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HYPNOSIS AND CRIMINAL DEFENDANTS: LIFE IN THE EIGHTH CIRCUIT AND BEYOND

*Rock v. Arkansas*¹

The purpose of this Note is not to embark on an extended discussion of the pros and cons of the admission of hypnotically enhanced testimony. Nor is it designed to provide a detailed, scientific description of the procedure.² Instead, this Note will give an overview of the use of hypnosis in criminal proceedings in the states which make up the Eighth Circuit Court of Appeals.³

The use of hypnosis in the Eighth Circuit centers upon two decisions. The first is the United States Supreme Court's decision in *Rock v. Arkansas*.⁴ *Rock* struck down an Arkansas rule which excluded hypnotically refreshed testimony from any witness.⁵ The second is the Eighth Circuit Court of Appeal's view of hypnosis in its recent *Little v. Armontrout*⁶ decision (*Little II*). In *Little II*, the court held that Missouri's failure to provide an expert in hypnosis to assist an indigent defendant in preparing his defense violated the defendant's right to a fair trial.⁷ These cases are more easily understood if viewed against the background of a basic understanding of hypnosis and how

1. *Rock v. Arkansas*, 107 S. Ct. 2704 (1987).

2. See M. ORNE, D. SOSKIS, D. DINGES, E. ORNE, & M. TONRYE, HYPNOTICALLY REFRESHED TESTIMONY: ENHANCED MEMORY OR TAMPERING WITH EVIDENCE? (National Institute of Justice, U.S. Department of Justice, *Issues & Practices In Criminal Justice*, Jan. 1985) [hereinafter HYPNOTICALLY REFRESHED TESTIMONY]; Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313 (1980); Sies & Wester, *Judicial Approaches to the Question of Admissibility of Hypnotically Refreshed Testimony: A History and Analysis*, 35 DE PAUL L. REV. 77 (1985).

3. The Eighth Circuit Court of Appeals is made up of the federal district courts in the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. 28 U.S.C. § 41 (1980).

4. 107 S. Ct. 2704 (1987).

5. The witness in this case was also the defendant. Her testimony was limited to those events which she remembered prior to the hypnotic session. *Rock v. State*, 288 Ark. 566, 568, 708 S.W.2d 78, 79 (1986), *vacated and remanded*, 107 S. Ct. 2704 (1987). See *infra* section II of text.

6. 835 F.2d 1240 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 2857 (1988), *vacating and modifying en banc*, 819 F.2d 1425 (8th Cir. 1987), *rev'g sub nom.* *State v. Little*, 674 S.W.2d 541 (Mo. 1984) (*en banc*), *cert. denied*, 470 U.S. 1029 (1985).

7. In *Little v. Armontrout*, 819 F.2d 1425 (8th Cir. 1987) [hereinafter *Little I*], the court held that defendant's due process rights had been violated in that the manner hypnosis was used to hypnotically enhance the witness' memory was overly suggestive. *Id.* at 1433.

8. 835 F.2d at 1243.

courts treat it.

I. HYPNOSIS AND THE LAW

Hypnosis is an "altered state of awareness or perception."⁸ Its goal, in a legal context, is to help the hypnotized individual remember past events. For example, one theory posits that individuals, at least on a subconscious level, "record" all that they see.⁹ The process of hypnosis allows the individual either to relive the event or observe it as if watching television.¹⁰ It also helps revive normal memories lost due to "pathological reason(s), such as a traumatic neurosis."¹¹ However, if used to refresh a witness' memory or discover details where none existed, or to "verify one of several conflicting accounts,"¹² hypnosis is of little value.

Subjects who undergo hypnosis can create memories where there were none. This is known as "confabulation."¹³ Other problems which reduce the reliability of hypnotically enhanced memories include an increase in a subject's suggestibility¹⁴ and a susceptibility to leading questions.¹⁵ Finally, witnesses will show much greater confidence that a belief is true while testifying if that belief was recalled in a previous hypnotic state.¹⁶ Despite these problems, hypnosis experts have proposed guidelines to limit the risk of faulty testimony,¹⁷ and courts deal with hypnosis in three ways.

8. Sies & Wester, *supra* note 2, at 79 (citing W. WESTER & A. SMITH, CLINICAL HYPNOSIS: A MULTIDISCIPLINARY APPROACH 19 (1984)).

9. M. ORNE, D. DINGES & E. ORNE, THE FORENSIC USE OF HYPNOSIS 3 (National Institute of Justice, U.S. Department of Justice, *Research in Brief*, Dec. 1984).

10. *Id.* at 3.

11. *Rock v. State*, 288 Ark. 566, 573-74 n.1, 708 S.W.2d 78, 82 n.1 (1986), *vacated and remanded*, 107 S. Ct. 2704 (1987) (citing EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 325 (G. Wells & E. Loftus eds. 1984)).

12. *Rock*, 288 Ark. at 573-74 n.1, 708 S.W.2d at 82 n.1 (citing EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES, *supra* note 11, at 324, 332).

13. HYPNOTICALLY REFRESHED TESTIMONY, *supra* note 2, at 10. Confabulation is defined as: "The act of filling-in gaps in memory by fantasy or by actual memories concerning events that occurred at another time. The term implies that the subject fully believes his answers to be correct." *Id.* at glossary.

14. *Id.* at 21.

15. *Id.* at 23.

16. *Id.* at 24-27.

17. Dr. Martin T. Orne, a leading expert in the field, has proposed the following seven guidelines:

1) Hypnosis should be conducted by a psychiatrist, psychologist, or an "equivalently qualified mental health professional." The hypnotist should not be employed by the police and any information about the case should be provided to him in writing. *Id.* at 43.

2) All meetings between the witness and the hypnotist, before, during and after the hypnotic session, should be videotaped. This allows a court to review the contact between the two for any prejudicial conduct by the hypnotist. *Id.* at 43-44.

3) Only the hypnotist should be present with the witness during the session in

The first approach is the *per se* exclusion of hypnotically refreshed testimony.¹⁸ In most of these cases, witnesses are limited to testifying only about the memories they had before hypnosis.¹⁹ In the Eighth Circuit, the courts of Arkansas, Iowa, Minnesota, Missouri, and Nebraska have adopted this rule.²⁰ The problem with such an approach is that it excludes potentially reliable new evidence.²¹ In addition, if a party cannot prove what the witness knew before hypnosis, her testimony will be barred.

A second theory is the admissibility view. Under this view, hypnotically enhanced testimony is always admissible. It is for the trier of fact to determine the weight of the evidence and to assess the declarant's credibility.²² The problem with always admitting hypnotically enhanced or aided testimony is that no

order to avoid any inadvertent cues by third parties. *Id.* at 44-45.

4) A complete psychological evaluation of the witness should take place before hypnosis, the witness should sign an informed consent statement and all facts about the incident at that time should be relayed by the witness. *Id.* at 45-46.

5) The hypnotic method used should be standard and the witness should be allowed to freely narrate the event. The hypnotist must be careful not to lead the subject into creating memories which do not exist. *Id.* at 46-47.

6) The hypnotist may leave the room before and during hypnosis in order to receive any questions by observers. However, the tape should continue to run and any questions should be in writing in order to preserve a record. *Id.* at 47.

7) During the post-hypnotic phase, the hypnotist should avoid making statements which reinforce the subject's belief he will now remember new bits of information. The witness, at this point, is still suggestible and should be questioned as to what he believed has occurred. *Id.* at 47-48.

18. *Rock v. State*, 288 Ark. 566, 708 S.W.2d 78 (1986), *vacated and remanded*, 107 S. Ct. 2704 (1987) (witnesses' testimony limited to pre-hypnotic knowledge); *State v. Seager*, 341 N.W.2d 420 (Iowa 1983) (allowed testimony of events known before hypnosis and no limitations if no substantial change in knowledge after hypnosis); *State v. Mack*, 292 N.W.2d 764 (Minn. 1980) (excluded post-hypnotic testimony based on the *Frye* test); *Alsbach v. Bader*, 700 S.W.2d 823 (Mo. 1985) (en banc) (excluded post-hypnotic testimony in civil cases); *State v. Patterson*, 213 Neb. 686, 331 N.W.2d 500 (1983) (excluded hypnosis-enhanced testimony, but witness not incompetent because hypnotized during investigatory phase of case; can still testify as to what he knew before hypnosis).

19. *Rock*, 288 Ark. at 576, 708 S.W.2d at 83; *Seager*, 341 N.W.2d at 431; *Mack*, 292 N.W.2d at 771; *Patterson*, 213 Neb. at 692, 331 N.W.2d at 504.

20. *See supra* note 18.

21. Many of the courts which exclude the evidence do so based on *United States v. Frye*, 293 F. 1013 (D.C. Cir. 1923). *See Rock v. State*, 288 Ark. 566, 708 S.W.2d 78 (1986); *State v. Seager*, 341 N.W.2d 420 (Iowa 1983); *State v. Mack*, 292 N.W.2d 764 (Minn. 1980); *Alsbach v. Bader*, 700 S.W.2d 823 (Mo. 1985). *Frye* held that expert testimony must be based on scientific procedures which have gained "general acceptance in the particular field. . . ." 293 F. at 1014. The problem with using the *Frye* test is that "[w]hat is involved is eyewitness testimony which, whether refreshed by hypnosis or not, is simply not the same thing as expert opinion deduced from a scientific test." *Sies & Wester, supra* note 2, at 111.

22. *Sies & Wester, supra* note 2, at 89.

safeguards are required to limit potential abuse.²³ In the Eighth Circuit, North Dakota is the only state that follows this theory.²⁴

The third and final approach is the guarded admissibility approach as articulated by the New Jersey case of *State v. Hurd*.²⁵ There, the court set forth guidelines that proponents of hypnotically-enhanced testimony must follow before the testimony can be introduced. First, the proponent must inform her opponent of her intent to hypnotize a witness.²⁶ The proponent must also provide a record and demonstrate that hypnosis was appropriate for the kind of memory loss suffered.²⁷ To help the trial court assess the reliability of the hypnotic session, the following six guidelines should be used:

- 1) A licensed psychologist or psychiatrist should carry out the procedure.
- 2) He should be independent.
- 3) Any information from the police should be in writing.
- 4) A detailed description of the facts should be obtained before the session.
- 5) A videotape should be made whenever the subject and hypnotist meet.
- 6) No one but the subject and the hypnotist should be present during the hypnotic session.²⁸

An advantage to the guarded admissibility approach is that it is consistent with Federal Rules of Evidence 403, which directs a court to weigh the probative value of evidence against its prejudicial effect.²⁹ It is also consistent with the idea that "[a]ll relevant evidence is admissible except as otherwise provided. . . ." contained in the Federal Rules.³⁰ The *Hurd* guidelines provide the court with a foundation upon which to weigh the evidence. If the testimony is not relevant, probative, or if it is highly prejudicial, a court can

23. *Id.* at 117. As an interesting side note, the Maryland court which established the admissibility rule in *Harding v. State* in 1968, reversed its decision in 1983.

24. *State v. Brown*, 337 N.W.2d 138 (N.D. 1983). The North Dakota Supreme Court stated: "[H]ypnosis affects credibility but not admissibility." *Id.* at 151. The court criticized guidelines set forth in *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981). See *infra* note 30. It claimed medical professionals were often more suggestive than police officers according to defendant's expert testimony at trial. 337 N.W.2d at 150. Furthermore, set guidelines for hypnotic procedures added an undeserved sense of credibility to the testimony. *Id.* at 150 (quoting *People v. Gonzales*, 108 Mich. App. 145, 160, 310 N.W.2d 306, 313 (1981), *aff'd*, 415 Mich. 615, 329 N.W.2d 743 (1982)). Therefore, the North Dakota Supreme Court felt that the best way to deal with the hypnosis problem is to allow the testimony plus expert testimony from both sides and allow the jury to decide. *Id.* at 151. The court did point out a number of facts it deemed significant including: a valid need for hypnosis due to the witness' lapse of memory, the session was conducted by a police officer with over 90 hours of formal training, and the sessions were videotaped. *Id.* at 152.

25. 86 N.J. 525, 432 A.2d 86 (1981).

26. *Id.* at 544, 432 A.2d at 95.

27. *Id.*

28. *Id.* at 545-46, 432 A.2d at 96-97. The procedures adopted were those proposed by Dr. Martin Orne as expert for the defendant, opponent of the evidence. See *supra* note 17.

29. Sies & Wester, *supra* note 2, at 122 (citing FED. R. EVID. 403).

30. FED. R. EVID. 402.

legitimately exclude it. Otherwise, it should be admitted.³¹ This approach was adopted by the Eighth Circuit Court of Appeals in *Sprynczynatyk v. General Motors Corp.*³²

In *Sprynczynatyk*, the court considered three factors: (1) the degree to which the *Hurd*-type guidelines were followed; (2) "the appropriateness of using hypnosis for the kind of memory loss involved"; and (3) whether "there [was] any evidence to corroborate" the testimony.³³ If the evidence is reliable, the court can then balance its probative value against its prejudicial effect.³⁴

These three views of the admissibility of hypnotically enhanced testimony are evidentiary rules. They are the courts' means of balancing the value of the evidence against its possible inaccuracies. The burden of evaluation can be placed upon the judge, the trier of fact, or can be eliminated altogether. A court's choice as to the adoption of one of these views and its placement of the burden of evaluating such evidence can affect the rights of the parties to the dispute. The sections that follow will focus upon how a court's rule of admissibility affects the rights of criminal defendants. The pivotal question is how their rights supercede a state's policy on hypnosis.

II. ROCK V. ARKANSAS

On July 2, 1983, an argument erupted between defendant Vickie Lorene Rock and her husband.³⁵ When defendant tried to leave their apartment, her husband grabbed and started choking her.³⁶ When defendant escaped his grasp, she grabbed a .22 caliber revolver.³⁷ After being warned to stay away, the husband again struck the defendant, a fatal mistake.³⁸ The gun went off causing a bullet to lodge in the husband's chest, thereby ending the argument, and his life.³⁹

A lapse of defendant's memory as to the specific details of the incident prompted her counsel to recommend that she undergo hypnosis.⁴⁰ The defendant did not inform the trial court nor the prosecutor of the decision before the hypnotic session.⁴¹ A "licensed neuropsychologist with training in . . . hypnosis" conducted the session.⁴² An interview before hypnosis between the

31. FED. R. EVID. 401-03.

32. 771 F.2d 1112 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986). The only Eighth Circuit state court to fall in line with the Federal Court of Appeals is South Dakota in *State v. Adams*, 418 N.W.2d 618 (S.D. 1988).

33. 771 F.2d at 1123.

34. *Id.*

35. 107 S. Ct. at 2706.

36. *Id.*

37. *Id.* at 2706-07.

38. *Id.* at 2706 n.1.

39. *Id.* at 2706.

40. *Id.*

41. *Rock v. State*, 288 Ark. at 568, 708 S.W.2d at 79.

42. 107 S. Ct. at 2706.

doctor and defendant was not taped but the actual hypnotic sessions were.⁴³ The doctor took detailed notes on what defendant remembered before hypnosis.⁴⁴ While the hypnosis revealed no new information, Rock later recalled that "she had her thumb on the hammer of the gun, but had not held her finger on the trigger."⁴⁵ The gun went off when her husband hit her arm.⁴⁶ Following this revelation, an expert tested the gun. He corroborated defendant's story, finding the "gun was defective and prone to fire, when hit or dropped, without the trigger's being pulled."⁴⁷

Upon motion by the prosecution, the Arkansas trial court limited the defendant's testimony to "matters remembered and stated to the examiner prior to being placed under hypnosis."⁴⁸ In effect, defendant could only testify as to those events contained in the doctor's notes and any police reports. The court excluded any details about the earlier events of the day of the shooting, whether enhanced by hypnosis or not. The prosecutor interrupted her testimony with objections many times.⁴⁹ Although the gun expert was allowed to testify as to the weapon's defective condition,⁵⁰ his testimony was obviously not enough to vindicate the defendant. She was convicted of manslaughter, sentenced to ten years in jail and fined \$10,000.⁵¹

On appeal, the Arkansas Supreme Court affirmed the conviction.⁵² In an extended discussion of the pros and cons of hypnosis, the court rejected a guarded admissibility approach to hypnotically enhanced testimony and opted for the *per se* exclusion of the evidence.⁵³ It deemed the trial court's testimonial limits as applied not only proper, but generous.⁵⁴ As far as the alleged violation of defendant's right to testify was concerned, the court reasoned that the "testimony was restricted only by what, in effect, are standard rules of evidence."⁵⁵ Given the unreliability of hypnosis, the probative value of the evidence was "questionable" and legitimately excluded.⁵⁶ One may strongly infer that the Arkansas court's failure to recognize any constitutional violation in part arises from the fact that the limits directly arose from the defendant's own conduct. Had she not sought hypnosis, no limits could have been

43. *Id.* at 2706-07.

44. *Id.* at 2706.

45. *Id.* at 2707.

46. *Id.*

47. *Id.*

48. *Id.* (quoting Appendix to Petition for Certiorari xvii).

49. *Id.* at 2707 n.4.

50. *Id.* at 2707.

51. *Id.*

52. *Rock v. State*, 288 Ark. at 568, 708 S.W.2d at 79.

53. *Id.* at 573, 708 S.W.2d at 81.

54. *Id.* at 577, 708 S.W.2d at 84.

55. *Id.* at 579, 708 S.W.2d at 85.

56. *Id.* The court stated: "In reality nothing was excluded that would have been much assistance to appellant, or would have enlarged on her testimony to any significant degree." *Id.*

imposed.⁵⁷

The job of the United States Supreme Court on certiorari was not to establish whether hypnosis should be admissible or to create a standard for its use. The ultimate question was whether a *per se* rule of exclusion was unconstitutional.⁵⁸ The Court's analysis focused on four questions: (1) Is there a constitutional right to testify?⁵⁹ (2) May rules of witness incompetency be arbitrary?⁶⁰ (3) Is the Arkansas *per se* rule of exclusion arbitrary?⁶¹ and (4) Did the Arkansas rule adversely affect the defendant's right to testify?⁶² In essence, the court merely applied the facts of the case (questions 3 and 4) to the pre-existing law (questions 1 and 2).

(1) *Is there a constitutional right to testify?* Yes, based on the fourteenth, sixth, and fifth amendments.⁶³ The fourteenth amendment ensures a right to procedural due process⁶⁴ and "an opportunity to be heard in [one's] defense."⁶⁵ The sixth amendment, as applied to the states through the fourteenth, guarantees "a defendant the right to call 'witnesses in his favor.'"⁶⁶ "Logically included in the accused's right to call witnesses whose testimony is 'material and favorable to his defense' is a right to testify himself, should he decide it is in his favor to do so."⁶⁷ Finally, the United States Supreme Court asserts the right to testify is a "necessary corollary to the Fifth Amendment's guarantee against compelled testimony."⁶⁸ Given these three constitutional bases for a defendant's right to testify, Rock had such a right. The next question deals with rules that limit the right.

(2) *May rules of witness incompetency be arbitrary?* No. Rules which

57. *Id.* at 580, 708 S.W.2d at 85-86.

58. 107 S. Ct. at 2710.

59. *Id.* at 2709-10.

60. *Id.* at 2710-11.

61. *Id.* at 2712, 2714.

62. *Id.* at 2712.

63. *Id.* at 2709-10.

64. *Id.* at 2709 n.9.

65. *Id.* at 2709 (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)). The *Rock* court restated the proposition: "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." *Id.* at 2709. *See also* *Ferguson v. Georgia*, 365 U.S. 570 (1961).

66. 107 S. Ct. at 2709 (quoting *Washington v. Texas*, 388 U.S. 14, 17-19 (1967)).

67. *Id.* at 2709 (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)). The Court relies on three cases to support its "logical" conclusion that the defendant's right to testify is grounded within the sixth amendment. Such a right is an outgrowth of two premises:

(1) A defendant has the right to call witnesses which favor his defense. *Washington*, 388 U.S. at 17-19; *Valenzuela-Bernal*, 458 U.S. at 867.

(2) A criminal defendant has the right to represent himself and "personally . . . make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975).

Therefore, a defendant has a right to call himself as a witness. 107 S. Ct. at 2710.

68. *Id.*

limit a criminal defendant's ability to testify may not be arbitrary.⁶⁹ "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."⁷⁰ In this vein, the Supreme Court relied on *Washington v. Texas*⁷¹ to conclude that a *per se* rule of exclusion, based solely on a fear of perjury, which prevented a defendant's witness from testifying was unconstitutional.⁷² Further, in *Chambers v. Mississippi*⁷³ the court stated that an evidentiary rule may "not be applied mechanistically to defeat the ends of justice."⁷⁴ Accordingly, a state "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony."⁷⁵ Given that a state may not arbitrarily limit the right to testify, the inquiry focuses on the extent to which the Arkansas rule was in fact arbitrary.

(3) *Is the Arkansas per se rule of exclusion arbitrary?* Yes. The *per se* rule against hypnotically enhanced testimony ignored that evidence which corroborated the defendant's post-hypnotic story and ignored the trial court's ability to analyze the session by listening to the tapes.⁷⁶ Essentially, the limitation on the defendant's testimony was not wrong in and of itself. The constitutional error arises when a court excludes the evidence *without* considering its reliability.⁷⁷ As to such consideration, the Court commented that guidelines could help trial courts evaluate the procedures surrounding hypnosis.⁷⁸

While the Court recognized the problems with hypnosis in the area of reliability,⁷⁹ the issue in the case was not the strength or weakness of hypnosis. If the evidence has any value at all, evidentiary rules call for consideration of probative value on a case-by-case basis. The Arkansas rule failed to do so.

Thus, in *Rock* the Supreme Court raised the probative value versus prejudicial effect test of the Federal Rules of Evidence to a constitutional level in the area of criminal law.⁸⁰ As applied to the testimony of criminal defendants, a guarded admission approach becomes constitutionally required.⁸¹ This result

69. *Id.* at 2711.

70. *Id.*

71. 388 U.S. 14 (1967).

72. 107 S. Ct. at 2710 (quoting *Washington*, 388 U.S. at 21).

73. *Chambers*, 410 U.S. at 295-96. In *Chambers* the trial court refused to allow a defendant to introduce evidence of a third party's confession to the same crime and prevented the defendant from cross-examining the third party. The decision was based on the Mississippi "voucher" rule later found violative of defendant's due process rights under the fourteenth amendment.

74. *Id.* at 2711 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

75. 107 S. Ct. at 2711.

76. *Id.* at 2714.

77. *Id.*

78. *Id.* The Court cited the guidelines from *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112 (8th Cir. 1985) and *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981). See *supra* notes 27-28, 32 and accompanying text.

79. 107 S. Ct. at 2713-14.

80. FED. R. EVID. 403. See *supra* notes 29-31 and accompanying text.

81. See *supra* notes 26-34 and accompanying text.

leads to the final question in the analysis.

(4) *Did the Arkansas rule adversely affect the defendant's right to testify?* Yes. The rule prevented the defendant from describing the shooting in any manner different than described in the doctor's notes.⁸² As well, the Court felt that defendant's inability to tell the jury that her finger was not on the gun's trigger severely limited the value of the gun expert's testimony.⁸³ Therefore, the *per se* rule limited the contents of defendant's testimony in an extremely relevant area and violated her right to testify.⁸⁴

The *Rock* case is not really a hypnosis case in the sense that it lays down guidelines to be used before the evidence is admissible. Hypnosis was but the vehicle the Court used to firmly establish a defendant's right to testify on his behalf.⁸⁵ Before this case "[w]hether a defendant . . . [had] a constitutional right to testify [had] never been resolved authoritatively by the Supreme Court. But while this right [was] not specifically expressed in the Constitution, it has been frequently referred to in the Supreme Court's more recent decisions."⁸⁶ Given the *Rock* decision, however, the right to testify has been authoritatively decided. The potential effects of the decision go beyond the hypnosis issue.

A second area of impact of the *Rock* case is the requirement that an evidentiary rule, before applied against a defendant, must not be arbitrary. As opposed to *Chambers* and *Washington*, *Rock* applied the "arbitrary rule" to the defendant's testimony. So not only did *Rock* establish the right to testify, but it as well set forth the means by which to attack evidentiary rules which limit that right.

In other areas of evidence, the question of the applicability of *Rock* is yet to be answered. For instance, "rape shield statutes" limit evidence of an alleged rape victim's prior sexual conduct.⁸⁷ Do such statutes, which in effect limit a defendant's testimony, now violate his right to testify? Can they now be attacked as arbitrary? Do the "interests" of such statutes override a defendant's rights under the fourteenth, sixth, and fifth amendments? These questions will only be answered in time.

Insofar as *Rock* addressed the question of a defendant's right to testify in a hypnosis situation, what about the use of hypnosis by the prosecution? The next section will look at the flip side of *Rock* in the Eighth Circuit. As will be shown, in the criminal law area there is more to hypnosis than adopting a simple rule of admission or exclusion.

82. 107 S. Ct. at 2712.

83. *Id.*

84. *Id.* at 2714-15. Although the Court did not explicitly comment, one wonders about the weight placed by the Court on the fact that defendant's testimony was continuously interrupted by the objections of the prosecutor.

85. See *supra* notes 63-68 and accompanying text.

86. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 23.3(g) (1985).

87. See Note, *The Missouri Supreme Court Confronts the Sixth Amendment in Its Interpretation of the Rape Victim Shield Statute*, 52 MO. L. REV. 925 (1987).

III. THE LITTLE CASE⁸⁸

The case of Leatrice Little is an excellent example of what can happen when police hypnotize prosecution witnesses and do not follow safeguards. Not only is a breeding ground for appeals created, but those appeals flourish.

M.B.G. was raped in her apartment on August 13, 1980.⁸⁹ Although she only saw the side of her assailant's face for approximately two to sixty seconds, she agreed to undergo hypnosis two days after the attack.⁹⁰ No new information arose immediately after hypnosis. On October 16th and November 5th and 10th, police showed M.B.G. groups of photographs, none of which contained defendant.⁹¹ She did pick out a man from the October 16th group whom she said looked like, but was not, the attacker.⁹² Sometime in December M.B.G. again underwent hypnosis because she was having sleep problems. While hypnotized she did not discuss the case.⁹³ Finally, on December 23, 1980, she picked Little's photograph out of another series.⁹⁴ A few days later, the police showed M.B.G. two pictures of the defendant, and on January 26, 1981 she picked him out of a lineup.⁹⁵ Little was arrested, found guilty of rape and sentenced to 25 years in prison.⁹⁶

This case is full of problems with respect to hypnosis:⁹⁷

(1) The hypnotist was not a neutral professional, but rather a police officer with only four days of training in hypnosis.⁹⁸

(2) The police made no record of the second hypnotic session. They did tape record the first session, but, according to the then-police procedures, they erased the tape fifteen days later. They also failed to make records of any other contacts.⁹⁹

88. *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 2857 (1988), *vacating and modifying en banc*, 819 F.2d 1425 (8th Cir. 1987), *rev'g sub nom.* *State v. Little*, 674 S.W.2d 541 (Mo. 1984) (en banc), *cert. denied*, 470 U.S. 1029 (1985). In subsequent references, *Little v. Armontrout*, 819 F.2d 1425 (8th Cir. 1987) will be known as *Little I*. Its subsequent rehearing and new decision shall be *Little II*.

89. 835 F.2d at 1241.

90. *Id.*

91. *Id.* at 1242.

92. *Id.*

93. 819 F.2d at 1427. The individual who conducted both hypnotic sessions was a policeman, Officer B. J. Lincecum. *Id.* The court noted that "Officer Lincecum stated that during the training course [in hypnosis] he attended he was taught not to use hypnosis for therapeutic purposes." *Id.* at 1430 n.2.

94. 835 F.2d at 1242.

95. *Id.*

96. *Id.*

97. Compare the facts of this case to the guidelines proposed by Dr. Orne, *supra* note 17, or adopted by *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981), *supra* note 28 and accompanying text.

98. 819 F.2d at 1434.

(3) "[O]ther persons besides Officer Lincecum and M.B.G. were present during the first session without any explanation as to why their presence was necessary."¹⁰⁰

(4) The officer kept no record of M.B.G.'s prehypnotic memory.¹⁰¹

(5) The technique used was the "T.V. screen" technique whereby the patient sits and imagines she sees the event as a third person.¹⁰²

(6) The hypnotist kept no records of the information he received before or during hypnosis, if any.¹⁰³

(7) After the session was over, the hypnotist told M.B.G. her memory would improve.¹⁰⁴

In addition, there was no evidence corroborating M.B.G.'s identification.¹⁰⁵ The only evidence showing that the police made no improper suggestions to M.B.G. was the testimony of the officer, of M.B.G., and of her sister denying the existence of any suggestions.¹⁰⁶

Evidence which tended to exonerate Little included: 1) His own testimony and that of friends placing him 78 miles away in another town at the time of the rape;¹⁰⁷ 2) "Fingerprints found on the window ledge where the rapist exited the apartment [did] not match Little's;"¹⁰⁸ and 3) M.B.G. "initially described her assailant as a young, broad-shouldered black, slender body, 145 pounds, 5 feet 7 inches tall, and between the ages of 16-20. Little was 25 years old, 175 pounds and 5 feet 11 inches at the time of the attack."¹⁰⁹ She used her own height of 5 feet 8 inches to gauge the height of the attacker.¹¹⁰ Therefore, given the lack of physical evidence, the prosecution's key testimony was M.B.G.'s in-court identification.

100. *Id.* at 1434.

101. *Id.*

102. *Id.* at 1428.

103. *Id.* at 1434.

104. 835 F.2d at 1242.

105. 819 F.2d at 1434.

106. 674 S.W.2d at 542. There seems to be no evidence the police suggested Little to be the rapist. The problems apparently aggravated by this case were confabulation, pseudomemory and memory hardening. 819 F.2d at 1429-30. In fact, the *Little I* court, whose decision was vacated, believed "source amnesia" could have been a problem in this case. *Id.* at 1430 n.12. Source amnesia is when an individual believes he is recalling a fact, yet that fact does not really arise out of his memory. *Id.* at 1430 (quoting Diamond, *Inherent Problems in the Use of Pretrial Hypnosis in a Prospective Witness*, 68 CALIF. L. REV. 313, 336 (1980)). The court suspected "source amnesia" because on some unknown date in December M.B.G. was hypnotized and then picked defendant on December 23, 1980. *Id.* at 1230 n.12. Not knowing the date of this session nor having a record of it and despite its alleged therapeutic purpose, the fact that Little had become a suspect "sometime in November or December" may support their suspicion. *Id.* at 1427.

107. 835 F.2d at 1242.

108. 819 F.2d at 1435.

109. *Id.* at 1433.

110. *Id.*

The Missouri Supreme Court affirmed Little's conviction.¹¹¹ The court held that the police's destruction of the tapes was not intended to conceal and was not prejudicial.¹¹² The defendant presented no evidence that the hypnotic sessions were suggestive nor that the hypnotist's qualifications led to any suggestion.¹¹³ Finally, the defendant failed to show that the appointment of his own expert in hypnosis would have been helpful.¹¹⁴ Little next sought habeas corpus relief from the United States District Court for the Eastern District of Missouri.

The United States Court of Appeals, Eighth Circuit, reversed the district court's denial of the petition and granted Little a writ of habeas corpus, ordering that he either be retried or released.¹¹⁵ The court held "that Little's right to due process of law guaranteed by the fourteenth amendment was violated by admitting the victim's posthypnotic identification testimony into evidence at trial."¹¹⁶ Note that, although this case has been vacated, it is still an exercise in how the court might, in the future, approach a prosecution witness' faulty hypnotic session. While the *Rock* court used due process to aid a defendant in presenting evidence of hypnosis, the *Little* court attempted to protect him from its potentially adverse effects.

The *Little I* court decided that the overall effect of the hypnosis, plus the failure to follow any safeguards, corrupted M.B.G.'s identification "both in the lineups and at trial" to the point of being "constitutionally unreliable."¹¹⁷ The court pointed to the safeguards of *Hurd* and its own decision in *Sprynczynatyk v. General Motors Corp.*¹¹⁸ as providing for the use of procedural safeguards. The failure to ensure the reliability of hypnotically induced testimony reduces its value to the point where its use constitutes constitutional error.¹¹⁹

111. 674 S.W.2d at 545.

112. *Id.* at 543.

113. *Id.* at 543-44.

114. *Id.* at 544. The court commented "There is a state university in Cape Girardeau with a faculty of psychology and library facilities, and we are confident that a resourceful lawyer would not be helpless in obtaining expert information sufficient for a preliminary inquiry, at little or no expense." *Id.*

115. 819 F.2d at 1435.

116. *Id.* at 1426.

117. *Id.* at 1433; see *supra* notes 97-105 and accompanying text.

118. 771 F.2d 1112 (8th Cir. 1985), *cert. denied*, 475 U.S. 1029 (1986); see *supra* notes 28, 32-34 and accompanying text.

119. 819 F.2d at 1433-35. The court stated:

The suggestive identification procedure in this case is, of course, the use of hypnosis in an attempt to improve M.B.G.'s recall. As noted, this circuit has not determined whether, under the due process clause of the fourteenth amendment, hypnotically-enhanced testimony can be used by the prosecution in a criminal case or, if allowed, what procedural safeguards must be complied with. And, we do not have to answer those questions to decide this case because the hypnosis of M.B.G. did not include *any* of the procedural safeguards required in jurisdictions which allow hypnotically-enhanced testimony.

Had this case remained law, the constitutionality of a *per se* rule of admission of the prosecution's hypnotic evidence would have been questionable. States with guarded admission rules would probably be subject to case-by-case reviews while those with *per se* rules of exclusion would be unaffected. In any event, *Little I's* rationale was rejected upon rehearing and a different constitutional violation supported the issuance of a writ of habeas corpus.¹²⁰

On December 23, 1987, the Eighth Circuit Court of Appeals, en banc, handed down a new opinion. Defendant Little had raised four points: 1) M.B.G's identification of him was unreliable because of the hypnosis and violated due process (the same argument on which he had won four months earlier); 2) His sixth amendment right to confrontation was violated because of the use of hypnosis; 3) the destruction of the hypnotic session's tape violated due process; and 4) his right to due process was violated because the trial court refused to appoint a hypnosis expert for him.¹²¹ The court held that the panel's requirements that the hypnotic session contain safeguards and the identification testimony be corroborated were not necessary to support an order for a new trial.¹²² Instead, it opted for defendant's argument number four, the state's failure to appoint an expert.¹²³

The court based its decision on the Supreme Court cases of *Ake v. Oklahoma*¹²⁴ and *Caldwell v. Mississippi*.¹²⁵ *Ake* was a capital murder case in which the Court ordered that a psychiatric expert be appointed for the defendant because his sanity was a major issue.¹²⁶ In *Caldwell*, the Court did not rule if a "nonpsychiatric expert" was required, in essence because the defendant failed to show his request was reasonable.¹²⁷ The *Little II* court stated: "[t]he question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have given."¹²⁸ A defendant must show a "reasonable probability that an expert would aid in his defense" and

Thus, even if we were to hold that such testimony was admissible, we would not allow it in this case because of the lack of procedural safeguards.

Id. at 1433-34 (citation and footnote omitted).

120. 835 F.2d at 1241.

121. *Id.* at 1242-43.

122. *Id.* at 1243.

123. *Id.* The court stated:

In our view, the denial of a state-provided expert on hypnosis to assist this indigent defendant rendered the trial fundamentally unfair and requires that the conviction be set aside. We deem it unnecessary to address the broader and more far-ranging issues about hypnotically enhanced testimony addressed by the panel opinion.

Id. (footnote omitted).

124. 470 U.S. 68 (1985).

125. 472 U.S. 320 (1985).

126. 470 U.S. at 86-87.

127. 472 U.S. at 323-24 n.1.

128. *Little II*, 835 F.2d at 1243.

an unfair trial would occur without one.¹²⁹

The court believed an expert would have significantly aided Little in his defense given the nature of hypnosis.¹³⁰ It recognized that whether or not M.B.G.'s memories are legitimate, she honestly believed they were. An expert could cast doubt on those beliefs. An additional fact that probably helped the court opt for more limited grounds for reversing Little's conviction was the fact that Missouri no longer allowed hypnotically enhanced testimony.

In *Alsbach v. Bader*¹³¹ the Missouri Supreme Court barred the use of hypnotically enhanced testimony, limiting testimony to those memories known before hypnosis.¹³² Given this new rule, the *Little II* court believed that with the aid of an expert Little might have been able to convince the court that M.B.G.'s testimony was the result of hypnosis, and thereby win exclusion of the evidence.¹³³ The court decided to use Missouri's own evidence law against the state rather than invalidate the entire hypnotic process involved. Of course, if the identification of Little is to be excluded, the trial court must not find the hypnosis to be inconsequential. To find otherwise places defendant back on trial armed with his newly found expert.

The *Little I* court had earlier stated that whether the state's use of hypnotically aided testimony against a criminal defendant was permissible had yet to be decided in the circuit.¹³⁴ *Little II* failed to provide an answer. The court did make clear, however, that the state's use of hypnosis must be in accord with already established constitutional principles. At a minimum, the state must provide experts to indigents. One striking fact about *Little II* is its failure to cite both the *Hurd* and *Sprynczynatyk* cases. The court obviously was not as eager to elevate those cases' guidelines to the level of a constitutional mandate.

IV. CONCLUSION

Prosecutors and defense counsel must both recognize the risks of hypnosis. For defense counsel, the *Rock* case provides an opportunity to present evidence in those jurisdictions which previously banned it; namely Arkansas, Iowa, Minnesota, Missouri, and Nebraska.¹³⁵ If a state allows hypnosis, like

129. *Id.* at 1244.

130. It's not surprising the defendant failed to impeach the state's expert at both the suppression hearing and at trial. Although the Missouri Supreme Court seemed to believe that defense experts fall off the trees at the local university, they obviously don't fall off for free. Defendant's counsel was reduced to trying to impeach the prosecution's expert by way of a psychology textbook and any information he gleaned from an interview with a local professor. *Id.*

131. 700 S.W.2d 823 (Mo. 1985).

132. *Id.* at 824.

133. 835 F.2d at 1245.

134. *See supra* note 118.

135. *See supra* note 118.

North Dakota¹³⁶ and South Dakota,¹³⁷ then there is a great opportunity to attack the prosecution's evidence if the procedures are questionable under the rationales of the *Little* cases.

Prosecutors also must play both sides of the street also. They must attack the defendant's testimony on the grounds it is unnecessary, uncorroborated, or suggestive (the same thing the defense will say about the prosecutor's evidence). Prosecuting attorneys must learn to restrain the local police force or risk losing valuable hypnotically enhanced testimony. Even if hypnotically enhanced testimony is allowed as a matter of law, hypnosis is a procedure that should only be used rarely. The days of "Officer Friendly" and his "hypnosis in ten easy lessons" are in jeopardy, as well they should be.

Hypnosis can be a powerful tool. It is a tool, like most, which can be abused. At first glance, it may appear that *per se* rules of exclusion, combined with the *Rock* and *Little* cases, tend to skew hypnotic evidence in favor of the defendant. But regardless of the truth of such an appearance, all these rules really do is bring the law up to date with the current state of science (or pseudo-science). The idea of reliable evidence, the right to testify, to an expert, to due process, and to protection from arbitrary rules of evidence, has not been created just for hypnosis. They are rules which existed, or at least their foundations existed, a long time ago. Law, as an ever-evolving creature will eventually come to grips with hypnosis. What the cases in this Note represent are but a short view of the process.

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136. See *supra* note 24 and accompanying text.

137. See *supra* note 32 and accompanying text.

