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BREAKING FROM THE HURD: MISSOURI REJECTS EIGHTH CIRCUIT—AN ANALYSIS OF THE ADMISSIBILITY OF POST-HYPNOTIC TESTIMONY

Sprynczynatyk v. General Motors Inc.[1]
Alsbach v. Bader[2]

In the past two years courts handed down decisions directly affecting Missouri practice concerning whether, or when, it is proper to use hypnosis as an aid to refreshing a witness' memory in a civil action. The first of these decisions, *Sprynczynatyk v. General Motors*,[3] was decided by a three judge panel of the Eighth Circuit and represents their first attempt to deal with this issue.[4] The rule suggested in *Spryncynatyk* provides for the conditional admissibility of hypnotically refreshed testimony in those cases in which the hypnosis procedure used can be shown to be likely to produce reasonably accurate "memories."

The second of these decisions, *Alsbach v. Bader*,[5] was handed down by the Missouri Supreme Court and is a complete rejection of prior Missouri case law.[6] In place of the old rule, which held that the hypnosis of a witness created a question of credibility for the jury to consider, the court in *Alsbach* adopted a rule of per se exclusion for hypnotically influenced testimony, to the extent that it is the product of the hypnotic session. Neither *Alsbach* nor *Sprynczynatyk* forbids the previously hypnotized witness from testifying concerning matters remembered and related before the hypnotic session.[7]

The Missouri decision rejects the conditional admissibility approach of the Eighth Circuit and in doing so creates conflicting rules on the admissibility of hypnotically influenced testimony. Both courts, in keeping with the analytical approach used in other jurisdictions, characterize the problem as one

1. 771 F.2d 1112 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1263 (1986).
2. 700 S.W.2d 823 (Mo. 1985) (en banc).
3. 771 F.2d 1112 (8th Cir. 1985), *cert. denied*, 106 S. Ct. (1986).
4. 771 F.2d at 1119, 1123; *see* United States v. Harvey, 756 F.2d 636, 644-45 (8th Cir.), *cert. denied*, 106 S. Ct. 97 (1985) (avoided until later date the question of admissibility of hypnotically refreshed memory).
5. 700 S.W.2d 823 (Mo. 1985) (en banc).
6. *See, e.g.*, State v. Barteau, 687 S.W.2d 573 (Mo. Ct. App. 1985); State v. Greer, 609 S.W.2d 423 (Mo. Ct. App. 1980).
7. *Sprynczynatyk*, 771 F.2d at 1123; *Alsbach*, 700 S.W.2d at 824.

of the admissibility of evidence and not the competency of the witness. As such, the federal courts are not bound by the state evidentiary rules[8] and since the Eighth Circuit rule is completely devoid of Constitutional considerations, the Missouri courts are not affected by the federal rule on the question.[9]

8. It should be noted that this problem was not treated as a question of witness competency by either court. *Alsbach*, 700 S.W.2d at 826 (summarily dismissing appellee's argument that the situation was controlled by Mo. REV. STAT. § 491.060 (1978), which deals with competency requirements); *Sprynczynatyk*, 771 F.2d at 1122 (while acknowledging that competency questions are governed by state law, declaring, without further explanation, that the present case dealt with the admissibility of evidence and was thus a question to be decided under federal law).

The Federal Rules of Evidence, by virtue of having been enacted by Congress, Pub. L. No. 93-595, 88 Stat. 1959 (1975), are applicable in the federal courts without regard to state rules of evidence unless the use of the state rule is mandated by the applicable federal rule. *See* Rules of Decision Act, 28 U.S.C. § 1652 (1976). Under the doctrine of Hanna v. Plummer, 380 U.S. 460 (1965), the only argument for non-implementation of the Federal Rules of Evidence is that Congress exceeded its power to regulate the federal courts in enacting the rules. *See In re* Air Crash Disaster Near Chicago, Illinois, 701 F.2d 1193 (7th Cir.), *cert. denied*, 464 U.S. 866 (1983). Since the rules were promulgated by the Supreme Court and submitted to Congress for enactment, this argument would appear exceedingly futile.

Had the *Sprynczynatyk* court chosen to decide the question as one of competency of the previously hypnotized witness, FED. R. EVID. 601 would apply, and where there was state law on the issue, it would be used to determine how the testimony was to be treated: "Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, in which state law supplies the rule of decision, the competency of the witness shall be determined in accordance with state law." *Id.*

However only one court has used incompetency to exclude hypnotically enhanced testimony. State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981). This rule was later modified in State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982), to state that the testimony enhanced by the hypnotic session would be inadmissible but that the witness was not incompetent as to those matters remembered and communicated before hypnosis.

9. Although some state courts have considered the question of whether hypnotically influenced testimony violates a criminal defendant's due process rights and right to confront the witness, see *infra* note 46, at the federal level the problems encountered have been held not to rise to the level of constitutional infirmity. *See* Clay v. Vose, 599 F. Supp. 1505 (D. Mass. 1984), *aff'd*, 771 F.2d 1 (1st Cir. 1985). However, under specific facts, courts have found constitutional violations entailing the use of hypnosis. *See* Leyra v. Denno, 347 U.S. 556, 561 (1954) (police department's use of psychiatrist with considerable knowledge of hypnosis to interrogate prisoner held to violate due process where "an already physically and emotionally exhausted suspect's ability to resist interrogation was broken to almost trance-like submission"); United States v. Charles, 561 F. Supp. 694, 697-98 (S.D. Tex. 1983) (lack of record of hypnotic session of key prosecution witness, coupled with the death, before trial, of the hypnotist held to preclude effective cross-examination of witness and required exclusion of the hypnotically influenced testimony); Emmett v. Ricketts, 397 F. Supp. 1025 (N.D. Ga. 1975) (attempt to bolster credibility of key prosecution witness through undisclosed and unprincipled use of hypnosis among Constitutional violations held to require habeas corpus relief).

The purpose of this Note is to present some of the scientific and legal theories relevant to the issue of admissibility of hypnotically refreshed testimony in an effort to aid understanding of the decisions and the problems encountered under each rule.

On July 16, 1980, fourteen year old Rodney Sprynczynatyk was driving his parents' 1980 Chevrolet Citation with his mother Vivian Sprynczynatyk riding in the passenger seat. While negotiating a steep downhill grade on a gravel road Rodney lost control of the car. The Citation left the road and overturned. Rodney escaped with minor injuries; however, as a result of injuries sustained in the wreck, his mother was rendered a quadraplegic.[10]

Donald and Vivian Sprynczynatyk filed this suit in the United States District Court for the District of North Dakota alleging negligence and strict liability against General Motors (GM) and seeking actual damages for Vivian's injuries and for loss of her consortium and services. Rodney was not a party to the suit. Specifically the Sprynczynatyks claimed that the accident had been caused by a defect in design of the rear brakes of the Citation.[11] This defect had been the cause of the recent "X-car" litigation against GM.[12] The X-car design configuration, which is the basis for the Citation, is alleged to have been designed with an unreasonably dangerous rear brake system which causes the brakes to lock up when forcefully applied.[13] This can result in the car being thrown into an uncontrollable slide.

Before trial young Rodney gave two depositions. In each of these he testified that he had not, to the best of his recollection, applied the brakes before the car went out of control.[14] Before trial, at his parents' attorney's request, Rodney was hypnotized by a psychologist, Dr. Gordon, and asked to relive the events of July 16, 1980. At this time he said that he had applied the brakes before the car went out of control.[15] This session was videotaped.[16]

Before trial GM made a motion in limine to prevent the hypnotically induced testimony and the videotapes of the session from being introduced into evidence. The court denied the motion, but only after the issue had been argued and briefed by the parties.[17] At trial the plaintiffs first introduced the testimony of Dr. Gordon and in conjuction with the testimony and over GM's objection, showed the jury the videotape of the hypnotic session. GM requested an instruction cautioning the jury not to accept the videotape for the truth of the matters asserted therein. The court refused the requested

10. *Sprynczynatyk*, 771 F.2d at 1114.
11. *Id.*
12. For more background information concerning the X-car litigation, see Thronton, *A Case History of the X-Car*, TRIAL, July 1985, at 22.
13. *Id.* at 23.
14. *Sprynczynatyk*, 771 F.2d at 1115.
15. *Id.*
16. *Id.*
17. *Id.* at 1116.

instruction, but did caution the jury that the tapes were being shown as evidence of the credibility of the witness.[18]

Only after this evidence had been presented did Rodney Sprynczynatyk take the witness stand. His testimony was substantially the same as his answers while under hypnosis. GM later presented evidence by Dr. Martin Orne, a leading authority on the subject of hypnosis, in an effort to impeach Rodney's credibility.[19]

The jury returned a verdict of 4.5 million dollars on Vivian Sprynczyntyk's claims and $525,000 on her husband Donald's, from which G.M. appealed.[20]

In reversing the jury verdict, the Sprynczynatyk court considered whether the presentation of the videotapes of the hypnotic session during the plaintiffs' case in chief was proper and whether the subsequent limiting instruction was sufficient. The admission of the video tape during the plaintiff's case in chief was held to be reversible error in that this practice constituted the rehabilitation of an unimpeached witness. The court pointed out that the proper procedure in such a case is to present the main witness and introduce the testimony of the hypnotist only if the opposing side chooses to impeach the witness on the basis of hypnosis.[21] A videotape of the session is admissible only if the opposing party attacks the procedures used or questions asked during the hypnotic session.[22] The court also found prejudicial error in the refusal of the offered instruction. Although both the offered instruction and the given instruction were technically correct, the refusal in the hearing of the jury of GM's instruction, which clearly pointed out that the evidence was not to be used as the truth of the matters asserted in the videotape, created the prejudicial impression that the testimony could in fact be used for the truth of the matters asserted on the videotape.[23] The case was re-

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18. The instruction given by the trial 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.

Sprynczynatyk, 771 F.2d at 1116.

19. *Id.*

20. *Id.*

21. *Id.* at 1118; *see also* United States v. Awkard, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979).

22. *Sprynczynatyk*, 771 F.2d at 1124.

23. *Id.* at 1117-18. The circuit court held that although the instruction did give a technically correct use of the videotape, i.e. for the assessment of Rodney's credibility, the purpose for which the tape was admitted was for the probative truth of the assertions therein. The court noted that it did not require instructions on the

manded for retrial consistent with the opinion.[24] The court then proceeded to give instructions for dealing with the testimony of Rodney Sprynczynatyk on retrial.[25]

In the early morning hours of June 2, 1979, an automobile driven by Carl J. Alsbach collided with a pickup truck driven by Margaret Sue Bader on a two-lane highway in Jefferson County, Missouri.[26] The Alsbach auto, which was eastbound, came to rest at a forty-five degree angle with its front end protruding into the westbound lane.[27] The Bader vehicle came to rest on an embankment to the north of the westbound lane. There was no other physical evidence that could shed light on the cause of the accident. Alsbach had no memory of the accident other than remembering a single headlight approaching his vehicle in the westbound lane.[28]

On June 26, 1979, Alsbach filed suit against Bader and her employer, alleging that the Bader truck was travelling at an excessive speed and was on the wrong side of the road. This allegation was denied by Bader who made identical allegations against Alsbach. State Farm Mutual Automobile Insurance intervened as Alsbach's uninsured motorist carrier.[29]

On January 24, 1981, Alsbach was hypnotized by a psychiatrist, Dr. Ulett, in an attempt to improve his recollection of the events of June 2, 1979.[30] During the session Mr. Alsbach recalled having seen two headlights approaching his vehicle rather than the single light originally reported. Im-

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prohibited use of evidence in every case where such an instruction is mandated under FED. R. EVID. 105. However, under these facts refusal to instruct on the prohibited use was reversible error. *Id.*

24. *Sprynczynatyk*, 771 F.2d at 1118.

25. Preliminary to the decision on the merits, the court first ruled that the denial of G.M.'s motion *in limine* satisfied the requirement for an objection found in FED. R. EVID. 103 (a)(1). The opinion notes that the court's pretrial ruling was made after full argument and briefing on the subject and was definitive for the purpose of the suit. The court also relied on FED. R. CIV. P. 46, which requires only an effective objection, not a formal exception to a ruling. This analysis is contrary to previous Eighth Circuit decisions, which have required an in court objection to preserve the point for appeal. *See* Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322 (8th Cir. 1985), and cases cited therein. The *Sprynczynatyk* analysis follows the reasoning of American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321 (3d Cir. 1985), in that it differentiates between the motion *in limine* decided upon hypothetical grounds and those situations, as was the case here, where the motion is denied in light of undisputed facts and is definitive. In such a case the requirement for an in court objection becomes a technicality in direct contravention of the purpose of the Federal Rules of Civil Procedure. FED. R. CIV. P. 46.

26. The truck Bader was driving at the time of the accident was owned by her employer, Gretson Corbitt. Corbitt was named as a co-defendant in the suit. *Alsbach*, 700 S.W.2d at 823.

27. *Id.*

28. *Id.*

29. *Id.* at 824.

30. *Id.*

mediately after the session Alsbach's recall improved to the point that he was able to remember that Bader's vehicle had crossed the center line and struck him in the eastbound lane.[31]

State Farm filed a motion in limine to prevent Alsbach from testifying concerning the hypnotic procedure or the fruits of the session.[32] This motion was sustained, as well as an objection on the same issue entered at trial. Subsequently the trial court entered judgment for the defendants on Alsbach's failure to make a submissible case.[33]

Alsbach appealed the trial court's ruling to the Eastern District of the Missouri Court of Appeals.[34] The appellate court held that the trial court was in error in refusing to further examine the circumstances of Alsbach's hypnotic experience and rule on the reliability of the procedures used by Dr. Ulet.[35] On application of the defendants the supreme court transferred [36] the case and affirmed the trial court's ruling that the testimony was inadmissible as a result of having been procured through the use of hypnosis.[37] The decision in *Alsbach* represents a reversal of previous criminal appellate holdings which ruled that hypnosis presents a question of credibilty and not admissability of testimony.[38]

To understand the courts' analysis, it is necessary to consider some of the problems inherent in the use of hypnosis as a memory restoration device. The question of whether hypnosis has a place in the legal system has been discussed since the mid- nineteenth century.[39] The inherent unreliability of testimony that is the product of hypnotic enhancement has been well documented in judicial opinions.[40] The dangers of hypnosis as they affect testimentary evidence generally fall into five categories.

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31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 823.
35. *Id.* at 823-24.
36. Pursuant to Mo. R. Civ. P. 83.03, the court may order the transfer of any case upon the application of a party "because of the general interest or importance of a question involved with the case, or for the purpose of re-examining existing law." *Id.*
37. *Alsbach*, 700 S.W.2d at 823.
38. *See supra* note 6. Although the *Alsbach* opinion carefully frames the question presented as one involving civil cases, the court concludes that hypnotically influenced testimony should "not be admitted in the courts of Missouri." 700 S.W.2d at 824.
39. *See* Laurence & Perry, *Forensic Hypnosis in the Late Nineteenth Century*, 31 Int'l J. of Clincial and Experimental Hypnosis 266 (1983). The first published case in the United States to deal with the question was People v. Ebanks, 117 Cal. 652, 49 P. 1049 (1897) (affirmed trial court's refusal of testimony offered by defendant that he had proclaimed his innocence while under hypnosis). "The law of the United States does not recognize hypnotism." *Id.* at 665, 49 P. at 1053.
40. *See infra* note 61.

Suggestibility: While in a hypnotic state the subject's critical judgment is suspended and the subject experiences an abnormal desire to comply with the interrogator's perceived requests. Suggestions may or may not be intentional on the part of the interrogator and may even be nonverbal. The subject may also be cued by prehypnotic suggestions from other sources and his or her perception of the purpose for the hypnotic session.[41]

Confabulation or Fanstasy: While in a hypnotic state the subject may divulge information which is completely the product of imagination or subconcious beliefs. This can occur either as a result of suggestion or completely spontaneously on the part of the subject.[42]

Inabililty to Distinguish: In both the hypnotic and posthypnotic state neither the subject nor the hypnotist can positively separate memories which are genuine from those which are the product of suggestion or confabulation. Nor can the subject separate memories present before hypnosis from those exposed or created while in a hypnotic state.[43]

Increased Confidence: Often after the subject has undergone hypnosis, the subject will have a heightened degree of confidence in his recollections merely as a result of knowing the memory was exposed while in a hypnotic state.[44] This confidence is buttressed by the tendency to confabulate a logical story or rationale around known "facts" so as to fill in gaps or reconcile inconsistencies.[45] This certainty is completely sincere on the part of the subject and thus as a witness she is both "convinced and convincing."[46]

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41. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313 (1980); Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. OF CLINICAL AND EXPERIMENTAL HYPNOSIS 311 (1979).

42. The most striking documentation of this phenomenon was done by Rubenstein and Newman, *The Living Out of "Future" Experiences Under Hypnosis*, 119 SCIENCE 472 (1954). Subjects were first regressed (while in a hypnotic state) to a point in their childhood. When questioned about their surroundings they produced a very descriptive narration from a child's point of view. The subjects were then progressed to an age ten years in the future from the date of the hypnotic session. The responses to questions about their surroundings and activities were again very detailed and lucid. *Id.* at 472.

43. Diamond, *supra* note 41, at 316 (citing E. HILGARD, THE EXPERIENCE OF HYPNOSIS 6-10 (1968)). This problem has been expressed as one of the "contamination" of the prehypnotic memory with posthypnotic fantasy or psuedomemory. Cases have been documented in which the subject become adamantly convinced of the veracity of an intentionally suggested, but entirely ficticious, event. *Id.*

44. Diamond, *supra* note 41, at 339-40. An example of this occurence can be found in the testimony reported in State v. Long, 32 Wash. App. 732, 737-38, 649 P.2d 845, 847 (1982) (Q: Are you sure Greg had nothing in his hand? A: Yes I am. Q: Why are you sure? A: I was hypnotized.).

45. *See* Diamond, *supra* note 41, at 342; Orne, *supra* note 41, at 316.

46. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982), states that because hypnosis affects a criminal defendant's Sixth Amendment rights, the problem of confidence may require the exclusion of the testimony even if hypnosis were proven to be a reliable method of extracting truthful memories. *Id.* at 187-89, 644 P.2d at 1273-75. *But cf. supra* note 9.

Popular Preconceptions: Since its discovery hypnosis has been the subject of much misinformation, some of it brought about by its practitioners.[47] One of the more common modern misconceptions is that the brain operates in a manner analagous to a video recorder and that memories may be faithfully reproduced when the hypnotist hits the playback button.[48] Not suprisingly, this more sensational "understanding" of hypnosis is more likely to be known to the jury through the media than the unspectacular, but scientific, bewilderment at the functioning of the subconcious mind. Such a misunderstanding of the phenomenon of hypnosis by the jury, and possibly by the court, coupled with the confidence of the subject in his story, may make the impeachment of a witness before a jury on the basis of hypnosis exceedingly difficult. If the jury is to be informed that a witness has been hypnotized, it becomes necessary to refute this misconception lest the jury give the witness undeserved credibility.[49]

There are three commonly applied analyses concerning the admission of hypnotically altered testimony. The oldest of the three originated in *Harding v. State.*[50] The *Harding* rule, urged upon the court by the plaintiffs in both the subject cases, states that having been hypnotized does not affect the admissibility of the witness' testimony. The only issue created by the hypnosis is a question of credibility for the trier of fact to decide.[51] The *Harding* court reached this conclusion by categorizing the testimony as present recollection refreshed. Therefore, the means used to refresh the memory, the hypnotic session, is subject to scrutiny from the bench only as to whether it actually catalyzed a dormant memory, not whether it produced an accurate recall of facts.[52]

The only expert testimony before the *Harding* court was that of the psychologist who had hypnotized the witness.[53] The hypnotist testified that there was little or no chance that there had been any undue suggestion, and that in his professional opinion the witness' account of events was reliable.[54] The hypnotist also stated that barring undue suggestion, hypnosis generally produced an accurate recollection of events.[55]

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47. Laurence & Perry, *supra* note 39.

48. *See* H. ARONS, HYPNOSIS IN CRIMINAL INVESTIGATION (1967).

49. Diamond, *supra* note 41, at 330.

50. Harding v. State, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969). The issue arose concerning the admissibility of the posthypnotic testimony of the woman Harding was accused of having raped and shot.

51. *Id.* at 236, 246 A.2d at 306.

52. *See* People v. Smrekar, 68 Ill. App. 3d 379, 384, 385 N.E.2d 848, 853 (1979); 3 WIGMORE, EVIDENCE § 758 (1961).

53. *Harding*, 5 Md. App. at 234-35, 246 A.2d at 306. Mr. Oropolo was found to be qualified as an expert witness by virtue of his education as a psychologist and his four years experience as a clinical psychologist. *Id.* at 235-36, 246 A.2d at 306.

54. *Id.* at 243, 246 A.2d at 310.

55. *Id.* at 239-40, 246 A.2d at 308. As to the credibility of these assertions

The rule in *Harding v. State* has been quoted extensively by both state and federal courts [56] and remained the rule in Missouri until the decision in *Alsbach*.[57] As the use of hypnotically influenced testimony became more prevalent, many jurisdictions moved away from a rule of per se admissibility and seriously considered the problems created by hypnotism. In 1983, the *Harding* court reexamined the scientific data on hypnosis and reversed itself in favor of a rule of per se inadmissibility.[58] Both the *Sprynczynatyk* and *Alsbach* courts rejected the *Harding* approach as being too liberal in allowing the admission of potentially unreliable and prejudicial testimony.[59]

A second line of authority, which Chief Justice Higgins refers to as the "recent and persuasive trend,"[60] influenced the Supreme Court of Missouri also to adopt a rule of per se inadmissibility of testimony that has been influenced by the use of hypnosis.[61] This line of authority is premised upon the rule set forth in *Frye v. United States*.[62] The *Frye* rule (arising from the refusal to admit as evidence the results of a primitive form of the polygraph) states that in order for deductions made from scientific testing to be admissible as evidence, the test involved must be "sufficiently established to have gained general acceptance in the particular field in which it belongs."[63] Even

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see *supra* notes 41-43 and accompanying text. Theoretically, had the scientific testimony been more complete, the court might have found that under the present recollection refreshed rule the use of hypnosis was impermissibly suggestive, and thus exclude the testimony of the witness.

56. United States v. Awkard, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); United States v. Adams, 581 F.2d 193 (9th Cir.), *cert denied*, 439 U.S. 1006 (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. Narcisco, 446 F. Supp. 252 (E.D. Mich. 1977); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240 (1974); State v. Wren, 425 So. 2d 756 (La. 1983); State v. Brown, 337 N.W.2d 138 (N.D. 1983); State v. Glebock, 616 S.W.2d 897 (Tenn. Ct. App. 1981); Chapman v. State, 638 P.2d 1280 (Wyo. 1982).

57. *See supra* note 6.

58. Collins v. State, 52 Md. App. 186, 447 A.2d 1272, *aff'd*, 296 Md. 670, 464 A.2d 1028 (1983).

59. *Sprynczynatyk*, 771 F.2d at 1122; *Alsbach*, 700 S.W.2d at 825.

60. *Alsbach*, 700 S.W.2d at 824.

61. *See, e.g.*, State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied*, 459 U.S. 860 (1982); People v. Quintanar, 659 P.2d 710 (Colo. Ct. App. 1982); Bundy v. State, 471 So. 2d 9 (Fla. 1985), *cert. denied*, 107 S. Ct. 295 (1986); State v. Haislip, 237 Kan. 461, 701 P.2d 909 (1985); Collins v. State, 52 Md. App. 186, 447 A.2d 1272 (1982), *aff'd*, 296 Md. 670, 464 A.2d 1028 (1983); People v. Gonzales, 108 Mich. App. 145, 310 N.W.2d 306 (1981), *aff'd*, 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, 88 A.D.2d 17, 452 N.Y.S.2d 929 (1981); State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984); Commonwealth v. Nazarovitch, 496 Pa. 97. 436 A.2d 170 (1981).

62. 293 F. 1013 (D.C. Cir. 1923).

63. *Id.* at 1014.

though this rule is not universally accepted,[64] it is followed by many state and federal courts. Although hypnosis has been accepted as both a verifiable phenomenon and a therapeutic tool by the American Medical Association since 1958,[65] the usefulness of the technique in fact finding is, at best, considered unproven.[66] On this basis courts applying the *Frye* test have held that the use of hypnosis to refresh a witness' memory or elicit new information renders that witness' testimony inadmissible as to the events discussed under hypnosis.[67]

Alsbach had argued that the *Frye* rule was inapplicable to the question of hypnosis because the hypnosis of a witness is not a scientific test or experiment, the result of which is to be testified to by an expert witness, nor is it a method by which the veracity of the witness is determined, such as the polygraph.[68] The court responded that this argument rests on the language, but not the purpose of the *Frye* rule: "[t]he purpose of the rule is to prevent the jury from being misled by unproven and unsound scientific methods."[69] Other courts have stated that the *Frye* rule is based on the proposition that it is unreasonable to expect a jury of twelve laymen to resolve scientific controversies.[70]

In his dissent, Judge Blackmar suggests that although hypnosis may indeed alter the witness' memory of events, where the human memory is involved the adversarial system has long acknowleged unreliability and developed procedures to deal with it.[71] Thus, absent a showing of improper suggestion on the part of the hypnotist, the effect of hypnosis creates no greater danger of unreliability than normal recall and is therefore acceptable.[72]

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64. At the federal level there has been some debate as to whether the *Frye* rule has been superceded by FED. R. EVID. 403. This question has not been authoritatively resolved; however a suggested solution to the problem is that *Frye* fits within FED. R. EVID. 403 because the relative reliability of a scientific procedure can be compared to its probative value or possible unfair prejudice. *See infra* notes 89-92; *see, e.g.*, United States v. Valdez, 722 F.2d 1196, 1201 nn.18-20 (1984); United States v. Charles, 561 F. Supp. 694 (S.D. Tex. 1983). For an execellent discussion of the issue, see *Symposium on Science and the Federal Rules of Evidence*, 99 F.R.D. 187 (1983).

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

66. *See supra* notes 41-43 and accompanying text; *see also* Council on Scientific Affairs, American Medical Association, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 J.A.M.A. 1918 (1985).

67. *See supra* note 61.

68. *Alsbach*, 700 S.W.2d at 828.

69. *Id.* at 829.

70. Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983); State v. Martin, 101 Wash. 2d 713, 684 P.2d 651 (1984) (Brachtenbach, J., concurring).

71. *Alsbach*, 700 S.W.2d at 830 (Blackmar, J., dissenting).

72. State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981) (The court held that if the hypnotic procedure used in a particular case "was reasonably likely to result in

Judge Blackmar's argument fails to take into account the potential of hypnosis for aggravating the unreliability inherent in human memory. Although we must accept the imperfection of the human mind, this imperfection can hardly serve as justification for practices which aggravate an already difficult situation.[73] Moreover, while we have developed an adversarial system which has as a central purpose the winnowing out of unreliable or untruthful testimony, much of the problem of hypnosis is that it may directly defeat the devices the system uses to achieve this purpose.[74]

The *Sprynczynatyk* court, and the Missouri court of appeals which followed its decision, declined to adopt either of these approaches to the problem.[75] Chief among the *Sprynczynatyk* court's concerns was that by removing the matter from the district court's discretion, a per se inadmissible rule may deprive fact finders of accurate and valuable evidence, while a per se admissible rule would allow into evidence potentially unreliable testimony and in some cases create a risk of grave injustice.[76] The rule adopted by the Eighth Circuit panel attempts to tread the narrow ground between these two perceived evils by disallowing hypnotically altered testimony in those cases in which the circumstances surrounding the hypnotic procedures pose an unnecessary risk of creating unreliable memories in the witness.

The rule adopted in *Sprynczynatyk* closely follows the rule first proposed in *Hurd v. State*,[77] which prescibes a procedure for employing hypnosis which, according to its proponents, largely reduces the dangers inherent in the hypnosis of potential witnesses.[78] The question of admissibility is to be decided by the court at a pretrial hearing. The burden of proof, which requires a showing that the offered testimony is reasonably reliable, lies with the party

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recall comparable in accuracy to normal human memory the testimony would be admissable." *Id.* at 538, 432 A.2d at 95.).

73. *See supra* notes 41-49 and accompanying text.

74. Those aspects which particularly work to defeat the system are: the witness' inability to distinguish between truthful and false memories (thus rendering fear of perjury no deterrent against falsehood); the unconscious homogenization of the remembered elements of the event into a cohesive story; and the abnormal confidence of the witness in his story in the post-hypnotic state. *See supra* notes 41-49 and accompanying text.

75. *Sprynczynatyk*, 771 F.2d at 1123.

76. *Id.* at 1122.

77. 86 N.J. 525, 432 A.2d 86 (1981); 173 N.J. Super. 333, 414 A.2d 291 (Law Div. 1980), *aff'd*, 86 N.J. 525, 432 A.2d 86 (1981).

78. The leading proponent of the procedural safeguard approach is Dr. Martin T. Orne, Professor of Psychiatry at the University of Pennsylvania and Director of the Unit for Experimental Psychiatry and Senior Attending Psychiatrist at the Institute of Pennsylvania Hospital. Dr. Orne is editor in chief of the INTERNATIONAL JOURNAL OF CLINICAL AND EXPERIMENTAL HYPNOSIS. Dr. Orne has testified extensively in both the state and federal courts as an expert witness regarding the use of hypnosis in memory enhancement, including the *Sprynczynatyk* case and *Hurd*. *See, e.g.*, *Sprynczynatyk*, 771 F.2d at 1116; *Hurd*, 173 N.J. Super. at 343-49, 414 A.2d at 296-99.

seeking to introduce the testimony.[79] However, the standard of proof is not discussed in the *Sprynczynatyk* opinion, and the *Hurd* opinion apparently left the matter undecided in regard to civil cases.[80]

The first element of the *Hurd* rule is that the trial court should consider the type of memory sought to be revived and the reason why the witness has been deprived of that memory. According to the scientific data relied upon in formulating the rule, hypnosis works as a reliable memory restorer only in those cases in which memory loss is attributable to a pathological condition, such as traumatic neurosis, which causes a complete blockage of the subject's recollection of the event.[81]

Secondly, the court should examine the procedure employed in the hypnotic sessions. The *Sprynczynatyk Court* adopts five standards[82] which, if applied correctly, provide some protection against unreliable results directly attributable to the procedure employed.[83]

First, the hypnotic session should be conducted by an impartial licensed psychiatrist or psychologist who is trained in the use of hypnosis and is thus aware of its possible effects on memory so as to aid in the prevention of improper suggestions and confabulation. The party's selection of a psychiatrist or psychologist should first be approved by the court.[84]

Second, information given to the hypnotist by either party concerning the case should be noted, preferably in written form, so that the extent of

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79. *Sprynczynatyk*, 771 F.2d at 1123.

80. In *State v. Hurd*, the burden placed upon the proponent in a criminal case is that of clear and convincing evidence. 86 N.J. at 546, 432 A.2d at 97. However, the court pointed out that this degree of proof may not be required in civil trials, and that not all the standards need apply in civil cases. *Id.* at 547, 432 A.2d at 97. No later case in New Jersey has offered further explanation of these issues.

81. The difficulty in cases in which there is no traumatic memory loss is that the subject may simply not have been cognitive of the facts sought by the interrogator, and having no genuine recall of the event is much more susceptible to suggestion, see *supra* note 41, or confabulation, see *supra* note 42.

82. The *Hurd* opinion lists six different procedural considerations. 86 N.J. at 533, 432 A.2d at 89-90. The rule as set forth in *Sprynczynatyk* combines two of these considerations, the qualification and impartiality of the hypnotist. Thus, the procedural element of the rule contains only five enumerated elements yet it is not substantively different from the *Hurd* rule. *Sprynczynatyk*, 771 F.2d at 1123 n.14.

83. These rules have been propounded by Dr. Orne in several publications. *See, e.g.*, Orne, *supra* note 41; M.T. ORNE, D. DINGES, E.C. ORNE, & M.H. TONEY, HYPNOTICALLY REFRESHED TESTIMONY: ENHANCED MEMORY OR TAMPERING WITH EVIDENCE (January 1985) (Published by National Institute for Justice, U.S. Department of Justice). These rules have also been adopted in part by the Federal Bureau of Investigation. *See* United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984).

84. *Sprynczynatyk*, 771 F.2d at 1123 n.14. The hypnotist may be compensated by one of the parties in the same way as any other consultant or expert witness. *Hurd*, 86 N.J. at 545 n.5, 432 A.2d at 96 n.5.

information that the subject may have received from the hypnotist may be determined at a later date.[85]

Third, prior to hypnosis the hypnotist should obtain a detailed description of the facts from the subject, avoiding adding new elements to the subject's description.[86]

Fourth, the session should be recorded so a permanent record is available to examine for evidence of suggestive procedures. Videotape is the preferred method of recordation.[87]

Last, 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.[88]

In light of all relevant circumstances, the final decision on admissibility is left to the district judge under Federal Rules of Evidence, Rule 403.[89] The court shall weigh in its decision the degree to which the witness' story is corroborated by independent evidence.[90] Under the rule's balancing test, the question becomes whether the testimony sought to be introduced bears enough indicia of reliablility for its probative value to outweigh the possible unfair prejudice and the risk of unreliablity to the opposing party caused by the admission of the hypnotically altered testimony.[91] The court states, "We are satisfied that, if the session is properly conducted in appropriate cases, the hypnotically enhanced testimony does not run afoul of the *Frye* test to the extent that it is applicable."[92]

It should be noted that two of the most important elements of the *Hurd* rule, as adopted by the *Sprynczynatyk* court, are not among the enumerated procedural standards.[93] These two elements are that the subject must suffer

85. *Sprynczynatyk*, 771 F.2d at 1122 n.14.
86. *Id.*
87. *Id.*
88. *Id.*
89. FED. R. EVID. 403 states:
"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
90. *Sprynczynatyk*, 771 F.2d at 1123; *see infra* notes 104-07.
91. *Sprynczynatyk*, 771 F.2d at 1123; *see also supra* note 64.
92. *Sprynczynatyk*, 771 F.2d at 1122 n.14. The court did not explain this conclusory assertion, and it is questionable in light of the scientific research of other authors. *See, e.g.*, Diamond, *supra* note 41.
93. In discussing the *Hurd* approach, one should resist the tempation to refer only to the enumerated rules. The court in State v. Long, 32 Wash. App. 732, 649 P.2d 845 (1982), cites *Hurd* with apparent approval but lists only the procedural requirements as a "comprehensive set of standards for the admissibility of hypnotically induced recollections." *Id.* at 736, 649 P.2d at 847.

from some pathological memory loss [94] and that there be some corroborative evidence to support the assertions made as a result of the hypnotic influence.[95]

The requirement that the subject be suffering from pathological memory loss should be the starting point, and as this is a relatively rare condition, in most cases the ending point of the admissibility question.[96] Pathological memory loss differs from a normal failure to remember in that the subject has, due to some trauma, completely lost the ability to consciously communicate his or her memory of the event in question.[97] In such a case, once the hypnotist succeeds in breaking the barrier to conscious recall, the event can be related in narrative form or with only general questioning.[98] The role of hypnosis in such cases more closely resembles hypnosis' medically approved [99] therapeutic use than it does hypnosis' dubious qualities as a fact finding tool.

As shown in the *Sprynczynatyk* and *Alsbach* cases, the purpose of the hypnotic session is often not to retrieve a memory blocked by the subconcious but rather to elicit a more detailed description of an event readily communicated before hypnosis.[100] This use of hypnosis greatly aggravates the risks of a fallacious result for two reasons: the repeated questioning creates an atmosphere especially conducive to suggested or confabulated "memories,"[101] and the reason the subject does not recall a detail prior to hypnosis is often that the subject did not have the opportunity or the motivation at the time of the event to be cognitive of the detail sought.[102] In such a situation there is no memory to be refreshed, only a strong motivation to comply with the hypnotist's request to provide more details.[103]

The requirement of corroboration [104] also limits the use of hypnosis as well as offering some protection from the risks inherent in it.[105] Corroboration

94. *Sprynczynatyk*, 771 F.2d at 1123; *Hurd*, 86 N.J. at 544, 432 A.2d at 95.

95. *Sprynczynatyk*, 771 F.2d at 1123.

96. The language of the *Hurd* opinion makes this point clear: "Once it is determined that a case is of a kind likely to yield normal recall . . . then it is necessary to determine whether the procedures followed were reasonably reliable." *Hurd*, 86 N.J. at 544, 432 A.2d at 96.

97. *See* Orne, *supra* note 41, at 324.

98. *Id.* at 325. By allowing the subject to narrate without prodding the hypnotist greatly reduces the risk of creating false 'memories.' *See supra* note 41 and accompanying text.

99. *See supra* note 65.

100. *Sprynczynatyk*, 771 F.2d at 1115; *Alsbach*, 770 S.W.2d at 823.

101. E. LOFTUS, EYEWITNESS TESTIMONY 72-74, 94-99 (1979). On one hand the questions themselves may suggest the answer ("Did you see the gun?"). On the other hand, even if the questions are kept content neutral, the act of searching for information creates the impression that the subject should add something more to the story. *See supra* notes 40-42 and accompanying text.

102. Orne, *supra* note 41, at 328.

103. *Supra* notes 41-42 and accompanying text.

104. *See Sprynczynatyk*, 771 F.2d at 1123; United States v. Valdez, 722 F.2d 1196, 1203 (5th Cir. 1984); Orne, *supra* note 41.

105. *See supra* notes 41-49 and accompanying text.

provides the court with further indicia of reliability as an aid to determine admissibility[106] and also lessens the dependence of the ultimate finder of fact on the hypnotically altered testimony. Another important benefit of this requirement is that if the court encounters discrepencies rather than corroboration during this inquiry the discrepancies should weigh heavily against admission of the testimony.[107]

In deciding whether a finding that the proposed testimony is inadmissible should also render the witness' testimony about what was remembered prior to hypnosis inadmissible, both the Eighth Circuit panel and the Missouri Supreme Court followed the majority rule[108] and held that if the prior memory is sufficiently documented[109] as such and is "uncontaminated" by the hypnosis, the witness may testify about events remembered prior to having been hypnotized.[110]

Although strict adherence to the rule adopted in *Sprynczynatyk* would preclude many of the applications of hypnosis and forbid most of its more flagrant abuses,[111] the rule of conditional admissibility fails to address several important problems that arise when introduction of hypnotically altered testimony is sought.

First among these considerations is the amount of resources expended in the pretrial hearing on admissibility. Although the proponent of the testimony bears the burden of proof at this hearing, the opponent must present countervailing arguments. As the most common use of hypnotically refreshed testimony is in criminal cases, this puts an added burden on defense counsel.

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106. *See* Diamond, *supra* note 41, at 338-39 (pointing out that any corroborative evidence should be made known neither to the hypnotist nor to the subject before hypnosis to avoid the risk of the creation of "memories" to match the facts).

107. For example, in State v. Mack, 292 N.W.2d 764 (Minn. 1980), the court points out at least four obvious factual discrepencies in the witness' posthypnotic account of events. *Id.* at 772.

108. This is the rule among those jurisdictions which limit or completely ban the use of hypnotically altered testimony. *See supra* note 61. Only California holds that the witness is not to testify concerning any matter related to the subject of the hypnotic session. People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal Rptr. 243, *cert. denied*, 459 U.S. 860 (1982). However, this rule has been relaxed to allow admission of statements and identifications made prior to hypnosis. *See* People v. Thompson, 176 Cal. 3d 554, 222 Cal.Rptr. 262 (1986).

109. *See supra* notes 85-87 and accompanying text.

110. Although not discussed in *Sprynczynatyk* or *Alsbach*, by allowing the witness to testify concerning prehypnotic memories, the use of hypnosis as a forensic tool in law enforcement is largely preserved. Even where the posthypnotic testimony of the witness is inadmissible the witness will probably not be precluded from testifying to the occurrence of the event itself, although unable to testify as to any details uncovered through hypnosis. Nonetheless, these details may prove to be quite valuable to law enforcement authorities in that they may lead to independently admissible evidence.

111. *Shirley*, 31 Cal. 3d at 69 n.56, 641 P.2d at 806 n.56, 181 Cal. Rptr. at 274 n.56.

Expert witnesses against the admission of the testimony may be difficult to obtain without adequate funds[112] while under the *Hurd* rule the proponent has at least one expert witness at the ready, the hypnotist.[113]

A case by case determination of admissability may also have an adverse effect on limited judicial resources.[114] Because the scientific community has divergent opinions on the use of hypnosis, the pretrial hearing certainly has the potential of becoming a battle of experts, requiring extensive briefing, testimony, and argument concerning the medical condition of the witness,[115] the validity of the procedures used in obtaining the witness' prehypnotic statements and in conducting and recording the hypnotic session,[116] the potential for sugguestion or confabulation in each question or comment made to the witness,[117] and the qualifications of the hypnotist,[118] as well as any facts or circumstances which may be relevent to the court's decision on the admissibility of the witness' posthypnotic testimony.[119]

If the court does decide to admit the posthypnotic testimony, counsel may then choose to relitigate the issues concerning the unreliability of posthypnotic testimony before the jury for the purpose of impeaching the hypnotized witness.[120] If the court rules the posthypnotic testimony inadmissable, it is then necessary to determine if the witness has been so effected by the hypnosis as to render her account of prehypnotic statements also inadmissible; if this testimony is allowable there may also be some question as to

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112. For a particularly Malthusian answer to this problem, see State v. Little, 674 S.W.2d 541 (Mo. 1984) (en banc), in which the court states that a "resourceful lawyer would not be helpless in obtaining expert information sufficient for a preliminary inquiry, at little or no expense." *Id.* at 544.

113. *See supra* note 84 and accompanying text. As required by the procedural guidelines, the hypnotist must be either a psychiatrist or a psychologist with specialized training in hypnosis. The use of the hypnotist who is partially the subject of the inquiry as an expert on hypnosis can itself raise some problems. While a balanced professional opinion should be expected from the hypnotist, under these rules the fact that the psychiatrist or psychologist was willing to assist in the attempt to restore the witness' memory through hypnosis is indicative of at least some degree of bias in favor of the reliability of hypnosis as a fact finding device. *Alsbach*, 770 S.W.2d at 839-40 (citing Diamond, *supra* note 39); *see also supra* notes 53-55 and accompanying text.

114. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 207, 644 P.2d 1266, 1294 (1982); People v. Shirley, 31 Cal. 3d 18, 40, 641 P.2d 775, 787, 181 Cal. Rptr. 243, 255-56, *cert. denied*, 459 U.S. 860 (1982).

115. *See supra* note 81 and accompanying text.

116. *See supra* notes 85-88 and accompanying text.

117. *See supra* note 42 and accompanying text.

118. *See supra* note 84 and accompanying text.

119. *See supra* notes 89-91 and accompanying text.

120. *See* Hurd v. State, 86 N.J. 525, 544, 432 A.2d 86, 95 (1981) (The court suggested limitations on counsel's right to present to the jury evidence on the unreliability of hypnosis where the court has admitted the testimony after a pretrial hearing.).

the scope of the statements made before hypnosis which must be resolved.[121]

A second problem with the *Sprynczynatyk* rule is that although the procedural standards provide control over intentional suggestion and conditions particularly conducive to unintentional suggestion, the rule offers no method by which the court can determine the reliability of the posthypnotic recollection itself.[122] The rule cannot prevent spontaneous confabulation[123] or aid the court in determining the reliability of any particular facet of the testimony regardless of the sterility of the hypnotic environment.[124]

A final unanswered problem created by hynotically altered testimony, even when it meets the requirements of the rule, is the question of increased confidence and assurance on the part of the witness.[125] Because hypnosis is a powerful reinforcer of both accurate and false memories, the normal human trait of questioning one's own recall is largely repressed.[126] Thus the witness may exhibit an abnormal degree of confidence in the accuracy of his posthypnotic recollection. Because of this artificial certainty in the witness' testimony, several courts have found hypnosis to be a serious infringement on the right to cross examine, which in a criminal case rises to the level of a constitutional infirmity.[127]

When faced with a rule which severely restricts the admissibility of hypnotically altered testimony, which fails to address several difficult questions, and which also adds several new problems to a troubled situation, several courts, including the Missouri Supreme Court, have rejected the *Hurd* analysis in favor of the per se inadmissible rule simply because "the game is not worth the candle."[128]

Although the opinion in *Sprynczynatyk v. General Motors* adopting the *Hurd* rule of conditional admissibility of hypnotically influenced testimony is a vast improvement over the ill founded and discredited *Harding* rule of per se admisibility, its practical application may prove it to be well intentioned yet ill advised. If applied correctly it will effectively end the use of hypnotically altered testimony in the federal courts of the Eighth Circuit. If this is the desired result, then it would be a much more efficient use of resources to ban the use of hypnosis altogether as did the Missouri Supreme Court in

121. *See supra* notes 108-10 and accompanying text.

122. The court in *Hurd* characterized the reliablility of testimony admissible under the rule as comparable to that of normal eyewitness testimony and therefore acceptable. *Hurd*, 86 N.J. at 544, 432 A.2d at 95.

123. *See supra* note 42 and accompanying text.

124. *See supra* note 43 and accompanying text.

125. *See supra* notes 44-46 and accompanying text.

126. Diamond, *supra* note 41, at 300; Orne, *supra* note 41, at 326.

127. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 187-89, 644 P.2d 1266, 1273-75 (1982); State v. Mack, 292 N.W.2d 764, 769 (Minn. 1980).

128. People v. Shirley, 31 Cal. 3d 18, 40, 641 P.2d 775, 787-88, 181 Cal. Rptr. 243, 256, *cert. denied*, 459 U.S. 860 (1982).

Missouri Law Review, Vol. 51, Iss. 3 [1986], Art. 5
Alsbach. The unreliablility of hypnosis as a memory restorer has not yet been fully explained by science. Until the scientific community can provide the unequivocal answers needed to make a principled judgment as to when, or whether, the hypnosis of a witness is a legally acceptable procedure it is the more prudent course to ban the use of hypnosis as an aid in procuring testimony.

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