Hypnotically Refreshed Testimony - Constitutional Right of a Criminal Defendant

Christine M. Dolfi

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Law Commons

Recommended Citation
Available at: https://dsc.duq.edu/dlr/vol27/iss1/6

This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.
Recent Decisions

HYPNOTICALLY REFRESHED TESTIMONY—CONSTITUTIONAL RIGHT OF A CRIMINAL DEFENDANT—The United States Supreme Court announced that a criminal defendant who is placed under hypnosis possesses a constitutional right to present hypnotically refreshed testimony at trial.


In Rock v. Arkansas the United States Supreme Court considered whether a criminal defendant has a constitutional right to testify on her own behalf when the defendant's memory was refreshed by hypnosis prior to her testimony. The Supreme Court, in a 5-4 decision, stated that a criminal defendant's right to testify on her own behalf is inherent in the due process clause of the fourteenth amendment, the compulsory process clause of the sixth amendment, and the fifth amendment privilege against self-incrimination. Justice Blackmun, writing for the majority, reasoned that the constitution provides the defendant with a right to be heard, produce favorable testimony, and decide whether or not to testify on her own behalf, and that these rights extended to hypnotically induced testimony. However, Justice Blackmun cautioned that testimony refreshed by hypnosis may only be admitted if procedural safeguards are adhered to which lessen the inaccuracies associated with hypnosis. Therefore, the United States Supreme Court concluded that the post-hypnotic testimony, providing procedural prerequisites are followed, could be admitted as evidence at trial in accordance with a criminal defendant's constitutional right to testify.

Petitioner Vickie Lorene Rock was charged in the Arkansas state court with manslaughter after fatally shooting her husband. Be-

2. Id. at 2709-10.
3. Id.
4. Id. at 2714.
5. Id. at 2710-14.
6. Id. at 2706.
Because Rock could not recall the details of the shooting incident, she attempted to refresh her memory by submitting to hypnosis under the care of a neuropsychologist, Dr. Betty Back. Before Dr. Back began the hypnosis, she recorded Rock's original recollections of the shooting. During the two hypnosis sessions, which were tape recorded, Rock failed to remember any new facts. However, subsequent to the sessions she was able to recall additional details of the shooting. The prosecutor filed a pretrial motion seeking to exclude all of Rock's testimony induced by the hypnosis sessions. After a pretrial hearing, the judge ordered that Rock's testimony be limited to her original recollections as recorded by Dr. Back and excluded all testimony which was hypnotically induced. The jury found Rock guilty of manslaughter.

Rock appealed to the Supreme Court of Arkansas, alleging first that the trial court's exclusion of the post-hypnotic testimony violated her fundamental right to testify in her own defense. Sec-
ond, Rock argued that even if hypnotically induced testimony may be inadmissible, her statements would have been admitted but for the trial court’s overly restrictive application of the State v. Hurd guidelines.17 Finally, Rock claimed that the Arkansas per se rule of prohibiting all post-hypnotic testimony was misapplied to her case.18

The Arkansas Supreme Court, responding to Rock’s first claim, determined that a defendant’s fundamental right to testify could be restricted by the standard rules of evidence.19 The court reasoned that a trial court could reasonably label the hypnotically induced testimony unreliable as evidence and exclude it without violating the constitution.20 In response to Rock’s second argument on appeal, the Supreme Court of Arkansas declined to adopt Hurd and affirmed the trial court’s decision.21 The Arkansas high court criticized the Hurd guidelines for failing to alleviate the dangers associated with admitting hypnotically induced testimony.22 The court also noted that utilizing the Hurd approach would unduly burden the pretrial process while offering no additional benefits.23 After weighing the probative value against the inherent risks, the Arkansas Supreme Court concluded that hypnotically induced testimony should be excluded from trial, although pre-hypnotic testimony might be utilized.24 Concerning Rock’s third claim that the per se rule was misapplied in her case, the court reiterated its decision to only permit testimony consistent with the neuropsychologist’s pre-hypnosis records or a defendant’s statements.25 As this

107 S. Ct. at 2709-10.
16. State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981). The New Jersey Supreme Court in Hurd held that the trial court must first determine whether hypnosis is an appropriate method for the type of memory loss encountered. If the trial court determines that in this instance hypnosis could reveal normal recall, then the trial court must determine whether certain procedural safeguards were complied with in order to minimize inherent suggestibility in the hypnotic process. The Hurd Court, however, held the hypnotically induced testimony to be inadmissible because the procedural safeguards were not properly observed. For a discussion of the Hurd guidelines, see infra note 231.
17. 288 Ark. at 576, 708 S.W.2d at 84.
18. Id.
19. Id. at 570-80, 708 S.W.2d at 84-85.
20. Id.
21. Id. at 573-74, 708 S.W.2d at 82.
22. Id. at 574, n.2, 708 S.W.2d at 82, n.2. For example, some of the dangers associated with hypnosis left uncorrected by the Hurd guidelines are confabulation and “unwarranted confidence in the validity of his [the witness’] recollection.” Id. at 82-83.
23. Id. at 575, 708 S.W.2d at 82-83.
24. Id. at 576-78, 708 S.W.2d at 83-84.
25. Id. at 576-77, 708 S.W.2d at 84.
rule was followed in Rock’s case, the court held that she failed to establish evidence of a violation.26

Rock appealed to the Supreme Court of the United States, which granted certiorari on the issue of whether the Arkansas evidentiary rule excluding hypnotically induced testimony of a criminal defendant is unconstitutional.27

Justice Blackmun, writing for the majority,28 initially noted that Congress established a general competency statute29 which stipulates that a criminal defendant is competent to testify in his own defense if he so requests.30 The Court reiterated that the right to testify advances both the “detection of guilt” and “the protection of innocence.“31 The Court also stated that the privilege to testify presents a fundamental right inherent in the fourteenth, the sixth, and the fifth amendments of the constitution.32

As a first part of its analysis, the Court examined the fourteenth amendment33 and found that a basic element of due process is an opportunity to be heard and to offer testimony.34 The Court also noted that the sixth amendment compulsory process clause35 necessitates that a criminal defendant be able to call a favorable witness.36 In addition, an accused, often the most significant witness to the advancement of his case, has a right to testify on his own behalf.37 Thus, the sixth amendment ensures that a criminal de-

26. Id.
28. Justice Blackmun’s majority opinion was joined by Justices Brennan, Marshall, Powell, and Stevens.
29. 18 U.S.C. § 3481. Section 3481 states in pertinent part:
   In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.
30. Id. at 2708.
32. 107 S. Ct. at 2709-10. More specifically, the due process clause of the fourteenth amendment, the compulsory process clause of the sixth amendment and the fifth amendment privilege against self incrimination.
33. U.S. CONST. amend. XIV, §1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .").
34. 107 S. Ct. at 2709.
35. U.S. CONST. amend. VI. “In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .” Id.
37. 107 S. Ct. at 2709.
fendant may present at trial his own version of the dispute. As a final step in its analysis, the Court examined the fifth amendment privilege against self-incrimination and concluded that only if a person first has the right to testify on his own behalf can he then decide whether or not testifying would be in his best interest. Thus, inherent within the fifth amendment is the right of a defendant to choose to testify.

After discussing the applicable constitutional provisions, Justice Blackmun reviewed two prior cases where the Court examined the constitutionality of a state rule which attempted to ensure trustworthy evidence by restricting a criminal defendant’s right to testify or to call witnesses. In the first case, Washington v. Texas, the Court held unconstitutional a state law prohibiting principals, accomplices, or accessories from testifying on behalf of one another because of the possibility that the codefendants’ relationship would likely cause each to “try to swear the other out of the charge.” The Court reasoned in Washington that a trial court should permit testimony of all witnesses with knowledge of relevant facts and allow the fact-finder to determine the credibility of the witnesses. The Washington Court concluded that their interpretation was consistent with the sixth amendment compulsory process right of a criminal defendant to obtain witnesses in his favor. Thus, the Court found that a state may not arbitrarily deny a criminal defendant the right to have witnesses present relevant and material testimony at trial.

The Supreme Court’s prohibition against a state rule excluding all testimony of a witness favoring the defendant from testifying at all was extended in Chambers v. Mississippi to forbid a state from arbitrarily limiting portions of a witness’ testimony on the stand. In Chambers, the Court held that where a state rule of

---

38. Id. at 2710.
39. U.S. CONST. amend. V. "No person shall . . . be compelled in any criminal case to be a witness against himself . . ." Id.
40. 107 S. Ct. at 2710.
41. Id.
42. Id.
44. Id. at 21 (quoting Benson v. United States, 146 U.S. 325, 355 (1892)).
45. 388 U.S. at 22 (quoting Rosen v. United States, 245 U.S. 467, 471 (1918)).
46. 388 U.S. at 22.
47. Id. at 23 (emphasis added).
49. Id. There, a criminal defendant was not permitted to cross-examine a witness in state court who had previously confessed to acquaintances about committing the murder to
evidence conflicts with a criminal defendant’s sixth amendment right to present witnesses, and “where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.” However, the Court cautioned, the right to call witnesses possessing relevant testimony is not absolute. Deference must be shown to procedural and evidentiary aspects of a criminal trial. Thus, the Supreme Court applied a balancing test to determine whether the interests of a state’s evidentiary rules justify the restrictions placed on a criminal defendant’s constitutional right to testify.

In evaluating Arkansas’ per se rule of limiting an accused’s testimony to matters remembered before hypnosis, Justice Blackmun criticized the effect of excluding the testimony of a hypnotized defendant “without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced.” In Rock’s case, the Arkansas per se rule exercised a significantly negative effect on her testimony at trial because it prevented her from discussing many of the critical events on the day of the shooting. Justice Blackmun reasoned that had Rock’s testimony not been restrained, it could have been confirmed by the ballistic expert’s testimony.

Justice Blackmun argued that the Arkansas Supreme Court could not justify its per se inadmissibility rule against defendants by adopting the rationale of other states that only exclude the hypnotically induced testimony of witnesses. The Court also noted

which the criminal defendant was charged. Mississippi’s prohibition on a criminal defendant’s cross-examination of a favorable witness originated from its hearsay and “voucher” rules. Id. at 295-97. The Supreme Court held that the state’s “voucher” rule was contrary to the fourteenth amendment due process clause which guarantees a criminal defendant the right to confront and cross-examine those witnesses he calls in his own behalf. Id. at 294.

50. Id. at 302.
51. Id. at 295.
52. Id. The Court recognized that rules of procedure and evidence are necessary to ensure fairness and reliability in trials as well as to prohibit the testimony of infants and persons with mental infirmities who lack the ability to properly observe and recall events. 107 S. Ct. at 2711, n.11.
53. Id. at 2711.
54. Id. at 2711-12.
55. Id. at 2712. Rock’s testimony was limited to the pre-hypnosis notes taken by Dr. Back. Id.
56. Id. After hypnosis, Rock remembered she did not have her finger on the gun trigger when her husband hit her arm and the pistol discharged. The ballistic’s expert determined the murder weapon was defective and could fire without using the trigger. Id. at 2707.
57. Id. at 2712.
that many other states permit hypnotically refreshed testimony in one form or another.\textsuperscript{58} The Court admitted that an individual's response often includes "an increase in both correct and incorrect recollections."\textsuperscript{68} However, Justice Blackmun recognized that the inaccuracies could be lessened by instituting procedural guidelines.\textsuperscript{60} Furthermore, corroborating evidence, cross-examination, and a jury made aware of the risks associated with hypnosis will help minimize the flaws associated with hypnotically refreshed testimony.\textsuperscript{61}

In concluding his majority opinion, Justice Blackmun recognized that uncertainties associated with using hypnosis to refresh a defendant's memory exist; however, he determined that these concerns failed to justify the Arkansas \textit{per se} rule excluding all the defendant's post-hypnotic testimony.\textsuperscript{62} Instead, Justice Blackmun recommended that the state establish guidelines to monitor the validity of post-hypnotic recollections and utilize these criteria to argue for the exclusion of all testimony as inherently unreliable in a particular case.\textsuperscript{63} In applying this analysis to Rock's case, the Court stated that the gun's defective condition corroborated Rock's post-hypnotic testimony.\textsuperscript{64} Furthermore, the recordings of the hypnosis sessions failed to suggest that leading questions were involved.\textsuperscript{65} These facts supported an argument in favor of admitting Rock's testimony.\textsuperscript{66} Therefore, Justice Blackmun concluded

\textsuperscript{58} Id. at 2713, n.16.
\textsuperscript{59} Id. at 2713. In terms of inaccurate memories, the Court outlined three common problem areas:

[T]he subject becomes 'suggestible' and may try to please the hypnotist with answers the subject thinks will be met with approval; the subject is likely to 'confabulate,' that is, to fill in details from the imagination in order to make an answer more coherent and complete; and, the subject experiences 'memory hardening,' which gives him great confidence in both true and false memories, making effective cross-examination more difficult.

\textit{Id.}

\textsuperscript{60} Id. at 2714. The Court recommended safeguards which included having the hypnosis performed only by a specially trained psychologist or psychiatrist independent of the controversy, in a neutral location with only the witness and hypnotist present, with all sessions tape or video recorded.

\textsuperscript{61} Id.

\textsuperscript{62} Id. "But [Arkansas] has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial." \textit{Id.}

\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id. at 2714-15.
that the Arkansas *per se* rule excluding Rock's testimony was an impermissible infringement on her fundamental right to testify. 67

Chief Justice Rehnquist's dissenting opinion 68 interpreted both Justice Blackmun's majority opinion and the Arkansas Supreme Court's opinion as admitting that: 1) several side effects of hypnosis tend to undermine the credibility of hypnotically refreshed testimony, 69 and 2) no procedural safeguards exist to correct the testimony's inherently unreliable nature. 70 In light of these conclusions, Chief Justice Rehnquist could find no constitutional justification for the majority's decision to invalidate the Arkansas *per se* exclusion rule and require the trial court to assess the scientific validity of hypnotically induced testimony on a case-by-case basis. 71

Chief Justice Rehnquist perceived the majority's holding as centering on the defendant's constitutional right to testify on her own behalf, and he criticized the Court for failing to realize that all evidence should be subject to reasonable restrictions. 72 In Rock's case, Chief Justice Rehnquist argued, unrestricted hypnotically induced testimony would frustrate the truth-seeking function at trial 73 since the side effects of hypnosis 74 would make cross-examination, which is to ensure truthful statements, more difficult. 75

The Chief Justice also complained that the Court's decision re-

---

67. *Id.*
68. *Id.* at 2715. Chief Justice Rehnquist's dissent was joined by Justices White, O'Connor, and Scalia.
69. *Id.* "[A] hypnotized individual becomes subject to suggestion, is likely to confabulate, and experiences artificially increased confidence in both true and false memories following hypnosis." *Id.*
70. *Id.*
71. *Id.*
73. 107 S. Ct. at 2715. The truth-seeking function of permitting defendants to testify on their own behalf improves both the 'detection of guilt' as well as the 'protection of innocence.' *Ferguson v. Georgia*, 365 U.S. 570, 581 (1961).
74. *See supra* note 59.
75. 107 S. Ct. at 2715. Chief Justice Rehnquist pointed out that even Justice Blackmun recognized that hypnosis could make cross-examination more difficult. *Id.*
stricts both state and federal courts in their ability to respond with flexibility to growth in the scientific understanding of hypnosis.76 He argued that the Supreme Court traditionally has left the state courts free to establish their own criminal procedures77 and finely tune their rules of evidence.78 In the present case, Chief Justice Rehnquist found that while the majority’s standard for determining the admissibility of hypnotically enhanced testimony had merit,79 the Arkansas Supreme Court’s response appeared equally sensible.80 However, until the use of hypnosis grows out of its scientific infancy and achieves greater reliability, the Chief Justice would continue to dissent against any attempts to impose the Court’s views of the hypnosis issue on the state courts.81

The right of a criminal defendant to testify on his own behalf had its origins at common law.82 During that time, the parties were disqualified from testifying at trial.83 By the end of the sixteenth century, the parties in civil actions were still prohibited from testifying, but defendants in criminal actions were required to present their own defense.84 After 1695, an accused charged with treason could call witnesses who would present evidence in his behalf.85 Subsequent to 1701, a criminal defendant facing a felony charge could also present witnesses; however, the criminal defendant was still prohibited from directly presenting evidence himself.86

In the United States, state legislatures first provided a criminal defendant with a right to testify on his own behalf when Maine adopted a general competency statute in 1864.87 Congress ap

76. 107 S. Ct. at 2716.
79. 107 S. Ct. at 2716. Chief Justice Rehnquist expressed concern with the administrative difficulties of the trial court applying the majority’s analysis on a case-by-case basis. Id.
80. Id.
81. Id.
82. Id. at 2708.
83. 2 J. Wigmore, EVIDENCE § 576 (J. Chadborn Rev. 1979) p. 810. The common law rationale for excluding the parties was a fear that their pecuniary interest in the outcome of the trial would most likely encourage false testimony. Id.
84. Ferguson v. Georgia, 365 U.S. 570, 573 (1961). Criminal defendants were not permitted assistance of counsel nor were they permitted to call witnesses in their own behalf. Id. at 573-74. Consequently, the criminal trial was characterized as “a long argument between the prisoner and the counsel for the Crown, in which they questioned each other and grappled with each other’s arguments with the utmost eagerness and closeness of reasoning.” 1 Stephen, HISTORY OF THE CRIMINAL LAW OF ENGLAND, p. 326.
85. 365 U.S. at 574.
86. Id.
87. See Wigmore supra note 83 at § 579, n.2. Other northeastern states gave a crimi-
proved a similar statute when it passed the Act of March 16, 1878.\textsuperscript{88} England enacted a comparable law in 1898.\textsuperscript{89} Most southern states later adopted a competency statute, although several added a proviso requiring the accused to appear as the first witness to testify for the defense.\textsuperscript{90} However, Georgia still refused to allow a criminal defendant to testify on his own behalf,\textsuperscript{91} thus limiting the defendant's participation in state court to presenting an unsworn statement.\textsuperscript{92}

The case law providing a criminal defendant with the right to testify has been recognized by the Supreme Court as arising from several clauses of the United States Constitution. The Court has interpreted the fourteenth amendment due process clause,\textsuperscript{93} sixth amendment compulsory process clause,\textsuperscript{94} and fifth amendment privilege against self-incrimination\textsuperscript{95} as supporting a criminal de-

\begin{itemize}
  \item \textsuperscript{89} See Wigmore \textit{supra} note 83 at § 579.
  \item \textsuperscript{90} Id.
  \item \textsuperscript{91} \textit{Ferguson}, 365 U.S. at 577. The judicial system reasoned that permitting the accused to testify, placed the criminal defendant in a disadvantaged position. See Wigmore \textit{supra} note 83 at § 579. If being competent, he failed to testify, that would damage his cause more seriously than if he were able to claim that his silence were enforced by law. Moreover, if he did testify, that would injure more than assist his cause, since by undergoing the ordeal of cross examination, he would appear at a disadvantage dangerous even to an innocent man. Id. at n.8.
  \item \textsuperscript{92} Id. at n.7.
  \item Until as recently as 1962, a criminal defendant in Georgia was not permitted to testify under oath. He was allowed to make an unsworn statement. If he did so, he could not be compelled to answer questions on cross-examinations. On the other hand, he had no right to have his statements elicited by questions from counsel. \textit{Id.}
  \item \textsuperscript{93} The fourteenth amendment states that: “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV, §1. For specific due process cases, see, e.g. Ferguson v. Georgia, 365 U.S. 570 (1961), In re Oliver, 333 U.S. 257 (1948), and Faretta v. California, 422 U.S. 806 (1975).
  \item \textsuperscript{94} The sixth amendment compulsory process clause reads: “In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.” U.S. CONST. amend. XI. For specific compulsory process cases, see, e.g., Washington v. Texas 388 U.S. 14 (1967), Faretta v. California, 422 U.S. 806 (1975), and Adams v. U.S. \textit{ex rel} McCann, 317 U.S. 269 (1942).
  \item \textsuperscript{95} The fifth amendment provides that: “No person shall . . . be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. For specific fifth amendment cases, see, e.g., Harris v. New York, 401 U.S. 222 (1971), and Miranda v. Arizona 384 U.S. 436 (1966).
fendant's right to personally present at trial his version of the facts in dispute. However, the Court has not labeled the right of a defendant to testify as absolute and has placed certain restrictions on a defendant's ability to appear as a witness at trial.98

The Supreme Court in Ferguson v. Georgia97 addressed the issue of whether the fourteenth amendment due process clause provides a criminal defendant in a state court with the right to be questioned by his counsel on the witness stand.98 In Ferguson, at the trial of a criminal defendant charged and convicted of murder, the judge prohibited defense counsel from questioning his client.99 The Supreme Court took exception to the Georgia rule, reasoning that a criminal defendant under the threat of losing life or liberty could not properly advance his own defense without the aid of counsel.100 Therefore, the Supreme Court held that the trial judge's denial of the defense counsel's request to elicit questions from the criminal defendant at trial violated the fourteenth amendment due process

---


97. Ferguson v. Georgia, 365 U.S. 570 (1961). Justice Brennan delivered the court's opinion. Justice Frankfurter filed a separate opinion, joined by Justice Clark, for reversing Ferguson's conviction. Id. at 598. Justice Clark filed a concurring opinion which was joined by Justice Frankfurter. Id. at 601.

98. Id.

99. Id. at 571. The trial court's decision to exclude questioning was based upon a law originally passed in 1868 which provided that:

In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer.

GA. CODE § 38-415 (1933). The trial judge also relied on an incompetency rule with origins in the nineteenth century that applied to persons "charged in any criminal proceeding with the commission of any indictable offense or any offense punishable on summary conviction." GA. CODE § 38-415 (1933).

100. 365 U.S. at 595. The Court stated:

But to hold that the moment the defendant is placed upon the stand he shall be debarred of all assistance from his counsel . . . would in our opinion be to make . . . [a]n innocent man, charged with a heinous offence, and against whom evidence of guilt has been given . . . much more likely to be overwhelmed by his situation, and embarrassed, when called upon for explanation, than the offender, who is hardened in guilt; and if he is unlearned, unaccustomed to speak in public assemblies, or to put together his thoughts in consecutive order anywhere, it will not be surprising if his explanation is incoherent, or if it overlooks important circumstances.

Id. at 595, citing Annis v. People, 13 Mich. 511, 519-20 (1865).
The Supreme Court also addressed a criminal defendant's rights under the fourteenth amendment in *Chambers v. Mississippi*.

There, McDonald admitted murdering a police officer but later repudiated his confession. Chambers was charged with the murder and at trial the judge denied not only Chambers' motion to call McDonald as an adverse witness, but also the defendant's request to present witnesses that would have undermined McDonald's repudiation. The issue before the Court was whether Chambers' due process rights were violated by the state court's denial of his request to cross-examine an adverse witness and present witnesses in his own favor.

The Supreme Court in *Chambers* found no need to establish new standards of constitutional law, but instead reaffirmed that a criminal defendant possesses a right to confront and cross-examine witnesses, especially in light of their significant contribution to the truth-seeking process at trial. The Court also reiterated that a criminal defendant possesses a fundamental right to present witnesses on his own behalf. If the testimony of the witnesses contains assurances of trustworthiness, the hearsay rule should not prohibit admission of the evidence. Thus, the Supreme Court concluded that the state court's denial of Chambers' request to cross-examine McDonald, coupled with the refusal to admit the favorable witnesses' testimony, violated Chambers' fourteenth amendment due process rights.

The Supreme Court also found a constitutional right of a criminal defendant to testify on his own behalf in its analysis of *In re Oliver*. In that case, the defendant was charged with criminal

---

101. 365 U.S. at 596.
103. *Id*. at 294.
104. *Id*.
105. *Id*. at 285.
106. *Id*. at 302.
110. *Id*. at 302.
111. *In re Oliver*, 333 U.S. 257 (1948). Justice Black delivered the majority opinion. *Id*.
contempt and convicted in a secret trial where he was not permitted to obtain counsel, prepare a defense, cross-examine opposing witnesses, or summon witnesses in his defense.112 The Supreme Court reasoned that the nature of the proceeding denied the criminal defendant a reasonable "opportunity to be heard in his defense."113 In addition, the Court noted that, at a minimum, the fourteenth amendment provides a criminal defendant with the right to receive notice of the charges filed against him, obtain his day in court, cross-examine the witnesses against him, have an attorney present, and "offer his own testimony."114 Thus, having found that these procedural protections of the due process clause, including the right to testify, were violated116 the Supreme Court reversed the criminal defendant's conviction.116

The Supreme Court's application of the compulsory process clause to the rights of a criminal defendant to present favorable witnesses at trial was discussed in Washington v. Texas.117 At his murder trial, Washington claimed as a defense that his co-participant had shot the victim.118 The co-participant was prepared to testify on Washington's behalf and confirm his defense, but Texas law prohibited the co-participant from appearing on the stand.119 The issues presented to the Court were whether the sixth amendment could be applied against the states through the fourteenth amendment and, if so, whether the Texas statutes120 prohibiting co-participants in the same crime from testifying for one another

at 258. Justice Rutledge filed a concurring opinion. Id. at 278. Justice Frankfurter filed a separate opinion, Id. at 283, and joined the dissenting opinion of Justice Jackson. Id. at 286.

112. Id. at 258-59.
113. Id. at 273 (emphasis added).
114. Id. (emphasis added).
115. Id. The Court stated:

[T]he fourteenth amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be [secretly] sentenced to prison. We further hold that failure to afford the [criminal defendant] a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law.

Id.

116. Id. at 278. "It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal." Id., citing Chambers v. Florida, 309 U.S. 227, 236-37 (1940).
118. Id. at 15-16.
119. Id.
120. The applicable statutes were TEX. PENAL CODE, art. 82 (1925) and TEX. CODE CRIM. PROC., art. 711 (1925). Both were repealed by implication under TEX. CODE CRIM. PROC. ANN. art. 36.09 (1965) after commencement of Washington's case. 388 U.S. at 16, n.4.
violated Washington's constitutional rights under the compulsory process clause.\footnote{121}

In terms of the first issue in \textit{Washington}, the Court reviewed its prior use of the fourteenth amendment to guarantee that the states recognize a criminal defendant's right to assistance of counsel\footnote{122} and to confront witnesses brought against him.\footnote{123} The Court reasoned that as a natural outgrowth of the defendant's right to present his own defense and confront his accusers, due process should also require that the states permit a criminal defendant to present witnesses favoring him.\footnote{124} Therefore, the Supreme Court held that the compulsory process clause of the sixth amendment could be applied against the states through the fourteenth amendment.\footnote{125}

The Court's analysis of the second issue, whether the compulsory process clause permits co-participants to testify on behalf of one another, began with a recognition that, in general, the search for truth is furthered by permitting witnesses with material and relevant information to testify at trial, leaving judgment about the testimony's credibility to the fact-finder.\footnote{126} The Court found no justification for the Texas procedural rule excluding all testimony favoring the defense, especially when the state failed to exclude testimony by a co-participant adverse to the defendant.\footnote{127} In addition, the Supreme Court reasoned that the Texas laws actually permitted a co-participant to testify when he had greater incentive to perjure himself, but prohibited his testimony where it was potentially more reliable.\footnote{128} Thus, the Court held that Texas arbitrarily denied Washington his right to compulsory process when the state denied him the opportunity to obtain witnesses in his favor.\footnote{129}

The Supreme Court also discussed the rights of a criminal de-
fendant under the compulsory process clause in *Faretta v. California*. In that case, Faretta's attempts to waive assistance of counsel and represent himself against a charge of grand theft were rejected by the trial judge. The issue presented to the Court was whether the sixth and fourteenth amendments provide a criminal defendant with the right to intelligently elect to proceed through a state trial without the assistance of counsel. The Court stated that the sixth amendment guarantees a criminal defendant the right to not only make a defense, but also personally present that defense. Also, the Court noted that the logic and intent behind the sixth amendment providing 'assistance' of counsel to a criminal defendant would demand that a defense attorney serve as the assistant, not the master at trial. Finally, the Court reviewed the historical motivations behind the passage of the sixth amendment and determined that the founding fathers clearly intended the accused to possess the right to self-representation. Therefore, the Supreme Court held that Faretta possessed a constitutional right to represent himself at trial which was violated when the California trial court forced upon him a court appointed attorney.

The right of a criminal defendant to testify on his own behalf has received recognition from the fifth amendment's guarantee against compelled testimony. In *Harris v. New York*, the pros-

---

130. *Faretta v. California*, 422 U.S. 806 (1975). The Court's opinion was delivered by Justice Stewart. *Id.* at 807. Chief Justice Burger filed a dissenting opinion which was joined by Justices Blackmun and Rehnquist. *Id.* at 836. Justice Blackmun also filed a dissenting opinion which was joined by Chief Justice Burger and Justice Rehnquist. *Id.* at 846.

131. *Id.* at 807-11. Faretta was convicted of a grand theft by a trial jury and sentenced to prison. *Id.*

132. *Id.* at 807. "Stated another way, the question is whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." *Id.*

133. *Id.* at 819. "It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" *Id.*, citing U.S. CONST. amend. VI.

134. 422 U.S. at 820.

135. *Id.* at 821-32. The Court provided a long and detailed review of the right to self-representation in common law England as well as in the American colonies. *Id.*

136. *Id.* at 831-32.

137. *Id.* at 836.


139. *Harris v. New York*, 401 U.S. 222 (1971). The majority opinion was delivered by Chief Justice Burger. Justice Black dissented without opinion. *Id.* at 226. Justice Brennan filed a dissenting opinion which was joined by Justices Douglas and Marshall. *Id.* Harris was accused of selling heroin to an undercover police officer. *Id.* at 222-23.
executor attempted to introduce evidence, which was inadmissible under *Miranda v. Arizona*\(^{140}\) to establish guilt, challenging the defendant's credibility as a witness.\(^{141}\) The issue before the Supreme Court was whether a criminal defendant's pretrial statements may be used to impeach his credibility when the evidence is inadmissible under *Miranda* to establish the prosecution's case in chief.\(^{142}\) 

The *Harris* Court stipulated that while *Miranda* was not controlling in the present case, *Walder v. United States*\(^{143}\) could be relied upon for guidance.\(^{144}\) In both cases, the evidence aided the jury in determining the witness' credibility, and the Supreme Court reasoned that this benefit should not be discarded over unfounded concern about encouraging improper police conduct.\(^{145}\) Also, the defendants in both instances voluntarily took the stand to testify, and once they did so, they became subject to all the truth seeking devices at the prosecutor's disposal.\(^{146}\) Thus, the Court held that when a criminal defendant exercises the right to testify, his earlier, conflicting statements which are inadmissible under *Miranda* can be utilized to impeach his testimony without violating the fifth amendment privilege against self-incrimination.\(^{147}\)

---

140. *Miranda v. Arizona*, 384 U.S. 436 (1966). Miranda was taken into custody, interrogated by the police, and submitted a confession, although he had not been informed of his right to remain silent and have counsel present for questioning. *Id.* at 439. The Supreme Court addressed the issue of whether a criminal defendant is deprived of his fifth amendment privilege against self-incrimination when admissions obtained by the police without proper procedural safeguards are thereafter used against the defendant at trial. *Id.* at 445. Chief Justice Warren, writing for the majority, held that "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444. The Court reasoned that without procedural safeguards the incommunicado police interrogation would likely elicit incriminating statements which were not of Miranda's free choice. *Id.* at 445. Thus, the Supreme Court guaranteed under the fifth amendment that a criminal defendant has a "right to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Id.* at 460, (quoting *Malloy v. Hogan* 378 U.S. 1, 8 (1964)).

141. 401 U.S. at 223-24.

142. *Id.* at 222.

143. *Walder v. United States*, 347 U.S. 62 (1954). In *Walder*, the Supreme Court found that physical evidence, inadmissible as part of the prosecutor's case in chief because it was obtained from an illegal search and seizure, could nevertheless be used to impeach the credibility of the criminal defendant's testimony. *Id.*

144. 401 U.S. at 225. "We are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in *Walder.*" *Id.*

145. *Id.* The Supreme Court disagreed that their decision would encourage the police to violate a criminal suspect's Miranda rights. *Id.*

146. *Id.*

147. *Id.* at 226.
Although case law has established a criminal defendant's right to testify under the fourteenth, sixth, and fifth amendments, the Supreme Court has made it clear that certain limitations exist on the right to testify. In several early decisions, as well as in recent due process cases, the Court has determined that the right to testify cannot be absolute and must sometimes give way to other compelling interests.

In the early case of Ex parte Terry, the defendant, an attorney, was charged with and convicted of contempt of court for assaulting a United States Marshall with a deadly weapon. On appeal, Terry argued for reversal on the grounds that he was committed to six months in jail without being present for sentencing, receiving notice of the hearing, or providing a defense to the charges. The Supreme Court dismissed Terry's second and third claims as immaterial, reasoning that punishment of acts committed in the face of the court, which would impair or threaten the court's authority, must take precedent over the procedural rights raised by the violator. In response to Terry's first claim, the Court noted that he voluntarily elected to leave the courtroom before sentencing and reasoned that he could not escape punishment in this manner.

The Supreme Court, however, in Cooke v. United States recognized a distinction where the contemptuous activity did not occur in open court. The Court reasoned that the critical factor which permitted the suspension of procedural rights rested not with whether the judge personally observed the misconduct, but

---

148. See, e.g., Ex parte Terry, 128 U.S. 289 (1888) and Cooke v. United States, 267 U.S. 517 (1925).
151. Ex parte Terry, 128 U.S. 289 (1888).
152. Id. at 298.
153. Id. at 306.
154. Id. at 306-07.
155. Id. at 310-11. The fact that Terry was sentenced on the same day as his misconduct in open court was critical to the Court's decision and the Justices took no position on whether the same outcome would be permitted if Terry's conviction and sentencing had been administered on a different day than when the incident occurred. Id. at 314.
156. Cooke v. United States, 267 U.S. 517 (1925). There, Cooke, an attorney, was held in contempt of court for a letter he wrote to the federal district court judge requesting the judge to remove himself from pending cases because of clear bias. Id. at 519-21. Eleven days later, Cooke was brought before the same judge and sentenced to thirty days in jail. Id. at 527.
157. Id. at 536.
whether the activity took place in the open court room and threatened the trial judge's authority and ability to proceed in an orderly, respected fashion.\textsuperscript{158} Thus, the Supreme Court would only limit a criminal defendant's procedural due process rights in contempt cases where the conduct occurred in the trial court's presence, the trial judge observed the conduct, and the activity disrupted the court's proceedings in a manner that required instant punishment to prevent a public loss of confidence in the court's authority.\textsuperscript{159}

In more contemporary Supreme Court cases, such as \textit{Goldberg v. Kelly};\textsuperscript{160} the Justices have recognized an individual's privilege to exercise fourteenth amendment rights, but within certain limitations. In \textit{Kelly}, the benefits provided to welfare recipients were unilaterally cancelled by a government agency and could only be reinstated at a post-termination hearing.\textsuperscript{161} The issue before the Court was whether the due process clause required that a recipient of welfare benefits receive a hearing \textit{before} the aid may be discontinued.\textsuperscript{162}

The Supreme Court reasoned in \textit{Kelly} that qualified citizens possessed a statutory right to welfare benefits\textsuperscript{163} and would face a desperate situation during the period after the cut-off of aid and before the post-termination hearing.\textsuperscript{164} The Court determined that a pre-termination hearing was necessary to protect the recipients' due process rights,\textsuperscript{165} and that the benefit of this hearing outweighed the cost and administrative inconvenience to the government.\textsuperscript{166} However, the Court stipulated that the pre-termination

---

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Id.} "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have reasonable opportunity to meet them by way of defense or explanation." \textit{Id.} at 537.


\textsuperscript{161} \textit{Id.} at 258-59.

\textsuperscript{162} \textit{Id.} at 260.

\textsuperscript{163} \textit{Id.} at 262.

\textsuperscript{164} \textit{Id.} at 264.

\textsuperscript{165} \textit{Id.} "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss." \textit{Id.} at 262-63, citing \textit{Joint Anti-Fascist Refugee Committee v. McGrath}, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

\textsuperscript{166} 397 U.S. at 266. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected
hearing should not assume the form of a quasi-judicial forum\textsuperscript{167} and need only test the validity of the government's decision to discontinue benefits.\textsuperscript{168} Therefore, the Supreme Court guaranteed at the pre-termination hearing only minimum procedural rights.\textsuperscript{169}

The Supreme Court also found that a person's fourteenth amendment rights could be modified in \textit{Morrissey v. Brewer}.\textsuperscript{170} There, Morrissey's parole was revoked by the state Board of Parole, without a hearing, on the basis of a parole officer's report.\textsuperscript{171} The issue before the Supreme Court was whether the due process clause entitled Morrissey to some form of hearing before his parole was revoked.\textsuperscript{172}

The Court's analysis began with a recognition that, although on parole, Morrissey possessed a liberty interest under the fourteenth amendment entitling him to some due process protection.\textsuperscript{173} In a balancing of Morrissey's and the state's interests, the Supreme Court stipulated that Morrissey had strong liberty interest in remaining free from imprisonment and functioning as a productive member of society.\textsuperscript{174} From the state's perspective, Morrissey committed a crime which justifies the state placing restrictions on him without the burden of needing a full adversarial proceeding before revoking his parole.\textsuperscript{175} Thus, the Court determined that while Morrissey was not entitled to the full panoply of due process rights, he should receive an informal, preliminary hearing\textsuperscript{176} by an indepen-
dent officer\textsuperscript{177} and a revocation hearing by the appropriate parole authority.\textsuperscript{178}

Although the Supreme Court has addressed many of the constitutional issues associated with a criminal defendant's right to testify at trial, the state and lower federal courts have provided most of the case law in the area of hypnotically induced testimony. Most courts have adopted one of four approaches to the admissibility of post-hypnotically induced testimony at trial.\textsuperscript{179} They include requiring a trial court to: 1) admit hypnotically induced testimony, but allow the fact-finder to weigh its credibility;\textsuperscript{180} 2) determine the admissibility of hypnotically induced testimony on a case-by-case basis;\textsuperscript{181} 3) exclude all hypnotically induced testimony because it tends to be unreliable;\textsuperscript{182} or, 4) follow procedural guidelines that reduce the risks associated with hypnosis.\textsuperscript{183}

In the first category of hypnosis cases, \textit{State v. Brown}\textsuperscript{184} outlined use a probable cause standard, the parolee should receive notice, and may present evidence, but he does not have an absolute right to confrontation and cross-examination of adverse witnesses. \textit{Id.} at 487. Justice Brennan's concurrence would also provide the parolee with assistance of counsel. \textit{Id.} at 491 (Brennan, J., concurring), citing \textit{Goldberg v. Kelly}, 397 U.S. 254 (1970).

177. 408 U.S. at 486. "This independent officer need not be a judicial officer." \textit{Id.}

178. \textit{Id.} at 487-89. In the revocation hearing, the minimum requirements of due process . . . include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. \textit{Id.} at 489. Justice Brennan's concurrence would also provide the parolee with assistance of counsel. \textit{Id.} at 491 (Brennan, J., concurring), citing \textit{Goldberg v. Kelly}, 397 U.S. at 254 (1970).


184. 337 N.W.2d 138 (N.D. 1983). There, a young woman was attacked, but could not remember any details of the crime. \textit{Id.} at 139. The victim was placed under hypnosis by an agent of the North Dakota Crime Bureau and after being instructed to act as a news reporter, the young woman emotionally and vividly re-enacted the events of the attack. \textit{Id.} at
the reasoning behind admitting post-hypnotically induced testimony, while permitting its credibility to be evaluated by the fact-finder. The issue before the North Dakota Supreme Court was whether the post-hypnotic testimony of a witness could be admitted at a criminal trial in state court.\textsuperscript{188} The North Dakota Supreme Court reasoned that because the purpose of a trial was to seek the truth, admitting hypnotically induced testimony was preferable to a \textit{per se} exclusion.\textsuperscript{186} The high court considered a challenge to the credibility of a witness, through cross-examination, to be the appropriate method for weighing the value of hypnotically refreshed testimony.\textsuperscript{187} Thus, the North Dakota Supreme Court held that the hypnosis of witnesses before trial could affect their credibility in the eyes of the jury, but not affect the admissibility of testimony at trial.\textsuperscript{188}

Although the first category of hypnosis cases recognizes the admissibility of testimony, the Ninth Circuit Court of Appeals in \textit{United States v. Awkard}\textsuperscript{189} found that the determination of credibility by the jury could not be unduly influenced by expert testimony. In \textit{Awkard}, the issue before the ninth circuit, assuming that hypnotically refreshed testimony was admissible,\textsuperscript{190} was whether the expert who hypnotized the witness could testify before the witness in order to buttress the witness’ credibility.\textsuperscript{191} The court rea-

\begin{flushleft}
141. In a second hypnotic session, the victim provided a detailed description of the assailant, which resulted in the arrest of defendant Brown. \textit{Id.} at 142.
\end{flushleft}

\begin{flushleft}
185. \textit{Id.} at 138.
186. \textit{Id.} at 151. The North Dakota Supreme Court drew a parallel between expert witnesses on hypnosis and medical experts. \textit{Id.} The court concluded that since a jury was capable of finding the truth in conflicting medical testimony a jury was also competent to make a similar decision when confronted with opposing expert testimony on hypnosis. \textit{Id.} at 151-52.
187. \textit{Id.} at 151.
188. \textit{Id.}
189. \textit{United States v. Awkard}, 597 F.2d 667 (9th Cir. 1979), \textit{cert. denied}, 444 U.S. 885 (1979). There, a prison inmate named Hackney, who participated in the fatal stabbing of another prisoner, was granted immunity in exchange for revealing the identities of, and testifying against, the other attackers. Hackney recalled the names of a few participants, and after being hypnotized by Dr. Kroger, an expert in the field, the government witness identified several additional individuals. At trial, Dr. Kroger appeared as an expert witness and testified about the accuracy of Hackney’s hypnotically refreshed memory before he testified as to the identity of the murder participants. \textit{Id.} at 669.
190. \textit{Id.} at 669. The court of appeals readily recognized that hypnotically induced testimony was admissible within the circuit. \textit{Id.}, citing \textit{United States v. Adams}, 581 F.2d 193, 198-99 (9th Cir. 1978) and \textit{Kline v. Ford Motor Co.}, 523 F.2d 1067, 1069-70 (9th Cir. 1975).
191. 597 F.2d at 669. Dr. Kroger’s testimony not only discussed the general advantages and results of hypnosis and the procedure utilized on Hackney, but also gave his opinion that Hackney’s memory had been accurately refreshed. \textit{Id.} at 670-71.
\end{flushleft}
soned that permitting a recognized expert on hypnosis to testify prior to his patient, a prosecution witness, created a highly prejudicial situation, especially since the defense had already stipulated that it had no intention of cross-examining the prosecution witness about his hypnosis. However, even if the defense had planned cross-examination on this matter, the Ninth Circuit concluded that the expert witness still could not give his personal opinion as to the accuracy of the prosecution witness’ memory, since the credibility of his post-hypnotically induced testimony must be decided by the jury.

The second category of hypnosis cases recommends that a trial court conduct an individualized inquiry into each case to determine admissibility. In Wicker v. McCotter, the issue before the fifth circuit was whether a criminal defendant’s due process rights were violated when the witness, after undergoing hypnosis, testified at trial that she had identified Wicker in a photo spread as the attacker of the murder victim. The court of appeals stated that the admissibility of hypnotically induced testimony should be determined on a case-by-case basis. The court reasoned that a trial judge should use the standard evidentiary evaluation of whether the probative value of the hypnotically refreshed testimony outweighs its prejudicial effect.

In State v. Iwakiri, the Idaho Supreme Court also took the

192. Id. at 670.
193. Id. at 670-71. “Credibility . . . is for jury—the jury is the lie detector in the courtroom.” Id. at 671, citing United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974).
194. Wicker v. McCotter, 783 F.2d 487 (5th Cir. 1986), cert. denied, 478 U.S. 1010 (1986). In Wicker, two witnesses observed a struggle between a man and woman before the man forced the woman into a car and drove away. The woman was found murdered and one of the witnesses tentatively identified the victim’s husband as the culprit. Id. at 489. After independent evidence incriminated Wicker as the murderer, the witness submitted to hypnosis and then identified Wicker in a police photo spread. Id. at 490. At trial, the witness initially only testified in accordance with her pre-hypnosis statement to the police. On cross-examination, Wicker’s counsel questioned the witness about identifying Wicker in the photo spread. On redirect, the prosecutor elicited from the witness that the identification of Wicker occurred after hypnosis. Id. at 492.
195. Id. at 492.
196. Id.
197. Id. In Wicker’s specific case, the court reasoned that because the witness’ pre-hypnotic statements paralleled her post-hypnotic identification of Wicker, he was not prejudiced against by her testimony at trial. Also, the court found that the witness’ testimony possessed probative value since it was subjected to complete cross-examination and her statements were corroborated by not only independent testimony, but also Wicker’s own confession. Id. at 492-93.
198. State v. Iwakiri, 106 Idaho 617, 682 P.2d 571 (1984). In that case, Boyer, a wit-
position that a trial court should complete an individualized inquiry into the admissibility of hypnotically induced testimony.\textsuperscript{199} The issue before the Idaho court was whether a witness was competent to testify at trial about those facts remembered subsequent to hypnosis.\textsuperscript{200}

The Idaho Supreme Court in \textit{Iwakiri} considered the trial court to be the most competent to deal with evidentiary issues and reasoned that the lower court should therefore have flexibility to determine the reliability of hypnotically refreshed testimony.\textsuperscript{201} The Idaho Supreme Court established that a trial court, faced with a previously hypnotized witness, should first conduct a pretrial hearing to evaluate whether procedural safeguards are properly administered.\textsuperscript{202} This would allow the benefit of memory recall, yet protect against the dangers of hypnosis.\textsuperscript{203} Next, applying a totality of the circumstances' test, the trial court should determine the reliability of the witness' testimony and, finally, deem the witness competent or incompetent to testify at trial.\textsuperscript{204}

In the third category of hypnosis cases, several courts have determined that hypnotically-refreshed testimony should be considered inadmissible \textit{per se}. In \textit{Commonwealth v. Nazarovitch},\textsuperscript{205} the issue before the Pennsylvania Supreme Court was whether hypnotically-refreshed testimony was admissible in a criminal trial when the witness had no recollection of facts related to the crime before being hypnotized.\textsuperscript{206} The Pennsylvania court in \textit{Nazarovitch}
agreed with commentators who argued that hypnosis used for forensic purposes created problems of hypersuggestibility, hypercompliance, and confabulation which distorted a hypnotized witness' sense of reality.\textsuperscript{207} The court applied the \textit{Frye} test,\textsuperscript{208} noted that the scientific community could not assure the reliability of hypnotically refreshed testimony,\textsuperscript{209} and concluded that until more conclusive proof about the reliability of hypnotically induced testimony could be established, the witness' statements would be inadmissible.\textsuperscript{210}

In \textit{Bundy v. State},\textsuperscript{211} the Florida Supreme Court, when addressing the issue of whether hypnotically induced testimony could be admitted in a criminal trial, also found hypnotically refreshed testimony to be inadmissible \textit{per se}.\textsuperscript{212} The Florida court reviewed case law from other jurisdictions which found hypnotically enhanced testimony inherently unreliable under either the \textit{Frye} analysis,\textsuperscript{213} or as a matter of law under Rule 403 of the Federal Rules of Evidence,\textsuperscript{214} or a combination of both.\textsuperscript{215} The \textit{Bundy} court reasoned that the use of hypnosis had failed to receive widespread acknowledgment from the scientific community, and therefore, concluded that the speculative, probative value of hypnotically in-

\begin{itemize}
\item \textsuperscript{207} Id. at 104-05, 436 A.2d at 174. "Thus, the hypnotically recalled memory is apt to be a mosaic of (1) appropriate actual events, (2) entirely irrelevant actual events, (3) pure fantasy, and (4) fantasized details supplied to make a logical whole." Id. at 105 (quoting Diamond, \textit{Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness}, 68 \textit{CALIF. L. REV.} 313, 335 (1980)).
\item \textsuperscript{208} 496 Pa. at 101, 436 A.2d at 174. \textit{Frye v. United States}, 293 F. 1013 (D.C. Cir. 1923). In \textit{Frye}, defense counsel attempted to introduce expert testimony of the defendant's performance in a systolic blood pressure deception test. \textit{Id.} The trial court excluded the evidence and the court of appeals affirmed, reasoning that "while 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." \textit{Id.} at 1014.
\item \textsuperscript{209} 496 Pa. at 105, 436 A.2d 175. "Most authorities agree that a general rule of reliability of the veracity of statements elicited during hypnosis cannot be formulated." \textit{Id.}, citing Spector & Foster, \textit{Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?}, 38 \textit{OHIO ST. L.J.} 567, 583 (1977).
\item \textsuperscript{210} 496 Pa. at 111, 436 A.2d at 178.
\item \textsuperscript{211} \textit{Id.} at 18.
\item \textsuperscript{212} \textit{Id.} at 18.
\item \textsuperscript{213} See \textit{supra} note 208.
\item \textsuperscript{214} Fed. R. Evid. 403. Rule 403 stipulates that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ..." \textit{Id.}
\item \textsuperscript{215} 471 So. 2d at 13.
\end{itemize}
duced testimony would never outweigh its prejudicial impact.\textsuperscript{216} Having found testimony of that nature inherently unreliable, the Florida Supreme Court held hypnotically enhanced testimony inadmissible \textit{per se}.\textsuperscript{217}

The Alaska Supreme Court reached a similar conclusion in \textit{Contreras v. State}.\textsuperscript{218} The issue before the court was whether a witness could identify her assailant at trial based upon recollections derived from hypnosis, or whether the witness' statements must be limited to pre-hypnosis memories.\textsuperscript{219} The Alaska court based its analysis on both the \textit{Frye} decision\textsuperscript{220} and Rule 403 of the Federal Rules of Evidence.\textsuperscript{221} In applying \textit{Frye}, the court reasoned that the use of hypnosis was still in an underdeveloped stage that had not yet gained general acceptance in the scientific community.\textsuperscript{222} In analyzing Rule 403, the court determined that the probative value of admitting post-hypnotic testimony could not outweigh the prejudice to the criminal defendant since hypnosis fostered suggestibility, confabulation and artificially enhanced certainty.\textsuperscript{223} Thus, the Alaska Supreme Court held that a hypnotized witness' testimony would be limited at trial to facts remembered before hypnosis, and that any information recalled subsequently would be inadmissible.\textsuperscript{224}

The fourth and final category of hypnosis cases considered the use of procedural safeguards to help ensure the reliability of hypnotically induced testimony. In \textit{State v. Hurd},\textsuperscript{225} the New Jersey

\textsuperscript{216} Id. at 18, citing People v. Gonzales, 415 Mich. 615, 626-27, 329 N.W.2d 743, 748 (1982).

\textsuperscript{217} 471 So. 2d at 18.

\textsuperscript{218} Contreras v. State, 718 P.2d 129 (Alaska 1986). There, in two separate cases that were consolidated on appeal, the victims of violent crimes were placed under hypnosis to help them identify their assailants. \textit{Id.} at 130-31.

\textsuperscript{219} \textit{Id.} at 129.

\textsuperscript{220} \textit{Id.} at 134-36. \textit{See supra} note 208.

\textsuperscript{221} There are four reasons why the \textit{Frye} 'general acceptance' standard is appropriate when reviewing the admission of new scientific evidence: 1) the standard is judicially manageable; 2) the standard saves judicial time and resources; 3) the standard assures that juries will not be misled by unproven, unsound 'scientific' procedures, thus safeguarding the court's truth-finding role; and 4) the standard assures fairness and uniformity of decision making.

\textsuperscript{222} 718 P.2d at 135.

\textsuperscript{223} \textit{Id.} at 136-38. \textit{See supra} note 214.

\textsuperscript{224} \textit{Id.} at 136.

\textsuperscript{225} 86 N.J. 525, 432 A.2d 86 (1981). There, a woman was stabbed in her own apartment, but could not identify her assailant. \textit{Id.} at 529-30, 432 A.2d at 88. The woman submitted to hypnosis and six days later gave a statement to police identifying her former hus-
Supreme Court addressed the issue of whether the hypnotically enhanced testimony of a state witness was admissible at a criminal trial when the witness’ hypnosis session failed to follow strict procedural safeguards.\textsuperscript{226} The court ruled that as long as procedural safeguards are closely observed, hypnotically refreshed testimony could be considered reliable, and thus, admissible at trial.\textsuperscript{227} However, the opponent of admission would remain free to convince the fact-finder to give less weight to hypnotically induced testimony by challenging the specific hypnosis procedures utilized on the witness.\textsuperscript{228}

The \textit{Hurd} court reasoned that the testimony resulting from hypnosis would be admissible where a scientific procedure could elicit a reasonably reliable result.\textsuperscript{229} The New Jersey court established the level of reliability for hypnotically induced testimony as equal to the reliability of the ordinary recall of a witness not subjected to hypnosis.\textsuperscript{230} Thus, the New Jersey Supreme Court would admit hypnotically refreshed testimony obtained under proper procedural safeguards\textsuperscript{231} that would permit a witness to reveal, in a reli-

\textsuperscript{226} Id. at 531-32, 432 A.2d at 88-89. However, after the hypnosis, but prior to her admission to the police, the woman expressed doubts “about her thinking.” Id. at 531, 432 A.2d at 89.

\textsuperscript{227} Id. at 529, 432 A.2d at 88.

\textsuperscript{228} Id. at 543, 432 A.2d at 95. However, in the present case, the court refused to admit the woman's identification of Hurd since the state failed to demonstrate by ‘clear and convincing’ evidence that the hypnosis procedure used on the woman was reliable. Id. at 548, 432 A.2d at 98.

\textsuperscript{229} Id. at 543, 432 A.2d at 95.

\textsuperscript{230} Id. at 536, 432 A.2d at 91. The court further reasoned that “[i]f the procedure is not capable of yielding reasonable reliable results then its probative value may be outweighed by the risks entailed in its use in a criminal trial.” Id.

\textsuperscript{231} The \textit{Hurd} court utilized the following six procedural safe-guards to ensure reliability equivalent to normal recall.

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, investigator, or defense. . . . Third, any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or another suitable form. . . . Fourth, \textit{before} inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them. The hypnotist should carefully avoid influencing the description by asking structured questions or adding new details. . . . Fifth, all contacts between the hypnotist and the subject must be recorded. . . . The use of videotape, the only effective record of visual cues, is strongly encouraged but not mandatory . . . 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.

\textit{Id.} at 545-46, 432 A.2d at 96-97.
able manner, normal recall of past facts and events.\textsuperscript{233}

Justice Blackmun's opinion in \textit{Rock} stands for the proposition that a state court cannot adopt a \textit{per se} inadmissibility rule for hypnotically induced testimony in a criminal trial.\textsuperscript{234} The majority's decision was clearly correct in ruling that a criminal defendant possesses a constitutional right to testify on his own behalf.\textsuperscript{235} Collectively, the fourteenth amendment due process clause,\textsuperscript{236} sixth amendment compulsory process clause,\textsuperscript{237} and the fifth amendment right against self-incrimination\textsuperscript{238} establish the defendant's fundamental right to testify on his own behalf.

In order to limit the potential inaccuracies of hypnosis and assess the credibility of the defendant's testimony, the \textit{Rock} opinion requires the trial judge to conduct an individualized inquiry into each case to determine whether proper procedural safeguards\textsuperscript{239} are followed and corroborating evidence exists.\textsuperscript{240} However, except for the physical evidence discussed in \textit{Rock},\textsuperscript{241} the Supreme Court failed to elaborate on what type of evidence may be used to corroborate. Based upon the experiences of other courts, Justice Blackmun's opinion should have included the testimony of other witnesses\textsuperscript{242} and the criminal defendant's pre-hypnosis statements\textsuperscript{243} as further criteria for evaluating the sufficiency of corroborating evidence. In addition, as \textit{Rock} discusses, the trial judge should also consider whether cross-examination and jury instructions would help improve the reliability and credibility of post-hypnotic testimony.\textsuperscript{244}

Assuming the trial judge finds that procedural safeguards are followed and corroborating evidence exists, the Supreme Court's
analysis of the Rock decision could comfortably be extended to establish a per se admissibility rule for the hypnotically refreshed testimony of a criminal defendant appearing at trial on his own behalf.\textsuperscript{244} This conclusion appears logical based upon the constitutional underpinnings of a criminal defendant's right to testify, and the recent judicial acceptance of hypnosis as an asset at trial to the truth-finding process.\textsuperscript{246} A criminal defendant's right to testify is so fundamental to his interest in the trial process that to prohibit his testimony, after he satisfies the procedural guidelines and provides corroborating evidence, would amount to a deprivation of his constitutional rights.

A further consideration not settled by the Supreme Court concerns whether a witness, in favor of a criminal defendant, may testify to observations remembered subsequent to hypnosis. Under the extension of the Court's analysis in Rock, the rationale for administering a per se admissibility rule to a criminal defendant to testify on his own behalf would also apply to other witnesses appearing at trial for the accused. Similar to the constitutional right of a criminal defendant to testify,\textsuperscript{244} the accused possesses a constitutional right to have favorable witnesses testify under the sixth amendment compulsory process clause.\textsuperscript{247} Thus, this constitutional underpinning, combined with the factors for establishing the reliability of hypnosis,\textsuperscript{248} would require judicial acceptance of the hypnotically induced testimony of a witness testifying for the criminal defendant.

An extension of the Rock analysis to create a per se admissibility rule for the hypnotically refreshed testimony of a criminal defendant and his witnesses naturally raises the question of whether a similar rule may be applied to the prosecution's witnesses in a criminal trial. The per se admissibility rule for hypnotically induced testimony requires a constitutional underpinning and assur-

\textsuperscript{244} The Rock Court stated that they were not "prepared to endorse without qualification the use of hypnosis as an investigative tool." \textit{Id.} at 2714. However, if the qualifications of procedural safeguards and corroborating evidence are satisfied, the court's analysis should logically result in a per se admission rule for a criminal defendant to testify on his own behalf.

\textsuperscript{245} See State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981). The New Jersey Supreme Court argued hypnotically refreshed testimony appears equivalent to the ordinary recall of a normal witness, in the sense that "the reliability of ordinary eyewitnesses reveals similar shortcomings." \textit{Id.} at 541-42.

\textsuperscript{246} See supra notes 235-237.

\textsuperscript{247} See supra note 236.

\textsuperscript{248} Procedural safeguards and corroborating evidence.
ances of reliability. In the case of a witness for the state, the requirement of procedural guidelines and corroborating evidence could be satisfied, but no constitutional right to testify exists. Therefore, the per se admissibility rule appears inappropriate for the hypnotically refreshed testimony of a prosecution witness.

Instead of a per se admissibility rule for state witnesses who have submitted to hypnosis, a trial court should apply an analysis similar to Rule 403 of the Federal Rules of Evidence.\textsuperscript{249} Thus, where no constitutional right to testify exists, the trial judge should retain discretion to weigh the probative value of a government witness' hypnotically induced testimony against the prejudicial impact of the testimony on the criminal defendant.

\textit{Christine M. Dolfi}

\textsuperscript{249} See supra note 214.