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Criminal Law - Hypnotically Affected Testimony is Admissible in a State Criminal Trial. *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386 (1983).

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NOTES

CRIMINAL LAW—Posthypnotic Testimony Is Admissible in a State Criminal Trial. *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386 (1983).

Hypnosis is recognized as a means of producing hypernesia,¹ a heightened state of vivid or complete memory. Because of this ability, the legal profession has used hypnosis to aid witnesses in their recollection of past events. Although courts consistently exclude statements made while a witness is under hypnosis,² the admissibility of statements made by a witness after hypnosis³ varies from state to state. In *State v. Armstrong*⁴ the Wisconsin Supreme Court, in a case of first impression,⁵ endorsed the admission of post-

1. E. HILGARD, HYPNOTIC SUSCEPTIBILITY 165-67 (1965); W. KROGER, CLINICAL AND EXPERIMENTAL HYPNOSIS 16 (2d ed. 1977); W. KROGER & W. FEZLER, HYPNOSIS AND BEHAVIOR MODIFICATION: IMAGERY CONDITIONING 21 (1976); Dywan & Bowers, *The Use of Hypnosis to Enhance Recall*, 222 SCI. 184, 184-85 (1983); Kroger & Douce, *Hypnosis in Criminal Investigation*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 358, 363-64 (1979); Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 312, 328 (1979); Worthington, *The Use in Court of Hypnotically Enhanced Testimony*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 402, 403 (1979).

2. See, e.g., *People v. Blair*, 25 Cal. 3d 640, ___, 602 P.2d 738, 753-54, 159 Cal. Rptr. 818, 833-34 (1979); *State v. Conley*, 6 Kan. App. 2d 280, ___, 627 P.2d 1174, 1177-78 (1981); *State v. Pusch*, 77 N.D. 860, ___, 46 N.W.2d 508, 521-22 (1950); *State v. Harris*, 241 Or. 224, ___, 405 P.2d 492, 497-98 (1965); *State v. Pierce*, 263 S.C. 23, ___, 207 S.E.2d 414, 418 (1974); *Greenfield v. Commonwealth*, 214 Va. 710, ___, 204 S.E.2d 414, 418-19 (1974). But see *People v. Modesto*, 59 Cal. 2d 722, ___, 382 P.2d 33, 39, 31 Cal. Rptr. 225, 231 (1963) (hypnotic statements admitted as a basis for determining the intent of the defendant); *State v. Nims*, 180 Conn. 589, ___, 430 A.2d 1306, 1310-11 (1980) (tape recorded hypnotic session admitted to dispel any inference that the examination was tainted by improper suggestion); *State v. Jorgensen*, 8 Or. App. 1, ___, 492 P.2d 312, 315 (1971) (tape recording of hypnotic statements played at the request of the defendant).

Courts have also refused to permit a witness to be hypnotized on the stand. See, e.g., *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974).

3. The terms "posthypnotic testimony," "hypnotically affected testimony" and "hypnotically aided testimony" all refer to testimony given subsequent to hypnosis.

4. 110 Wis. 2d 555, 329 N.W.2d 386 (1983).

5. A Wisconsin circuit court addressed the issue of hypnotically affected testimony in 1979. The court recognized the potential value of hypnosis, but denied the admission of the testimony because unnecessary and prejudicial suggestions plagued

hypnotic testimony in a state criminal trial.⁶ Recognizing the scientific uncertainties of hypnosis, the court adopted a conservative case-by-case determination of the admission of such testimony and set forth clear procedural safeguards to protect against potential abuse in the future admissions of posthypnotic testimony.⁷

This note will review the decision of the court and compare the approach adopted in *Armstrong* with cases from other jurisdictions. It will also analyze the impact of the case on the legal community and discuss questions left unanswered by the court in its decision.

I. STATEMENT OF THE CASE

In the prosecution of Ralph D. Armstrong for the first degree murder and first degree sexual assault of Charise Kamps on June 24, 1980, the state introduced into evidence the incriminating testimony of Riccie Orebia. While sitting on her porch, Orebia saw a man enter and exit Kamps' apartment building. He did so three times in the course of forty minutes.⁸ When the man finally left the apartment building, Orebia noticed he was shirtless, running quickly and perspiring.⁹

During the police investigation of the murder, Orebia described the man as well developed, with big arms, a flat stomach, and long dark hair.¹⁰ Orebia gave her consent to be hypnotized in an effort to refresh her memory of the description of the man. Under hypnosis, Orebia described a man of medium height with big arms, a small stomach, a fat

the hypnotic examination. *State v. White*, No. J-3665 (Milwaukee County Cir. Ct. Mar. 27, 1979).

6. *Armstrong*, 110 Wis. 2d at 560, 329 N.W.2d at 389.

7. *See id.*

8. Orebia testified that she first noticed the defendant at approximately 12:30 a.m. on June 24, 1980. Dr. Robert Huntington, a pathologist testifying for the state, corroborated Orebia's testimony by estimating the time of death to be between 12:00 a.m. and 3:30 a.m. on June 24, 1980. *State v. Armstrong*, 110 Wis. 2d 555, 562, 329 N.W.2d 386, 390 (1983).

9. Orebia described the man's skin as "shining" when she saw him exit the apartment building for the final time. During his two previous exits, his skin did not exhibit such an effect. Heavy perspiration may account for the "shining" appearance. *Id.* at 562-63, 329 N.W.2d at 390.

10. *Id.* at 563, 329 N.W.2d at 390.

nose, bushy dark eyebrows and dark wavy hair covering the back of his neck.¹¹

After the hypnotic session, Orebia viewed a line-up and promptly identified the defendant as the man she saw running from the victim's apartment. In a pretrial motion, the defense counsel moved to suppress Orebia's posthypnotic identification of the defendant on the grounds that improper suggestions of the defendant's height were made to Orebia while under hypnosis. The trial court reviewed the hypnotic examination and denied the motion, holding that no significant suggestions were made to Orebia to influence her identification of the defendant.

The jury found the defendant guilty of murder and sexual assault. On appeal to the Wisconsin Supreme Court,¹² the defendant argued that the trial court erred in admitting Orebia's posthypnotic testimony and identification of the defendant.¹³ In *State v. Armstrong*¹⁴ the Wisconsin Supreme Court authorized the use of hypnosis to refresh the memory of a witness and held Orebia's hypnotic session had been satisfactorily performed. Consequently, the supreme court upheld the trial judge's admission of Orebia's hypnotically

11. *Id.* at 563, 329 N.W.2d at 390-91.

12. Apparently, the state felt this issue warranted immediate review by the supreme court and petitioned to bypass the intermediary court of appeals pursuant to Wis. STAT. §§ 809.60 & 808.05 (1979-80).

13. The defendant also raised three other issues on appeal. The court found the line-up procedure sufficiently reliable to permit an out-of-court identification to be admitted into evidence. Although the line-up was conducted in close proximity to Kamps' apartment building and the men participating in the line-up were of equal height and were shown sequentially rather than as a group, the court held these factors did not make the identification impermissibly suggestive. Nor did the extensive security precautions improperly induce Orebia to identify the defendant so as to cast doubt on the reliability of the identification. *Armstrong*, 110 Wis. 2d at 577, 329 N.W.2d at 397. The court also affirmed the trial judge's admission of two color photographs of the victim lying on her face with blood smeared over her nude body. The court agreed the pictures would aid the jury in their dispassionate determination of the facts. *Id.* at 579, 329 N.W.2d at 398. Finally, the court summarily held the state did not breach its duty to disclose exculpatory evidence. This duty only arises when evidence is within the exclusive control of the state. *See State v. Amundson*, 69 Wis. 2d 554, 230 N.W.2d 775 (1975). *Armstrong* argued that a parking ticket may have proved his innocence. The court, however, held that since the defendant paid the ticket and received the cancelled check, the ticket was never in the exclusive control of the state. Therefore, the duty of disclosing exculpatory evidence never arose. *Armstrong*, 110 Wis. 2d at 580, 329 N.W.2d at 398.

14. 110 Wis. 2d 555, 329 N.W.2d 386 (1983).

aided testimony and identification and affirmed the conviction.

II. HISTORICAL PERSPECTIVE

A. *Scientific Background*

Although the phenomenon of hypnosis has its origin dating back thousands of years,¹⁵ hypnosis has only recently enjoyed serious scientific interest and recognition.¹⁶ Because no theory of the nature of hypnosis has gained universal acceptance,¹⁷ it is difficult to accurately define the phenomenon. One representative definition of hypnosis is the following:

[Hypnosis is a] temporary condition of altered attention in the subject which may be induced by another person and in which a variety of phenomena may appear spontaneously or in response to verbal or other stimuli. The phenomena include alterations in consciousness and memory, increased susceptibility to suggestion and the production in the subject of responses and ideas unfamiliar to him in his usual state of mind.¹⁸

Scientists agree that hypnosis has significant value and application in medicine, dentistry and psychiatry.¹⁹ The le-

15. The origin of hypnosis may date back to antiquity, with Egyptian priests, Greek oracles, and Hindu fakirs using hypnosis in some form. For speculation concerning the origin of hypnosis, see H. CRASILNECK & J. HALL, *CLINICAL HYPNOSIS: PRINCIPLES AND APPLICATIONS* 5-6 (1975); W. KROGER, *supra* note 1, at 1; W. KROGER & W. FEZLER, *supra* note 1, at 6-8; MacHovec, *Hypnosis Before Mesmer*, 17 AM. J. CLINICAL HYPNOSIS 215-19 (1975).

16. The interest in and use of hypnosis increased greatly during World War II, when hypnosis was successfully used to treat psychogenic war problems (battle fatigue, battle neuroses). See H. CRASILNECK & J. HALL, *supra* note 15, at 9-10; E. HILGARD, *supra* note 1, at 4; W. KROGER, *supra* note 1, at 4.

17. For excellent summaries of the various theories of hypnosis, see H. CRASILNECK & J. HALL, *supra* note 15, at 13-31; W. KROGER, *supra* note 1, at 26-32; M. TEITELBAUM, *HYPNOSIS INDUCTION TECHNIQUES* 8-15 (1980); Chertok, *Early Theories of Hypnosis*, in *HANDBOOK OF HYPNOSIS AND PSYCHOSOMATIC MEDICINE* 1-11 (G. Burrows & L. Dennerstein eds. 1980); Meares, *Theories of Hypnosis*, in *HYPNOSIS IN MODERN MEDICINE* 390-404 (J. Schneck 3d ed. 1963).

18. COUNCIL ON MENTAL HEALTH, *Medical Use of Hypnosis*, 168 J. A.M.A. 186, 187 (1958). The Council adopted the British Medical Association's definition of hypnosis.

19. The medical profession uses hypnosis to control and relieve pain caused by cancer, burns, headaches and childbirth, as a method of anesthesia, and in the treatment of dermatological, gynecological, respiratory and neuromuscular disorders. The dental practitioner skilled in the use of hypnosis finds it effective in calming patients

gal profession has been increasingly attracted to hypnosis due to its ability to discover the truth by enhancing recall.²⁰ However, courts have approached hypnosis cautiously, fearing the dangers inherent in its use.

The most serious concerns regarding hypnosis center upon its effect on the subject. Scientific evidence indicates it is possible for a subject to fill in gaps in memory with imaginary or inaccurate bits of information.²¹ This is known as confabulation. The danger of confabulation is that the subject may recall inaccurate images while under hypnosis and then confidently testify at trial to the validity of his memory of the event.²² Another danger inherent in the use of hypno-

and relieving excessive pain. Perhaps hypnosis is most often applied and appreciated in the psychiatric profession, where hypnosis is used in treating the following: psychosomatic illnesses; obesity and diet; control of smoking and nail biting; sexual dysfunction; group hypnotherapy; psychotherapy; and phobia disorders. See generally H. CRASILNECK & J. HALL, *supra* note 15; HANDBOOK OF HYPNOSIS AND PSYCHOSOMATIC MEDICINE, *supra* note 17; W. KROGER, *supra* note 1.

20. See *supra* note 1.

21. See W. KROGER, *supra* note 1, at 16; W. KROGER & W. FEZLER, *supra* note 1, at 21; Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 335 (1980); Loftus & Loftus, *On the Permanence of Stored Information in the Human Brain*, 35 AM. PSYCHOLOGIST 409, 415 (1980); Orne, *supra* note 1, at 318-19; Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567, 594 (1977). See generally C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 208, at 507-10 (2d ed. 1972).

22. Diamond, *supra* note 21, at 339-40; Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 OHIO N.U.L. REV. 1, 9 (1977); Orne, *supra* note 1, at 327-28. Orne states that hypnosis "serves to help convince the subject about the veridicality of these memories—memories that might previously have been extremely tentative and about which the individual had little or no subjective conviction." Orne, *supra* note 1, at 327. An example of this phenomenon is an attempt by a subject to recall the second verse of Longfellow's poem, "The Village Blacksmith." The correct wording of the poem is the following:

His hair is crisp, and black, and long,
His face is like the tan;
His brow is wet with honest sweat,
He earns whate'er he can,
And looks the whole world in the face,
For he owes not any man.

The subject felt the following response was an accurate recollection of the poem:

"The smithy whistles at his forge
As he shapes the iron band;
The smith is very happy
As he owes not any man."

E. HILGARD, *supra* note 1, at 166.

sis is the subject's heightened susceptibility to suggestion.²³ Suggestion may promote confabulation.²⁴ In addition, there is a direct relationship between the depth of hypnosis and the degree of suggestibility.²⁵ As a subject falls deeper into a hypnotic state, it is more likely the subject will respond to suggestion. Finally, studies indicate that a subject may actually deceive an experienced hypnotist by faking a hypnotic state²⁶ or by wilfully lying²⁷ during a hypnotic session.

The dangers inherent in hypnosis can also stem from the hypnotist. In addition to the unintentional slip of a prejudicial suggestion,²⁸ a hypnotist can deliberately distort the mind of a deeply hypnotized subject to the point of brain-washing.²⁹ This danger, combined with the possibility of the continuing influence of the hypnotic suggestion,³⁰ can substantially affect the reliability of posthypnotic testimony.

Hypnosis may also affect the subjective consideration of a jury. Hypnosis may resolve any doubts and uncertainties the witness had experienced recollecting prior events.³¹ This effect can significantly increase the confidence of the witness

23. Diamond, *supra* note 21, at 333 (person in hypnotic state cannot escape heightened suggestibility, because by its nature, hypnosis is a condition of increased susceptibility to suggestion). See generally Dilloff, *supra* note 22, at 5; Orne, *On the Simulating Subject as a Quasi-Control Group in Hypnosis Research: What, Why and How*, in HYPNOSIS: DEVELOPMENTS IN RESEARCH AND NEW PERSPECTIVES 519, 520-21 (E. Fromm & R. Shor 2d ed. 1979); Spector & Foster, *supra* note 21, at 574-78.

24. It is common for a subject to want to please the hypnotist. To satisfy that desire, the subject may confabulate in order to respond favorably to the suggestion of the hypnotist. Diamond, *supra* note 21, at 335; Loftus & Loftus, *supra* note 21, at 414-15.

25. Dilloff, *supra* note 22, at 5; Spector & Foster, *supra* note 21, at 574-75. Suggestibility refers to the degree of response to a suggestion whereas depth refers to the degree of the subject's hypnotic condition.

26. Diamond, *supra* note 21, at 336-37; Dilloff, *supra* note 22, at 6; Orne, *supra* note 1, at 313.

27. Orne, *supra* note 1, at 313; Spector & Foster, *supra* note 21, at 594.

28. See Diamond, *supra* note 21, at 333 (hypnotic suggestions need not be verbal, for attitudes, demeanor and even body language may communicate suggestions to the subject).

29. "An unscrupulous hypnotist with a malleable subject can totally distort the purpose of hypnosis and its purported use in the legal sphere." Dilloff, *supra* note 22, at 6.

30. Scientific evidence indicates the effect of suggestions endure indefinitely. The duration of the effect may correspond to the type of suggestion; a theatrical type of posthypnotic suggestion may last only a few hours, but a less obvious suggestion may never cease. Diamond, *supra* note 21, at 335-36; Dilloff, *supra* note 22, at 7.

31. See *supra* note 22.

on the stand. Because the jury relies on the courtroom demeanor of a witness in its determination of the weight to accord the testimony, this artificially induced confidence may affect the accuracy of that determination. Moreover, the erroneous belief that hypnosis reveals only the truth³² may improperly influence the jury's assessment of the credibility of the witness.

B. Prior Case Law

American courts were originally opposed to the admission of testimony aided by hypnosis. In 1897, the California Supreme Court stated: "[T]he law of the United States does not recognize hypnotism."³³ This judicial reluctance to accept hypnosis continued well into the twentieth century with most courts excluding all testimony derived from hypnosis or given subsequent to it.³⁴ Finally, in 1968 a Maryland court reversed this trend in its endorsement of the admission of posthypnotic testimony in a state criminal proceeding.³⁵

Since 1968, many jurisdictions have considered the admission of posthypnotic testimony.³⁶ Three approaches to the admission of hypnotically affected testimony have developed.

Some courts exclude posthypnotic testimony, basing their exclusion on the evidentiary test established by the District of Columbia Court of Appeals in *Frye v. United States*.³⁷ In *Frye*, a defendant convicted of second degree murder appealed the decision of the trial court to exclude expert testimony concerning the results of a systolic blood pressure deception test performed on him. Affirming the exclusion of the testimony, the court reasoned that before expert testimony may be admitted the procedure from which

32. See Orne, *supra* note 1, at 313; Spector & Foster, *supra* note 21, at 594-95. See generally C. McCORMICK, *supra* note 21, at 507-10.

33. *People v. Ebanks*, 117 Cal. 652, —, 49 P. 1049, 1053 (1897).

34. See *supra* note 2.

35. *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969). Maryland has since reconsidered its position on the admissibility of posthypnotic testimony and has held such testimony inadmissible. See *Collins v. State*, 52 Md. App. 186, 447 A.2d 1272 (1982), *aff'd*, 296 Md. 670, 464 A.2d 1028 (1983).

36. At least 26 states and the federal courts have addressed this exact issue, with 11 states excluding posthypnotic testimony and 15 admitting it.

37. 293 F. 1013 (D.C. Cir. 1923).

the expert opinion was made must first gain general acceptance in the scientific community.³⁸ Applying this theory, the *Frye* court held that the systolic blood pressure deception test had not received the scientific recognition necessary to justify expert testimony concerning the results of the test.³⁹

Courts which base their exclusion of posthypnotic testimony on *Frye* interpret the *Frye* decision to require that before such testimony is admitted into evidence, the appropriate scientific discipline must first recognize hypnosis as a valid technique for extracting accurate memories from which reliable testimony can be derived. Because of the dangers of hypnosis,⁴⁰ some experts have refused to endorse the reliability of hypnotically affected testimony.⁴¹ This rejection has provided the basis for courts to state that hypnosis has not yet received the scientific recognition required by *Frye* to allow the admission of posthypnotic testimony.⁴²

In the jurisdictions which admit hypnotically affected testimony, there are two approaches to its admission. Some courts indicate the issue of hypnosis is properly considered by attacking the credibility of the testimony, not its admissibility.⁴³ In these jurisdictions the trier of fact must deter-

38. *Id.* at 1014.

39. *Id.*

40. *See supra* text accompanying notes 21-32.

41. *See, e.g.,* *Diamond*, *supra* note 21, at 349; *Spector & Foster*, *supra* note 21, at 583.

42. *See, e.g.,* *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, ___, 644 P.2d 1266, 1285-87 (1982) (supplemental opinion following rehearing); *People v. Shirley*, 31 Cal. 3d 18, ___, 641 P.2d 775, 794-804, 181 Cal. Rptr. 243, 263-72 (1982); *People v. Quintanar*, 659 P.2d 710, 711-12 (Colo. App. 1982); *State v. Collins*, 296 Md. 670, ___, 464 A.2d 1028, 1034 (1983); *Commonwealth v. Kater*, 388 Mass. 519, ___, 447 N.E.2d 1190, 1196-97 (1983); *People v. Gonzales*, 415 Mich. 615, ___, 329 N.W.2d 743, 745-48 (1982); *State v. Blanchard*, 315 N.W.2d 427, 430 (Minn. 1982); *People v. Hughes*, 59 N.Y.2d 523, ___, 453 N.E.2d 484, 494, ___, N.Y.S.2d ___, ___, (1983); *Commonwealth v. Nazarovitch*, 496 Pa. 97, ___, 436 A.2d 170, 172-78 (1981). Some courts have merely relied on a review of or comparison to other jurisdictions and have embraced *Frye* without explicitly adopting it. *See, e.g.,* *Peterson v. State*, ___, Ind. ___, 448 N.E.2d 673 (1983); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981). Many of these jurisdictions have since modified their per se exclusion of all testimony from a previously hypnotized witness to admit prehypnotic testimony provided it is reliably preserved. *See, e.g.,* *State v. Patterson*, 213 Neb. 686, 331 N.W.2d 500 (1983); *Commonwealth v. Taylor*, 294 Pa. Super. 171, 439 A.2d 805 (1982).

43. *See, e.g.,* *United States v. Awkard*, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); *Creamer v. State*, 232 Ga. 136, ___, 205 S.E.2d 240, 241-42 (1974); *State v. Seager*, No. 237-68535 (Iowa Nov. 23, 1983) (available Jan. 21, 1984, on

mine the proper weight to accord the hypnotically affected testimony. Other states admit the posthypnotic testimony provided the proponent can first satisfy the burden of demonstrating that the use of hypnosis is a reasonably reliable means of restoring memory.⁴⁴ These jurisdictions either demand compliance with specific procedures in conducting a hypnotic session⁴⁵ or suggest guidelines for the trial court to follow in its review of the hypnotic examination.⁴⁶

III. THE *ARMSTRONG* ANALYSIS OF POSTHYPNOTIC TESTIMONY

In *State v. Armstrong*,⁴⁷ the Wisconsin Supreme Court initially reviewed the dangers and benefits of hypnosis to the legal profession. The court noted hypnosis creates the possibility of producing inaccurate recollections and increases the suggestibility of the subject. However, the court also emphasized the ability of hypnosis to uncover information locked in the memory of a witness.⁴⁸

After a discussion of decisions from other jurisdictions, the court addressed the applicability of *Frye v. United States*⁴⁹ to the admission of posthypnotic testimony. The court narrowly construed the holding of *Frye* by stating: "The *Frye* test requires that before expert opinion can be admitted, the appropriate scientific discipline must generally

LEXIS, States library, Iowa file); *State v. Wren*, 425 So. 2d 756, 759 (La. 1983); *State v. McQueen*, 295 N.C. 96, ___, 244 S.E.2d 414, 427-29 (1978); *State v. Brown*, 337 N.W.2d 138, 151 (N.D. 1983); *State v. Jorgensen*, 8 Or. App. 1, ___, 492 P.2d 312, 315 (1971).

44. See, e.g., *Key v. State*, 430 So. 2d 909 (Fla. Dist. Ct. App. 1983); *People v. Smrekar*, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979); *State v. Greer*, 609 S.W.2d 423 (Mo. Ct. App. 1980); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (1981); *State v. Glebock*, 616 S.W.2d 897 (Tenn. Crim. App. 1981); *State v. Long*, 32 Wash. App. 732, 649 P.2d 845 (1982); *Chapman v. State*, 638 P.2d 1280 (Wyo. 1982).

45. See, e.g., *State v. Hurd*, 86 N.J. 525, ___, 432 A.2d 86, 96-97 (1981); *State v. Beachum*, 97 N.M. 682, ___, 643 P.2d 246, 252-54 (1981); *State v. Long*, 32 Wash. App. 732, ___, 649 P.2d 845, 846-47 (1982).

46. See, e.g., *Key v. State*, 430 So. 2d 909, 911-12 (Fla. Dist. Ct. App. 1983); *People v. Smrekar*, 68 Ill. App. 3d 379, ___, 385 N.E.2d 848, 855 (1979); *State v. Greer*, 609 S.W.2d 423, 435-36 (Mo. Ct. App. 1980); *State v. Glebock*, 616 S.W.2d 897, 904 (Tenn. Crim. App. 1981); *Chapman v. State*, 638 P.2d 1280, 1284-85 n.6 (Wyo. 1982).

47. 110 Wis. 2d 555, 329 N.W.2d 386 (1983).

48. *Id.* at 565-66, 329 N.W.2d at 392.

49. 293 F. 1013 (D.C. Cir. 1923).

accept as valid and reliable the scientific technique from which the evidence underlying the testimony is derived."⁵⁰ The court determined the *Frye* test was inapplicable to the question presented in *Armstrong* because the reliability of Orebias's posthypnotic testimony was at issue, not the admission of expert scientific opinion.⁵¹

The *Armstrong* court could have ended its discussion of *Frye* at this point, but instead it interpreted *Frye* to require that scientific authorities recognize the reliability of hypnosis to extract accurate information from a witness before posthypnotic testimony will be admitted in court.⁵² However, the *Armstrong* court rejected this application of *Frye* by relying on the fact that no expert can testify to the exact effect of hypnosis on human memory nor can an expert testify that normal conscious memory is an accurate representation of an event.⁵³ Without such expert testimony, the court con-

50. *Armstrong*, 110 Wis. 2d at 567, 329 N.W.2d at 392.

51. *Id.* at 567-68, 329 N.W.2d at 393. Other jurisdictions have rejected *Frye* for various reasons. See, e.g., *Key v. State*, 430 So. 2d 909, 910 (Fla. Dist. Ct. App. 1983) (admission of hypnotically affected testimony lies simply in the discretion of the trial court); *State v. Wren*, 425 So. 2d 756, 759 (La. 1983) (cases applying *Frye* are factually distinguished); *State v. Hurd*, 86 N.J. 525, ___, 432 A.2d 86, 91-92 (1981) (*Frye* test satisfied because hypnosis has received the necessary scientific recognition); *State v. Beachum*, 97 N.M. 682, ___, 643 P.2d 246, 252 (1981) (hypnosis as a memory aid has gained scientific recognition).

52. *Armstrong*, 110 Wis. 2d at 568, 329 N.W.2d at 393. It appears the court wanted to reject *Frye* by using the other courts' interpretations of it. See *supra* notes 37-42 and accompanying text.

53. *Armstrong*, 110 Wis. 2d at 568, 329 N.W.2d at 393. The reliability of eyewitness identification and testimony has been increasingly questioned, undoubtedly because of the formidable number of eyewitness misidentifications. The United States Supreme Court has stated: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967).

To compensate for deficiencies in memory, corroboration of evidence or expert testimony concerning the unreliability of eyewitness identification may be required. Some courts have set forth an instruction to inform the jury of the problems with eyewitness identification. See *United States v. Telfaire*, 469 F.2d 552, 558 (D.C. Cir. 1972). *Telfaire* was adopted in *United States v. Hodges*, 515 F.2d 650, 653 (7th Cir. 1975) and *United States v. Holley*, 502 F.2d 273, 275 (4th Cir. 1974). However, not all jurisdictions follow *Telfaire* and even if the courts employ the remedial procedures mentioned above, "[a]ll the evidence points rather strikingly to the conclusion that there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'that's the one!'" *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Marshall, J., joining Brennan, J., dissenting) (emphasis in original) (quoting E. LOFTUS, EYEWITNESS TESTIMONY 19 (1979)).

cluded this interpretation of *Frye* could not control the admission of hypnotically affected testimony.⁵⁴

In *Armstrong*, the court responded to the defendant's argument that the admission of Orebia's testimony was a denial of Armstrong's constitutionally protected right to confront and cross-examine a witness.⁵⁵ The defendant argued that hypnosis strengthened the confidence Orebia had in the validity of her testimony and identification of the defendant,⁵⁶ thus affecting the jury's ability to "determine credibility by viewing the witness' conduct, appearance and demeanor, and clarity of recollection."⁵⁷

The *Armstrong* court acknowledged that some experts agree hypnosis may increase the confidence of a witness, but noted that although other forms of refreshed recollection⁵⁸ may produce similar effects on confidence,⁵⁹ none have been held a denial of the right of confrontation.⁶⁰ The court stated three factors had preserved the defendant's right of confrontation: defense counsel cross-examined Orebia; defense counsel informed the jury of Orebia's hypnotic examination; and defense counsel introduced expert testimony to reveal the confidence-strengthening effect of hypnosis.⁶¹ The

54. The *Armstrong* court noted that even if the *Frye* test governed the disposition of this issue, its requirements would be satisfied by the recognition and acceptance of hypnosis by the appropriate scientific discipline. *Armstrong*, 110 Wis. 2d at 567 n.14, 329 N.W.2d at 393 n.14. For case law and scientific authority recognizing the reliability of hypnosis to refresh memory, see *State v. Hurd*, 86 N.J. 525, ___, 432 A.2d 86, 91-92 (1981); *State v. Beachum*, 97 N.M. 682, ___, 643 P.2d 246, 252 (1981); Reiser, *Hypnosis as an Aid in a Homicide Investigation*, 17 AM. J. CLINICAL HYPNOSIS 84-87 (1974).

55. *Armstrong*, 110 Wis. 2d at 568, 329 N.W.2d at 393. Other states have accepted this argument and denied admission of hypnotically affected testimony. See, e.g., *State v. Mena*, 128 Ariz. 276, ___, 624 P.2d 1274, 1280 (1981) (en banc); *State v. Peterson*, ___, Ind. ___, ___, 448 N.E.2d 673, 678-79 (1983).

56. See *supra* note 22 and accompanying text.

57. *Armstrong*, 110 Wis. 2d at 569, 329 N.W.2d at 393.

58. See, e.g., WIS. STAT. § 906.12 (1981-82). This statute provides in part: **906.12 Writing used to refresh memory.** If a witness uses a writing to refresh his memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

59. *Armstrong*, 110 Wis. 2d at 569, 329 N.W.2d at 393.

60. *Id.*

61. *Id.* at 570, 329 N.W.2d at 394. To preserve the right of confrontation, the federal courts have ruled that if the proponent of the testimony fails to notify the

court stated these factors provided a basis for jury evaluation of the credibility of Orebia's testimony, thus satisfying the defendant's right of confrontation.

IV. PROCEDURES AND GUIDELINES ESTABLISHED

Because the court was acutely aware of the dangers involved in posthypnotic testimony, it set forth procedures to be followed during a hypnotic session and during trials when hypnotically affected testimony is proffered. The court also suggested guidelines the trial court should consider in a pretrial review of the hypnotic session. In order to use posthypnotic testimony, the proponent of the testimony must reveal its intended use to his adversary before trial. Opposing counsel may then move for a suppression hearing. At the pretrial hearing, the proponent of the testimony must demonstrate to the court⁶² that no undue suggestions were made to the witness during the hypnotic session to make the subsequent testimony unreliable.⁶³

The trial judge in his pretrial review of the hypnotic session should consider the following guidelines. The person administering hypnosis should have special training in the use of hypnosis. It is preferable that the expert is a psychiatrist or psychologist. The hypnotist should be an independent professional and should have limited knowledge of the case. No person representing any party should be in the examining room while the witness is hypnotized. Finally, the hypnotist should strive to avoid prejudicial suggestions concerning critical facts of the case.⁶⁴ It is important to note that these guidelines are not absolute, since compliance with

opposing party of the use of hypnotically affected testimony, a new trial may be granted. *See, e.g.*, *United States v. Miller*, 411 F.2d 825, 830-33 (2d Cir. 1969); *Emmett v. Ricketts*, 397 F. Supp. 1025, 1037-42 (N.D. Ga. 1975).

62. Two courts have determined the use of hypnotically affected testimony requires additional safeguards for its admission. Therefore, the proponent of the testimony must prove by clear and convincing evidence that the testimony is reliable. According to these courts, this standard is appropriate to deter the potential abuse of hypnosis, to avoid injustice and to ensure reliability. *State v. Hurd*, 86 N.J. 525, ___, 432 A.2d 86, 97 (1981); *State v. Beachum*, 97 N.M. 682, ___, 643 P.2d 246, 254 (1981).

63. *State v. Armstrong*, 110 Wis. 2d 555, 571-73, 329 N.W.2d 386, 394-95 (1983).

64. *State v. White*, No. J-3665 (Milwaukee County Cir. Ct. Mar. 27, 1979), *quoted in* *State v. Armstrong*, 110 Wis. 2d 555, 571 n.23, 329 N.W.2d 386, 394 n.23 (1983). The exact guidelines are:

them does not assure the admission of the testimony nor does the failure to follow the guidelines automatically exclude the testimony.⁶⁵

If, at the pretrial hearing, the trial judge determines the hypnotically affected testimony to be admissible, the proponent of the testimony may not introduce the fact of hypnosis in his case-in-chief because of the possibility the jury will erroneously believe that hypnosis reveals only the truth.⁶⁶ Only opposing counsel may raise the issue of hypnosis and challenge the testimony by calling experts to testify to the possible adverse effects of hypnosis on memory.⁶⁷ However, the proponent will then be permitted to introduce his experts

1. The person administering the hypnotic session ought to be a mental health person with special training in the use of hypnosis, preferably a psychiatrist or a psychologist.

2. This specially trained person should not be informed about the case verbally. Rather, such person should receive a written memorandum outlining whatever facts are necessary to know. Care should be exercised to avoid any communication that might influence the person's opinion.

3. Said specially trained person should be an independent professional not responsible to the prosecution, investigators or the defense.

4. All contact between the specially trained person and the subject should be videotaped from beginning to end.

5. Nobody representing the police or the prosecutor or the defendant should be in the same room with the specially trained person while he is working with the subject.

6. Prior to induction, a mental health professional should examine the subject to exclude the possibility that the subject is physically or mentally ill and to confirm that the subject possesses sufficient judgment, intelligence, and reason to comprehend what is happening.

7. The specially trained person should elicit a detailed description of the facts as the subject believes them to be prior to the use of hypnosis.

8. The specially trained person should strive to avoid adding any new elements to the subject's description of her/his experience, including any implicit or explicit cues during the pre-session contact, the actual hypnosis and the post-session contact.

9. Consideration should be given to any other evidence tending to corroborate or challenge the information garnered during the trance or as a result of posthypnotic suggestion.

Armstrong, 110 Wis. 2d at 571 n.23, 329 N.W.2d at 394 n.23.

65. *Armstrong*, 110 Wis. 2d at 571-72 n.23, 329 N.W.2d at 394-95 n.23.

66. *Id.* at 573, 329 N.W.2d at 395. See *supra* note 32 and accompanying text.

67. This procedure satisfies three goals. It permits the defendant to properly attack the credibility of the witness, it protects the jury from initially giving undue weight to the testimony as a result of its knowledge of hypnosis and it satisfies the defendant's right to confront and cross-examine the witness. *Armstrong*, 110 Wis. 2d at 573, 329 N.W.2d at 395.

to counter any opposing expert testimony.⁶⁸

The *Armstrong* court also noted its concern regarding the danger of confabulation. The court recognized confabulation could not be controlled through procedural protections because it occurs during hypnotic recall and also during conscious recollection.⁶⁹ Consequently, the court's decision requires the trial judge to consider the possibility of confabulation in determining whether to admit the testimony. To do this, the trial judge must take into account both the totality of the circumstances and the procedures used in the hypnotic examination to determine whether the hypnotically influenced testimony is reliable.

V. REFLECTIONS

Relying on its rejection of *Frye* and a comparison of decisions in other jurisdictions, the Wisconsin Supreme Court in *Armstrong* refused to adopt a per se exclusion of posthypnotic testimony. The critical question is whether the *Armstrong* decision will provide a basis for the admission of reliable posthypnotic testimony.

Of the two alternatives available to the court in the admission of posthypnotic testimony,⁷⁰ a conservative case-by-case approach is clearly the more desirable. A per se rule of admission leaves the consideration of the reliability of hypnotically affected testimony to the trier of fact without any prior judicial intervention.⁷¹ While this approach may promote judicial economy,⁷² it may also admit testimony seriously affected by prejudicial suggestions or containing impermissible amounts of confabulation. In addition, this per se approach gives the proponent of the evidence an advantage because the testimony is virtually assured admittance.⁷³

68. *Id.* at 573, 329 N.W.2d at 395.

69. *Id.* at 568, 329 N.W.2d at 393.

70. See *supra* text accompanying notes 43-44.

71. See *supra* text accompanying note 43.

72. See *Commonwealth v. Kater*, 338 Mass. 519, —, 447 N.E.2d 1190, 1196 (1983) (allowing experts to testify on the effects of the hypnotic session in each case is time-consuming and expensive).

73. The only recourse available to the opponent of the posthypnotic testimony is to challenge the basis for its admission to a higher court. However, the likelihood of a

In its choice of a case-by-case approach, the Wisconsin Supreme Court avoided the dangers associated with per se admissibility and adopted the alternative which takes into account the scientific uncertainties of hypnotically affected testimony. Although a case-by-case approach is more favorable to the opponent of the testimony,⁷⁴ it is more consistent with the court's recognition of the dangers involved in hypnosis. The pretrial hearing may be costly and time consuming, but the questionable reliability of this testimony demands judicial review of the hypnotic session. In light of these considerations, the court has correctly chosen the more cautious approach to the admission of posthypnotic testimony.

Although the Wisconsin Supreme Court promoted flexibility in the review of the hypnotic session by making the guidelines permissive rather than mandatory,⁷⁵ there is likely to be close adherence to the guidelines because hypnotically affected testimony is a novel and complex issue. Trial judges may also find safety in following authorized guidelines and although compliance with the guidelines by the proponent will not guarantee admission of the posthypnotic testimony,⁷⁶ the likelihood of its admission will be much greater.

VI. UNANSWERED QUESTIONS

One critical question left unanswered in *Armstrong* is the amount of additional facts recalled through hypnosis which will be admitted into evidence before the testimony becomes unreliable as a product of confabulation.⁷⁷ The *Armstrong*

reversal by the higher court is limited and the expense of the appeal to the opponent may be prohibitive. Yet, a Maryland court recently reconsidered its position on this issue and reversed its former practice of directing the fact of hypnosis to an attack on the credibility of the witness in lieu of a per se exclusion rule. See *supra* note 35.

74. This procedure is advantageous to the opponent because an attack on the admission of hypnotically aided testimony may be made before trial, thus requiring the proponent to meet the appropriate burden of proof — a burden he may not satisfy.

75. Flexibility is a good policy because the court can consider a factor not specifically authorized, yet nevertheless important to the determination of the admission of posthypnotic testimony. See *Chapman v. State*, 638 P.2d 1280, 1284 (Wyo. 1982).

76. See *supra* text accompanying note 65.

77. However, the court has indicated that some unnecessary suggestions will not defeat the reliability or admissibility of hypnotically affected testimony. The court reviewed the hypnotic examination and found that although some suggestions were

court did not address this issue because the hypnotized witness, Orebias, was unable to give a posthypnotic facial description of the defendant. Such a detailed description might raise an inference of confabulation. Moreover, Orebias's general description of the defendant was not significantly altered by hypnosis.⁷⁸ The court noted the detailed posthypnotic testimony of a witness suffering from posttraumatic amnesia would be excluded as unreliable because of the probability of confabulation.⁷⁹ However, limiting the admission of hypnotically affected testimony to cases in which the posthypnotic testimony is "substantially the same"⁸⁰ as the prehypnotic description casts considerable doubt on the utility of hypnosis to aid a witness in the recollection of prior events. Hypnosis is a procedure to refresh memory; a refreshed memory recalls additional facts. In establishing a standard to follow, the court in the future will have to balance the benefit of the additional facts against the possibility of confabulation within them.

Future cases may also address the admission of unreliable posthypnotic testimony. Does admission of such unreliable testimony demand automatic reversal or warrant a case-by-case determination of whether it is prejudicial or harmless error?⁸¹ Other issues for future consideration include: the effect of the failure to notify opposing counsel of the intended use of hypnosis;⁸² the exact evidentiary burden the proponent of the testimony bears in the pretrial suppression hearing;⁸³ and the effect of the opponent's failure to

made to Orebias concerning the defendant's height, these suggestions were harmless considering that, at the posthypnotic line-up, the height of the defendant was not readily apparent. *State v. Armstrong*, 110 Wis. 2d 555, 574, 329 N.W.2d 386, 396 (1983). At the line-up, the defendant refused to cross the street near the victim's apartment building, thus forcing police officers to drag him. To assure the reliability of the line-up, the police also dragged other participants to produce the similar limp effect. *Id.* at 563, 329 N.W.2d at 391.

78. See *supra* text accompanying notes 10-11.

79. *Armstrong*, 110 Wis. 2d at 575, 329 N.W.2d at 396.

80. *Id.*

81. See, e.g., *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1981) (admission of unreliable posthypnotic testimony is not per se reversible error, but requires a case-by-case determination of whether the admission is prejudicial or harmless); *State v. Blanchard*, 315 N.W.2d 427 (Minn. 1982).

82. See *supra* note 61.

83. See *supra* note 62.

move for a pretrial suppression hearing. Perhaps of greatest interest will be the applicability of hypnosis to civil cases⁸⁴ and, if applicable, whether the procedures will vary or remain the same.

Any answers to these questions are purely speculative. Because *Armstrong* was a case of first impression, the court could not address every issue involved in admission of post-hypnotic testimony. The *Armstrong* court approved the use of hypnosis to refresh the memory of a witness and took precautionary steps to help promote the reliability of hypnotically aided testimony. Additional questions regarding the use of hypnotically affected testimony will be answered in time. However, the importance of the *Armstrong* decision is that Wisconsin has received a practical foundation for the use of posthypnotic testimony from its highest court.

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84. For civil cases permitting the use of hypnosis, see *Kline v. Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975); *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974).