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Hypnotically Refreshed Testimony: Is It Legally Relevant to a Criminal Proceeding in Ohio

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NOTE
HYPNOTICALLY REFRESHED TESTIMONY: IS IT LEGALLY RELEVANT TO A CRIMINAL PROCEEDING IN OHIO?

I. INTRODUCTION

In the past twenty years a growing number of courts, both state[1] and federal,[2] have addressed the problem of the admissibility in a criminal

[1] *See, e.g.*, Prewitt v. State, 460 So. 2d 296 (Ala. Crim. App. 1984); State v. Contreras, 718 P.2d 792 (Alaska 1986); State *ex rel* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981); Rock v. State, 288 Ark. 566, 708 S.W.2d 78, *cert. granted*, 107 S. Ct. 430 (1986); People v. Guerra, 37 Cal. 3d 385, 690 P.2d 635, 208 Cal. Rptr. 162 (1984); People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *modified*, 31 Cal. 3d 918(a), 181 Cal. Rptr. at 273, *cert. denied*, 459 U.S. 860 (1982); People v. Zamarripa, 174 Cal. App. 3d 595, 220 Cal. Rptr. 173 (1985); People v. Rex, 689 P.2d 669 (Colo. Ct. App. 1984); People v. Quintanar, 659 P.2d 710 (Colo. Ct. App. 1982); State v. Atwood, 39 Conn. Supp. 273, 479 A.2d 258 (Conn. Super. Ct. 1984); State v. Davis, 490 A.2d 601 (Del. Super. Ct. 1985); Bundy v. State, 471 So. 2d 9 (Fla. 1985); Brown v. State, 426 So. 2d 76 (Fla. Dist. Ct. App. 1983); State v. Moreno, ___Haw. ___, 709 P.2d 103 (1985); State v. Iwakiri, 106 Idaho 618, 682 P.2d 571 (1984); Peterson v. State, 448 N.E.2d 673 (Ind. 1983); State v. Haislip, 237 Kan. 461, 701 P.2d 909, *cert. denied*, 106 S. Ct. 575 (1985); State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983); Harding v. State, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969); Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983); People v. Gonzales, 415 Mich. 615, 329 N.W.2d 743 (1982), *modified*, 417 Mich. 968, 336 N.W.2d 751 (1983); State v. Ture, 353 N.W.2d 502 (Minn. 1984); State v. Mack, 292 N.W.2d 764 (Minn. 1980); House v. State, 445 So. 2d 815 (Miss. 1984); State v. Levering, 213 Neb. 686, 331 N.W.2d 500 (1983); State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981); State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983); State v. Beachum, 97 N.M. 682, 643 P.2d 246 (N.M. Ct. App. 1981), *cert. quashed*, 98 N.M. 51, 646 P.2d 1040 (1982); People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983); State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984); State v. Brown, 337 N.W.2d 138 (N.D. 1983); State v.

trial of testimony by a witness whose memory has been "refreshed" by the use of pre-trial hypnosis.[3] Due to the divergence of scientific opinion on: (1) the nature and reliability of the hypnotic process to produce accurate (or actual) recall; and (2) its possible effect on a witness' subsequent testimony, expert testimony regarding hypnosis has not been dispositive of the question. In fact, the only thing that the courts, like the experts, can agree on is that they cannot agree.

Some courts are of the opinion that hypnosis is nothing more than a memory aid, to be treated like any other device to refresh recollection.[4] Other courts believe hypnosis is more of a "science," and as such should be treated consistently with the rules for the admission of other scientific evidence,[5] as they have been applied, for instance, to lie detect-

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Weston, 16 Ohio App. 3d 279, 475 N.E.2d 805 (1984); Standridge v. State, 701 P.2d 761 (Okla. Crim. App. 1985); Robison v. State, 677 P.2d 1080 (Okla. Crim. App.), *cert. denied*, 104 S. Ct. 3524 (1984); State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312 (1971); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981); State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974); Burnett v. State, 642 S.W.2d 765 (Tex. Crim. App. 1982); State v. Martin, 101 Wash. 2d 713, 684 P.2d 651 (1984); State v. Laureano, 101 Wash. 2d 745, 682 P.2d 889 (1984). This list is not meant to be, nor is it, a complete representation of all the state cases that have dealt with this issue over the past twenty years. It is meant only to convey the significance of the issue, as indicated by the sheer number of cases addressing it. These cases do, however, represent the most significant decisions on the issue, in that they are the ones generally looked to by the courts addressing it for the first time.

[2] *See, e.g.*, United States v. Keplinger, 776 F.2d 678 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 2919 (1986); United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984); 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); McQueen v. Garrison, 617 F. Supp. 633 (E.D.N.C. 1985); United States v. Waksal, 539 F. Supp. 834 (S.D. Fla. 1982), *rev'd on other grounds*, 709 F.2d 653 (11th Cir. 1983); United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977).

[3] Generally, the courts are presented with this issue in one of two ways. The majority of cases involve situations wherein the prosecution attempts to introduce at trial the incriminating testimony of a witness who had undergone a hypnotic session prior to trial, usually during the investigation of the crime. Correspondingly, it is equally possible, although not nearly as common, for a defendant to attempt to introduce the testimony of a previously hypnotized witness, usually the defendant himself. *See infra* text accompanying notes 90-93. Alternatively, a defendant might try to introduce exculpatory testimony regarding statements made while either the defendant himself or some other witness was under hypnosis. *See infra* note 13.

[4] *See, e.g.*, State v. Brown, 337 N.W.2d 138, 151 (N.D. 1983). The court in *State v. Brown* noted, in regard to the jurisdictions that have adopted this reasoning, that "[t]hese courts generally reason that the testimony of a witness whose memory has been enhanced through hypnosis should be treated like other witnesses whose present recollection has been refreshed." *Id.*

[5] *See* State v. Collins, 296 Md. 670, 708, 464 A.2d 1028, 1047 (1983) (Murphy, C.J., concurring and dissenting). *See also infra* note 86 (courts holding hypnosis subject to the *Frye* test for the admissibility of scientific evidence).

tors,[6] voice print analysis,[7] and breath analysis devices designed to test for intoxication.[8] This divergence of legal, as well as scientific, opinion has led to the adoption of five different legal tests utilized by the various jurisdictions to resolve the issue of the admissibility of hypnotically "refreshed" testimony ("HRT"). The author has categorized these tests as follows: (i) credibility; (ii) reliability; (iii) safeguards; (iv) relevancy balancing; and (v) totality of circumstances.[9] In addition to those jurisdictions that have resolved the issue, still others, like Ohio, have not had a sufficiently concrete opportunity to decide the question, and as to those states, the legal standard to be applied to HRT remains, as yet, unresolved.

While the reliability of using hypnosis to refresh a witness' memory and hence his[10] testimony to be used in a criminal proceeding is not an entirely unfamiliar issue to the Ohio criminal justice system, it has never been directly addressed by the Ohio Supreme Court. Ohio has, however,

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[6] *See, e.g.*, Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); State v. Wakefield, 263 N.W.2d 76 (Minn. 1978).

[7] *See, e.g.*, State *ex rel* Trimble v. Hedman, 291 Minn. 442, 192 N.W.2d 432 (1971); State v. Cary, 49 N.J. 343, 230 A.2d 384 (1967).

[8] *See, e.g.*, People v. Morse, 325 Mich. 270, 38 N.W.2d 322 (1949).

[9] (i) The credibility test is a rule of *per se* admissibility. Under this approach, a pre-trial hypnotic session does not affect the competency of the witness, but rather goes to the weight to be given that testimony by the trier of fact. (ii) Generally speaking, the reliability test uses, as its main criteria for admissibility, the rule of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The *Frye* rule has been interpreted as the test for determining the admissibility of evidence obtained from new scientific principles or discoveries. Under this approach, hypnosis, as a scientific procedure, is to be judged on its "general acceptance" within the scientific community. However, because practically speaking, no two experts can agree on the reliability and use of hypnosis, the effective result of applying the rule is *per se* inadmissibility. The adoption of this rule thus becomes one of *per se* inadmissibility for all HRT. In both the credibility and reliability approaches, the trial court is not required to, nor is it permitted to, consider the admissibility of HRT, since both are *per se* rules. (iii) The safeguards test is an extension of the *Frye* test. Under this rule, a hypnotic session is conducted under strict guidelines designed to insure that a legally sufficient level of reliability is achieved in the hypnotic procedure. It is the trial court's duty to review the circumstances surrounding the hypnotic session and to determine whether the guidelines have been strictly complied with. If so, then the HRT is admissible. (iv) The relevancy balancing test considers both the logical and legal relevancy of the HRT. In determining admissibility under this approach, the trial court must determine the extent to which the suggested guidelines have been followed in the conduct of the hypnotic procedure. This is necessary because the probative value of HRT relies on both the reliability of the principle of hypnosis and the hypnotic procedure itself. On a case-by-case basis, the trial court must determine whether the probative value of the HRT outweighs the dangers of unfair prejudice, confusion of the issues, or misguidance of the jury. (v) Under the totality of circumstances approach the trial court is charged with the responsibility of making a determination of the extent to which prescribed safeguards surrounding the hypnotic session were adhered to and to decide whether, in view of all the circumstances of the case, the proposed testimony is sufficiently reliable to merit admission.

[10] Unless otherwise indicated by the context in which they occur, "he" and "his" are used generically throughout this Note to indicate both the female and male gender.

had an interesting experience with the relationship between hypnosis and a criminal proceeding. In 1962, in *State v. Nebb*,[11] the Franklin County Courthouse was the site of an apparent "first" in American criminal jurisprudence.[12] In *Nebb*, out of the jury's presence, the defendant took the stand, was hypnotized, and allowed to testify while actually under hypnosis. The hypnotist, a psychiatrist, also took the stand as a qualified expert and testified on the nature of hypnosis and the reliability of hypnotic testimony. So compelling was this testimony that the prosecution subsequently elected to amend the indictment and the defendant plead guilty to a lesser charge of manslaughter. What is important to note about *State v. Nebb* is that, notwithstanding the novelty of using hypnotic evidence in a criminal proceeding, both the hypnotic testimony[13] of the defendant and the testimony of the hypnotist were admitted by stipulation. Consequently, the court was not asked, nor did it undertake *sua sponte*, to question the admissibility of the hypnotic testimony or its reliability.

Nearly twenty-two years would pass before the issue of the relationship of hypnosis and a criminal proceeding would again surface in yet another Ohio criminal trial. In 1984, the issue of the admissibility of hypnotically refreshed testimony was placed squarely before the Court of Appeals for Clermont County in *State v. Weston*.[14] The defendant in *Weston* was convicted of four counts of aggravated murder.[15] Two of the witnesses who gave identification testimony at trial had been hypnotized during the investigation of the multiple slayings by Ohio State Highway Patrol officers.[16] One witness was hypnotized nine days after the murders in an attempt to "cause her to more accurately recall the physical attributes of the individual" that she had observed at the home of the victims on the

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[11] No. 39,540 (C.P. Franklin County May 28, 1962).

[12] *See generally*, Herman, *The Use of Hypno-Induced Statements in Criminal Cases*, 25 OHIO ST. L.J. 1 (1964).

[13] At this juncture, it is important to distinguish between "hypnotic" evidence or testimony and "hypnotically refreshed" testimony as the terms are utilized in this Note. "Hypnotic" evidence is that related by a person while actually in a hypnotic trance. "Hypnotically refreshed" testimony is testimony given by a person in a normal waking state after having undergone a hypnotic session. All the courts that have considered the issue of the admissibility of "hypnotic" testimony concur in holding it inadmissible, whether offered as the testimony of a witness under hypnosis or as some memorialization, audio or video recording or transcript, of the statements made while the witness was actually in the hypnotic trance. *See, e.g.*, Emmett v. State, 232 Ga. 110, 115, 205 S.E.2d 231, 235 (1974); Pearson v. State, 441 N.E.2d 468, 471 (Ind. 1982); State v. Pusch, 77 N.D. 860, 887- 88, 46 N.W.2d 508, 522 (1950); Jones v. State, 542 P.2d 1316, 1326-27 (Okla. Crim. App. 1975); State v. Pierce, 263 S.C. 23, 30, 207 S.E.2d 414, 418 (1974); Greenfield v. Commonwealth, 214 Va. 710, 715-16, 204 S.E.2d 414, 419 (1974).

[14] 16 Ohio App. 3d 279, 475 N.E.2d 805 (Clermont County 1984).

[15] *Id.* at 281, 475 N.E.2d at 808.

[16] *Id.* at 280, 475 N.E.2d at 807.

night of the crime.[17] The other witness, a police officer who had stopped a vehicle believed to have been driven by the defendant, was hypnotized in an "unsuccessful attempt to cause him to remember the license number of the truck" and other details of the vehicle and the driver.[18] The defendant appealed his conviction, citing as one error on appeal the denial of his motion to suppress the in-court identification testimony of the two previously hypnotized witnesses.[19]

In a *per curiam* opinion, the *Weston* court evaluated three of the currently utilized legal tests and reasoned that "hypnotically refreshed" testimony would be admissible under certain circumstances. The test set forth in *Weston* allows HRT to be admitted if the court determines that certain safeguards have been followed during the hypnotic process, thus rendering the post-hypnotic testimony sufficiently reliable to merit admission.[20] Based upon the facts as presented at trial, the court determined that the testimony of both witnesses was admissible.[21]

Had the *Weston* decision been handed down just a few weeks earlier, it might have been the subject of some noteworthy dicta in an Ohio Supreme Court decision rendered a mere three and one-half months later.[22] In *State v. Maurer*,[23] the Ohio Supreme Court only indirectly addressed the issue of the admissibility in a criminal trial of the testimony of a witness who had undergone pre-trial hypnosis. In an appeal as of right from a capital conviction, the defendant in *Maurer* challenged the trial court's admission of post-hypnotic testimony offered by the prosecution, claiming that, because the witness' memories had been refreshed by hypnosis during the investigation of the crime, the admission of the witness' testimony violated his rights of due process, confrontation, and effective assistance of counsel.[24]

In upholding the court of appeals' dismissal of the defendant's appeal, the Ohio Supreme Court took a careful look at the particular facts[25] and declined "to hold that a prior hypnotic session should necessarily render a witness completely incompetent to testify at trial concerning events

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[17] *Id.*

[18] *Id.*, 475 N.E.2d at 807-08.

[19] *Id.* at 281, 475 N.E.2d at 808.

[20] *Id.* at 287, 475 N.E.2d at 813.

[21] *Id.* at 287-89, 475 N.E.2d at 813-15.

[22] State v. Maurer, 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984), *cert. denied*, 105 S. Ct. 2714 (1985).

[23] *Id.*

[24] *Id.* at 259, 473 N.E.2d at 787.

[25] In *Maurer*, the defendant filed a pre-trial motion *in limine* questioning the admissibility of testimony by state's witnesses that had been hypnotized prior to trial. *Id.* at 258, 473 N.E.2d at 787. The prosecution agreed at the hearing on the motion to limit the witness' testimony to only their "pre-hypnotic recollections" and the trial court overruled the motion. *Id.* Thus, since there was no hypnotically induced evidence introduced at trial, the court was not in a position to rule on the admissibility of HRT.

recalled independent of hypnosis."[26] Apparently, the court distinguished between situations where the witness testified as to matters recalled prior to hypnosis, as was the case in *Maurer,* and situations where the witness testified to matters he recalled only after undergoing hypnosis. In the former situation, the court felt that the effect of hypnosis, if any, was best dealt with on cross-examination as a matter of credibility, agreeing "that any credibility issue could properly be resolved by the trier of fact and assigned weight appropriately."[27] Because the record in *Maurer*, like that in *Nebb,* did not "disclose any objection . . . at trial concerning the issue of hypnotic [hypnotically refreshed, as used herein] testimony,"[28] there was no need for the supreme court to establish what standard was to be applied in Ohio regarding the admissibiliy of hypnotically refreshed testimony in criminal proceedings. The court's statements in *Maurer* may then be considered as dicta in regard to this issue. Presumably, because the *Weston* and *Maurer* cases were almost simultaneously decided, the supreme court was deprived of the opportunity to indicate how it would resolve any conflict between its "dicta" in *Maurer* and the legal test adopted by the *Weston* court.

Although the supreme court has managed to avoid setting decisive precedent on this issue in *Maurer,* it is only a matter of time until someone, like the defendant in *Weston*, presents the issue squarely to the court, in a manner that will require a definitive answer to the defendant's challenge to the reliability of hypnotically refreshed testimony. It is reasonable to assume that when that day comes, the court will need to be well advised, giving careful consideration not only to its own dicta in *Maurer* and to the decision in *Weston*, but to the various decisions handed down in other jurisdictions as well.

With this in mind, this Note seeks to analyze the legal framework of hypnosis as it has been dealt with in Ohio and in other jurisdictions, and to recommend an approach to deciding the issue. To accomplish this, the author has divided this Note into four sections. The first section will deal with the controversy surrounding the applicability of hypnosis and the hypnotic process to a legal proceeding. The second section focuses on the legal tests currently in use by other jurisdictions. In the third section, the existing legal tests will be evaluated as to their strengths and weaknesses. Finally, the fourth section will recommend the approach most consistent with the applicable law in Ohio.

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[26] *Id.* at 259, 473 N.E.2d at 788.
[27] *Id.* at 260, 473 N.E.2d at 788.
[28] *Id.* at 259, 473 N.E.2d at 787.

II. HYPNOSIS-THE CONTROVERSY

Hypnosis, like so many other scientific phenomena, seems to defy precise definition.[29] In *State v. Brown*,[30] the state's expert witness, Dr. Martin Reiser, a recognized expert in the area of hypnosis, testified that hypnosis is "an altered state of consciousness which is characterized by an increased focus of attention, a heightened state of mental concentration, and a decrease of focus and concern about peripheral, or surrounding noises and stimuli."[31] The defense expert, Dr. Bernard Diamond, another authority in this field, defined hypnosis as "an artifically[sic] induced state of altered conciousness characterized by increased suggestibility, suspension of critical judgment and psychological and physical relaxation."[32] Thus, the courts are confronted with two recognized authorities,[33] espousing two divergent opinions; herein lies the basis of the controversy.

The proponents of hypnosis equate memory with a videotape recording of the events in one's life that are stored in compartments in the brain, ready to be replayed as they were observed.[34] Inability to remember events is said to be "simply an inability to retrieve stored information."[35] The theory is that hypnosis, due to its state of relaxation and heightened concentration, facilitates bringing these recollections back to the conscious level where they are remembered and can be related.[36] The proponents further contend that these memories "refreshed" by hypnosis are as accurate as normal memory. They go on to stress, however, that hypnosis is not a guarantor of truth.[37]

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[29] Hypnosis has been defined as an "artifically induced trancelike state . . . in which the subject is highly susceptible to suggestion, oblivious to all else, and responds readily to the commands of the hypnotist." STEDMAN'S MEDICAL DICTIONARY 678 (5th unabr. lawyer's ed. 1982). This neutral definition, in terms of the question facing both the legal and scientific communities, would seem to encompass the definitions of hypnosis put forth by the proponents and the opponents of the use of HRT in criminal proceedings. *See infra* text accompanying notes 31-33.

[30] 337 N.W.2d 138 (N.D. 1983) [hereinafter *State v. Brown* whenever necessary to eliminate confusion with Brown v. State, 426 So. 2d 76 (Fla. Dist. Ct. App. 1983)].

[31] *Id.* at 145.

[32] *Id.* at 143.

[33] These two men, along with Dr. Martin T. Orne, are the experts most involved in this controversy, in that they are the ones most frequently quoted on the subject and most often called to testify as experts. Dr. Reiser is a proponent of the use of HRT in criminal proceedings, whereas Dr. Diamond appears to be *per se* opposed to its use or would confine it to very strictly limited circumstances.

[34] People v. Shirley, 31 Cal. 3d 18, 57, 641 P.2d 775, 798, 181 Cal. Rptr. 243, 266, *modified*, 31 Cal. 3d 918(a), 181 Cal. Rptr. at 273, *cert. denied*, 459 U.S. 860 (1982).

[35] United States v. Valdez, 722 F.2d 1196, 1200 (5th Cir. 1984).

[36] Note, *People v. Shirley: The Use of Hypnotically Enhanced Testimony at Trial*, 20 CAL. W.L. REV. 332, 335 (1984).

[37] *See State v. Brown*, 337 N.W.2d at 149. This proposition was well stated in *State v.*

The opponents of the use of HRT reject the videotape theory and cite a number of conditions associated with hypnosis that they contend render testimony derived from a hypnotic session unreliable for use as legally sufficient evidence in a criminal proceeding. Their five basic areas of concern have been well stated to be: (1) hypersuggestiveness; (2) hypercompliance; (3) confabulation; (4) jury misunderstanding of the concept of hypnosis; and (5) unusually strong confidence by the hypnotized subject in his ability to recall events accurately.[38] Therefore, there is a difference of opinion among the experts as to whether these problems exist, or if existent, the extent to which they adversely influence the use of HRT in a criminal trial.[39]

The concern with hypersuggestiveness is based on the premise that a hypnotized subject is said to be extremely sensitive to any suggestions made to him during the hypnotic episode, and extends to suggestions that he will be able to either recall fully afterwards or will continue to recall further after the hypnotic session. It has also been said that this state of heightened suggestibility is such that minimal cues, even non-verbal "messages" and ones that may be unknown to either the hypnotist or the subject, may serve to irreparably taint the recall.[40]

Hypercompliance is said to result from the subject's desire to please the hypnotist.[41] Thus, the subject may tend to "incorporate into his response his notion of what is expected of him."[42] It has been noted that this drive to please may be very strong in the context of a criminal trial, since most

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Hurd, when the court opined that the "purpose of using hypnosis is not to obtain the truth, as a polygraph or 'truth serum' is supposed to do. Instead, hypnosis is employed as a means of overcoming amnesia and restoring the memory of a witness." State v. Hurd, 86 N.J. 525, 538, 432 A.2d 86, 92 (1981).

[38] Brown v. State, 426 So. 2d 76, 82 (Fla. Dist. Ct. App. 1983) [hereinafter *Brown v. State* whenever necessary to eliminate confusion with State v. Brown, 337 N.W.2d 138 (N.D. 1983)]. The first three concerns of HRT deal with conditions stemming from the hypnotic session itself and are said to so significantly influence the reliability of the testimony as to make it unfit for use in a criminal trial. The last two, increased veracity and jury misconception, arise after the hypnotic session and could result from the in-court use of HRT.

[39] It appears, however, that there must be some credence to these claims since their potential for adverse influence on HRT has been addressed by the courts that allow the use of HRT as well as those that hold it inadmissible. *See, e.g., Shirley*, 31 Cal. 3d at 63-66, 641 P.2d at 802-03, 181 Cal. Rptr. at 270-72 (1982) (HRT inadmissible); *Brown v. State*, 426 So. 2d at 82 (HRT admissible); State v. Iwakiri, 106 Idaho 618, 622-23, 682 P.2d 571, 575 (1984) (HRT admissible); State v. Collins, 296 Md. 670, 695-96, 464 A.2d 1028, 1041 (1983) (HRT inadmissible).

[40] Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 333 (1980).

[41] *Brown v. State*, 426 So. 2d at 83.

[42] *Hurd*, 86 N.J. at 539, 432 A.2d at 93.

people want to help fight crime, but is even stronger yet if the subject also happens to be the victim.[43]

Confabulation refers to a subject's tendency to fill in the gaps in his memory in order to be able to "remember" a complete picture of the occurence.[44] This can be manifested by memory distortion or sheer fantasy.[45] It is said that no one, neither the hypnotist nor the subject, can determine which recollections are accurate and which are manufactured.[46] The relation between hypercompliance and confabulation is said to be such that it may be the desire to please the hypnotist that contributes to the subject's memory distortion. If a subject wants to please the hypnotist, it has been theorized that he will make up something to fill in the gaps in his incomplete memory in order to fulfill what he feels is expected of him.[47]

The opponents also contend that due to an alleged misconception by the general public of the nature of hypnosis, a fear arises that the jury will view the HRT as absolutely true by equating the hypnotic process with a "truth serum."[48] In this context, it is said that the jury will place more weight on HRT than on normal witness recall.[49]

The final purported problem with HRT is that of a supposed "unshakeable" belief by the previously hypnotized witness that what he is saying is the absolute truth. This has been attributed in part to the hypnotic procedure in which the subject is told he will remember "everything" about the occurence and in part to a phenomenon of hypnosis known as "post-hypnotic source amnesia."[50] It is said that a subject who recalls a fact while under hypnosis cannot recall upon awakening the source of that recollection and assumes it to be a product of his actual experience.[51] Since the subject's belief in the accuracy of the recollection is the same whether actual or manufactured it is said that the recollection becomes essentially immune to effective cross examination.[52] The concern here is that if cross examination is ineffective, then

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[43] *Shirley*, 31 Cal. 3d at 62 n.42, 641 P.2d at 801 n.42, 181 Cal. Rptr. at 270 n.42.

[44] *Brown v. State*, 426 So. 2d at 84.

[45] *Hurd*, 86 N.J. at 538, 432 A.2d at 92.

[46] *See, e.g., id.*; State v. Peoples, 311 N.C. 515, 523, 319 S.E.2d 177, 182 (1984).

[47] *Brown v. State*, 426 So. 2d at 84.

[48] *Id. But see supra* note 37 and accompanying text. This alleged misconception of hypnosis by the public can be dealt with in the criminal trial setting by the use of cautionary jury instructions whenever HRT is admitted at trial. *See infra* note 166.

[49] Note, *The Admissibility of Testimony Influenced by Hypnosis*, 67 VA. L. REV. 1203, 1222 (1981).

[50] *Shirley*, 31 Cal. 3d at 65-66, 641 P.2d at 803-04, 181 Cal. Rptr. at 272.

[51] *Id.* at 65, 641 P.2d at 804, 181 Cal. Rptr. at 272.

[52] Commonwealth v. Nazarovitch, 496 Pa. 97, 105, 436 A.2d 170, 174 (1981).

infringement of the defendant's constitutional right to confrontation may exist.[53]

Notwithstanding all of the alleged problems with the use of HRT in criminal proceedings, most courts do recognize the importance of hypnosis as an investigatory aid in law enforcement.[54] This seems to be due to the fact that investigatory leads derived by hypnosis are left to verification and an investigator is not concerned with the immediate evaluation of the truthfulness of the statements as in courtroom testimony.[55]

As can readily be seen, due to the divergence of scientific opinion on hypnosis and the hypnotic process, and their purported effect on post-hypnotic testimony, it is no wonder that there is no single consistent legal rule throughout the jurisdictions regarding the use of HRT in criminal proceedings. In addition, each jurisdiction is faced with its own inherent legal considerations related to the use of any proffered evidence, including HRT.

There are many conflicting, often contrary, non-scientific factors the courts must consider in resolving this issue, such as: (1) the proper role of the trial court in determining the admissibility of such testimony; (2) the concern for judicial efficiency and consistency if the trial courts are left to make this determination; (3) the ability of the jury to justly weigh its significance; and (4) the possible infringement of a defendant's constitutional right to confrontation; all as balanced against the rights of the people to due process of law and their interest in the fair and effective administration of criminal justice. The variation in the ultimate determination of this issue by the courts which have addressed HRT seems best explained by a consideration of the judicial policy[56] underlying any

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[53] *See, e.g.*, State v. Mena, 128 Ariz. 226, 232, 624 P.2d 1274, 1280 (1981); *Shirley*, 31 Cal. 3d at 66, 641 P.2d at 804, 181 Cal. Rptr. at 272; *Peoples*, 311 N.C. at 526, 319 S.E.2d at 184. *See infra* note 79 and accompanying text.

[54] *See, e.g.*, State *ex rel* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); *Shirley*, 31 Cal. 3d at 67, 641 P.2d at 805, 181 Cal. Rptr. at 273.

[55] *Collins*, 132 Ariz. at 209, 644 P.2d at 1295.

[56] *See, e.g., id.* at 196, 644 P.2d at 1282; House v. State, 445 So. 2d 815 (Miss. 1984). In *House*, the Supreme Court of Mississippi began consideration of the issue of HRT with a statement of policy. *House*, 445 So. 2d at 818. The court stated that they "eschew[ed] *per se* inadmissibility rules wherever possible," were "committed to the proposition that all credible evidence that will assist the jury in its fact-finding task ought, if put in proper form, be admissible" and that they favored inclusion as being "consistent with the correct administration of justice." *Id.* at 818-19. They stressed however that there must be "vigilance against forms of evidence with the potential for mischief and injustice." *Id.* at 819. In State *ex rel* Collins v. Superior Court, the court stated that the decision on the use of HRT involves, to a great extent, the resolution of a single issue of policy, whether the *Frye* test of "general acceptance" for the admissibility of scientific evidence should be applied to hypnosis and hypnotically refreshed testimony. *Collins*, 132 Ariz. at 196, 644 P.2d at 1282. It follows then, at least in the opinion of this court, that the decision on the use of HRT would not turn on the prospective value of HRT, but rather on the individual court's

individual jurisdiction's decision. It is against this background, scientific and non-scientific, that the various legal tests must be studied and evaluated.

III. Legal Tests

A. *Credibility Test*

The credibility test was first espoused in the leading case of *Harding v. State*,[57] in which the court held that the testimony of a prosecution witness whose memory had been refreshed by a pre-trial hypnotic session was sufficient to support the jury's verdict.[58] In *Harding*, the defendant was indicted and convicted of assault with intent to rape and assault with intent to murder.[59] His conviction for the rape charge rested in part on the testimony of the victim, who had undergone hypnosis administered by a psychologist approximately one month after the incident in order to aid her in remembering a more complete picture of the events of the crime.[60] Before the hypnotic session, the victim knew and related to the police the identity of the person that had shot her, but was unable to recall events subsequent to the shooting, including the time of the alleged rape.[61] While under hypnosis, the victim was able to recall those events that occurred after the shooting, including identification of the defendant as being involved in the sexual attack as well as the shooting. At trial, she testified as to those events and to the fact that she was "doing so from her own recollection."[62]

After conviction, the defendant appealed and challenged the admission of the post-hypnotic testimony of the victim and the testimony of the hypnotist.[63] The Maryland Court of Special Appeals affirmed the conviction for rape on the basis of the witness' hypnotically refreshed testimony, the testimony of the hypnotist who stated that there was no reason to doubt the truth of the witness' testimony and in light of other corroborating evidence.[64] The *Harding* court ruled that the fact of hypnosis "concerns the question of the weight of the evidence which the trier-of-

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determination of the exact meaning and scope of the rule laid down by the *Frye* court. *See infra* text accompanying notes 85-89.

[57] 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969) (overruled by State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983)).

[58] *Id.* at 236, 246, 246 A.2d at 306, 312.

[59] *Id.* at 232, 246 A.2d at 304.

[60] *Id.* at 234, 246 A.2d at 305.

[61] *Id.*

[62] *Id.* at 236, 246 A.2d at 306.

[63] *Id.* at 235, 246 A.2d at 306.

[64] *Id.* at 247, 246 A.2d at 312.

fact, in this case the jury, must decide."[65] This approach has been and is currently followed in many jurisdictions.[66]

Under this approach, memory refreshed by hypnosis is compared to the recall stimulated by seeing a document, for instance, and is equated to present recollection refreshed. Present recollection refreshed "involves allowing the witness to consult some stimulus that revives his weakened memory, thereby enabling him to later testify from present recollection to matters which he had temporarily been unable to recall."[67] This concept is said to be the general reasoning of the courts that have adopted the credibility approach.[68] Further, under this rationale, the conclusion is that skillful cross examination will enable the jury to evaluate the effect of hypnosis on the witness and his proffered testimony.[69]

It is interesting to note that the federal jurisdiction having had the most experience with this issue, the Ninth Circuit Court of Appeals, also holds that the fact of pre-trial hypnosis goes to the credibility but not the admissibility of the testimony.[70] However, in *United States v. Adams*,[71] while holding that HRT is *per se* admissible, the court did recognize that hypnotically refreshing a witness' memory "carries a dangerous potential for abuse" and that care must be taken to insure that a witness' statements are the product of his own memory.[72]

By definition, the credibility approach has been rejected by the proponents of the remaining four tests, which concur that pre-trial hypnosis does affect the competency of the witness to testify. The credibility approach was criticized in *State v. Mena*[73] and *State v. Mack*[74] as being

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[65] *Id.* at 236, 246 A.2d at 306.

[66] United States v. Awkard, 597 F.2d 667 (9th Cir.), *cert. denied,* 444 U.S. 885 (1979); United States v. Adams, 581 F.2 193 (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. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977); State v. Contreras, 674 P.2d 794 (Alaska Ct. App. 1983), *rev'd,* 718 P.2d 792 (Alaska 1986); Clark v. State, 379 So. 2d 372 (Fla. Dist. Ct. App. 1979); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240 (1974); State v. Wren, 425 So. 2d 756 (La. 1983); Harding v. State, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied,* 395 U.S. 949 (1969); State v. Greer, 609 S.W.2d 423 (Mo. Ct. App. 1980); State v. Brown, 337 N.W.2d 138 (N.D. 1983); State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312 (1971); Chapman v. State, 638 P.2d 1280 (Wyo. 1982).

[67] Perry, *The Trend Toward Exclusion of Hypnotically Refreshed Testimony - Has the Right Question Been Asked?*, 31 U. KAN. L. REV. 579, 580 n.3 (1983).

[68] *Hurd*, 86 N.J. at 535, 432 A.2d at 91.

[69] *State v. Brown*, 337 N.W.2d at 151.

[70] *See supra* notes 2, 66. A comparison of the federal cases cited *supra* note 2 with the federal courts advocating the credibility approach as found *supra* note 66 shows the Ninth Circuit to have most frequently addressed this issue and to advocate the credibility approach.

[71] 581 F.2d 193 (9th Cir.), *cert. denied,* 439 U.S. 1006 (1978).

[72] *Id.* at 198-99.

[73] 128 Ariz. 226, 624 P.2d 1274 (1981).

[74] 292 N.W.2d 764 (Minn. 1980).

unresponsive to the then current scientific knowledge regarding hypnosis. It has been faulted on the ground that it is too simplistic to view memory refreshed by hypnosis in the same way as memory refreshed by consulting a document.[75]

The opponents of the credibility test maintain that because HRT is *per se* admissible under this approach, and due to the purported problems with HRT, it is not possible for the jury to properly assess the credibility of the witness or the weight to be given his testimony if it has been influenced by suggestion and confabulation and is presented by the witness as totally accurate information in an unshakeable manner. Possibly the most significant consideration of the influence of purported suggestion, confabulation and increased veracity of the previously hypnotized witness' testimony is its effect on the defendant's constitutional right to confrontation.

If cross examination is presumed to be of primary importance in the adequate exercise of the right of confrontation and if a previous hypnotic session adversely influences a witness' susceptibility to cross examination, then there may be an infringement upon this right.[76] It is argued that if the previously hypnotized witness has the purported increased belief in the truthfulness of his testimony, whether it is accurate or not, then the jury will be more apt to see a confident, self-assured witness and thus will be unable to determine credibility by viewing the witness' conduct, appearance and demeanor because it is likely that the witness will not exhibit signs of hesitancy, nervousness, and self-doubt on cross examination.[77] However, in *State v. Armstrong*,[78] the court held that if the defendant was given the opportunity to cross examine the witness and was permitted to introduce testimony on the witness' pre-hypnotic recollection and the effect hypnosis may have on memory, then the defendant's right to confrontation was satisfied.[79]

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[75] Haward & Ashworth, *Some Problems of Evidence Obtained by Hypnosis*, 1980 CRIM. L. REV. 469, 474-75 (Sweet & Maxwell 1980).

[76] *See, e.g., Shirley*, 31 Cal. 3d at 66, 641 P.2d at 804, 181 Cal. Rptr. at 272; *Peoples*, 311 N.C. at 526, 319 S.E.2d at 184.

[77] It has been noted that this same type of self-assuredness can also occur in witnesses that have not been hypnotized. The court in *State v. Hurd* stated, in reference to non-hypnotized witnesses, that a "false confidence in the details of one's memory, especially when it satisfies a personal need to know and is reinforced through repeated interrogation, imparts an impression of credibility to the jury . . . ." *Hurd*, 86 N.J. at 542, 432 A.2d at 95. In *State v. Brown*, Dr. Martin Reiser testified that, in his opinion, "the literature is quite clear on eyewitness testimony generally, that after a certain number of reviews without hypnosis of going through a crime event a person may become more sure of the recall at the end of that multi- review process than before." *State v. Brown*, 337 N.W.2d at 145.

[78] 110 Wis. 2d 555, 329 N.W.2d 386, *cert. denied*, 461 U.S. 946 (1983).

[79] *Id.* at 570, 329 N.W.2d at 394. The courts that have addressed the issue of the admissibility of HRT have specifically, and not so specifically, addressed the question of whether such admission impermissibly interferes with a defendant's right to confrontation

It is also important to note that both Maryland and North Carolina, which had previously followed the credibility approach, have now abandoned it and opted for adoption of the reliability test. This reversal of position, from *per se* admissibility to *per se* inadmissibility, is indicative of both the significance of the controversy surrounding this issue and the tremendously unsettled state of the law regarding it. The Court of Appeals of Maryland adopted the reliability approach in *State v. Collins*[80] and in so doing removed the shroud of acceptance from the credibility test of the *Harding* court. The Supreme Court of North Carolina overruled its decision in *State v. McQueen*,[81] which allowed HRT, by its holding in *State v. Peoples*.[82] The *Collins* court simply "adopted the *Frye* test as the basis for evaluation of testimony where a witness has been hypnotized."[83] In *Peoples*, the court stated that a major reason for their adoption of the credibility test was the holding in *Harding* and with that precedent removed and in light of the current scientific controversy regarding hypnosis, *McQueen* was overruled.[84]

B. *Reliability Test*

The backbone of the reliability test is the *Frye* test[85] for the admissibility of scientific evidence. The majority of jurisdictions that follow this

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as guaranteed by the sixth amendment to the Constitution and made applicable to the states by the fourteenth amendment. Smith v. Illinois, 390 U.S. 129 (1968); Pointer v. Texas, 380 U.S. 400 (1965). As with the rest of the questions regarding the use of HRT, the courts have arrived at differing conclusions in regard to this inquiry as well.

In *State v. Hurd*, the court determined that, since the proponent had the burden of proving by "clear and convincing" evidence that the HRT was admissible, it would be "difficult to imagine an identification would violate due process once the court has determined that the testimony satisfies the more stringent standard for reliability" embodied in the safeguards approach to determining the admissibility of HRT. *Hurd*, 86 N.J. at 548, 432 A.2d at 98.

In *State v. Weston*, in adopting a "substantial compliance" safeguards test, the court specifically addressed the issue of a possible violation of the defendant's right to confrontation. The court held that if there has been substantial compliance with the recommended safeguards, then the "accused's right of confrontation is preserved," because "witnesses that have not been subjected to pretrial hypnosis are often falsely confident about their testimony" and, further, witnesses are "commonly 'rehearsed' prior to trial to enhance their 'credibility'." *Weston*, 16 Ohio App. 3d at 289, 475 N.E.2d at 815. *But see* McQueen v. Garrison, 617 F. Supp. 633 (E.D.N.C. 1985) (holding that the sixth amendment does not demand *per se* exclusion of all testimony by a previously hypnotized witness, but it does bar the use of any testimony concerning matters not recalled prior to the hypnotic session).

[80] 296 Md. 670, 464 A.2d 1028 (1983).

[81] 295 N.C. 96, 244 S.E.2d 414 (1978).

[82] 311 N.C. 515, 319 S.E.2d 177 (1984).

[83] *Collins*, 296 Md. at 681, 464 A.2d at 1034.

[84] *Peoples*, 311 N.C. at 532, 319 S.E.2d at 187.

[85] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

approach have decided that hypnosis is a scientific procedure, and as such that it falls under the purview of the *Frye* standard.[86]

In *Frye,* the court held expert testimony, offered by the defendant, concerning results obtained by the use of a "systolic blood pressure deception" test[87] inadmissible, stating that "while the courts will go a long way in admitting *expert testimony* deduced from a well recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[88] Thus, the courts that have adopted this approach are of the opinion that the underlying principle of hypnosis is not, according to the weight of the scientific evidence, "generally accepted" as reliable in the scientific community in which it exists. The reliability approach is then a rule of *per se* inadmissibility.[89]

If a witness has been hypnotized before trial in order to refresh his recollection of the occurence, for whatever reason, then, because hypnosis

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[86] The following courts have held hypnosis and HRT inadmissible as not meeting the *Frye* test for admissibility of scientific evidence: Prewitt v. State, 460 So. 2d 296 (Ala. Crim. App. 1984); State v. Contreras, 718 P.2d 792 (Alaska 1986); State *ex rel* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981); People v. Guerra, 37 Cal. 3d 385, 690 P.2d 635, 208 Cal. Rptr. 162 (1984); People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *modified,* 31 Cal. 3d 918(a), 181 Cal. Rptr. at 273, *cert. denied,* 459 U.S. 860 (1982); People v. Quintanar, 659 P.2d 710 (Colo. Ct. App. 1982); State v. Atwood, 39 Conn. Supp. 273, 479 A.2d 258 (Conn. Super. Ct. 1984); State v. Davis, 490 A.2d 601 (Del. Super. Ct. 1985); Peterson v. State, 448 N.E.2d 673 (Ind. 1983); State v. Haislip, 237 Kan. 461, 701 P.2d 909, *cert. denied,* 106 S. Ct. 575 (1985); State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983); Commomwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983); People v. Gonzales, 415 Mich. 615, 329 N.W.2d 743 (1982), *modified,* 417 Mich. 968, 336 N.W.2d 751 (1983); State v. Ture, 353 N.W.2d 502 (Minn. 1984); State v. Mack, 292 N.W.2d 764 (Minn. 1980); State v. Levering, 213 Neb. 686, 331 N.W.2d 500 (1983); People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983); State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984); Harmon v. State, 700 P.2d 212 (Okla. Crim. App. 1985); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981); State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974); Burnett v. State, 642 S.W.2d 765 (Tex. Crim. App. 1982); Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414 (1974); State v. Martin, 101 Wash. 2d 713, 684 P.2d 651 (1984); State v. Laureano, 101 Wash. 2d 745, 682 P.2d 889 (1984). Additionally, the following states have adopted a *per se* rule of inadmissibility for HRT without specifically adopting the *Frye* test: Rock v. State, 288 Ark. 566, 708 S.W.2d 78, *cert. granted,* 107 S. Ct. 430 (1986); Bundy v. State, 471 So. 2d 9 (Fla. 1985); Walraven v. State, 255 Ga. 276, 336 S.E.2d 798 (1985) (Gregory, J., concurring specially); State v. Moreno, ___Haw. ___, 709 P.2d 103 (1985).

[87] The device used to conduct the "systolic blood pressure deception" test is considered a forerunner of the modern "lie detector". *Weston,* 16 Ohio App. 3d at 283, 475 N.E.2d at 810.

[88] *Frye,* 293 F. at 1014 (emphasis added).

[89] Those courts that have recently adopted this approach, without specifically adopting the *Frye* rule, agree that HRT should be *per se* inadmissible notwithstanding the applicability of the *Frye* standard. *See, e.g.,* Rock v. State, 288 Ark. 566, 708 S.W.2d 78, *cert. granted,* 107 S. Ct. 430 (1986); Bundy v. State, 471 So. 2d 9 (Fla. 1985); Walraven v. State, 255 Ga. 276, 336 S.E.2d 798 (1985); State v. Moreno, ___Haw. ___, 709 P.2d 103 (1985).

is deemed unreliable as a scientific process under the *Frye* test of "general acceptance," all subsequent testimony by that previously hypnotized witness is inadmissible. This approach has the "advantage" of eliminating the possible problems associated with hypnosis or the hypnotic session by simply eliminating all testimony that could have been influenced by hypnosis, no matter how material or reliable it could be shown to be.

A number of the courts that have adopted this *per se* rule have felt the need to make concessions to the harshness of its application.[90] Most courts have ruled, subsequent to its initial adoption, that a previously hypnotized witness is competent to testify to that which was known prior to the hypnotic session.[91] It is also interesting to note that two of the states instrumental in the trend toward the reliability approach have now allowed an exception to the rule whereby the defendant is permitted to testify after being hypnotized and does not appear to be held only to testimony on his proven pre-hypnotic statements. The *Shirley* court modified their original decision to allow a previously hypnotized defendant to testify in his own behalf.[92] In *State v. Superior Court*,[93] the Arizona Court of Appeals allowed a previously hypnotized defendant to testify when denial of such testimony would have precluded the defendant's only defense.

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[90] Under a strict interpretation, this test could produce the ludicrous result wherein a victim, who was also the only witness to the crime, would be precluded from testifying at trial even to the fact that the crime occurred, simply by virtue of having undergone a hypnotic session prior to the trial during the criminal investigation. *See, e.g., State v. Brown*, 337 N.W.2d at 149.

[91] *See, e.g., Collins*, 132 Ariz. at 209, 644 P.2d at 1295; People v. Zamarripa, 174 Cal. App. 3d 595, 220 Cal. Rptr. 173 (1985); People v. Rex, 689 P.2d 669 (Colo. Ct. App. 1984); State v. Collins, 296 Md. at 702, 464 A.2d at 1044; People v. Perry, 126 Mich. App. 86, 337 N.W.2d 324 (1983); State v. Ture, 353 N.W.2d 502 (Minn. 1984); State v. Levering, 213 Neb. 715, 331 N.W.2d 505 (1983); Commonwealth v. Smoyer, 505 Pa. 83, 476 A.2d 1304 (1984); State v. Laureano, 101 Wash. 2d 745, 682 P.2d 889 (1984). By allowing a previously hypnotized witness to testify to those things the witness "knew" prior to the hypnotic session these courts have shown that, at the least, they have recognized the tremendous potential for a loss of relevant, material, and reliable evidence and the needs of the system for all such evidence. However, this concession also serves to significantly undermine one of these courts' primary reasons for holding HRT *per se* inadmissible and to emphasize the impracticality of using such a rigid rule. These courts purport to be concerned with the possible violation of a defendant's right to confrontation that could result from a supposed inadequacy of meaningful cross-examination due to the possibility that a witness attains an increased veracity in the truthfulness of his testimony after being hypnotized. If this is so, how then can they, in good faith and in keeping with their purported concern, allow a previously hypnotized witness to testify at all, since it would seem that the witness would also have the same increased veracity, and the same possibility for infringing a defendant's rights, when his testimony concerns only his "known" pre-hypnotic memories.

[92] People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *modified*, 31 Cal. 3d 918(a), 181 Cal. Rptr. at 273, *cert. denied*, 459 U.S. 860 (1982).

[93] 142 Ariz. 375, 690 P.2d 94 (Ariz. Ct. App. 1984).

The reliability approach is not without its critics. The *Hurd* court stated that "we believe that a rule of *per se* inadmissibility is unnecessarily broad and will result in the exclusion of evidence that is as trustworthy as other eyewitness testimony."[94]

The basic premise on which the reliability approach rests has also been the subject of criticism. It was well stated by the *Valdez* court that the *Frye* test applies to the "admissibility of expert opinion and experimental data. The issue here is not the admissibility of a hypnotist's observations or statements made by the witness during hypnosis but instead the admissibility of the testimony of a lay witness in a normal, waking state."[95]

C. *Safeguards Test*

The safeguards approach as set out in *State v. Hurd*[96] is an extension of the *Frye* rule concept of admissibility. The *Hurd* court adopted the *Frye* standard and reasoned that hypnosis itself need not be "generally accepted" as a means to restore accurate memory, but rather "hypnosis can be considered reasonably reliable if it is able to yield recollections as accurate as those of an ordinary eyewitness, which likewise are often historically inaccurate."[97] On this basis the court determined that "hypnosis to refresh memory satisfies the *Frye* standard in certain instances."[98]

In *Hurd,* the defendant was indicted on charges of assault with intent to kill, possession of and assault with a deadly weapon, and breaking and entering with intent to assault.[99] It appears that the indictment was based almost exclusively on the statement of the victim, the defendant's ex-wife, which was given to police approximately one month after the attack, a time that was also six days after the victim had been hypnotized in an attempt to get her to recall details of the incident.[100] It also appears that prior to the hypnotic session the victim was not able to recall any details about the attacker, either immediately after the incident or for the following three and one-half weeks.[101]

The hypnotic session involving this victim was conducted by a psychiatrist, at the suggestion of the prosecutor, and attended by two police

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[94] *Hurd,* 86 N.J. at 541, 432 A.2d at 94.

[95] *Valdez,* 722 F.2d at 1200-01; *accord, Brown v. State,* 426 So. 2d at 89; *State v. Brown,* 337 N.W.2d at 151; *Armstrong,* 110 Wis. 2d at 567, 329 N.W.2d at 393. *See supra* text accompanying note 88.

[96] 86 N.J. 525, 432 A.2d 86 (1981).

[97] *Id.* at 538, 432 A.2d at 92.

[98] *Id.*

[99] *Id.* at 532, 432 A.2d at 89.

[100] *Id.*

[101] *Id.* at 530, 432 A.2d at 88.

officers who were allowed to question the witness while she was under hypnosis.[102] It was shown at the pre-trial hearing on the defendant's motion to suppress the post-hypnotic identification testimony of the victim that during the hypnotic session numerous strong, almost coercive, "suggestions" were made to the witness that she should remember details of the incident.[103]

The trial court granted the defendant's motion to suppress and the State, after denial of its motion to appeal the trial court order, sought and received leave to appeal the lower courts' orders.[104] In affirming the trial court's order, the Supreme Court of New Jersey set out the requirements of the safeguards test and determined that on the facts the post-hypnotic testimony of the witness did not meet those requirements.

The court recognized both the alleged problems associated with HRT *and* its concern with a *potential loss of important evidence.* In balancing these factors it arrived at an approach that would allow HRT if certain guidelines[105] were followed in the hypnotic procedure that increased the reliability of HRT to that of normal eyewitness testimony.[106]

If compliance with these safeguards has been met, it is the burden of the proponent to establish by clear and convincing evidence the admissibility of the HRT.[107] This approach has been followed in several

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[102] *Id.* at 530-31, 432 A.2d at 88-89.

[103] *Id.* at 531, 432 A.2d at 89.

[104] *Id.* at 533-34, 432 A.2d at 90.

[105] The guidelines adopted by the court were first suggested by Dr. Martin Orne, a leading authority on hypnosis, and are as follows:

> First, a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session . . . .
>
> Second, the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, defense, or investigator.
>
> Third, any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded in writing or in other suitable form . . . .
>
> Fourth, before conducting hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them . . . .
>
> Fifth, all contacts between the hypnotist and the subject must be recorded. This will establish a record of the pre-induction interview, the hypnotic session and the post-hypnotic period, enabling a court to determine what information or suggestions the witness may have received . . . .
>
> Sixth, only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and the post- hypnotic interview . . . .

Id. at 545-46, 432 A.2d at 96-97.

[106] *Id.* at 538, 432 A.2d at 92.

[107] *Id.* at 546-47, 432 A.2d at 97.

jurisdictions, including Illinois,[108] Mississippi,[109] New Mexico[110] and Tennessee.[111]

In *House v. State*,[112] the court determined that HRT would be admissible if the trial court determined in an advance *in camera* hearing that there had been "substantial compliance" with the mandatory guidelines and that the "probative value of a victim's hypnotically refreshed memory outweighs the risk of unfair prejudice to the accused."[113]

The proponents of both the credibility[114] and reliability[115] tests have criticized the *Hurd* approach. The primary disadvantages are said to be judicial inefficiency and the production of conflicting results in different trial courts when the guidelines are applied by the individual courts on a case-by-case basis.[116] It has also been said that when the trial court deems the testimony admissible, such admission might have the adverse effect of giving the HRT, in the eyes of the jury, "an aura of reliability which, in actuality, it does not possess."[117] The guidelines themselves

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[108] People v. Smrekar, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979).

[109] House v. State, 445 So. 2d 815 (Miss. 1984).

[110] State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983); State v. Beachum, 97 N.M. 682, 643 P.2d 246 (N.M. Ct. App. 1981).

[111] State v. Glebock, 616 S.W.2d 897 (Tenn. Crim. App. 1981).

[112] 445 So. 2d 815 (Miss. 1984). In *House*, the defendant was indicted and convicted of unnatural intercourse with an eight- year-old girl. *Id.* at 817. His conviction seems to have rested entirely on the post-hypnotic testimony of the victim and the testimony of the hynotist, who was allowed to testify both as to what the subject told him about the alleged offense and his expert opinion regarding the fact that the victim was telling the truth. *Id.* at 818-19. There was no other "independent, objective verification" of the charges against the defendant. *Id.* at 818. Further, the alleged incident that gave rise to the indictment was not the first time that this victim had made such accusations against this defendant and other individuals. After determining that the testimony of the hypnotist constituted reversible error on the grounds of impermissible hearsay, holding that the testimony concerning what the victim told him in regard to the alleged incident constituted hearsay and that an opinion as to the truthfulness of the victim's statements was not a proper subject on which to render a permissible expert opinion, the court then proceeded to determine the rule of law to be applied to HRT. The court reasoned that, because the case had to be remanded, the trial court would still need guidance as to the hypnotically refreshed testimony of the victim. *Id.* at 820-23. After a consideration of the "relevant legal and psychological authority" the court declined to adopt a *per se* rule of inadmissibility and set out the requirements of the test to be utilized in Mississippi. *Id.* at 823-27.

[113] *Id.* at 827.

[114] *See, e.g., State v. Brown*, 337 N.W.2d at 151.

[115] *See, e.g., Collins*, 132 Ariz. at 208, 644 P.2d at 1294; *Shirley*, 31 Cal. 3d at 39-40, 641 P.2d at 787, 181 Cal. Rptr. at 255-56.

[116] *Collins*, 132 Ariz. at 208, 644 P.2d at 1294; *Shirley*, 31 Cal. 3d at 39, 641 P.2d at 787, 181 Cal. Rptr. at 255; *State v. Brown*, 337 N.W.2d at 151.

[117] 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).

have been criticized for failing to provide the requisite level of assurance of reliability and for being unworkable.[118]

D. *Relevancy Balancing Test*

In *Brown v. State*,[119] the court put forth the relevancy balancing test to determine the admissibility of HRT.[120] The court determined that the *Frye* test was not applicable and that the relevancy balancing approach was consistent with Florida Evidence Code, Sections 90.401, 90.402, and

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[118] *Collins*, 132 Ariz. at 186-87, 644 P.2d at 1272; *Hughes*, 59 N.Y.2d at 544, 484 N.E.2d at 495, 466 N.Y.S.2d at 266.

[119] 426 So. 2d 76 (Fla. Dist. Ct. App. 1983). In *Brown v. State*, the defendant was indicted and convicted on charges of forgery, uttering a forged instrument, and grand theft. *Id.* at 78. The incident leading to the indictments involved the cashing of checks that had been stolen and forged. The prosecution felt that a conviction for uttering a forged instrument would be nearly impossible to prove without the testimony of the bank teller identifying the defendant as the individual who had cashed the the check, but the teller's recollection of the identity of the person had faded in the intervening two years between the occurence and the time of the trial. The teller was hypnotized four days before trial "in an effort to assist her in refreshing her faded memory" of the day of the crime. *Id.* at 79. The day before trial the defendant moved for a continuance on the grounds that the short notice of the proposed use of the testimony was prejudicial. This motion was denied and the defendant was subsequently convicted. *Id.*

On appeal, the Florida District Court of Appeals reversed the convictions for uttering a forged instrument and grand theft due to the prejudice resulting from the lack of effective notice of the proposed use of the hypnotically refreshed testimony. *Id.* at 81. Because the court realized that the issue of the use of the testimony would again arise at trial they set forth the relevancy balancing test to be utilized by the trial court in determining whether the testimony of the previously hypnotized witness was admissible and remanded the case to the trial court for proceedings consistent with their opinion. *Id.* at 94.

[120] In 1985 the Supreme Court of Florida, in Bundy v. State, 471 So. 2d 9 (Fla. 1985) [hereinafter *Bundy II*], held HRT to be *per se* inadmissible. They did so without comment on the reasoning of the Florida Court of Appeals in *Brown v. State*. The *Bundy II* court simply stated that they were "swayed by the opinions of the courts of other jurisdictions that have held that the concerns surrounding the reliability of hypnosis warrant a holding that this mechanism, *like polygraph and truth serum results*, has not been proven sufficiently reliable by experts in the field . . . ." *Bundy II*, 471 So. 2d at 18 (emphasis added). It should be remembered that the proponents of the use of HRT do not hold it out as a guarantor of truth. Therefore, if the *Bundy II* court is relying on the lack of a "truth-determining" component to HRT as a basis for holding it *per se* inadmissible, then the holding of this case becomes even more suspect because the proponents of the use of HRT have not held hypnosis out as a device for determining the truthfulness of a witness' statements. *See supra* note 37 and accompanying text. Further, it was noted in a concurring opinion that "the majority's rule of *per se* inadmissibility is merely an advisory opinion to the courts of Florida because it is not necessary to apply the rule" to decide the defendant's appeal on the specific facts of the case as presented. *Id.* at 24 (Boyd, C.J., concurring specially). For these reasons, the thoughtful analysis of the court in *Brown v. State*, and possibly the current law of the jurisdiction as well, would seem to remain intact as suggested by the concurring opinion.

90.403, which were patterned after Rules 401, 402, and 403 of the Federal Rules of Evidence.[121]

The court stated that there are two kinds of relevancy, logical and legal. They went on to state that "'[t]he relevancy of a fact to the issue being tried is ordinarily a question of logic rather than one of law'" and that "'relevant evidence is evidence tending to prove or disprove a material fact.'"[122] However, even if evidence is logically relevant it may not be admissible if it is not legally relevant.[123] Their test for legal relevance states that "'[r]elevant evidence is inadmissible if its *probative value* is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or needless presentation of cumulative evidence . . . .' "[124]

The court in *Brown v. State* reasoned that because the probative value of HRT relies on both the principle of hypnosis and the hypnotic procedure, the circumstances of the particular hypnotic session itself, the trial court *must* decide its admissibility on a case-by-case basis.[125] The trial court must determine if the proffered testimony is logically relevant and whether adequate safeguards have been followed to meet the test of legal relevancy.[126] In recognizing the supposed problems associated with HRT, the court placed the burden of proving the legal relevancy, and hence admissibility, of the HRT on the party advocating its admission.[127]

The guidelines advocated by the court, in *Brown v. State,* to reduce the potential for prejudice that could be enhanced by the supposed problems

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[121] FLA. STAT. §§ 90.401, 90.402, 90.403 (1979); FED. R. EVID. 401, 402, 403.

[122] *Brown v. State*, 426 So. 2d at 88 (citing 23 FLA. JUR. 2D *Evidence and Witnesses* § 123 (1980) and FLA. STAT. § 90.401 (1979)).

[123] *Id.*

[124] *Id.* (citing FLA. STAT. § 90.403 (1979)).

[125] *Id.* at 90.

[126] *Id.*

[127] *Id.* at 91. The court in *Brown v. State* adopted the language of the *Hurd* court in regard to this burden of proof. *Id.* In the words of the *Hurd* court:

> [T]he party seeking to introduce hypnotically refreshed testimony has the burden of establishing admissibility by clear and convincing evidence. We recognize that this standard places a heavy burden upon the use of hypnosis for criminal trial purposes. This burden is justified by the potential for abuse of hypnosis, the genuine likelihood of suggestiveness and error, and the consequent risk of injustice. Hypnotically refreshed testimony must not be used where it is not reasonably likely to be accurate evidence.

Hurd, 86 N.J. at 547, 432 A.2d at 97; *accord*, *Beachum*, 97 N.M. at 690, 643 P.2d at 254. In *Brown v. State*, the court then went on to state that the party advocating admission should attempt to comply with the suggested guidelines for conducting the hypnotic session and that the higher the level of compliance, "the more reliable and less suggestive" the hypnotic session could be shown to be by the party seeking admission of the HRT. *Brown v. State*, 426 So. 2d at 91. Further, it was their opinion that "[u]se of these extensive safeguards can minimize the gravity of objections to admissibility." *Id.*

of hypersuggestiveness, hypercompliance and confabulation associated with the hypnotic procedure are as follows:[128]

> *First,* a neutral and detached hypnotist should be employed . . . Use of a police officer/hypnotist is not per se a compelling reason for a court to supress automatically . . . on prejudicial grounds. . . .
>
> A *second safeguard* involves the location of the hypnosis session. Ideally, the session should be conducted at an independent location, such as a doctor's office, free from a coercive or suggestive atmosphere. . . .
>
> *Third,* . . . only the hypnotist and the witness should be present during hypnosis.[129]
>
> A recommended *fourth safeguard* proposes that the subject, before the hypnosis session, be examined by the hypnotist in an effort to elicit every possible detail that the witness recalls concerning the crime. This procedure should be recorded in some fashion . . . .[130]

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[128] *Id.* at 91-93.

[129] The first three procedural guidelines and the seventh guideline suggested by the court are aimed at decreasing the potential for any unwanted and unnecessary "coerciveness" or bias in the hypnotic procedure and directly address the problems of hypersuggestibility, hypercompliance, and confabulation. A "neutral and detatched hypnotist" independent of either the prosecution or the defense would serve to decrease the potential for bias towards either party in the conduct of the session. The court would not require that the hypnotist necessarily be a psychiatrist; however, as determined by the *Hurd* court, perhaps this would be the better approach. *Hurd*, 87 N.J. at 545, 432 A.2d at 96. As noted by the *Brown* court, the hypnotist should then be able to qualify more readily as an expert and testify as to the procedure employed in the particular case and as to hypnosis in general. *Brown v. State*, 426 So. 2d at 91. In addition, if the hypnotist were also a psychiatrist, he would seem to be more qualified to comment on the reason for memory loss and the appropriateness of the use of hypnosis in this particular case. Further, he would be able to conduct a physical, as well as a mental, examination of the subject as recommended by the fifth safeguard. The elimination of all persons other than the subject and the hypnotist from the hypnotic session, including the pre- hypnotic and post-hypnotic phases, in conjunction with the "neutral" location, would allow both the hypnotist and the subject to conduct the session in an environment as free as possible from any unnecessary coercive pressure. It would also seem permissible, in fact advisable, to allow any interested parties to view the session, so long as it was done in a manner that did not interfere with the privacy of the session. The *Brown* court suggests that one-way mirrors or closed circuit television would serve this purpose well. *Brown v. State*, 426 So. 2d at 92. Such an arrangement would allow interested parties to observe the session first hand and to note any possible problems with the session that perhaps would not be available for the court's inspection on reviewing the recordations of the session. This requirement of only the witness and the hypnotist being present at the session would also eliminate sources of unwanted suggestion or expectation by all other interested parties and would thus seem to decrease the possibility of stimulating confabulation and hypercompliance on the part of the subject.

[130] The fourth safeguard, requiring the hypnotist to try to "elicit every detail that the witness recalls," seems to be somewhat counter to the purpose of maintaining a neutral examiner. Perhaps the information that the subject would supply in this pre-hypnotic

Fifth, prior to being hypnotized the witness should be examined by the hypnotist to ascertain whether the witness suffers from any mental or physical disorders that might affect the results of the session.[131]

As a *sixth safeguard,* we consider it highly desireable that some type of record of the actual session be preserved . . . [W]e do not go so far as to require the session and pre-session examination be video-taped . . . we strongly suggest that a videotape system be utilized . . . Absent the use of a videotape, an audio tape recording or a written transcript of the proceedings is an alternative . . . [I]n determining the admissibility . . . if videotaping of the hypnosis session is not employed, the manner in which the session was conducted becomes less demonstrably reliable and more inherently suspect.

A *seventh safeguard* relates to the means by which the interview is conducted. The hypnotist should avoid reassuring remarks that might assist in stimulating the process of confabulation . . . leaving the witness free to present a narrative that will fill in the details of previous observations of the crime.

Eighth, in weighing the reliability of the session and its results, the court should carefully consider whether there is independent 'evidence corroborative of or contradictory to statements made during the trance. . . .'[132]

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interview could have an adverse effect on the objectivity of the hypnotist, so as to decrease his ability to conduct the session in as neutral and non-suggestive a manner as possible. It would seem more in keeping with the purposes of the guidelines to furnish the hypnotist with only written information as necessary to perform the session and dispense with the initial "eliciting" of all the details the subject remembers. It would seem preferable, if the purpose of the pre-hypnotic interview is to have a record of the witness' memories before the hypnotic session, as suggested by the *Brown* court, *Brown v. State*, 426 So. 2d at 92, that such a record of the pre-hypnotic statements be made prior to the time of the session and serve as the basis of the recorded information given to the hypnotist to enable him to conduct the session.

[131] Before the session the subject should be examined, not only for physical or mental conditions that could influence the outcome of the session as suggested by the fifth guideline, but also to determine that the use of hypnosis is appropriate for the type of memory loss experienced by the witness. *See, e.g., Hurd*, 86 N.J. at 544, 432 A.2d at 95. In this regard, if the hypnotist was a psychiatrist, he would be qualified to evaluate not only the subject's mental status, but his physical state as well.

[132] The sixth safeguard, suggesting that some type of record of the session be made and preserved, should include a record of all contacts between the hypnotist and the subject, including the pre-hypnotic and post-hypnotic phases. Although under this test the recordation of the session is recommended, not required, it would be hard to envision a determination of admissibility of the HRT if there were no record available for review. It is also important to note that "independent" evidence, either supportive or non-supportive of the admission of the proffered testimony, is a significant factor to be considered in determining whether the probative value of the evidence is "substantially outweighed by

It is important to note that these are not mandatory requirements like those set out in *Hurd*, for which non-compliance leads to inadmissibility. They are truly guidelines that provide a basis for the trial judge's decision as to the legal relevance of HRT.

If the trial court determines that the testimony is legally relevant, then the *Brown* court would require two mandatory safeguards for its in-court use to prevent the problems of jury misconception and possible infringement on the defendant's right to confrontation.[133] Because the court recognized the situation whereby a previously hypnotized witness may have an increased confidence in his post-hypnotic statements, they require the court to give "great leeway to a party opponent in cross-examining the witness" and suggest that the "most advantageous approaches are to discredit the accuracy of testimony or to question the hypnotic procedure itself through cross-examination of experts."[134] They would also require that cautionary jury instructions warning the jury of the possible influence hypnosis may have on a witness be given both before the time the HRT is presented and again when the jury is charged.[135]

Currently, no other jurisdiction specifically advocates or adopts the relevancy balancing approach.[136] However, in *United States v. Valdez*,[137] in finding inadmissible the post-hypnotic testimony regarding the identification of a person the witness had reason to know was under suspicion, the *Valdez* court applied the same reasoning as the *Brown* court. The *Valdez* court did "not formulate a rule of *per se* inadmissibility" but rather examined whether "the probative value of this hypnotically

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the danger of unfair prejudice." This recommendation should go far in alleviating the fears of the court in *Shirley* regarding a possible reversal of an "otherwise unimpeachable conviction." *See infra* note 139. The recommended guidelines proposed by the *Brown* court are similar to the mandatory safeguards to be employed in the hypnotic procedure adopted by the court in *State v. Hurd*. *See supra* note 105. Like the *Hurd* mandatory procedural safeguards, the *Brown v. State* safeguards are designed to confront the problems inherent in the procedure of hypnosis and to provide a basis upon which the trial court can determine the legal sufficiency of HRT. The *Brown v. State* court further provides for the protection of the reliability of the judicial process by requiring two mandatory safeguards if HRT is used at trial. *See infra* text accompanying notes 133-35, and note 166.

[133] *Brown v. State*, 426 So. 2d at 93.

[134] *Id.*

[135] *Id.*

[136] It would be possible perhaps to include the "substantial compliance" safeguards test, previously classified as another variant of the *Hurd* safeguard genre due to its underlying reliance on the *Frye* test, as set forth by the court in *House v. State*, as also advocating a relevancy balancing approach. The *House* court did state that for HRT to be admissible, not only must there be "substantial compliance" with the mandatory guidelines, but also that the "probative value of a victim's hypnotically refreshed memory outweighs the risk of unfair prejudice to the accused." *House*, 445 So. 2d at 827.

[137] 722 F.2d 1196 (5th Cir. 1984).

influenced testimony was outweighed by the dangers of unfair prejudice, jury confusion or jury misapprehension."[138]

In lieu of specific criticisms of the relevancy balancing test, it is reasonable to presume that disadvantages similar to those argued by the critics of the safeguards approach would be equally applicable to this approach.[139]

E. *Totality of Circumstances Test*

The totality of circumstances test was first introduced and set out in *State v. Armstrong*.[140] In 1984 the Idaho Supreme Court also advocated this test in *State v. Iwakiri*.[141] Both courts take notice of the supposed problems inherent in HRT, and the court in *Armstrong* specifically addresses the issue of a defendant's right to confrontation.[142]

In *Armstrong*, the defendant was convicted of first-degree murder and first-degree sexual assault.[143] His pre-trial motions to suppress the HRT were denied after a hearing at which extensive evidence was heard by the court on hypnosis in general and the hypnotic session of this witness in particular.[144] He appealed his conviction directly to the Supreme Court of Wisconsin on multiple grounds, including a challenge to the admission of the identification testimony of a witness who had been hypnotized prior to trial. The witness was hypnotized by a pyschiatrist five days after the murder. Her description of the man she saw leaving the victim's apartment building remained substantially the same as her pre-hypnotic

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[138] *Id.* at 1203, 1201.

[139] *See supra* text accompanying notes 116-118. The *Shirley* court's oft quoted phrase, opining that "because the hypnotized subject would frequently be the victim, the eyewitness, or a similar source of crucial testimony against the defendant, any errors in ruling on the admissibility of such testimony could easily jeopardize otherwise unimpeachable judgments of conviction" and therefore, "the game is not worth the candle," is primarily directed at the *Hurd* safeguards approach, however, its significance pales in light of the requirements of the relevancy balancing approach. *Shirley*, 31 Cal. 3d at 40, 641 P.2d at 787, 181 Cal. Rptr at 256. Under the relevancy balancing approach the particular determinations the trial court is required to make in order to find HRT admissible and the mandatory safeguards that must be utilized when HRT is admitted at trial would make the possibility of having an "otherwise unimpeachable conviction" jeopardized by an error in admitting the HRT essentially negligible. It would seem highly unlikely that if the testimony was such as to create a significant chance of prejudicial error, then under the definitive requirements of the relevancy balancing test it would never have been admitted initially.

[140] 110 Wis. 2d 555, 329 N.W.2d 386, *cert. denied*, 461 U.S. 946 (1983).

[141] 106 Idaho 618, 682 P.2d 571 (1984).

[142] *Armstrong*, 110 Wis. 2d at 568-70, 329 N.W.2d at 393. *See supra* note 79 and accompanying text.

[143] *Armstrong*, 110 Wis. 2d at 559, 329 N.W.2d at 389.

[144] *Id.* at 564, 329 N.W.2d at 391.

recollection.[145] After reviewing the evidence presented on hypnosis and the hypnotic process the court adopted the totality of circumstances test and determined that the trial court had properly admitted the post-hypnotic testimony of the witness.[146]

The basis of the totality of circumstances rule is that the trial court is in the best position to determine the admissibility of any evidence, including that derived from a pre-trial hypnotic session.[147] The trial court is to look to certain guidelines in order to determine whether the hypnotic procedure was so suggestive as to render the evidence derived unreliable for use at trial. The procedural recommendations put forth by the *Iwakiri* and *Armstrong* courts are similar to those of *Hurd,*[148] but not identical to *Hurd* nor to each other, and serve only as a guide to the trial court. Therefore, non-compliance with these guidelines does not automatically result in exclusion and conversely, complete compliance will not guarantee admission. Instead, after the initial examination of the hypnotic procedure, the court must then apply a "totality of the circumstances" test to determine if the proffered evidence, in view of all the circumstances of the case, is sufficiently reliable to merit admission.[149]

Both courts insist that the proponent, if his evidence is deemed admissible, not mention the fact of hypnosis to the jury at trial.[150] If, however, the opponent brings it out, then both parties are free to introduce expert testimony as to the effects of hypnosis on memory.[151] It is their theory that not informing the jury that a witness has been hypnotized will remove the problems associated with jury misconception of the hypnotic process.[152] This approach would seem to allow a previously hypnotized witness to testify to those matters not the subject of the hypnotic interview, even if the HRT is inadmissible.

IV. Comparative Evaluation Of The Existing Legal Tests

The foregoing overview aptly illustrates the difficulty courts have had in coming to terms with the complexity and the interrelationship of the

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[145] *Id.* at 563, 329 N.W.2d at 390.

[146] *Id.* at 573, 329 N.W.2d at 395.

[147] *Iwakiri*, 106 Idaho at 626, 682 P.2d at 579; *Armstrong*, 110 Wis. 2d at 571-73, 329 N.W.2d at 394-95.

[148] *See supra* note 105 and accompanying text.

[149] *Iwakiri*, 106 Idaho at 625, 682 P.2d at 578; *Armstrong*, 110 Wis. 2d at 574, 329 N.W.2d at 396.

[150] *Iwakiri*, 106 Idaho at 626, 682 P.2d at 579; *Armstrong*, 110 Wis. 2d at 573, 329 N.W.2d at 395.

[151] *Iwakiri*, 106 Idaho at 626, 682 P.2d at 580; *Armstrong*, 110 Wis. 2d at 573, 329 N.W.2d at 395.

[152] *Iwakiri*, 106 Idaho at 626, 682 P.2d at 579; *Armstrong*, 110 Wis. 2d at 573, 329 N.W.2d at 395.

many considerations associated with the use of HRT. These courts have recognized the many factors to be considered and presumably have sought to deal with them in a manner most consistent with their individual judicial policies.

The variety of tests now being used spans the legal spectrum from *per se* admissibility to *per se* inadmissibility, with several intervening approaches addressing the issues in slightly different manners with differing emphasis on the various factors to be considered. The ultimate question involved in the determination of whether hypnotically refreshed testimony should be admissible in a criminal trial is the proper balancing, and the method of achieving that balance, between the rights of the defendant and the needs of the adversary system of criminal justice to have available all material evidence regarding the crime in order to best effect the goal of a fair and equitable system of criminal justice for all parties involved.

The *per se* rules of admissibility or inadmissibility negate the possible disadvantages of judicial inefficiency and inconsistency that could occur when the trial court is left to determine the admissibility of HRT on a case-by-case basis, since under these rules there is no determination for the trial court to make. However, the application of these *per se* rules cannot achieve the balance of interests necessary to fulfill the goal of the system.

The *per se* rule of the credibility approach perhaps begs the question of the adequate protection of the defendant's right to confrontation by leaving the entire determination of the credibility of the HRT up to the jury. This may be especially true when considered in light of the supposed problems inherent in the hypnotic procedure as used to refresh witness' recall.[153] It appears that the proponents' theory of credibility, analogizing HRT to be no more than another example of "present recollection refreshed," is unsound in view of the scientific evidence, although not undisputed, to the contrary. It is, at best, questionable whether a jury of laymen is capable of justly making such a determination.

The *per se* rules of inadmissibility seem to include both the reliability and the safeguards approaches. The safeguards approach is included here because it also appears to represent a *per se* rule, by virtue of its interpretation. It has been interpreted to require mandatory compliance with *all* the safeguards as a precondition to admissibility, in the same way that the strict *Frye* rule approach of the reliability test requires "general acceptance" of the scientific procedure as a requisite for admission.[154]

The *per se* exclusion of hypnotically refreshed testimony, under either

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[153] *See supra* note 38 and accompanying text.

[154] *Shirley*, 31 Cal. 3d at 39, 641 P.2d at 787, 181 Cal. Rptr. at 255; *Iwakiri*, 106 Idaho at 624, 682 P.2d at 577.

the reliability or the mandatory compliance safeguards test, if all the procedural guidelines have not been adhered to, gives the appearance of protecting the defendant's rights, perhaps at the expense of reliable testimony material to the inquiry at hand and vital to a proper determination by the trier-of-fact. Under any rule of *per se* inadmissibility, there will be situations that will "disallow reliable testimony, thus thwarting the truthseeking function of our judicial system."[155]

The inapplicability of the *Frye* rule as a precondition of admissibility is supported as well by independent authority. It has been well stated that "[g]eneral scientific acceptance is a proper condition for taking judicial notice of scientific facts, but it is *not* a suitable criterion for the admissibility of scientific evidence."[156]

The test advocated by the court in *House v. State,*[157] a modified safeguards approach requiring only "substantial compliance" with mandatory safeguards, appears to be the one adopted by the Clermont County Court of Appeals in *State v. Weston.*[158] This approach moves one step closer to achieving the necessary balance, however, it seems to falter at the last moment by not adequately describing its requirements.

The totality of circumstances test is a move toward the desired method of balancing, but it seems to have gone too far. The problem with this test also occurs in its final step in determination. After the trial court has reviewed the hypnotic procedure to verify compliance with the recommended safeguards, the court is then to determine whether "in view of all the circumstances, the proposed testimony is sufficiently reliable to merit admission."[159] This final step appears to be so vague as to make it meaningless as a legal test; a test which is no test at all. The actual "standardlessness" of this test would seem to achieve nothing more than to open the door to further litigation in order to more accurately describe its boundries.

The relevancy balancing test seems to address all the issues most directly, in that it: (1) considers all the interests;[160] (2) provides recommended safeguards to maximize the level of reliability of HRT;[161] and (3) provides a just and definite means for balancing the necessary rights and interests.[162] After the trial court has reviewed the proffered evidence in

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[155] *Iwakiri*, 106 Idaho at 624, 682 P.2d at 577.

[156] C. McCormick, McCormick on Evidence § 203 at 608 (E. Cleary 3rd ed. 1984) [hereinafter McCormick] (emphasis added).

[157] 445 So. 2d 815, 827 (Miss. 1984).

[158] *Weston*, 16 Ohio App. 3d at 287, 289, 475 N.E.2d at 815.

[159] *Iwakiri*, 106 Idaho at 625, 682 P.2d at 578.

[160] By its very nature, the balancing test requires the court to recognize and weigh both the rights of the defendant and the needs of the adversary system.

[161] *See supra* notes 128-32 and accompanying text.

[162] The requirement of determining the "legal relevancy" of HRT provides the just and definite means for balancing the rights of all parties involved.

regard to the level of compliance of the hypnotic procedure with the recommended guidelines, the court must then apply the test of "legal relevancy."[163] It is at this juncture that the safeguards approach, whether in its mandatory or substantial compliance method of application, fails to provide the court with a legally sufficient basis for the ultimate determination of the admissibility of HRT.

In contrast, the relevancy balancing approach definitively describes what the court is required to do in order to make such a determination. Under this test the court must determine that the probative value of the proffered testimony is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury or needless presentation of cumulative evidence."[164]

Here again, there is independent support for the superiority of the relevancy balancing approach. It has been stated, in regard to this method of determining admissibility, that "the traditional balancing method focuses the court's attention where it belongs—on the actual usefulness of the evidence . . . " and further, that "unlike the general or the substantial acceptance standards, it [the relevancy balancing approach] is sensitive to the perceived degree of prejudice . . . associated with the scientific technique in issue."[165]

Further, if the testimony is deemed admissible, two mandatory safeguards are enforced by the court that directly address the concerns associated with the in-court use of HRT. The court is required to give "great leeway" in cross-examination and to give cautionary jury instructions both before the HRT is presented and again at the time the jury is charged.[166]

The defendant's rights and interests are fully considered under this approach. Equally important is the fact that these interests are effectively balanced with the need for all material evidence in order to allow the finder-of-fact to properly and justly perform its function.

Critical evaluation of the five basic approaches utilized to determine

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[163] *Brown v. State*, 426 So. 2d at 90, 93.

[164] *Id.* at 88; *accord*, *Valdez*, 722 F.2d at 1201.

[165] McCORMICK, *supra* note 156, at 609.

[166] *Brown v. State*, 426 So. 2d at 93. These instructions should warn the jury of the potential influence hypnosis may have on a witness. At a minimum, such an instruction should carefully advise the jury that HRT should carry no greater weight than other testimony and that hypnosis is not a guarantor of truth, but rather only an aid in recollection. *Id.* at 93-94. These twice-given mandatory jury instructions are aimed directly at the problem envisioned by the court in *People v. Gonzales*, when the *Gonzales* court expressed concern that the mere admission of HRT would give it an unwarranted "aura of reliability" in the eyes of the jury. *Gonzales*, 108 Mich App. at 160, 310 N.W.2d at 313. Surely such cautionary jury instructions as the *Brown* court would administer would cause the jurors to cast a more critical eye, to more closely scrutinize the HRT, than they would ordinarily do with normal eyewitness testimony and if so, would alleviate the concern expressed by the *Gonzales* court.

the admissibility of hypnotically refreshed testimony thus reveals that the relevancy balancing test is the one that best achieves the proper balance of interests necessary to promote the ultimate goal of a fair, equitable and effective system of criminal justice. However, because other approaches are available, and the choice of a legal test seems to be primarily a matter of judicial policy, one further inquiry must be made. Before the relevancy balancing test can be recommended as the approach that should be utilized in this jurisdiction, it is necessary to determine whether such an approach is, not only appropriate for, but also, the method most consistent with the existing judicial policies in the State of Ohio.

V. Application And Recommendation

The ultimate determination of the legal test to be utilized in any jurisdiction to evaluate the admissibility of hypnotically refreshed testimony involves two seperate matters of judicial policy. The first concerns the level of commitment to the trial court to rule on the admissibility of proffered evidence. Second, the legal test must be the one most consistent with the jurisdiction's existing evidentiary rules.

In *State v. Maurer*,[167] the Ohio Supreme Court stated, in reference to the defendant's claim that the admission of certain photographic evidence was prejudicial error, that "'[t]he trial court has *broad discretion* in the admission * * * of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere.'"[168] This policy of endowing the trial court with "broad discretion" in the admission of evidence is given even greater weight by the court's holding in *State v. Williams*.[169]

In *Williams*, the court stated, in ruling on the admissiblity of expert testimony regarding spectrographic voice analysis, that "we leave to the discretion of this state's judiciary, on a case by case basis, to decide whether the questioned testimony is relevant . . . ."[170] Thus, the decisions in both *Maurer* and *Williams* indicate a strong judicial policy for evidentiary rulings by the trial courts on a case-by-case basis.[171] It follows then that any legal rule governing the admissibility of hypnotically refreshed testimony in Ohio should be consistent with this policy.

The *per se* rules of the credibility and the reliability tests possess no element of individual case-by-case determination by the trial court and

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[167] 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984).

[168] *Id.* at 265, 473 N.E.2d at 791 (quoting State v. Hymore, 9 Ohio St. 2d 122, 128, 224 N.E.2d 126, 130 (1967)) (emphasis added).

[169] 4 Ohio St. 3d 53, 446 N.E.2d 444 (1983).

[170] *Id.* at 58, 446 N.E.2d at 448.

[171] *Accord*, State v. Hymore, 9 Ohio St. 2d 122, 224 N.E.2d 126 (1967).

would therefore seem to be counter to Ohio's established policy in this regard. Both the safeguards and the relevancy balancing approaches, due to their reliance on a judicial consideration of the procedures surrounding any hypnotic session do, however, incorporate this essential characteristic of existing judicial policy.

The second prong of the policy inquiry revolves around the jurisdiction's existing evidentiary rules. Ohio has provided by statute the rules that govern the admission of evidence.[172] The ones of primary concern to the issue of the admissibility of hypnotically refreshed testimony are embodied in Article IV of the Ohio Rules of Evidence, Rules 401, 402, and 403.[173] These rules are analogous, if not identical as is Rule 401, to the Federal Rules of Evidence and are meant to codify the rules in a form most appropriate to utilization by a state judicial system and, concurrently, to reaffirm the existing law of the State of Ohio.[174]

At this point in the inquiry it is significant to note that the relevancy balancing test, as described in *Brown v. State*,[175] and seemingly applied without reference to *Brown* in *United States v. Valdez*,[176] shares a common basis of legal analysis, an underlying reliance on these same analogous statutory provisions, with the situation in Ohio. The Fifth Circuit's decision in *Valdez* was premised on Rules 401, 402, and 403 of the Federal Rules of Evidence. Similarly, in *Brown v. State* the court was concerned with determining a rule of law applicable to hypnotically refreshed testimony which was consistent with Florida Evidence Code,

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[172] OHIO R. EVID.

[173] OHIO R. EVID. 401, 402, 403.

[174] These Ohio Rules of Evidence are as follows:

Rule 401. Definition of 'Relevant Evidence'

'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

(A) Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

[175] 426 So. 2d 76 (Fla. Dist. Ct. App. 1983).

[176] 722 F.2d 1196 (5th Cir. 1984).

Sections 90.401, 90.402, and 90.403 which are patterned after the Federal Rules of Evidence.[177] Barring any countervailing policy considerations, the analysis utilized by the courts in *Valdez* and *Brown v. State* would be applicable to a resolution of this issue in Ohio. Both these courts, when confronted with the multiple lines of authority on the proper test to be applied to hypnotically refreshed testimony, first undertook to determine if any policy existed that mandated the use of a particular test. This question arises with specific reference to the applicability of the *Frye* test of general acceptance in regard to hypnotically refreshed testimony.

In *Brown v. State,* the court determined that it was not bound to apply the *Frye* rule since it had not been adopted in Florida as the test to be applied to scientific evidence.[178] The court in *United States v. Valdez* determined that the *Frye* test was not applicable to hypnotically refreshed testimony since it was concerned only with the admission of expert testimony on the result of a scientific procedure.[179] Further, the *Valdez* court noted, but did not undertake to resolve, the question of whether the Federal Rules of Evidence may have abolished the *Frye* test.[180]

This initial inquiry is very much in harmony with Ohio's existing policy on scientific evidence. In *State v. Williams,*[181] the supreme court, when faced with the issue of the rule of law to be applied to expert testimony on the results of a "voice spectography" test, first stated that "[t]his court has never adopted the '*Frye* test'" and then went on to determine the rule of law most consistent with existing Ohio law.[182] The *Williams* court's patent rejection of the *Frye* rule indicates that any approach utilizing it as its basic premise would not be consistent with existing Ohio law.[183] Therefore, because both the reliability test and the safeguards approach have such a basis, they would not be acceptable as the proper legal test to be applied to hypnotically refreshed testimony in Ohio.

Following the determinations in *Brown v. State* and *Valdez* that the *Frye* rule was not applicable to hypnotically refreshed testimony, these

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[177] *Brown v. State*, 426 So. 2d at 88.

[178] *Id.* at 87.

[179] *Valdez*, 722 F.2d at 1201.

[180] *Id.* at 1201 n.20.

[181] 4 Ohio St. 3d 53, 446 N.E.2d 444 (1983).

[182] *Id.* at 57 n.5, 446 N.E.2d at 447 n.5.

[183] It is for this reason, in addition to the superiority of the relevancy balancing approach in regard to the final determination to be made by the trial court, that the legal test to be applied to HRT announced in the very thoughtful opinion of the Clermont County Court of Appeals in State v. Weston, 16 Ohio App. 3d 279, 475 N.E.2d 805 (Clermont County 1984) is not the one that should be utilized in Ohio. By adopting even the "substantial compliance" method of application of the safeguards approach, the court has in fact adopted a test which has as its basic underpinning the rigid structure of the *Frye* rule.

courts then proceeded to determine the rule of law most consistent with their individual jurisdictional policies. Similarly, in *State v. Williams*, after declining to establish a "concrete rule," the *Frye* test, of admissibility regarding voice print analysis, the court "endorse[d] a more flexible standard" and stated that the "Rules of Evidence establish adequate preconditions for admissibility."[184]

It is quite clear that the statutory provisions of the Ohio Rules of Evidence control the admissibility of any evidence in Ohio, including hypnotically refreshed testimony. Rule 402 provides that all relevant evidence is admissible unless contrary to certain enumerated exceptions.[185] Rule 403 further qualifies the provisions of Rule 402 and mandates that even relevant evidence is inadmissible if the "probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."[186] The Supreme Court of Ohio has further decided that it is the trial courts that should make this determination on a case-by-case basis and that a "concrete rule" of admissibility for scientific evidence is unacceptable under existing Ohio judicial policies.

Not only does the relevancy balancing test coincide with the approach embodied in the Ohio Rules of Evidence, but its other elements are also wholly consistent with the policies articulated by the Ohio Supreme Court regarding the function of the trial courts in determining the admissibility of evidence on an individual case basis. Therefore, because this test is most consistent with existing Ohio law, both statutory and judicial, the relevancy balancing test is recommended as the one that should be utilized in Ohio to determine the admissibility of hypnotically refreshed testimony.

VI. Conclusion

The determination of the legal sufficiency, and hence the admissibility, in a criminal trial, of testimony by a witness who has been hypnotized

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[184] *Williams*, 4 Ohio St. 3d at 57-58, 446 N.E.2d at 447-48.

[185] *See supra* note 174, Ohio R. Evid. 402.

[186] *See supra* note 174, Ohio R. Evid. 403. It could, perhaps, be argued that, because the requirements of Rule 403 "stand behind" all the other Rules of Evidence, the inclusion of the determination by the trial court that the probative value of the HRT is not "substantially outweighed by the danger of unfair prejudice . . ." is repetitive and unnecessary. However, because the goal of the evidentiary rules (statutory and judicial) is to ensure a fair and just determination of the issue before the court that is based solely upon legally sufficient evidence, the fact that this requirement of an initial *sua sponte* determination by the court, when considered in light of the other factors required by the relevancy balancing approach, is specifically built-in to the test itself would best serve to minimize any possibility for error detrimental to the defendant and, simultaneously, to further aid in ensuring the integrity of the system.

prior to trial in an effort to aid him in remembering the events related to a crime is an issue that has repeatedly confronted, and perhaps at times confounded, the American judicial system. No less than five different legal rules governing the admissibility of hypnotically refreshed testimony have been adopted by the various state and federal jurisdictions that have addressed and resolved this issue. The current array of tests runs the gamut of admissibility from *per se* admissible to *per se* inadmissible. This lack of uniformity of decision stems, in part, from the nature of the underlying question: the reliability of hypnosis to aid a witness' recollection. Because courts must, to some extent, depend on information from experts in the field of hypnosis to reach the proper legal conclusion, and because the experts expound conflicting views on the subject, their input has not been dispositive of the question. In addition to these non-legal considerations, the courts must also fashion a rule of law that is consistent with the evidentiary rules and other judicial policies of the jurisdiction.

The proper test for determining the admissibility of hypnotically refreshed testimony must be the one that best promotes the ultimate goal of a fair and effective system of criminal justice for all parties involved. A critical comparative analysis of the existing legal tests that have been applied to hypnotically refreshed testimony shows the relevancy balancing test to be the one that accomplishes this goal. This test is sensitive both to the needs of the adversary system for all material evidence that will aid the trier-of-fact in justly determining the issue before it and the rights of the defendant to due process of law and to confront a witness against him. It recognizes and protects the needs of the system by not holding the testimony *per se* inadmissible no matter how reliable it could be shown to be in a particular instance. It provides for a definitive method by which the trial court can determine the admissibility of the testimony on a case-by-case basis. The defendant's rights are protected by providing safeguards to be utilized in the hypnotic procedure and, if the testimony is determined to be admissible, mandating two additional safeguards for the in-court use of hypnotically refreshed testimony to further ensure the protection of these rights.

This test is, as well, the one that is most consistent with the existing evidentiary rules[187] and judicial policies in the State of Ohio. The requirements of the relevancy balancing test are mandated by the Ohio Rules of Evidence. Further, they are in complete harmony with other rules of the court regarding the function of the trial court in determining the admissibility of proffered evidence and a rejection of *per se* rules of admissibility. Therefore, as a matter of statutory and judicial policy, the relevancy balancing test is the proper test to be applied to hypnotically refreshed testimony in Ohio.

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[187] OHIO R. EVID..