CASENOTE

The Admissibility of Hypnotically Refreshed Testimony: *Rock v. Arkansas*[1] — Criminal defendants throughout the country are undergoing hypnosis in the hope of uncovering exculpatory information.[2] In addition, witnesses and victims of crimes are undergoing hypnosis to enhance their memories so that they may serve as eyewitnesses in court.[3] Although medical experts agree that there is no single, accepted definition of hypnosis,[4] it is generally defined as an artificially induced, sleeplike or trancelike condition in which a person is extremely responsive to suggestions made from the hypnotist.[5] Testimony that a witness is unable to recall prior to undergoing hypnosis, but can recall after undergoing hypnosis, is known as "hypnotically refreshed" testimony.[6]

Courts have adopted three approaches regarding the admissibility of hypnotically refreshed testimony: *per se* admissibility;[7] qualified admissibility conditioned upon an adherence to procedural safeguards;[8] and *per se* inadmissibility.[9] The *per se* admissibility approach permits a trier of fact to determine the weight of hypnoti-

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[1] 107 S. Ct. 2704 (1987).

[2] *See* Orne, *The Use and Misuse of Hypnosis in Court*, 3 CRIME AND JUSTICE; AN ANNUAL REVIEW OF RESEARCH 62 (M. Tonry & N. Morris eds. 1981) [hereinafter *Use and Misuse*].

[3] *See id.*; P. GIANNELLI & E. IMWINKELRIED, SCIENTIFIC EVIDENCE 345 (1986).

[4] P. GIANNELLI & E. IMWINKELRIED, *supra* note 3, at 346–47; *see* Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 316–17 (1980).

[5] THE AMERICAN HERITAGE DICTIONARY 648 (New College Ed. 1978); BLACK'S LAW DICTIONARY 668 (5th ed. 1979); STEDMAN'S MEDICAL DICTIONARY 678 (5th Unabridged Lawyer's Ed. 1982). The American Medical Association has defined hypnosis as:

> 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. These 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.

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

[6] *See, e.g.*, Orne, *Hypnotically Induced Testimony*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 171–72 (G. Wells & E. Loftus eds. 1984) [hereinafter *Hypnotically Induced Testimony*]; State v. Peoples, 311 N.C. 515, 518, 319 S.E.2d 177, 179 (1984).

[7] *E.g.*, United States v. Awkard, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979). See *infra* notes 78–98 and accompanying text for cases dealing with the *per se* admissibility approach.

[8] *E.g.*, State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981). See *infra* notes 97–101 and accompanying text for cases dealing with the procedural safeguards approach.

[9] *E.g.*, State v. Mack, 292 N.W.2d 764 (Minn. 1980). See *infra* notes 102–08 and accompanying text for cases dealing with the *per se* inadmissibility approach. *See* Sies & Wester, *Judicial Approaches to the Question of Admissibility of Hypnotically Refreshed Testimony: A History and Analysis*, 35 DE PAUL L. REV. 77, 78–79 (1985) (examination of all three approaches).

cally refreshed testimony.[10] The procedural safeguards approach allows the admission of hypnotically refreshed testimony provided that the hypnotist follows certain procedural guidelines both before and during the hypnosis session.[11] The *per se* inadmissibility standard excludes all hypnotically refreshed testimony. The standard does allow previously hypnotized witnesses to take the stand, but limits their testimony to events that the witnesses can prove they recalled prior to hypnosis and to events that are unrelated to the content of the hypnosis sessions.[12] Recently, as courts have confronted scientific studies that detail the unreliable nature of hypnotically refreshed testimony, they have begun to move away from the *per se* admissibility standard and have increasingly chosen the procedural safeguards or the *per se* inadmissibility approach.[13] In *Rock v. Arkansas*, the United States Supreme Court addressed the question of the admissibility of hypnotically refreshed testimony for the first time, ruling on the question of whether Arkansas's *per se* exclusionary rule prohibiting the admission of hypnotically refreshed testimony violated a criminal defendant's constitutional right to testify on his or her own behalf.[14]

In *Rock*, the State of Arkansas charged Vicki Rock with manslaughter in the July 2, 1983 shooting death of her husband, Frank Rock. On that night, a fight erupted between the couple when Mr. Rock refused to let Ms. Rock eat some of his pizza and refused to allow her to leave the apartment to get something to eat. When the police arrived on the scene, they found Mr. Rock on the floor with a bullet wound in his chest.[15] According to an investigating officer's testimony, Ms. Rock stated that as she began to leave the room, her husband grabbed her by the throat, choked her, and threw her against the wall.[16] Ms. Rock recounted that she then picked up a gun; Mr. Rock hit her again, and then she shot him.[17] Ms. Rock was unable, however, to recall the shooting's exact details.[18]

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[10] *See, e.g.*, *Awkard*, 597 F.2d at 669.

[11] *See, e.g.*, *Hurd*, 86 N.J. at 535–37, 432 A.2d at 89–90; *see also* P. GIANNELLI & E. IMWINKELRIED, *supra* note 3, at 360–61.

[12] *See, e.g.*, *Mack*, 292 N.W.2d at 772.

[13] *See, e.g.*, *Hurd*, 86 N.J. at 535–37, 432 A.2d at 91; People v. Shirley, 31 Cal. 3d 18, 36–37, 723 P.2d 1354, 1364; 181 Cal. Rptr. 243, 253–54 (1982); *see also* P. GIANNELLI & E. IMWINKELRIED, *supra* note 3, at 359.

[14] Rock v. Arkansas, 107 S. Ct. 2704, 2706 (1987).

[15] *Id.*

[16] *Id.*

[17] *Id.* Another officer stated that Ms. Rock said the "gun went off" rather than "she shot him." *Id.* at 2706 n.1.

[18] *Id.* at 2706.

Following her lawyer's advice, Ms. Rock underwent hypnosis to refresh her memory. Dr. Betty Back, a licensed neuropsychologist, hypnotized Ms. Rock twice.[19] Prior to the first hypnosis session, the doctor questioned Ms. Rock about the state of her present memory of the incident and recorded the interview via handwritten notes.[20] Ms. Rock did not relate any new information during either session.[21] After the hypnosis, however, she recalled that, at the time of the shooting, her thumb was not on the trigger of the gun, but rather, on its hammer. Ms. Rock also remembered that the gun discharged when her husband grabbed her arm while they were scuffling. Ms. Rock's lawyer then had the gun examined by an expert, who discovered that the gun was defective and prone to fire when simply hit or dropped.[22]

Upon learning that Ms. Rock had undergone hypnosis, the prosecutor filed a motion to exclude her testimony. The trial judge issued an order limiting Ms. Rock's testimony to the information contained in Dr. Back's notes taken prior to the first hypnosis session.[23] A jury subsequently convicted Ms. Rock of manslaughter, and the trial judge sentenced her to ten years imprisonment and fined her $10,000.[24]

Ms. Rock appealed directly to the Supreme Court of Arkansas, claiming that the limitation of her testimony violated her right to present her defense.[25] The Arkansas Supreme Court rejected Ms. Rock's claim and decided to adopt the approach taken by the state courts that have held witnesses' hypnotically refreshed testimony as inadmissible *per se*.[26] Ms. Rock petitioned for a writ of *certiorari*, which the United States Supreme Court granted.

In a 5–4 decision, the Supreme Court declared Arkansas's *per se* rule unconstitutional.[27] Writing for the majority, Justice Blackmun stated that Arkansas's *per se* prohibition on hypnotically refreshed testimony infringed impermissibly on a criminal defen-

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[19] *Id.*

[20] *Id* at 2706 & n.2.

[21] *Id.* at 2707.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id. See also* Rock v. State, 708 S.W.2d 78 (Ark. 1986). The Arkansas Supreme Court opinion does not specify which constitutional rights Ms. Rock claimed were violated. *See Rock*, 708 S.W.2d at 84–86.

[26] *Rock*, 708 S.W.2d at 79.

[27] *Rock*, 107 S. Ct. at 2714, 2715.

dant's constitutional right to testify on his or her own behalf.[28] The Court held that, when the admission of a criminal defendant's hypnotically refreshed testimony is at stake, the trial court must employ a case-by-case balancing test.[29] The trial court may exclude such testimony only if a state can prove that the testimony is so unreliable in a particular case that the state's interest in avoiding unreliable testimony outweighs the criminal defendant's constitutional right to testify.[30] Chief Justice Rehnquist, writing for the dissent, argued that the Constitution does not dictate that the testimony of criminal defendants is immune from state courts' rules of evidence designed to ensure the reliability of testimony, and concluded that the Arkansas rule passed constitutional muster.[31]

Before the Supreme Court addressed the question, state and federal courts had developed three standards: *per se* admissibility, *per se* inadmissibility, and a qualified admissibility based on an adherence to procedural safeguards.[32] In *Rock*, the Supreme Court held that the standard that had been emerging as the most prevalent of the three among state courts, *per se* inadmissibility, violates a criminal defendant's constitutional right to testify on his or her own behalf.[33] Thus, state courts may no longer automatically limit a criminal defendant's testimony to that which he or she can prove was recalled prior to hypnosis.[34] A state court may still exclude a criminal defendant's post-hypnotic testimony, but may not do so in a mechanistic fashion. State courts must utilize a case-by-case balancing test, weighing the unreliability of potential testimony against a criminal defendant's constitutional right to testify.[35]

Although the Court expressly stated that its holding applied only to the hypnotically refreshed testimony of criminal defendants,[36] the Court's reasoning clearly opens the doors of admissi-

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[28] *Id.* The Court limited its holding only to the hypnotically refreshed testimony of criminal defendants. Thus, the holding has no direct implications for defense witnesses other than the defendant, and has no direct implications for the admissibility of hypnotically refreshed testimony in civil proceedings. *Id.* at 2712 n.15.

[29] *Id.* at 2714.

[30] *Id.*

[31] *Id.* at 2716 (Rehnquist, C.J., dissenting).

[32] *See infra* notes 78–108 and accompanying text.

[33] *Rock*, 107 S. Ct. at 2714.

[34] *Id.* Although no federal courts have presently excluded hypnotically refreshed testimony on a *per se* basis, the holding in *Rock* effectively precludes them from adopting such a standard in the future in regard to the hypnotically refreshed testimony of criminal defendants.

[35] *Id.*

[36] *Id.* at 2712 n.15.

bility to the hypnotically refreshed testimony of all criminal defense witnesses. Furthermore, the *Rock* opinion, as a whole, does not rest upon firm pragmatic and legal ground. The Court ignored the special dangers that hypnotically refreshed testimony poses to our truth-seeking process. This refusal to recognize the unreliability of hypnotically refreshed testimony allowed the Court to misapply precedent, as it enabled the Court to rely upon decisions that clearly are inapplicable to state rules that govern the admissibility of inherently untrustworthy testimony.

Section one of this casenote reviews a criminal defendant's fourteenth and sixth amendment rights to present a defense,[37] and then explores the limitations that a state may place upon this right.[38] Section one ends with a review of the approaches that courts have taken regarding the admissibility of hypnotically refreshed testimony.[39] Section two of this casenote examines the majority opinion of *Rock*,[40] and section three reviews the dissenting opinion of *Rock*.[41] Finally, section four of this casenote analyzes and criticizes the Court's holding, concluding that the Supreme Court incorrectly decided *Rock*, and, as a result, has posed a serious threat to the integrity of our trial process.[42]

I. BACKGROUND

A. *A Criminal Defendant's Fourteenth and Sixth Amendment Rights to Present a Defense*

The fourteenth[43] and sixth[44] amendments of the United States Constitution establish a criminal defendant's right to present a de-

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[37] *See infra* notes 43–55 and accompanying text.

[38] *See infra* notes 56–77 and accompanying text.

[39] *See infra* notes 78–108 and accompanying text.

[40] *See infra* notes 109–34 and accompanying text.

[41] *See infra* notes 135–39 and accompanying text.

[42] *See infra* notes 140–65 and accompanying text.

[43] U.S. CONST. amend. XIV, § 1. Section one states that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

[44] U.S. CONST. amend. VI. The sixth amendment states that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

fense on his or her own behalf. In regard to a criminal defendant's right to personally testify on his or her own behalf, the United States Supreme Court, in *Ferguson v. Georgia*, outlined the history of the transition from a rule of a criminal defendant's incompetency, which prevented a criminal defendant from testifying on a *per se* basis, to a rule of competency, which allowed a criminal defendant to testify.[45] The rule of competency, the Court asserted, rested on the assumption that both the "detection of guilt" and "the protection of innocence" are best achieved when criminal defendants are allowed to testify.[46] In addition, the Supreme Court has declared that the rule of competency is mandated not only by logic, but also by the fourteenth and sixth amendments. In *In Re Oliver*, a Michigan circuit judge was conducting a one-man grand jury investigation into alleged gambling and official corruption.[47] Petitioner William Oliver, obeying a subpeona, appeared before the judge and gave testimony. The judge told him that his story did not "jell," and immediately sentenced him to sixty days in jail. The United States Supreme Court held that, because Mr. Oliver did not have an opportunity to present a defense, the State of Michigan had violated his fourteenth amendment due process rights.[48] Thus in *Oliver*, the Supreme Court enunciated what it regarded as the most basic ingredients of due process of law: a criminal defendant possesses the right to be heard in his or her defense, including as a minimum, the right to examine opposing witnesses and the right to offer testimony.[49]

> confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.

Id.

[45] Ferguson v. Georgia, 365 U.S. 570, 573–82 (1961).

[46] *Id.* at 581. The Court stated: "In sum, decades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case." *Id.* at 582. In *Ferguson* the Court held that a Georgia statute that limited a criminal defendant's presentation at trial to an unsworn statement violated the fourteenth amendment in that the statute denied the defendant "the right to have his counsel question him to elicit his statement." *Id.* at 596. The Court did not address the question of whether a defendant possesses a constitutional right to testify, because the case did not present a challenge to the specific Georgia statute that rendered a criminal defendant incompetent to testify. *Id.* at 572 n.1. Two Justices, in concurrence, however, argued for the establishment of such a right. *Id.* at 600–01, 602 (Clark, J., concurring).

[47] In Re Oliver, 333 U.S. 257, 258–59 (1948).

[48] *Id.*

[49] *Id.* at 273. The Court in *Oliver* wrote:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in

In addition to the fourteenth amendment's guarantees, the sixth amendment assures the accused the right "to have compulsory process for obtaining witnesses in his favor,"[50] a right that is guaranteed by the fourteenth amendment to defendants in state criminal courts.[51] The Supreme Court in *Washington v. Texas* held that a criminal defendant possesses a sixth amendment right to present a defense, including the right to offer the testimony of his or her own witnesses.[52] In *Faretta v. California*[53] the Supreme Court recognized that the sixth amendment does not merely mandate that a defense be made for the accused, but rather, that the accused "personally" has the right to present his or her own defense.[54] The Court stated that the defendant, and not the defendant's counsel, possesses the sixth amendment right to have compulsory process for obtaining witnesses in his or her favor.[55] In sum, the fourteenth and sixth amendments combine to assure criminal defendants the general right to present a defense. This general right includes the rights to examine opposing witnesses, offer testimony, and present favorable witnesses.

B. *Limits That State Courts and Legislatures Have Attempted to Place Upon a Criminal Defendant's Right to Present a Defense*

Although the Supreme Court has interpreted the fourteenth and sixth amendments to guarantee a criminal defendant the right to present a defense, states[56] have attempted to limit this right.[57] Specifically, states have established rules that dictate when a criminal defendant could not present witnesses. The Supreme Court, how-

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> our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

Id. (footnote omitted).

[50] U.S. CONST. amend. VI.

[51] Washington v. Texas, 388 U.S. 14, 17–19 (1967).

[52] *Id.* at 19.

[53] Faretta v. California, 422 U.S. 806 (1975). The Court held that a criminal defendant possesses a constitutional right to proceed without counsel when he or she voluntarily elects to do so. *Id.* at 836.

[54] *Id.* at 819.

[55] *Id.*

[56] "States" refers both to rules created by state courts as well as those promulgated by state legislatures. For example, in Chambers v. Mississippi, 410 U.S. 284, 294 (1973), a state court's hearsay rule was in question. *See infra* notes 68–77 and accompanying text. In Washington v. Texas, 388 U.S. 14, 15 (1967), a state statute was in question. *See infra* notes 58–67 and accompanying text.

[57] *See, e.g.*, Washington v. Texas, 388 U.S. 14 (1967); Chambers v. Mississippi, 410 U.S. 284 (1973).

ever, has consistently held that such rules, as applied, violate a criminal defendant's constitutional right to present a defense. Specifically, the Supreme Court has held that the sixth and fourteenth amendments prevent states from attempting to bar the unreliable testimony of criminal defense witnesses from their courtrooms by the use of absolute, mechanical, or arbitrary rules of disqualification and exclusion.

In *Washington v. Texas*, the Supreme Court reviewed such an attempt by a state. The defendant in *Washington*, Jackie Washington, was charged with murder.[58] At trial, Mr. Washington attempted to offer proof that another man, Charles Fuller, had committed the murder by himself.[59] Mr. Fuller, however, had already been convicted of the murder, and a Texas statute,[60] prohibiting persons charged as accomplices in the same crime from testifying for one another, barred him from testifying on Mr. Washington's behalf.[61]

Writing for the majority, Chief Justice Warren concluded that Texas violated Mr. Washington's sixth amendment compulsory process right because the state prevented an entire class of defense witnesses from testifying simply by asserting that such witnesses belong to "*a priori* categories" that presume that such witnesses' testimony is untrustworthy.[62] The Court stated that Texas may not achieve the goal of preventing perjury through the categorical exclusion of defense witnesses.[63] Citing *Rosen v. United States*,[64] the

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[58] 388 U.S. 14, 14–15 (1967).

[59] *Id.* at 16. The opinion states, "it is undisputed that Fuller's testimony would have been relevant and material, and that it was vital to the defense" after noting that "[t]he record indicates that Fuller would have testified that petitioner [Washington] pulled at him and tried to persuade him to leave, and that petitioner ran before Fuller fired the fatal shot." *Id.*

[60] TEX. PENAL CODE ANN. § 82 (repealed 1967) (Vernon 1974).

[61] *Washington*, 388 U.S. at 16 n.4.

[62] *Id.* at 22–23.

[63] *Id.* at 22; *see also* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 115 (1974) (preeminent article on the history and present day application of the compulsory process clause). The Texas statute apparently assumed that accomplices would be prone to perjure themselves in order to extricate one another. *Washington*, 388 U.S. at 21.

[64] *Washington*, 388 U.S. at 22 (quoting Rosen v. United States, 245 U.S. 467, 471 (1918)). The *Washington* Court stated that:

> [T]he conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court . . . .

Id. In *Rosen*, the Supreme Court expressly overruled United States v. Reid, 12 U.S. (1 How.) 361 (1852). 245 U.S. 467, 471 (1918). *Reid* held that criminal co-defendants could not testify for one another. 53 U.S. (12 How.) 361 (1852). Although *Rosen* rested on statutory grounds, the *Washington* Court stated that the sixth amendment required the reasoning in *Rosen*. *Washington*, 388 U.S. at 22.

Washington Court stressed that Texas could have achieved its goal of preventing perjury without excluding accomplices' testimony, simply by leaving the weight and credibility of such testimony to the jury.[65] The Court reiterated its support for a rule of general competency of witnesses, explaining that a state should allow all persons of "competent understanding" to testify, rather than exclude witnesses' testimony in a wholesale fashion.[66] The Court ruled that a jury was capable of making individual determinations of credibility and trustworthiness.[67]

In addition to reviewing the limits a state may place upon a criminal defendant's right to present witnesses, the Supreme Court addressed in *Chambers v. Mississippi* whether a state may limit a criminal defendant's witness's testimony once that person has taken the stand.[68] In *Chambers*, the defendant, Leon Chambers, was on trial for the murder of a police officer.[69] Prior to Mr. Chambers's trial, another man, Gable McDonald, confessed in writing to the same murder and also admitted to three different friends on three different occasions that he had killed the police officer.[70] Mr. Chambers called Mr. McDonald to the stand, whereupon Mr. McDonald repudiated his written confession.[71] Mr. Chambers then found himself unable to cross-examine Mr. McDonald about the repudiation of his confession because of Mississippi's common law voucher rule that prohibited a party from impeaching his or her own witness.[72] Furthermore, Mississippi's hearsay rule prevented Mr. Chambers from introducing Mr. McDonald's oral admissions.[73]

The United States Supreme Court held that the exclusion of the hearsay evidence coupled with the state court's prohibition on

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[65] *Washington*, 388 U.S. at 21–22 (quoting Rosen v. United States, 245 U.S. 467, 471 (1918)); *see also* Westen, *supra* note 63, at 115–16.

[66] *Washington*, 388 U.S. at 22 (quoting Rosen v. United States, 245 U.S. 467, 471 (1918)).

[67] *Id.* at 22 (quoting Rosen v. United States, 245 U.S. 467, 471 (1918)). Professor Westen wrote in regard to the *Washington* opinion:

> That the jury is deemed an adequate measurer of credibility bears directly on the standard for determining the competence of defense witnesses. It means that the defendant has a right to present any witness whose credibility is genuinely at issue, and that witnesses cannot be barred from testifying on his behalf unless they are so untrustworthy as to provide no basis short of pure speculation for evaluating their testimony.

Westen, *supra* note 63, at 136.

[68] Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

[69] *Id.* at 285.

[70] *Id.* at 287, 289.

[71] *Id.* at 288.

[72] *Id.* at 295.

[73] *Id.* at 292.

cross-examination of Mr. McDonald denied Mr. Chambers "a trial in accord with traditional and fundamental standards of due process."[74] The Court noted that, although the exclusion of hearsay testimony is widely accepted throughout the country, when a criminal defendant's right to present a defense is at issue, a hearsay rule may not be applied "mechanistically" to exclude hearsay evidence that bears "persuasive assurances of trustworthiness,"[75] and in *Chambers* the Court concluded that the excluded hearsay was extremely trustworthy.[76] In short, the Court held that a state rule of evidence may not be used absolutely to exclude evidence that bears indicia of reliability when such evidence is critical to a criminal defendant's defense.[77]

In sum, *Washington* and *Chambers* establish that state courts and legislatures may not attempt to prevent the introduction of unreliable testimony by defense witnesses in their criminal courts by the use of absolute, mechanical, or arbitrary rules of disqualification and exclusion. Instead, when a criminal defendant's right to put on a defense is at stake, a state court or legislature may only attempt to ensure the reliability of defense witnesses' testimony by leaving

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[74] *Id.* at 302. Although the Court spoke of the defendant's right to present a defense in "due process" terms, it appears that the Court actually used a sixth amendment compulsory process clause analysis, as the Court cited Washington v. Texas, 388 U.S. 14 (1967), as a source of the defendant's right to present a defense. *Chambers*, 410 U.S. at 302. Possible explanations for this include the fact that the author of the *Chambers* opinion, Justice Powell, opposes the incorporation of the Bill of Rights into the fourteenth amendment and the fact that the defendant did not raise the issue of his sixth amendment compulsory process clause rights in the lower court. Westen, *supra*, note 63, at 151 n.384; *see also* Comment, *Polygraph Admission Through Compulsory Process*, 16 AKRON L. REV. 761, 773 n.76 (1983). Further evidence of the assertion that *Chambers* is in fact a compulsory process clause case is seen in the dissent of the *Rock* opinion where *Chambers* is clearly cited as being a compulsory process clause case. Rock v. Arkansas, 107 S. Ct. 2704, 2716 (1987) (Rehnquist, C.J., dissenting).

[75] *Chambers*, 410 U.S. at 302.

[76] *Id.* at 300–01. The *Chambers* Court noted:

> The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability. First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case — McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal-interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest.

Id. (citation omitted).

[77] *Id.* at 302.

the weight and credibility of such testimony to the jury. A court may only disqualify witnesses and exclude evidence if, in the particular case at hand, the potential witness or testimony is so unreliable that it would be impossible for a jury to weigh its credibility.

C. *Approaches Courts Have Taken Regarding the Admissibility of Hypnotically Refreshed Testimony*

Only relatively recently have courts begun to address the question of hypnotically refreshed testimony. During this period of time, however, courts have developed three distinct approaches to the problem. Initially, courts admitted hypnotically refreshed testimony on a *per se* basis. Then, as scientific studies detailing the unreliable nature of hypnotically refreshed testimony became available, courts began to move away from the *per se* admissibility approach and began either to hold hypnotically refreshed testimony inadmissible *per se*, or to admit hypnotically refreshed testimony only if the hypnotist adhered to certain procedural safeguards both during and before the hypnosis session. In 1968 the Maryland Special Court of Appeals was the first court to rule in a reported opinion on the admissibility of hypnotically refreshed testimony.[78] In *Harding v. State* the court held hypnotically refreshed testimony admissible *per se*, leaving to the trier of fact to determine the weight of such evidence.[79] Today, a number of state and federal courts still hold that hypnotically refreshed testimony is admissible *per se*.[80]

State courts, however, have increasingly rejected the rationale underlying *Harding* and its progeny, thus placing the validity of these cases in serious question.[81] The major criticism of the *Harding*

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[78] *See* Harding v State, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969).

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

[80] For federal courts taking the *per se* admissibility approach, see: Beck v. Norris, 801 F.2d 242 (6th Cir. 1986); United States v. Awkard, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); United States v. Adams, 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974). For state examples, see: People v. Smrekar, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979); State v. Wren, 425 So. 2d 756 (La. 1983); State v. Brown, 337 N.W.2d 138 (N.D. 1983); State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312 (1971); State v. Glebock, 616 S.W.2d 897 (Tenn. Crim. App. 1981); Chapman v. State, 638 P.2d 1280 (Wyo. 1982).

[81] *See, e.g.*, State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983), *overruling* Harding v. State, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969); State v. Mack, 292 N.W.2d 764 (Minn. 1980); State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984), *overruling* State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978); *see also* P. GIANNELLI & E. IMWINKELRIED, *supra* note 3, at 359; *Hypnotically Induced Testimony*, *supra* note 6, at 172, 201.

approach is its failure to take into account recognized scientific opinion regarding the nature and dangers of hypnotically refreshed testimony.[82] The scientific community agrees that hypnosis is not, by nature, a retriever of actual memories, and thus is not a source of accurate, reliable testimony.[83] Rather, scientists agree that when hypnosis is used to enhance a witness's memory, a series of phenomena is unleashed which seriously calls into question the reliability of the witness's resultant recollections.[84]

First, hypnosis by its very nature is a process of suggestion that renders its subject extremely receptive to suggestions that the subject perceives as emanating from the hypnotist.[85] The hypnotist can transmit suggestions to the subject even when the hypnotist does not intend to do so and even when the hypnotist cannot perceive any transference of suggestions.[86] The suggestive cues need not be verbal. Such factors as the hypnotist's attitude, demeanor, expectations, tone of voice, and body language all may communicate suggestive messages to the subject.[87]

Second, a person under hypnosis experiences a compelling desire to comply with the hypnotist, and thus produce the response that he or she believes the hypnotist wants to hear.[88] As a result, rather than admit that he or she is unable to recall certain facts, a subject will often create a memory comprised of relevant actual facts, irrelevant actual facts from past unrelated experiences, fantasized gap-fillers or confabulations, and conscious lies.[89] Furthermore, hypnosis impairs a subject's critical judgment capabilities. Thus, a person under hypnosis is likely to give significant credence

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[82] *Hypnotically Induced Testimony*, *supra* note 6, at 201; *see* Recent Development, *Growing Disenchantment with Hypnotic Means of Refreshing Witness Recall*, 41 VAND. L. REV. 379, 392–407 (1988).

[83] *Use and Misuse*, *supra* note 2, at 76.

[84] *See generally Use and Misuse*, *supra* note 2, at 68–84; *Hypnotically Induced Testimony*, *supra* note 6, at 171–204; Diamond, *supra* note 4 at 313–15, 332–42.

[85] *See* People v. Shirley, 31 Cal. 3d 18, 63, 723 P.2d 1354, 1382, 181 Cal. Rptr. 243, 270–71 (1982); Diamond, *supra* note 4, at 333. The California Supreme Court produced a summary of the professional literature on hypnotically refreshed testimony relying primarily on the works of two of the field's most preeminent scholars, Dr. Martin T. Orne and Dr. Bernard L. Diamond. *See Shirley*, 31 Cal. 3d at 63 n.45, 723 P.2d at 1381 n.45, 181 Cal. Rptr. at 270–71 n.45.

[86] *Shirley*, 31 Cal. 3d at 64, 723 P.2d at 1382, 181 Cal. Rptr. at 271; *see also* Diamond, *supra* note 4, at 333.

[87] Diamond, *supra* note 4, at 333.

[88] *Shirley*, 31 Cal. 3d at 64, 723 P.2d at 1382, 181 Cal. Rptr. at 271.

[89] *Shirley*, 31 Cal. 3d at 64, 723 P.2d at 1382, 181 Cal. Rptr. at 271; *see also* Diamond, *supra* note 4, at 335.

to vague and sketchy recollections that he or she would not have relied upon prior to undergoing hypnosis.[90]

Absent a means for independent corroboration, no one can discern whether hypnotically refreshed memories are fact or fiction.[91] During hypnosis neither the subject nor the hypnotist is able to differentiate between actual and fabricated memories. Moreover, afterwards, when the subject repeats such recollections at trial, no one, neither hypnosis expert nor trier of fact, will be able to distinguish between true and false recollections.[92] The detail and plausibility of the subject's recollections are not at all probative of truthfulness, as the subject may confabulate while under hypnosis in an effort to present a lucid, logical recollection of events in order to please the hypnotist.[93]

Finally, a witness who is unsure of his or her recollections prior to hypnosis will likely become convinced that his or her post-hypnotic recollections are assuredly correct.[94] Each time the subject is asked to repeat his or her hypnotically refreshed recollections, the subject's belief that the recollections are true and accurate grows stronger.[95] This potentially renders cross-examination incapable of detecting unreliable testimony because the subject's convictions regarding the truth of his or her hypnotically refreshed recollections are so strong and persuasive.[96]

Confronted with professional literature and testimony that detailed the unreliable nature of hypnotically refreshed testimony and the impossibility, even through cross-examination, of distinguishing between reliable and unreliable recollections, state and federal courts began to move away from the *Harding* approach of admitting hypnotically refreshed testimony on a *per se* basis.[97] In fact, the Maryland Court of Special Appeals overruled *Harding* in *Collins v.*

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[90] *Shirley*, 31 Cal. 3d at 64, 723 P.2d at 1382, 181 Cal. Rptr. at 271; *see also* Diamond, *supra* note 4, at 340.

[91] *Shirley*, 31 Cal. 3d at 65, 723 P.2d at 1382, 181 Cal. Rptr. at 271–72.

[92] *Id. See also* Diamond, *supra* note 4, at 333–34, 337, 340–41.

[93] *Shirley*, 31 Cal. 3d at 64–65, 723 P.2d at 1382–83, 181 Cal. Rptr. at 271–72; *see also* Diamond, *supra* note 4, at 337–40.

[94] *Shirley*, 31 Cal. 3d at 65, 723 P.2d at 1383, 181 Cal. Rptr. at 271–72; *see also* Diamond, *supra* note 4, at 339–40.

[95] *Shirley*, 31 Cal. 3d at 65–66, 723 P.2d at 1383, 181 Cal. Rptr. at 271–73.

[96] *Id. See also* Diamond, *supra* note 4, at 339–40; Contreras v. State, 718 P.2d 129, 138–39 (Alaska 1986) (holding that criminal defendants were deprived of confrontational rights when cross-examining a hostile, hypnotically refreshed witness because of the danger that the witness's demeanor and confidence could be altered by the hypnosis).

[97] *See supra* note 81 and accompanying text; *see also* Sies & Wester, *supra* note 9, at 93; *Hypnotically Induced Testimony, supra* note 6, at 172, 201–03.

State.[98] In response to the scientific community's findings, some state and federal courts have adopted a procedural safeguards approach, which permits hypnotically refreshed testimony's admission if the proponent of the hypnotically refreshed testimony follows certain procedural safeguards regarding the hypnosis session.[99] In *State v. Hurd*, the leading procedural safeguards case, the New Jersey Supreme Court promulgated procedural guidelines that the proponent of hypnotically refreshed testimony must follow in order for such testimony to gain admission at trial.[100] The *Hurd* court's guidelines include the requirements that an independent, licensed psychiatrist or psychologist should conduct the hypnosis session, that the hypnotist should make a record of the subject's pre-hypnosis memory, and that the hypnosis session should be recorded, preferably on videotape.[101]

A growing number of state courts,[102] however, have opted to go beyond the procedural safeguards approach and have chosen to

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[98] 296 Md. 670, 464 A.2d 1028 (1983) (adopting *per se* inadmissibility standard).

[99] For cases that admit hypnotically refreshed testimony in accordance with procedural safeguards, see Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986); United States v. Harrington, 18 M.J. 797 (A.C.M.R. 1984); People v. Romero, 745 P.2d 1003 (Colo. 1987); State v. Iwakiri, 106 Idaho 618, 682 P.2d 571 (1984); House v. State, 445 So. 2d 815 (Miss. 1984); State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981); State v. Beachum, 97 N.M. 682, 643 P.2d 246 (N.M. App. 1981), *writ quashed*, 98 N.M. 51, 644 P.2d 1040 (1982); State v. Weston, 16 Ohio App. 3d 279, 475 N.E.2d 805 (1984); State v. Armstrong, 110 Wis. 2d 555, 329 N.W.2d 386, *cert. denied*, 461 U.S. 946 (1983).

[100] The six procedural safeguards the New Jersey Supreme Court promulgated in State v. Hurd are as follows:

> (1) The hypnotic session should be conducted by a licensed psychiatrist or psychologist trained in the use of hypnosis. (2) The qualified professional conducting the hypnotic session should be independent of and not responsible to the prosecutor, investigator or the defense. (3) Any information given to the hypnotist by law enforcement personnel prior to the hypnotic session must be in written form so that subsequently the extent of the information the subject received from the hypnotist may be determined. (4) Before induction of hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them, carefully avoiding adding any new elements to the witness' description of the events. (5) All contacts between the hypnotist and the subject should be recorded so that a permanent record is available for comparison and study to establish that the witness has not received information or suggestion which might later be reported as having been first described by the subject during hypnosis. Videotape should be employed if possible, but should not be mandatory. (6) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and post-hypnotic interview.

86 N.J. 525, 533, 432 A.2d 86, 89–90 (1981).

[101] *Id.*

[102] No federal courts have adopted a *per se* exclusion rule. *See* P. GIANNELLI & E. IMWINKELRIED, *supra* note 3, at 353 n.38.

exclude hypnotically refreshed testimony on a *per se* basis.[103] These state courts simply view hypnotically refreshed testimony as so unreliable,[104] and thus so dangerous,[105] that its complete exclusion outweighs any potential loss of accurate information.[106] When the California Supreme Court adopted a *per se* exclusion standard in *People v. Shirley*, the court also forcefully rejected the *Hurd* procedural safeguards approach.[107] The California Supreme Court ar-

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[103] For cases adopting a *per se* inadmissibility standard, see Contreras v. State, 718 P.2d 129 (Alaska 1986); State ex rel. Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); People v. Guerra, 37 Cal. 3d 385, 690 P.2d 635, 208 Cal. Rptr. 162 (1985); People v. Shirley, 31 Cal. 3d 18, 723 P.2d 1354, 181 Cal. Rptr. 243 (1982); State v. Davis, 490 A.2d 601 (Del. Super. 1985); Bundy v. State, 471 So. 2d 9 (Fla. 1985), *cert. denied*, 107 S. Ct. 295 (1986); Walraven v. State, 255 Ga. 276, 336 S.E.2d 798 (1985); State v. Moreno, 709 P.2d 103 (Haw. 1985); State v. Haislip, 237 Kan. 461, 701 P.2d 909, *cert. denied*, 474 U.S. 1022 (1985); State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983); People v. Gonzalez, 415 Mich. 615, 329 N.W.2d 743 (1982), *modified*, 417 Mich. 968, 336 N.W.2d 751 (1983) (court modified its earlier opinion by stating that the opinion did not exclude a witness's pre-hypnotic recollections); State v. Koehler, 312 N.W.2d 108 (Minn. 1981); State v. Mack, 292 N.W.2d 764 (Minn. 1980); Alsbach v. Badar, 700 S.W.2d 823 (Mo. 1985); State v. Palmer, 210 Neb. 206, 313 N.W.2d 648 (1981), *cert. denied*, 108 S. Ct. 206 (1987); People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484 (1983); State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984); Harmon v. State, 700 P.2d 212 (Okla. Crim. App. 1985); Robison v. State, 677 P.2d 1080 (Okla. Crim. App.), *cert. denied*, 467 U.S. 1246 (1984); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981); State v. Martin, 101 Wash. 2d 713, 684 P.2d 651 (1984). These states, with the exception of California, do not hold that a previously hypnotized witness is fully incompetent to testify, but limit his or her testimony to that which the witness can prove to have been recalled prior to hypnosis. *See supra* note 10 and accompanying text. In People v. Shirley the California Supreme Court opted for a harsher rule, holding that a previously hypnotized witness is incompetent to testify as to any events that were the subject of a hypnosis session, including pre-hypnotic recollections. 31 Cal. 3d 18, 66–67, 723 P.2d 1354, 1384. The California Supreme Court did, however, carve out an exception for criminal defendants, allowing them to testify even if they had been previously hypnotized. *Id.* at 67, 723 P.2d at 1384.

[104] *See supra* notes 85–96 and accompanying text.

[105] Dr. Bernard L. Diamond writes:

> I believe that once a potential witness has been hypnotized for the purpose of enhancing memory his recollections have been so contaminated that he is rendered effectively incompetent to testify. Hypnotized persons, being extremely suggestible, graft onto their memories fantasies or suggestions deliberately or unwittingly communicated by the hypnotist. After hypnosis the subject cannot differentiate between a true recollection and a fantasy or a suggested detail. Neither can any expert or the trier of fact. This risk is so great, in my view, that the use of hypnosis by police on a potential witness is tantamount to the destruction or fabrication of evidence.

Diamond, *supra* note 4, at 314.

[106] *See, e.g.*, State v. Peoples, 311 N.C. 515, 531, 319 S.E.2d 177, 186 (1984); People v. Shirley, 31 Cal. 3d 18, 39, 723 P.2d 1354, 1365–66; *see also* P. GIANNELLI & E. IMWINKELRIED, *supra* note 3, at 353. Many of the courts that have excluded hypnotically refreshed testimony on a *per se* basis have used a *Frye* rationale, holding that hypnotically refreshed testimony was simply not accepted by the scientific community. *Hypnotically Induced Testimony*, *supra* note 6, at 202 (discussing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).

[107] 31 Cal. 3d 18, 39, 723 P.2d 1354, 1365–66.

gued that the *Hurd* rules are only designed to prevent the hypnotist from exploiting the suggestibility of the subject, and that no safeguards exist that a court can employ to detect when the subject has lost his or her critical judgment or when the subject is confabulating. Furthermore, the *Shirley* court contended that procedural safeguards cannot determine whether a witness is relating accurate or false recollections, nor can any set of safeguards detect when a witness is exuding a false sense of confidence in his or her testimony.[108]

In summary, the fourteenth and sixth amendments guarantee to a criminal defendant the right to present a defense, which includes the rights to examine opposing witnesses, offer testimony, and present favorable witnesses. As a result, states may not attempt to bar the unreliable testimony of defense witnesses from their criminal courtrooms by the use of absolute, mechanical, or arbitrary rules of disqualification and exclusion. The question then arises as to whether a state's efforts to keep what it perceives as inherently unreliable hypnotically refreshed testimony from its courtrooms infringes upon a criminal defendant's constitutional right to present a defense. The United States Supreme Court addressed this question in *Rock v. Arkansas*.

II. The *Rock* Majority Opinion

The Supreme Court, in *Rock v. Arkansas*, held that Arkansas's *per se* rule excluding hypnotically refreshed testimony impermissibly infringes upon a criminal defendant's constitutional right to testify on his or her own behalf at trial.[109] The majority recognized that the fourteenth amendment's due process clause, the sixth amendment's compulsory process clause, and the fifth amendment's prohibition of compelled testimony combined to produce the right to testify on one's own behalf at a criminal trial.[110] The Court then relied upon *Washington v. Texas* and *Chambers v. Mississippi* to determine whether Arkansas's *per se* exclusionary rule violated a criminal defendant's constitutional right to testify.[111] The Court concluded that, when a criminal defendant's constitutional right to testify is at stake, a state may not use *per se* exclusionary rules unless the state

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[108] *Id.*

[109] Rock v. Arkansas, 107 S. Ct. 2704, 2709 (1987).

[110] *Id.* at 2709–10.

[111] *Id.* at 2710–11, 2715.

can prove that all of the evidence in question is unreliable.[112] Applying this standard to the facts of *Rock*, the Court held that Arkansas had not proven that hypnotically refreshed testimony is always so untrustworthy to warrant its exclusion on a *per se* basis, and thus determined that Arkansas's *per se* exclusionary rule impermissibly infringed upon a criminal defendant's constitutional right to testify.[113] The Court thereby limited its holding to the hypnotically refreshed testimony of criminal defendants only.[114]

The majority emphasized the law's movement from a general rule of criminal defendants' incompetency to testify to a rule of competency, which permits criminal defendants to testify.[115] The Court interpreted the fourteenth amendment's due process clause as containing this rule, citing *In re Oliver* for the proposition that every criminal defendant has a right to "*an opportunity to be heard in his defense*."[116] The Court also noted that the sixth amendment's compulsory process clause, which grants a criminal defendant the right to call "witnesses in his favor," contains this right to testify on one's own behalf.[117] The Court reasoned that, because the compulsory process clause grants to criminal defendants the right to call favorable witnesses, it must also logically include the criminal defendant's right to call himself or herself to the stand and to testify.[118] Relying upon *Faretta v. California*, which held that the sixth amendment grants to the accused the right to "personally" present his or her own defense, the Court concluded that a defendant's right to

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[112] *Id.* at 2714.

[113] *Id.*

[114] *Id.* at 2712 n.15.

[115] *Id.* at 2708.

[116] *Id.* at 2709 (citing In Re Oliver, 333 U.S. 257, 273 (1948)). The Court also cited a footnote in *Faretta v. California*. *Id.* at 2709 (citing Faretta v. California, 422 U.S. 806, 819 n.15 (1975)). In *Faretta* the Court held that a criminal defendant has a constitutional right to represent him or herself. 422 U.S. 806, 836 (1975). The text of the opinion accompanying footnote 15 states that the sixth amendment grants to a criminal defendant the right to personally present his or her own defense. *Id.* at 819 n.15. In *Rock* the Court interpreted footnote 15, which states in pertinent part, "[t]his Court has often recognized the constitutional status of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process," as promulgating that a criminal defendant's right to testify is one of those rights that are "essential to due process of law in a fair adversary process." *Rock*, 107 S. Ct. at 2709. The *Rock* Court also cited Justice Clark's concurring opinion in *Ferguson v. Georgia*, in which Justice Clark urged that the Court interpret the fourteenth amendment's due process clause as securing to the criminal defendant the right "to choose between silence and testifying in his own behalf." *Id.* at 2709 (quoting Ferguson v. Georgia, 365 U.S. 570, 602 (1961) (Clark, J., concurring)).

[117] *Rock*, 107 S. Ct. at 2709.

[118] *Id.*

call witnesses and thereby present his or her defense is not complete unless the defendant is allowed to take the stand and testify.[119] The Court thus extended the scope of the compulsory process clause to include the right of a criminal defendant to testify on his or her own behalf.[120] Additionally, the Court held that the opportunity to testify on one's own behalf at a criminal trial is a required corollary to the fifth amendment's guarantee against compelled testimony.[121] Citing *Harris v. New York*,[122] the Court reasoned that, if the fifth amendment guarantees a criminal defendant the right not to testify, the fifth amendment must also guarantee him or her the right to testify if he or she desires.[123]

Having established a criminal defendant's right to testify on his or her own behalf, the Court turned to the question of whether a state court's rule of evidence that excludes hypnotically refreshed testimony may restrict this right. The Court examined two cases in which it previously dealt with constitutional challenges to state rules designed to ensure trustworthy testimony, but which interfered with the ability of a criminal defendant to offer evidence.[124] The cases were *Washington v. Texas*, in which the Court invalidated Texas's accomplice statute that prevented persons charged as accomplices in the same crime from testifying for one another,[125] and *Chambers v. Mississippi*, in which the Court held that Mississippi may not use its hearsay rule in an absolute, arbitrary fashion to exclude apparently trustworthy evidence that is critical to a criminal defendant's defense.[126]

The Court cited *Washington* to establish that a state may not arbitrarily deny a criminal defendant the right to present witnesses

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[119] *Id.* at 2709–10 (citing Faretta v. California, 422 U.S. 806, 819 (1975)).

[120] *Rock*, 107 S. Ct. at 2709–10.

[121] *Id.* at 2710.

[122] *Id.* (citing Harris v. New York, 401 U.S. 222, 225, 230 (1971)). In *Harris*, the Supreme Court held that a statement elicited from a criminal defendant by police in violation of Miranda v. Arizona, 384 U.S. 436 (1966), may be used for impeachment purposes. 401 U.S. 222, 223–26 (1971).

[123] *Rock*, 107 S. Ct. at 2710. In *Harris*, the Court stated: "Every criminal defendant is privileged to testify in his own defense, or refuse to do so." 401 U.S. at 225. In addition, three dissenting justices argued that the fifth amendment's privilege against self-incrimination guarantees the accused the right, "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Harris*, 401 U.S. at 230 (Brennan, J., dissenting) (quoting Malloy v.Hogan, 378 U.S. 1, 8 (1964)).

[124] *Rock*, 107 S. Ct. at 2710–11.

[125] *See supra* notes 58–67 and accompanying text.

[126] *See supra* notes 68–77 and accompanying text.

in his or her favor.[127] In short, the Court used *Washington* to underscore our country's general rule of competency of witnesses, which rests on the rationale that the truth is more likely to be arrived at when all persons with material knowledge of a case are allowed to take the stand, and not through the disqualification of witnesses. The Court relied upon *Chambers* to establish that a state rule of evidence may not be applied in an absolute fashion to exclude apparently trustworthy evidence that is critical to a criminal defendant's defense.[128] Rather, the Court continued, a state may only exclude such evidence if it can prove that its interests outweigh a criminal defendant's constitutional right to present a defense. In sum, the Court concluded that a state may only exclude such evidence if it can prove that in a particular case the evidence is so unreliable as to outweigh a criminal defendant's right to present favorable evidence.[129]

The Court applied these two principles to Arkansas's *per se* prohibition on hypnotically refreshed testimony.[130] When a criminal defendant's right to present a defense is at stake, the Court concluded, a state may only utilize *per se* exclusionary rules if it can prove by clear evidence that all of the evidence in question is untrustworthy. The Court held that Arkansas had not proven that hypnotically refreshed testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility — means such as the prosecution's use of cross-examination and the judge's issuance of cautionary instructions — to warrant its exclusion on a *per se* basis.[131] Thus, the Court held that Arkansas's *per se* exclusionary rule constituted an arbitrary and therefore unconstitutional restraint upon a criminal defendant's right to testify.

The Court expressly limited its holding to the hypnotically refreshed recollections of the criminal defendant only.[132] Furthermore, the Court did not unequivocally endorse the use of hypnosis as an investigative tool.[133] Rather, the Court simply concluded that Arkansas had not justified the exclusion of all a criminal defendant's hypnotically refreshed recollections in light of a criminal defendant's right to testify. The Court did, however, endorse the use of

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[127] *Rock*, 107 S. Ct. at 2710–11.
[128] *Id.* at 2711.
[129] *Id.* at 2711, 2714.
[130] *Id.* at 2714.
[131] *Id.*
[132] *Id.* at 2712 n.15.
[133] *Id.* at 2714.

procedural safeguards that assure that the hypnotist is an independent psychiatrist or psychologist with special training in hypnosis, and that the hypnosis is conducted in a neutral setting with only the hypnotist and the subject present, and that the hypnosis session is recorded on tape or videotape.[134]

III. The *Rock* Dissenting Opinion

In dissent, Chief Justice Rehnquist contended that the majority's interpretation of a criminal defendant's constitutional right to testify was faulty, stating that both the due process and the compulsory process clause decisions upon which the majority relied to establish a criminal defendant's right to testify did not create an absolute right to present evidence.[135] The dissent argued that the Constitution simply does not dictate that state courts' rules of evidence designed to ensure the reliability of testimony are inapplicable to the testimony of criminal defendants.[136] Contending that hypnotically refreshed testimony is inherently untrustworthy and therefore dangerous to the truth-seeking process, the dissent also asserted that a criminal defendant possesses no absolute right to override state rules of evidence designed to ensure trustworthy testimony.[137] Thus, the dissent concluded that a state court's rule that bars hypnotically refreshed testimony is constitutionally permissible, as a state court has the right to exclude untrustworthy evidence and a criminal defendant does not possess an absolute right to override such state courts' rules of evidence.

The dissent argued further that considerations of federalism dictated that Arkansas's *per se* rule should be allowed to stand.[138] The Supreme Court, the dissent contended, has traditionally deferred to the states in matters regarding criminal trial rules and procedures, and should do so in regard to Arkansas's *per se* exclusionary rule, especially because the rule in question involved an unsettled area of science.[139] In sum, the dissent concluded that the Constitution simply does not warrant Supreme Court intervention,

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[134] *Id.*

[135] *Id.* at 2715–16 (Rehnquist, C.J., dissenting).

[136] *Id.* at 2716 (Rehnquist, C.J., dissenting).

[137] *Id.* at 2715–16 (Rehnquist, C.J., dissenting).

[138] *Id.* at 2716 (Rehnquist, C.J., dissenting).

[139] *Id.* The dissent stated: "'[W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states.'" *Id.* (quoting Patterson v. New York, 432 U.S. 197, 201 (1977)).

given the present state of understanding regarding the nature of hypnotically refreshed testimony.

IV. *Rock*: Analysis and Criticism

A. *The Scope of* Rock

The United States Supreme Court held in *Rock v. Arkansas* that states may not exclude the hypnotically refreshed testimony of criminal defendants on a *per se* basis.[140] Instead, states must use a case-by-case balancing test, weighing the unreliability of the potential testimony against a criminal defendant's constitutional right to testify. This section examines the extent to which the *Rock* opinion contains implications for all hypnotically refreshed defense witnesses,[141] as well as criticizes the Court's reasoning and result.[142]

Although the *Rock* Court expressly limited its holding to the hypnotically refreshed testimony of criminal defendants, the decision's logic clearly opens the doors of admissibility to the hypnotically refreshed testimony of criminal defense witnesses. The Court located a criminal defendant's right to testify on his or her own behalf in several provisions of the Constitution. The sixth amendment's compulsory process clause guarantees a criminal defendant the right to call material "witnesses in his favor." In *Rock*, the Supreme Court, for the first time, extended this phrase to include a criminal defendant's right to testify on his or her own behalf.[143] Thus, the logic of the Court's reasoning mandates that a hypnotically refreshed defense witness whose potential testimony is material to the defendant's case cannot be kept from testifying on a *per se* basis. The Court cannot logically apply its holding to the right it has just created — a criminal defendant's right to testify — and not also apply its holding to the right that spawned the newly created right — a criminal defendant's right to present favorable witnesses.

The Court also derived a criminal defendant's right to testify from the fourteenth amendment's due process clause, reiterating that a criminal defendant possesses a due process right to present a defense.[144] The Court did not rule that the due process clause

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[140] *Id.* at 2714.

[141] *See infra* notes 143–47 and accompanying text.

[142] *See infra* notes 148–65 and accompanying text.

[143] *Rock*, 107 S. Ct. at 2708–10.

[144] *Id.* at 2709.

grants greater protection to a criminal defendant's right to testify than it does to a criminal defendant's right to present a defense in general.[145] It logically follows that this right would not only apply to the defendant's testimony, but would also include all witnesses who would be material to the defendant in presenting his or her defense. In sum, there is no constitutional difference between the importance of the material testimony of a hypnotically refreshed defendant and that of a hypnotically refreshed defense witness.[146] Therefore, because the Court held that the *per se* exclusion of the hypnotically refreshed testimony of criminal defendants violated their constitutional right to present a defense, it seems virtually inescapable that, in a future case, when the Court confronts the issue of the admissibility of the hypnotically refreshed testimony of a material criminal defense witness, that the Court must extend its holding in *Rock*, and hold that the hypnotically refreshed testimony of material defense witnesses cannot be excluded by courts on a *per se* basis.[147]

B. *The Faulty Nature of the Majority Opinion*

The Court in *Rock v. Arkansas* held that the hypnotically refreshed testimony standard that had emerged as a majority view among state courts, *per se* inadmissibility, is unconstitutional when applied to criminal defendants.[148] Thus, state courts may no longer automatically exclude all the hypnotically refreshed testimony of criminal defendants. Instead, state courts must submit each case involving the hypnotically refreshed testimony of a criminal defendant to a balancing test, weighing the unreliability of the potential testimony against the defendant's constitutional right to testify.[149] A court may exclude the hypnotically refreshed testimony of a criminal defendant only if a state can prove that the particular testimony

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[145] *Id.* *See supra* notes 48–49, 131–32 and accompanying text.

[146] *See Rock*, 107 S. Ct. at 2709.

[147] Conceivably, not allowing a criminal defendant to present a material witness's hypnotically refreshed testimony might constitute a violation of the criminal defendant's fifth amendment privilege against compelled testimony, for if a material defense witness is not allowed to testify, then the defendant, who may not want to take the stand, might be forced to testify in order to offer particular testimony that the defense witness otherwise would have offered.

[148] *Rock*, 107 S. Ct. at 2714.

[149] *Id.*

in question is so unreliable as to render a jury incapable of weighing its credibility.[150]

Both the legal reasoning and the result of this decision are faulty. The Court relied upon *Washington v. Texas* and *Chambers v. Mississippi* to establish a criminal defendant's right to testify in the face of state evidentiary restrictions, and then extended this right to the realm of hypnotically refreshed testimony.[151] In so doing, however, the Court ignored crucial factors that differentiated *Rock* from *Washington* and *Chambers*. In light of these factors, it is clear that *Washington* and *Chambers* do not support the Court's holding.

Underlying *Washington* is the rationale that when a criminal defendant's right to present a defense is at stake, a state may not attempt to ensure the reliability of testimony through the use of categorical, arbitrary rules of disqualification.[152] Rather, the *Washington* Court stated that it is far more preferable to hear the testimony of all material witnesses, and then to rely upon cross-examination and cautionary instructions to assist the jury in weighing the testimony's credibility.[153] Underlying *Chambers* is the rationale that a state court may not utilize mechanistic, absolute rules of exclusion to limit a defense witness's testimony, provided that such testimony bears "persuasive assurances of trustworthiness" and is critical to the defense.[154]

The *Washington* Court's proposition that the truth is best arrived at when all material witnesses are allowed to testify, and the jury, relying upon cross-examination and cautionary instructions, is allowed to weigh their credibility, is not operative when a witness is relating hypnotically refreshed recollections. When an ordinary witness takes the stand, a jury is able to make determinations as to the witness's credibility. A jury ideally takes into consideration the manner in which the witness relates his or her testimony. For example, a jury will notice whether a witness is confident and sure of his or her recollections or, rather, is wavering and doubtful. The degree to which a witness's testimony is impeached through cross-examination will influence a jury. Cautionary instructions, which the judge may offer, may also affect a jury's deliberations. In sum, a jury

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[150] *Id.*

[151] *Id.* at 2710–11, 2714.

[152] *See supra* notes 58–67 and accompanying text.

[153] *Id.*

[154] *Chambers*, 410 U.S. 284, 302 (1973); *see supra* notes 68–77 and accompanying text.

ideally will factor all of these considerations into its final calculus and then determine the weight to be given a witness's testimony.

In contrast, when a witness relates hypnotically refreshed testimony, this process is not possible. A person under hypnosis is not only extremely receptive to suggestions,[155] but also experiences a compelling desire to please the hypnotist,[156] and is prone to create memories.[157] Absent independent corroboration, a factfinder cannot determine whether hypnotically refreshed memories are fact or fiction. Neither the detail nor plausibility of such recollections are at all probative of their truthfulness.[158] Furthermore, a witness will be convinced that his or her hypnotically refreshed memories are assuredly correct, and this confidence will grow stronger each time the subject repeats his or her recollections.[159] Thus, no one, not even the world's foremost experts on hypnosis, can determine if a particular hypnotically refreshed recollection is true or false.[160]

Consequently, a jury will not be able to judge the credibility of hypnotically refreshed testimony as it can ordinary testimony.[161] The witness will exude great confidence in detailed and plausible testimony; as a result, an opposing attorney will not be able to cross-examine a hypnotically refreshed witness as effectively as he or she would an ordinary witness.[162] The danger also exists that juries will not heed a judge's cautionary instructions which detail the dangers

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[155] *See supra* note 85 and accompanying text.

[156] *See supra* note 88 and accompanying text.

[157] *See supra* note 89 and accompanying text.

[158] *See supra* notes 92–93 and accompanying text.

[159] *See supra* notes 94–95 and accompanying text.

[160] *See supra* note 92 and accompanying text.

[161] In Commonwealth v. Nazarovitch, the Pennsylvania Supreme Court stated:

> However, at this time, we remain unconvinced that the trier of fact could do anything more than speculate as to the accuracy and reliability of hypnotically-refreshed memory. The *Hurd* court's rationale that hypnotically-refreshed recollection might as well be admissible since ordinary eyewitness accounts are also vulnerable to error and inaccuracies does not do full justice to the fact that 'the traditional guaranties of trustworthiness as well as the jury's ability to view the demeanor of the witness are wholly ineffective to reveal distortions of memory induced by the hypnotic process.'

496 Pa. 97, 109, 436 A.2d 170, 176–77 (1981) (quoting Note, *Probative Value of Testimony from the Hypnotically Refreshed Recollection*, 14 AKRON L. REV. 609, 615 (1981)).

[162] In State v. Peoples, the North Carolina Supreme Court wrote: "In short, hypnosis not only irrevocably masks whether a subject's recall induced by it is true, it also creates a barrier to the ascertainment of the truthfulness through cross-examination — that method normally relied on in the courtroom to test the truthfulness of testimony." 311 N.C. 515, 523, 319 S.E.2d 177, 182 (1984).

of hypnotically refreshed testimony, but instead, will view hypnosis as a type of truth serum and thus accord undue credibility to hypnotically refreshed testimony.[163] In sum, the traditional devices upon which our system relies to ensure trustworthy testimony are ineffectual when applied to hypnotically refreshed testimony.[164] Thus, the rationale underlying *Washington* does not support the Court's holding in *Rock*.

Furthermore, the *Chambers* Court held that the evidence in question must bear "persuasive assurances of trustworthiness."[165] Juries cannot possibly determine whether particular hypnotically refreshed testimony bears any assurances of trustworthiness. Hypnotically refreshed testimony leaves no clues. Consequently juries cannot possibly determine whether the testimony bears any assurances of trustworthiness.

By mandating that trial judges conduct a case-by-case balancing test, weighing a criminal defendant's constitutional right to testify against the unreliability of the hypnotically refreshed testimony, the United States Supreme Court is, in effect, ordering trial court judges to do the impossible. Although trial judges make balancing determinations everyday, the balancing test the Supreme Court mandated in *Rock* differs from the ordinary balancing test because the *Rock* test forces judges to make a balancing determination with only one scale. The essence of a balancing test is that two distinct entities or concerns are weighed against one another. The balancing test that the *Rock* Court created supposedly weighs a criminal defendant's constitutional right to testify against the unreliability of the particular hypnotically refreshed testimony in question. A trial judge can weigh a criminal defendant's constitutional right to testify, but when the trial judge attempts to weigh the unreliability of the particular hypnotically refreshed testimony, however, he or she cannot do so — hypnotically refreshed testimony cannot be weighed.[166] There are no indicators which a trial judge may use to make a logical, reasoned determination regarding the unreliability of par-

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[163] Brown v. State , 426 So. 2d 76, 84–85 (Fla. App. 1983); *Peoples*, 311 N.C. at 526–27, 319 S.E.2d at 184.

[164] The North Carolina Supreme Court in *Peoples* stated: "The problem with hypnotically refreshed testimony lies not so much with the fallibility of the human witness but with the defects in the hypnotic process itself which cannot be compensated for by the ordinary trial process." 311 N.C. at 529, 319 S.E.2d at 185.

[165] *Chambers*, 410 U.S. 284, 302 (1973).

[166] *See supra* notes 85–96 and accompanying text.

ticular hypnotically refreshed testimony. In sum, the Supreme Court is ordering trial court judges to make scientific determinations regarding the reliability of particular hypnotically refreshed testimony, determinations that the foremost experts on hypnotically refreshed testimony in the country are unable to make. In short, the Supreme Court is forcing trial judges to make legal determinations based solely on pure speculation.

In summary, hypnotically refreshed testimony presents a novel problem because such testimony is immune to our trial system's methods of determining credibility. Hypnotically refreshed testimony does not fit into the traditional truth-seeking machinery that our courts have set in place over the years. Given its ability to elude naturally such protections, hypnotically refreshed testimony is thus a very real threat to our truth-seeking process. As such, until science discovers the capability to determine the accuracy of hypnotically refreshed testimony, it should not be admitted at trial. This suggestion is not as draconian as it appears. A previously hypnotized witness will always be able to testify to that which he or she recalled prior to undergoing hypnosis. Moreover, each and every previously hypnotized witness placed himself or herself in that position. They chose to be hypnotized. Thus, a rule that excludes hypnotically refreshed testimony on a *per se* basis is not penalizing a witness for being in a predicament over which he or she exercised no control. In sum, the exclusion of hypnotically refreshed testimony on a *per se* basis is necessary to preserve the integrity of our truth-seeking process.

V. Conclusion

In *Rock v. Arkansas*, the United States Supreme Court addressed the question of the admissibility of hypnotically refreshed testimony for the first time, holding that Arkansas's *per se* exclusion of hypnotically refreshed testimony impermissibly infringed upon a criminal defendant's right to testify on his or her own behalf. The Court ruled that, when a criminal defendant's fourteenth, sixth, and fifth amendment rights to testify are at stake, courts must use a case-by-case balancing test, weighing a criminal defendant's constitutional right to testify against the unreliability of the hypnotically refreshed testimony. The Court expressly limited its holding to the hypnotically refreshed testimony of criminal defendants only; the opinion, however, clearly opens the doors of admissibility to the hypnotically refreshed testimony of material criminal defense witnesses. Fur-

thermore, the opinion does not rest upon firm pragmatic and legal ground, as the Court ignored the special dangers that hypnotically refreshed testimony presents to our truth-seeking process. In sum, the holding in *Rock v. Arkansas* poses a serious threat to the integrity of our trial process.

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