

Constitutional Rights and Hypnotically Elicited Testimony

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Despite the former popularity of hypnosis as a way of “improving” eyewitness memory, many courts almost always regard the use of this testimony to be inadmissible, whereas others allow it only when strict procedural guidelines have been followed. Although the U.S. Supreme Court recognized a defendant’s constitutional right to admit his own hypnotically elicited testimony, others have recognized a constitutional basis to exclude hypnotically elicited testimony in most other circumstances.

Hypnosis has never been well regarded in most courtroom settings¹ despite its use in American courts as early as 1846.² Early claims about the usefulness of hypnosis were met with skepticism, as seen in the 1895 California case *People v. Ebanks*. In this case, the trial judge refused to admit the testimony of a hypnotist, stating that “the law of the United States does not recognize hypnosis. It would be an illegal defense and I cannot admit it.”³

As hypnosis became accepted as a general medical procedure, it was increasingly used for nonmedical purposes. One common use for hypnosis by police investigators and attorneys in the 1960s and 1970s was to refresh eyewitness memory.^{4,5} This use of hypnosis made it nec-

essary for courts to examine fundamental questions about the admissibility of such information as evidence. A number of courts have addressed the effect that the admission and omission of hypnotically refreshed testimony has on the rights of a defendant as guaranteed by the U.S. Constitution, particularly rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

The Sixth Amendment

The Sixth Amendment guarantees protections relevant to the use of hypnosis in court. These guarantees include the right to an impartial jury, the right to confront witnesses, the right to call witnesses in one’s favor, and the right to the assistance of counsel. The Fourteenth Amendment applies the protections listed in the Sixth Amendment to the individual states.

Right to Confront Witnesses A popular strategy once commonly used by police investigators and prosecutors was to hypnotize witnesses and defendants to fa-

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cilitate their recall of events surrounding the time of a crime. This practice was based on the then often widely accepted view that the mind, like a video recorder, stores everything it is ever exposed to, and thus forgotten or repressed memories can be successfully and accurately elicited using hypnosis.⁴ Research on individuals who have undergone hypnosis demonstrates precisely the opposite: hypnosis can cause permanent memory distortions.⁶ These distortions can have a profound influence on witnesses in criminal trials. According to Martin Orne:

Hypnosis may readily cause the subject to confabulate the person who is suspected into his "hypnotically enhanced memories." These pseudomemories, originally developed in hypnosis, may come to be accepted by the subject as his actual recall of the original events; they are then remembered with great subjective certainty and reported with conviction. Such circumstances can create convincing, apparently objective "eyewitnesses" rather than facilitating actual recall.⁶

If hypnosis permanently alters the memory of a witness, the defendant does not have access to the witness' prehypnotic uncontaminated memories during the trial, therefore denying the defendant the opportunity to confront the witness.⁷

Right to an Impartial Jury The Sixth Amendment guarantees the right of a defendant to an impartial jury. The admission of hypnotically refreshed testimony can potentially create a violation of a defendant's Sixth Amendment rights in a number of ways. If a hypnotized witness is strongly convinced of the accuracy of his memories, that witness may appear more credible to a jury than a witness who appears less confident of his recol-

lection. If a jury is persuaded more by the inaccurate memories of a confident witness than the tentative but accurate memories of an uncontaminated witness, the defendant may have been denied his or her right to an impartial jury.

Commentators who are skeptical of the use of hypnosis have noted that some members of the general public have unrealistic beliefs about the powers of hypnosis. These may include beliefs that people can accurately be "regressed" to a young age, that amnesia can be lifted, and that people cannot lie under hypnosis.⁸ If jurors hold these beliefs, excess weight could be given to eyewitness or expert testimony derived from the inappropriate use of hypnosis, leading to a potential violation of the right to an impartial jury. Wilson and coworkers⁸ studied attitudes about hypnosis held by college students and community members. In their study, 70 percent of the students and 50 percent of the individuals from the community favored the use of hypnosis by police. Interestingly, this study noted that twice as many subjects had less faith in hypnotized witnesses versus nonhypnotized witnesses. Spanos and coworkers⁹ noted that jury verdicts in a mock trial were not significantly influenced by either favorable or unfavorable expert testimony about hypnosis.

One strategy employed by some courts to minimize these potential distortions involved the use of procedural safeguards to prevent suggestions from altering a subject's recall. In 1979, Orne⁶ proposed a number of safeguards to minimize potentially distorted memories by hypnotized crime witnesses:

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(1) The hypnotist must be a psychiatrist or psychologist experienced in the use of hypnosis; (2) to avoid bias, the hypnotist must be independent of the prosecution or defense; (3) all information the police or defense give the hypnotist before the session must be recorded; (4) before the session the subject must describe in detail to the hypnotist the facts as he remembers them, and the hypnotist must avoid influencing that description; (5) all contacts between the hypnotist and the subject—i.e., the prehypnotic examination, the hypnotic session, and the posthypnotic interrogation—must be recorded, preferably on videotape; and (6) no person other than the hypnotist and the subject may be present during the session, or even during the prehypnotic examination and the posthypnotic interrogation.⁶

In *New Jersey v. Hurd*,¹¹ the New Jersey Supreme Court in 1981 affirmed the use of Orne's safeguards by a trial court. As noted by Udolf, Orne eventually concluded that hypnotically refreshed testimony is unreliable and advocated its use only when a defendant's constitutional rights were in jeopardy.¹²

In *People v. Shirley*,¹⁰ the Supreme Court of California in 1982 rejected the procedural guidelines adopted in *Hurd*. The *Shirley* court felt that the guidelines would lead to "a fertile new field for litigation," causing unnecessary expenses and delays. The *Shirley* court adopted a strategy of *per se* inadmissibility of any testimony by any witness (except the defendant himself) for memories reported after the subject was hypnotized.¹³

Despite the general trend toward inadmissibility of hypnotically refreshed witness memory, the Seventh Circuit in 1994 held in *Biskup v. McCaughy*¹ that the use of hypnotically refreshed testimony by prosecutors does not automatically

constitute a violation of the Sixth and Fourteenth Amendments.

The Fifth Amendment

The Fifth Amendment guarantees that an individual cannot be compelled to be a witness against himself in a criminal trial. As does the Sixth Amendment, the Fourteenth Amendment applies the protections of the Fifth Amendment to the states. There are two important aspects of the Fifth Amendment that apply to hypnosis: protection against self-incrimination and the right to testify.

Protection Against Self-Incrimination
In *Miranda v. Arizona*,¹⁴ the Supreme Court recognized that the Fifth Amendment protects individuals against involuntary or coercive confessions. Although the *Miranda* case specifically addressed confessions made in a coercive environment, the argument could equally apply to the use of hypnosis by police investigators to encourage defendants to confess that they are guilty. In 1981, Bragin³ recommended giving hypnotized defendants a posthypnotic suggestion that intimates that "bad feelings will result if the subject keeps the crime to himself, and good feelings will result if the subject 'lets it out' (confesses)." Bragin does not discuss the effect such a suggestion would have on the defendant's Fifth Amendment rights or the danger of such a suggestion to an innocent defendant, particularly if the hypnosis were administered by a police hypnotist who might have preconceived views about the subject's guilt. Even though the Supreme Court has not specified hypnosis used to obtain confessions

as being a Fifth Amendment violation, courts do not generally accept confessions made during a hypnotic trance.

Right to Testify in One's Own Behalf
 In *Rock v. Arkansas*,¹⁵ the U.S. Supreme Court in 1987 upheld the Constitutional right of defendants to testify by striking down a *per se* rule excluding all hypnotically refreshed testimony. In this case, a murder defendant underwent hypnosis to obtain better memory of events surrounding the crime with which she was charged. Although the hypnotist applied the Orne guidelines as described in *New Jersey v. Hurd*,¹¹ the trial court refused to admit any of the defendant's posthypnotic testimony.¹⁶ The lower court's decision to not admit her testimony was sustained by the Arkansas Supreme Court, who cited *People v. Shirley*¹⁰ in their reasoning supporting the *per se* inadmissibility of hypnotically elicited testimony. The U.S. Supreme Court, in a five to four decision, disagreed with the Arkansas Court, asserting the right of the defendant to testify in his or her own defense.¹⁵ Writing for the majority, Justice Blackmun noted that the Fifth Amendment's guarantee against self-incrimination "is fulfilled only when an accused is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will'" (quoting *Harris v. New York*, 401 U.S. 222, 230 (1971)) (483 U.S. 44, 53).

The *Rock* case also noted that "[t]he right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' a

right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment" (483 U.S. at 51).

Orne and colleagues¹⁷ have noted that nothing in *Rock* invalidates *People v. Shirley* when properly interpreted. That is, a court can choose not to admit testimony by others that has been affected by hypnosis but cannot deny the right of a defendant to testify in her own behalf, despite the risk of memory distortions caused by hypnosis.

One recent case demonstrates how the constitutional right of a defendant to testify has not necessarily allowed all hypnotically elicited information by a defendant to be admissible. In *Radcliff v. Commonwealth*,¹⁸ the Virginia Court of Appeals in 1995 affirmed the decision of a trial court to refuse to admit evidence from the hypnotic session of a murder defendant. This case differed from *Rock* in that the issue was not the defendant's right to testify during the trial itself but rather whether a videotape of a pretrial hypnotic session could be admitted. The trial court stated that "viewing... that portion of the tape showing only the hypnosis itself as well as an in-court demonstration of it without any testimony would be of little probative value and carries with it great risk of fabrication" (1995 WL 33217, at 1). The Court of Appeals, citing a 1985 case, affirmed the decision, stating: "It is well established that hypnotic testimony is considered unreliable and inadmissible evidence in this Commonwealth" (*Id.*). Like the Arkansas Supreme Court in *Arkansas v. Rock*, the Virginia Court of Appeals based their de-

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cision to exclude on two factors: evidence that hypnosis causes memory distortions and previous case law that excluded eyewitness testimony by a hypnotized eyewitness. Whereas some might consider the defendant's request to admit the videotape of his hypnotic session to address some of the same constitutional issues protected by the Supreme Court in *Rock v. Arkansas*, there is nothing in the published *Radcliff* case that suggests that the Virginia Court of Appeals was even aware of the *Rock* case or its holding.

Conclusions

Police and prosecutors are often frustrated by the lack of conclusive physical evidence in criminal cases, which forces them to rely on eyewitness testimony. Unfortunately, the memories of eyewitnesses are frequently poor and inaccurate. Because hypnosis was once considered to be an accurate and reliable method of "refreshing" eyewitness memory, it was adapted as an investigative tool.¹⁹ Research on hypnosis revealed that as a method of retrieving memories, it was severely flawed and created numerous risks to a defendant's constitutional rights in court. By permanently altering a witness' memories, the defendant is deprived of the right to cross-examine the witness' prehypnotic memories. The defendant's right to an impartial jury can be affected by the jury's preconceived attitudes about the effectiveness of hypnosis as an investigative tool. Further, a confident witness with hypnotically distorted memories can unfairly influence a jury.

To reduce these risks, many courts allow hypnotically elicited testimony to be used only when strict procedural guidelines are followed, whereas other courts have gone even further, barring almost all hypnotically elicited testimony. Even though such restrictions are made to help insure the validity of testimony, the Supreme Court held in *Rock v. Arkansas* that a *per se* rule excluding all hypnotically refreshed testimony cannot apply to a hypnotized defendant without violating the defendant's constitutional right to testify in his own behalf.

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