Blackmun Rev. (or Vacated & Remand)

Ask rule re per se. This bothersome.

~~Rule~~ The is the weight of the testimony.

HAB has been hypnotized (?)

Justice Powell Vacate & Remand

[HAB agree with me — as he noted after I spoke]

See my notes.

I did not approve a per se rule.

Leave to trial cts to determine admissibility with appropriate instructions.

JUSTICE STEVENS Vacate & Remand

Can't adopt a per se rule.

Agree with LFP)

Must require that notice do other role: (9 agree)

JUSTICE O'CONNOR Vacate & Remand

Agree with LFP as to impropriety of Ark per se rule.

Particularly ~~here~~ in this case the evidence was critical. Only victim's TC must find ev. is reliable

JUSTICE SCALIA Affirm

Agree with CJ – we can't write a code of criminal procedure

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Stevens
Justice O'Connor
Justice Scalia

L.F.P.

From: **Justice Blackmun**

Circulated: JUN 10 1987

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Reversed

No. 86–130

VICKIE LORENE ROCK, PETITIONER *v.* ARKANSAS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

[June ——, 1987]

Another opinion that is too long. But is correctly concluded that ~~the~~ admission of such testimony must be determined on case by case basis.

JUSTICE BLACKMUN delivered the opinion of the Court.

The issue presented in this case is whether Arkansas' evidentiary rule prohibiting the admission of hypnotically refreshed testimony violated petitioner's constitutional right to testify on her own behalf as a defendant in a criminal case.

I

Petitioner Vickie Lorene Rock was charged with manslaughter in the July 2, 1983, death of her husband, Frank Rock. A dispute had been simmering about Frank's wish to move from the couple's small apartment adjacent to Vickie's beauty parlor to a trailer she owned outside town. That night a fight erupted when Frank refused to let petitioner eat some pizza and prevented her from leaving the apartment to get something else to eat. App. 98, 103–104. When police arrived on the scene they found Frank on the floor with a bullet wound in his chest. Petitioner urged the officers to help her husband, Tr. 230, and cried to a sergeant who took her in charge, "please save him" and "don't let him die." *Id.*, at 268. The police removed her from the building because she was upset and because she interfered with their investigation by her repeated attempts to use the telephone to call her husband's parents. *Id.*, at 263–264, 267–268. According to the testimony of one of the investigating officers, petitioner told him that "she stood up to leave the room and [her husband] grabbed her by the throat and choked her and threw her

against the wall and . . . at that time she walked over and picked up the weapon and pointed it toward the floor and he hit her again and she shot him." *Id.*, at 281.[1]

Because petitioner could not remember the precise details of the shooting, her attorney suggested that she submit to hypnosis in order to refresh her memory. Petitioner was hypnotized twice by Doctor Betty Back, a licensed neuropsychologist with training in the field of hypnosis. *Id.*, at 901–903. Doctor Back interviewed petitioner for an hour prior to the first hypnosis session, taking notes on petitioner's general history and her recollections of the shooting. App. 46–47.[2] Both hypnosis sessions were recorded on tape. *Id.*, at 53. Petitioner did not relate any new information during either of the sessions, *id.*, at 78, 83, but, after the hypnosis, she was able to remember that at the time of the incident she had her thumb on the hammer of the gun, but had not held her finger on the trigger. She also recalled that

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[1] Another officer reported a slightly different version of the events: "She stated that she had told her husband that she was going to go outside. He refused to let her leave and grabbed her by the throat and began choking her. They struggled for a moment and she grabbed a gun. She told him to leave her alone and he hit her at which time the gun went off. She stated that it was an accident and she didn't mean to shoot him. She said she had to get to the hospital and talk to him." Tr. 388.

See also *id.*, at 301–304, 337–338; App. 3–10.

[2] Doctor Back's handwritten notes regarding petitioner's memory of the day of the shooting read as follows:

"Pt states she & husb. were discussing moving out to a trailer she had prev. owned. He was 'set on' moving out to the trailer—she felt they should discuss. She bec[ame] upset & went to another room to lay down. Bro. came & left. She came out to eat some of the pizza, he wouldn't allow her to have any. She said she would go out and get [something] to eat he wouldn't allow her—He pushed her against a wall an end table in the corner [with] a gun on it. They were the night watchmen for business that sets behind them. She picked gun up stated she didn't want him hitting her anymore. He wouldn't let her out door, slammed door & 'gun went off & he fell & he died' [pt looked misty eyed here—near tears]" (additions by Doctor Back). App. 40.

the gun had discharged when her husband grabbed her arm during the scuffle. *Id.*, at 29, 38. As a result of the details that petitioner was able to remember about the shooting, her counsel arranged for a gun expert to examine the handgun, a single action Hawes .22 Deputy Marshal. That inspection revealed that the gun was defective and prone to fire, when hit or dropped, without the trigger's being pulled. Tr. 662–663, 711.

When the prosecutor learned of the hypnosis sessions, he filed a motion to exclude petitioner's testimony. The trial judge held a pretrial hearing on the motion and concluded that no hypnotically refreshed testimony would be admitted. The court issued an order limiting petitioner's testimony to "matters remembered and stated to the examiner prior to being placed under hypnosis." App. to Pet. for Cert. xvii.[3] At trial, petitioner introduced testimony by the gun expert,

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[3] The full pretrial order reads as follows:

"NOW on this 26th day of November, 1984, comes on the captioned matter for pre-trial hearing, and the Court finds:

"1. On September 27 and 28, 1984, Defendant was placed under hypnotic trance by Dr. Bettye Back, PhD, Fayetteville, Arkansas, for the express purpose of enhancing her memory of the events of July 2, 1983, involving the death of Frank Rock.

"2. Dr. Back was professionally qualified to administer hypnosis. She was objective in the application of the technique and did not suggest by leading questions the responses expected to be made by Defendant. She was employed on an independent, professional basis. She made written notes of facts related to her by Defendant during the pre-hypnotic interview. She did employ post-hypnotic suggestion with Defendant. No one else was present during any phase of the hypnosis sessions except Dr. Back and Defendant.

"3. Defendant cannot be prevented by the Court from testifying at her trial on criminal charges under the Arkansas Constitution, but testimony of matters recalled by Defendant due to hypnosis will be excluded because of inherent unreliability and the effect of hypnosis in eliminating any meaningful cross-examination on those matters. Defendant may testify to matters remembered and stated to the examiner prior to being placed under hypnosis. Testimony resulting from post-hypnotic suggestion will be excluded." App. to Pet. for Cert. xvii.

Tr. 647–712, but the court limited petitioner's own description of the events on the day of the shooting to a reiteration of the sketchy information in Doctor Back's notes. See App. 96–104.[4] The jury convicted petitioner on the manslaughter charge and she was sentenced to 10 years imprisonment and a $10,000 fine.

On appeal, the Supreme Court of Arkansas rejected petitioner's claim that the limitations on her testimony violated her right to present her defense. The court concluded that "the dangers of admitting this kind of testimony outweigh whatever probative value it may have," and decided to follow the approach of States that have held hypnotically refreshed testimony of witnesses inadmissible *per se*. *Rock* v. *State*, 288 Ark. 566, 573, 708 S. W. 2d 78, 81 (1986). Although the court acknowledged that "a defendant's right to testify is fundamental," *id.*, at 578, 708 S. W. 2d, at 84, it ruled that the exclusion of petitioner's testimony did not violate her constitutional rights. Any "prejudice or deprivation" she suffered "was minimal and resulted from her own actions and not by any erroneous ruling of the court." *Id.*, at 580, 708 S. W. 2d, at 86. We granted certiorari, —— U. S. ——

[4] When petitioner began to testify she was repeatedly interrupted by the prosecutor, who objected that her statements fell outside the scope of the pretrial order. Each time she attempted to describe an event on the day of the shooting, she was unable to proceed for more than a few words before her testimony was ruled inadmissible. For example, she was unable to testify without objection about her husband's activities on the morning of the shooting, App. 11, about their discussion and disagreement concerning the move to her trailer, *id.*, at 12, 14, about her husband's and his brother's replacing the shock absorbers on a van, *id.*, at 16, and about her brother-in-law's return to eat pizza, *id.*, at 19–20. She then made a proffer, outside the hearing of the jury, of testimony about the fight in an attempt to show that she could adhere to the court's order. The prosecution objected to every detail not expressly described in Doctor Back's notes or in the testimony the doctor gave at the pretrial hearing. *Id.*, at 32–35. The court agreed with the prosecutor's statement that "ninety-nine percent of everything [petitioner] testified to in the proffer" was inadmissible. *Id.*, at 35.

(1986), to consider the constitutionality of Arkansas' *per se* rule excluding a criminal defendant's hypnotically refreshed testimony.

II

Petitioner's claim that her testimony was impermissibly excluded is bottomed on her constitutional right to testify in her own defense. At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense. This, of course, is a change from the historic common-law view, which was that all parties to litigation, including criminal defendants, were disqualified from testifying because of their interest in the outcome of the trial. See generally 2 J. Wigmore, Evidence §§ 576, 579 (J. Chadbourn rev. 1979). The principal rationale for this rule was the possible untrustworthiness of a party's testimony. Under the common law, the practice did develop of permitting criminal defendants to tell their side of the story, but they were limited to making an unsworn statement that could not be elicited through direct examination by counsel and was not subject to cross-examination. *Id.*, at § 579, p. 827.

This Court in *Ferguson* v. *Georgia*, 365 U. S. 570, 573–582 (1961), detailed the history of the transition from a rule of a defendant's incompetency to a rule of competency. As the Court there recounted, it came to be recognized that permitting a defendant to testify advances both the "'detection of guilt'" and "'the protection of innocence,'" *id.*, at 581, quoting 1 Am. L. Rev. 396 (1867), and by the end of the second half of the 19th century,[5] all States except Georgia had en-

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[5] The removal of the disqualifications for accused persons occurred later than the establishment of the competence to testify of civil parties. 2 J. Wigmore § 579, p. 826 (J. Chadbourn rev. 1979). This was not due to concern that criminal defendants were more likely to be unreliable than other witnesses, but to a concern for the accused:

"If, being competent, he failed to testify, that (it was believed) would damage his cause more seriously than if he were able to claim that his silence

acted statutes that declared criminal defendants competent to testify. See *id.*, at 577 and n. 6, 596–598.[6] Congress enacted a general competency statute in the Act of Mar. 16, 1878, 20 Stat. 30, as amended, 18 U. S. C. § 3481, and similar developments followed in other common-law countries. Thus, more than 25 years ago this Court was able to state:

> "In sum, decades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case." *Ferguson* v. *Georgia*, 365 U. S., at 582.[7]

The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that "are essential to due process of law in a fair adversary process." *Faretta* v. *California*, 422 U. S. 806, 819, n. 15 (1975). The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony:

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were enforced by law. Moreover, if he did testify, that (it was believed) would injure more than assist his cause, since by undergoing the ordeal of cross-examination, he would appear at a disadvantage dangerous even to an innocent man." *Id.*, at 828.

[6] The Arkansas Constitution guarantees an accused the right "to be heard by himself and his counsel." Art. 2, § 10. Rule 601 of the Arkansas Rules of Evidence provides a general rule of competency: "Every person is competent to be a witness except as otherwise provided in these rules."

[7] *Ferguson* v. *Georgia*, 365 U. S. 570 (1961), struck down as unconstitutional under the Fourteenth Amendment a Georgia statute that limited a defendant's presentation at trial to an unsworn statement, insofar as it denied the accused "the right to have his counsel question him to elicit his statement." *Id.*, at 596. The Court declined to reach the question of a defendant's constitutional right to testify, because the case did not involve a challenge to the particular Georgia statute that rendered a defendant incompetent to testify. *Id.*, at 572, n. 1. Two Justices, however, urged that such a right be recognized explicitly. *Id.*, at 600–601, 602 (concurring opinions).

> "A person's right to reasonable notice of a charge against him, and *an opportunity to be heard in his defense*—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver*, 333 U. S. 257, 273 (1948) (emphasis added).[8]

See also *Ferguson* v. *Georgia*, 365 U. S., at 602 (Clark, J., concurring) (Fourteenth Amendment secures "right of a criminal defendant to choose between silence and testifying in his own behalf").[9]

The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor," a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. *Washington* v. *Texas*, 388 U. S. 14, 17–19 (1967). Logically included in the accused's right to call witnesses whose testimony is "material and favorable to his defense," *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 867 (1982), is a right to testify himself, should he decide it is in his favor to do so. In fact, the most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony. Like the truthfulness of other witnesses, the defendant's veracity,

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[8] Before *Ferguson* v. *Georgia*, it might have been argued that a defendant's ability to present an unsworn statement would satisfy this right. Once that procedure was eliminated, however, there was no longer any doubt that the right to be heard, which is so essential to due process in an adversary system of adjudication, could be vindicated only by affording a defendant an opportunity to testify before the factfinder.

[9] This right reaches beyond the criminal trial: the procedural due process constitutionally required in some extra-judicial proceedings includes the right of the affected person to testify. See, *e. g.*, *Gagnon* v. *Scarpelli*, 411 U. S. 778, 782, 786 (1973) (probation revocation); *Morrissey* v. *Brewer*, 408 U. S. 471, 489 (1972) (parole revocation); *Goldberg* v. *Kelly*, 397 U. S. 254, 269 (1970) (termination of welfare benefits).

which was the concern behind the original common-law rule, can be tested adequately by cross-examination. See generally Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 119–120 (1974).

Moreover, in *Faretta* v. *California*, 422 U. S., at 819, the Court recognized that the Sixth Amendment

> "grants to the accused *personally* the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" (Emphasis added.)

Even more fundamental to a personal defense than is the right of self-representation, which was found to be "necessarily implied by the structure of the Amendment," *ibid*, is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness.

The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. In *Harris* v. *New York*, 401 U. S. 222 (1971), the Court stated: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Id.*, at 225. Three of the dissenting Justices in that case agreed that the Fifth Amendment encompasses this right: "[The Fifth Amendment's privilege against self-incrimination] is fulfilled only when an accused is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' . . . The choice of whether to testify in one's own defense . . . is an exercise of the constitutional privilege." *Id.*, at 230 (emphasis removed), quoting *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964).[10]

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[10] On numerous occasions the Court has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a

III

The question now before the Court is whether a criminal defendant's right to testify may be restricted by a state rule that excludes her post-hypnosis testimony. This is not the first time this Court has faced a constitutional challenge to a state rule, designed to ensure trustworthy evidence, that interfered with the ability of a defendant to offer testimony. In *Washington* v. *Texas*, 388 U. S. 14 (1967), the Court was confronted with a state statute that prevented persons charged as principals, accomplices, or accessories in the same crime from being introduced as witnesses for one another. The statute, like the original common-law prohibition on testimony by the accused, was grounded in a concern for the reliability of evidence presented by an interested party:

> "It was thought that if two persons charged with the same crime were allowed to testify on behalf of each other, 'each would try to swear the other out of the charge.' This rule, as well as the other disqualifications for interest, rested on the unstated premises that the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue." (Footnote omitted.) *Id.*, at 21, quoting *Benson* v. *United States*, 146 U. S. 325, 335 (1892).

As the Court recognized, the incompetency of a codefendant to testify had been rejected on nonconstitutional

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fundamental constitutional right. See, *e. g.*, *Nix* v. *Whiteside*, —— U. S. —— (1986) (slip op. 5); *id.*, at ——, n. 5 (slip op. 9, n. 5) (BLACKMUN, J., opinion concurring in the judgment); *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983) (defendant has the "ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . testify in his or her own behalf"); *Brooks* v. *Tennessee*, 406 U. S. 605, 612 (1972) ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right").

grounds in 1918, when the Court, refusing to be bound by "the dead hand of the common-law rule of 1789," stated:

> "'[T]he conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court . . . .'" *Id*, at 22, quoting *Rosen* v. *United States*, 245 U. S. 467, 471 (1918).

The Court concluded that this reasoning was compelled by the Sixth Amendment's protections for the accused. In particular, the Court reasoned that the Sixth Amendment was designed in part "to make the testimony of a defendant's witnesses admissible on his behalf in court." *Ibid.*

With the rationale for the common-law incompetency rule thus rejected on constitutional grounds, the Court found that the mere presence of the witness in the courtroom was not enough to satisfy the Constitution's Compulsory Process Clause. By preventing the defendant from having the benefit of his accomplice's testimony, "the State *arbitrarily* denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." (Emphasis added.) *Id.*, at 23.

Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony. In *Chambers* v. *Mississippi*, 410 U. S. 284 (1973), the Court invalidated a State's hearsay rule on the ground that it abridged the defendant's right to "present witnesses in his own defense." *Id.*, at 302. Chambers was tried for a murder to which another person repeatedly had confessed in the presence of acquaintances. The

State's hearsay rule, coupled with a "voucher" rule that did not allow the defendant to cross-examine the confessed murderer directly, prevented Chambers from introducing testimony concerning these confessions, which were critical to his defense. This Court reversed the judgment of conviction, holding that when a state rule of evidence conflicts with the right to present witnesses, the rule may "not be applied mechanistically to defeat the ends of justice," but must meet the fundamental standards of due process. *Ibid.* In the Court's view, the State in *Chambers* did not demonstrate that the hearsay testimony in that case, which bore "assurances of trustworthiness" including corroboration by other evidence, would be unreliable, and thus the defendant should have been able to introduce the exculpatory testimony. *Ibid.*

Of course, the right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.*, at 295.[11] But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.

IV

The Arkansas rule enunciated by the state courts does not allow a trial court to consider whether posthypnosis testi-

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[11] Numerous state procedural and evidentiary rules control the presentation of evidence and do not offend the defendant's right to testify. See, *e. g.*, *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973) ("In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence"); *Washington* v. *Texas*, 388 U. S. 14, 23, n. 21 (1967) (opinion should not be construed as disapproving testimonial privileges or nonarbitrary rules that disqualify

mony may be admissible in a particular case; it is a *per se* rule prohibiting the admission at trial of any defendant's hypnotically refreshed testimony on the ground that such testimony is always unreliable.[12] Thus, in Arkansas, an accused's testimony is limited to matters that he or she can prove were remembered *before* hypnosis. This rule operates to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced.[13]

In this case, the application of that rule had a significant adverse effect on petitioner's ability to testify. It virtually prevented her from describing any of the events that occurred on the day of the shooting, despite corroboration of many of those events by other witnesses. Even more importantly, under the court's rule petitioner was not permitted to describe the actual shooting except in the words contained in Doctor Back's notes. The expert's description of the gun's tendency to misfire would have taken on greater significance if the jury had heard petitioner testify that she did not have her finger on the trigger and that the gun went off when her husband hit her arm.

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those incapable of observing events due to mental infirmity or infancy from being witnesses).

[12] The rule leaves a trial judge no discretion to admit this testimony, even if the judge is persuaded of its reliability by testimony at a pretrial hearing. Tr. of Oral Arg. 36 (statement of the Attorney General of Arkansas).

[13] The Arkansas Supreme Court took the position that petitioner was fully responsible for any prejudice that resulted from the restriction on her testimony because it was she who chose to resort to the technique of hypnosis. *Rock* v. *State*, 288 Ark. 566, 580, 708 S. W. 2d 78, 86 (1986). The prosecution and the trial court each expressed a similar view and the theme was renewed repeatedly at trial as a justification for limiting petitioner's testimony. See App. 15, 20, 21–22, 24, 36. It should be noted, however, that Arkansas had given no previous indication that it looked with disfavor on the use of hypnosis to assist in the preparation for trial and there were no previous state-court rulings on the issue.

In establishing its *per se* rule, the Arkansas Supreme Court simply followed the approach taken by a number of States that have decided that hypnotically enhanced testimony should be excluded at trial on the ground that it tends to be unreliable.[14] Other States that have adopted an exclusionary rule, however, have done so for the testimony of *witnesses*, not for the testimony of a *defendant*. The Arkansas Supreme Court failed to perform the constitutional analysis that is necessary when a defendant's right to testify is at stake.[15]

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[14] See, *e. g.*, *Contreras* v. *State*, 718 P. 2d 129 (Alaska 1986); *State ex rel. Collins* v. *Superior Court*, 132 Ariz. 180, 207–208, 644 P. 2d 1266, 1293–1294 (1982); *People* v. *Quintanar*, 659 P. 2d 710, 711 (Colo. App. 1982); *State* v. *Davis*, 490 A. 2d 601 (Del. Super. 1985); *Bundy* v. *State*, 471 So. 2d 9, 18–19 (Fla. 1985), cert. denied, —— U. S. —— (1986); *State* v. *Moreno*, —— Haw. ——, 709 P. 2d 103 (1985); *State* v. *Haislip*, 237 Kan. 461, 482, 701 P. 2d 909, 925–926, cert. denied, —— U. S. —— (1985); *State* v. *Collins*, 296 Md. 670, 464 A. 2d 1028 (1983); *Commonwealth* v. *Kater*, 388 Mass. 519, 447 N. E. 2d 1190 (1983); *People* v. *Gonzales*, 415 Mich. 615, 329 N. W. 2d 743 (1982), opinion added to, 417 Mich. 1129, 336 N. W. 2d 751 (1983); *Alsbach* v. *Badar*, 700 S. W. 2d 823 (Mo. 1985); *State* v. *Palmer*, 210 Neb. 206, 218, 313 N. W. 2d 648, 655 (1981); *People* v. *Hughes*, 59 N. Y. 2d 523, 453 N. E. 2d 484 (1983); *Robison* v. *State*, 677 P. 2d 1080, 1085 (Okla. Crim. App.), cert. denied, 467 U. S. 1246 (1984); *Commonwealth* v. *Nazarovitch*, 496 Pa. 97, 110, 436 A. 2d 170, 177 (1981); *State* v. *Martin*, 101 Wash. 2d 713, 684 P. 2d 651 (1984). See *State* v. *Ture*, 353 N. W. 2d 502, 513–514 (Minn. 1984).

[15] The Arkansas court relied on a California case, *People* v. *Shirley*, 31 Cal.3d 18, 723 P. 2d 1354, cert. denied, 459 U. S. 860 (1982), for much of its reasoning as to the unreliability of hypnosis. 288 Ark., at 575–578, 708 S. W. 2d, at 83–84. But while the California court adopted a far stricter general rule—barring entirely testimony by any witness who has been hypnotized—it explicitly excepted testimony by an accused:

"[W]hen it is the defendant himself—not merely a defense witness—who submits to pretrial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. In that case, the rule we adopt herein is subject to a necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf." 31 Cal.3d, at 67, 723 P. 2d, at 1384.

Although the Arkansas court concluded that any testimony that cannot be proved to be the product of prehypnosis memory is unreliable, many courts have eschewed a *per se* rule and permit the admission of hypnotically refreshed testimony.[16] *Hypnosis by trained physicians or psychologists* has been recognized as a valid therapeutic technique since 1958, although there is no generally accepted theory to explain the phenomenon, or even a consensus on a single definition of hypnosis. Council on Scientific Affairs, Scientific Status of Refreshing Recollection by the Use of Hypnosis, 253 J. A. M. A. 1918, 1918–1919 (1985) (Council Report).[17] The

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This case does not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants and we express no opinion on that issue.

[16] Some jurisdictions have adopted a rule that hypnosis affects the credibility, but not the admissibility, of testimony. See, *e. g.*, *Beck* v. *Norris*, 801 F. 2d 242, 244–245 (CA6 1986); *United States* v. *Awkard*, 597 F. 2d 667, 669 (CA9), cert. denied, 444 U. S. 885 (1979); *State* v. *Wren*, 425 So. 2d 756 (La. 1983); *State* v. *Brown*, 337 N. W. 2d 138, 151 (N. D. 1983); *State* v. *Glebock*, 616 S. W. 2d 897, 903–904 (Tenn. Crim. App. 1981); *Chapman* v. *State*, 638 P. 2d 1280, 1282 (Wyo. 1982).

Other courts conduct an individualized inquiry in each case. See, *e. g.*, *McQueen* v. *Garrison*, 814 F. 2d 951, 958 (CA4 1987) (reliability evaluation); *Wicker* v. *McCotter*, 783 F. 2d 487, 492–493 (CA5 1986) (probative value of the testimony weighed against its prejudicial effect), cert. denied, —— U. S. —— (1986); *State* v. *Iwakiri*, 106 Idaho 618, 625, 682 P. 2d 571, 578 (1984) (weigh "totality of circumstances").

In some jurisdictions, courts have established procedural prerequisites for admissibility in order to reduce the risks associated with hypnosis. Perhaps the leading case in this line is *State* v. *Hurd*, 86 N. J. 525, 432 A. 2d 86 (1981). See also *Sprynczynatyk* v. *General Motors Corp.*, 771 F. 2d 1112, 1122–1123 (CA8 1985), cert. denied, —— U. S. —— (1986); *United States* v. *Harrington*, 18 M.J. 797, 803 (A. C. M. R. 1984); *House* v. *State*, 445 So. 2d 815, 826–827 (Miss. 1984); *State* v. *Beachum*, 97 N. M. 687, 689–690, 643 P. 2d 246, 253–254 (N. M. App. 1981), writ quashed, 98 N. M. 51, 644 P. 2d 1040 (1982); *State* v. *Weston*, 16 Ohio App. 3d 279, 287, 475 N. E. 2d 805, 813 (1984); *State* v. *Armstrong*, 110 Wis. 2d 555, 329 N. W. 2d 386, cert. denied, 461 U. S. 946 (1983).

[17] Hypnosis has been described as "involv[ing] the focusing of attention; increased responsiveness to suggestions; suspension of disbelief with a lov-

use of hypnosis in criminal investigations, however, is controversial, and the current medical and legal view of its appropriate role is unsettled.

Responses of individuals to hypnosis vary greatly. The popular belief that hypnosis guarantees the accuracy of recall is as yet without established foundation and, in fact, hypnosis often has no effect at all on memory. The most common response to hypnosis, however, appears to be an increase in both correct and incorrect recollections.[18] Three general characteristics of hypnosis may lead to the introduction of inaccurate memories: the subject becomes "suggestible" and may try to please the hypnotist with answers the subject thinks will be met with approval; the subject is likely to "confabulate," that is, to fill in details from the imagination in order to make an answer more coherent and complete; and, the subject experiences "memory hardening," which gives him great confidence in both true and false memories, making effective cross-examination more difficult. See generally M. Orne, et al., Hypnotically Induced Testimony, in Eyewitness Testimony: Psychological Perspectives 171 (G. Wells and E. Loftus, eds., 1985); Diamond, Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness, 68 Calif. L. Rev. 313, 333–342 (1980). Despite the unreliability that hypnosis concededly may introduce, however, the procedure has been credited as instrumental in obtaining investigative leads or identifications that were later confirmed by independent

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ering of critical judgment; potential for altering perception, motor control, or memory in response to suggestions; and the subjective experience of responding involuntarily." Council Report, 253 J. A. M. A., at 1919.

[18] "[W]hen hypnosis is used to refresh recollection, one of the following outcomes occurs: (1) hypnosis produces recollections that are not substantially different from nonhypnotic recollections; (2) it yields recollections that are more inaccurate than nonhypnotic memory; or, most frequently, (3) it results in more information being reported, but these recollections contain both accurate and inaccurate details. . . . There are no data to support a fourth alternative, namely, that hypnosis increases remembering of only accurate information." *Id.*, at 1921.

evidence. See, *e. g.*, *People* v. *Hughes*, 59 N. Y. 2d 523, 533, 453 N. E. 2d 484, 488 (1983); see generally R. Udolf, Forensic Hypnosis 11–16 (1983).

The inaccuracies the process introduces can be reduced, although perhaps not eliminated, by the use of procedural safeguards. One set of suggested guidelines calls for hypnosis to be performed only by a psychologist or psychiatrist with special training in its use and who is independent of the investigation. See Orne, The Use and Misuse of Hypnosis in Court, 27 Int'l J. Clinical & Experimental Hypnosis 311, 335–336 (1979). These procedures reduce the possibility that biases will be communicated to the hypersuggestive subject by the hypnotist. Suggestion will be less likely also if the hypnosis is conducted in a neutral setting with no one present but the hypnotist and the subject. Tape or video recording of all interrogations, before, during, and after hypnosis, can help reveal if leading questions were asked. *Id.*, at 336.[19] Such guidelines do not guarantee the accuracy of the testimony, because they cannot control the subject's own motivations or any tendency to confabulate, but they do provide a means of controlling overt suggestions.

The more traditional means of assessing accuracy of testimony also remain applicable in the case of a previously hypnotized defendant. Certain information recalled as a result of hypnosis may be verified as highly accurate by corroborating evidence. Cross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies. Moreover, a jury can be educated to the risks of hypnosis through expert testimony and cautionary instructions. Indeed, it is probably to a defendant's advantage to establish carefully the extent of his memory prior to hypnosis, in order to minimize the decrease in credibility the procedure might introduce.

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[19] Courts have adopted varying versions of these safeguards. See n. 16, *supra*. Oregon by statute has adopted a requirement for procedural safeguards for hypnosis. Ore. Rev. Stat. § 136.675 (1985).

We are not now prepared to endorse without qualifications the use of hypnosis as an investigative tool; scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy. Arkansas, however, has not justified the exclusion of *all* of a defendant's testimony that a defendant is unable to prove to be the product of prehypnosis memory. A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case. Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections. The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified. But it has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial.

In this case, the defective condition of the gun corroborated the details petitioner remembered about the shooting. The tape recordings provided some means to evaluate the hypnosis and the trial judge concluded that Doctor Back did not suggest responses with leading questions. See n. 3, *supra*. Those circumstances present an argument for admissibility of petitioner's testimony in this particular case, an argument that must be considered by the trial court because of petitioner's constitutional right to testify on her own behalf.[20]

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[20] This disposition makes it unnecessary to consider petitioner's claims that the trial court's order restricting her testimony was unconstitutionally broad and that the trial court's application of the order resulted in a denial of due process of law. We also need not reach petitioner's argument that Arkansas' restriction on her testimony interferes with her Sixth Amendment right to counsel. Petitioner concedes that there is a "substantial

The judgment of the Supreme Court of Arkansas is vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

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question" whether she raised this federal question on appeal to the Arkansas Supreme Court. Reply Brief for Petitioner 2.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 10, 1987

Re: 86-130 - Rock v. Arkansas

Dear Harry:

Please join me.

Respectfully,

John

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 11, 1987

Re: 86-130 - Rock v. Arkansas

Dear Harry:

I will shortly circulate a dissent in this case.

Sincerely,

WEB

Justice Blackmun

cc: The Conference

June 11, 1987

86-130 Rock v. Arkansas

Dear Harry:

Please join me.

Sincerely,

Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 12, 1987

Re: No. 86-130 - Rock v. Arkansas

Dear Harry:

Please join me.

Sincerely,

T.M.

Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 15, 1987

No. 86-130 Rock v. Arkansas

Dear Chief,

At Conference I voted tentatively to vacate and remand, but now am persuaded we should find no constitutional violation here. Please join me in your dissent.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTONIN SCALIA

June 16, 1987

Re: No. 86-130 - Rock v. Arkansas

Dear Chief:

I would be pleased to join your dissent in the above case.

Sincerely,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 16, 1987

Re: No. 86-130 - Rock v. Arkansas

Dear Harry,

Please join me.

Sincerely,

Justice Blackmun
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 16, 1987

86-130 - Rock v. Arkansas

Dear Chief,

Please join me.

Sincerely yours,

Byron

The Chief Justice

Copies to the Conference

86-130 Rock v. Arkansas (Leslie)

HAB for theCourt 4/6/87
1st draft 6/10/87
2nd draft 6/12/87
Joined by JPS 6/10/87
LFP 6/11/87
TM 6/12/87
WJB 6/16/87

CJ dissenting
1st draft 6/15/87
2nd draft 6/17/87
3rd draft 6/18/87
4th draft 6/19/87
Joined by SOC 6/15/87
AS 6/16/87

CJ will dissent 6/11/87