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CASENOTES

ROCK v. ARKANSAS:* HYPNOSIS AND THE PREJUDICE RULE—YOUR MEMORIES MAY NOT BE YOUR OWN

Although the United States Constitution guarantees a criminal defendant the right to present a defense,¹ several states have adopted *per se* rules excluding the testimony of a hypnotically enhanced witness.² Recently, in *Rock v. Arkansas*,³ the United States

* 107 S. Ct. 2704 (1987).

1. See, e.g., *Faretta v. California*, 422 U.S. 806, 818 (1975) (“the [sixth] [a]mendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it”). The sixth amendment provides:

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 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 defense.

U.S. CONST. amend. VI.

2. See, e.g., *Contreras v. State*, 718 P.2d 129 (Ala. 1986) (testimony of alleged victim of kidnapping, assault, and rape); *Collins v. Superior Ct.*, 132 Ariz. 180, 207-08, 644 P.2d 1266, 1293-94 (1982) (testimony of alleged victim of kidnapping, assault, and rape); *People v. Quintanar*, 659 P.2d 710, 711 (Colo. App. 1982) (testimony of witness to alleged negligent homicide); *State v. Davis*, 490 A.2d 601 (Del. Super. 1985) (testimony of witness to alleged assault); *Bundy v. State*, 471 So. 2d 9, 18-19 (Fla. 1985), *cert. denied*, 107 S. Ct. 295 (1986) (testimony of witness to alleged kidnapping and murder); *State v. Moreno*, 709 P.2d 103 (Haw. 1985) (testimony of alleged rape victim); *State v. Haislip*, 237 Kan. 461, 482, 701 P.2d 909, 925-26, *cert. denied*, 106 S. Ct. 575 (1985) (testimony of witnesses to alleged shooting of police officer); *State v. Martin*, 101 Wash. 2d 713, 684 P.2d 651 (1984) (testimony of alleged victim of statutory rape); *State v. Collins*, 296 Md. 670, 464 A.2d 1028 (1983) (testimony of witness to alleged murder); *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E.2d 1190 (1983) (testimony of witness to alleged kidnapping and murder); *People v. Gonzales*, 415 Mich. 615, 329 N.W.2d 743 (1982), *opinion added to*, 417 Mich. 1129, 336 N.W.2d 751 (1983) (sole witness in alleged murder case); *Alsbach v. Badar*, 700 S.W.2d 823 (Mo. 1985) (testimony of driver of automobile in personal injury suit arising from accident); *State v. Palmer*, 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981) (testimony of three witness placing suspect at scene of robbery and murder); *People v. Hughes*, 59 N.Y.2d 523, 453 N.E.2d 484 (1983) (testimony of alleged victim of burglary and rape); *Robinson v. State*, 677 P.2d 1080, 1085 (Okla. Crim. App.), *cert. denied*, 467 U.S. 1246 (1984) (testimony of witness identifying accused as alleged murderer); *Commonwealth v. Nazarovitch*, 496 Pa. 97, 110, 436 A.2d 170,177 (1981) (testimony of witness

Supreme Court declared that an Arkansas' rule that prohibited the admission of such testimony from the defendant was unconstitutional. The Court held⁴ that a *per se* rule that excludes all hypnotically enhanced testimony is arbitrary and disproportionate to the purpose of preventing jury prejudice.⁵ Therefore, the exclusion impermissibly infringed upon a defendant's constitutional right to testify.⁶

During a domestic quarrel,⁷ a gun⁸ discharged killing defendant Vickie Lorene Rock's husband.⁹ Charged with manslaughter and unable to remember the details of the events leading up to the shooting, Vickie Rock submitted¹⁰ to professional¹¹ hypnosis¹² in an at-

to alleged murder).

3. 107 S. Ct 2704 (1987).

4. *Id.* at 2710.

5. A court may exclude relevant evidence if its "probative value is substantially outweighed by the risk that its admission will cause undue or unfair prejudice, confusion of the issues, misleading of the jury, undue delay or waste of time, or needless presentation of cumulative evidence." 1 B. JONES, JONES ON EVIDENCE § 4.6, at 395 (6th ed. 1972). FED. R. EVID. 403, which provides for the exclusion of prejudicial evidence, states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

6. *Rock*, 107 S. Ct. at 2714-15. The Court did not reach the defendant's additional claims of denial of due process and denial of the right to counsel. *Id.* at 2715 n.20. In addition, the Court specifically limited its holding to the effect of a *per se* rule on a criminal defendant's right to testify in her own defense, and refrained from extending its ruling to discretionary state rules of evidence, or testimony offered by a witness other than a criminal defendant. *Id.* at 2712 n.15. The Court stated that a "State is well within its powers if it establishes guidelines to aid trial courts in the evaluation of post-hypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified." *Id.* at 2714. The Court specifically distinguished the cases relied on by the Arkansas Supreme Court as pertaining to *per se* exclusionary rules for the "testimony of witnesses, not for the testimony of a defendant." *Id.* at 2712.

7. *Id.* at 2706. Frank Rock, the victim and defendant's husband, wanted to move from their apartment, adjacent to a beauty parlor owned by the defendant Vickie Rock, to a trailer also owned by the defendant. The move had been a subject of ongoing dispute, which erupted on this night when the victim refused to let the defendant eat a pizza, and physically prevented her from leaving their apartment to obtain dinner on her own. *Id.*

8. *Id.* The Rocks kept the gun as part of their employment as nightwatchmen for a business located behind their apartment. *Id.* at 2706-07 n.2.

9. Joint Appendix at 107, *Rock v. Arkansas*, 107 S. Ct. 2704 (1987) (No. 86-130). Frank Rock was pronounced dead at Rogers Memorial Hospital. *Id.*

10. The defendant's attorney recommended that she use hypnosis to refresh her memory. *Rock*, 107 S. Ct. at 2706.

11. Dr. Betty Back, PhD, a licensed neuropsychologist with experience and training in the field of hypnosis conducted the hypnosis. Joint Appendix at 108, *Rock*, 107 S. Ct. 2704. Neither the trial court nor the Arkansas Supreme Court questioned Dr. Back's qualifications, which obviously satisfied the safeguard requirement that only a professional perform the hypnosis. See *infra* note 55 for a discussion of the complete safeguard requirements.

12. Hypnosis is defined as "the act of inducing artificially a state of sleep or trance in a subject by means of verbal suggestion by the hypnotist or by the subject's

tempt to refresh her memory.¹³ Before undergoing the hypnosis,¹⁴ she provided the neuropsychologist with a general account of the events as she remembered them.¹⁵ As a result of the hypnosis,¹⁶ Vickie Rock recalled that her finger was never actually on the trigger of the gun. Instead, the gun had discharged accidentally when her husband struck her.¹⁷

When the state discovered that Vickie Rock had undergone hypnosis, it moved to exclude her testimony¹⁸ on the grounds of prejudice, alleging that her hypnotically enhanced testimony was unreliable.¹⁹ Following a pretrial hearing,²⁰ the court issued an order limiting Vickie Rock's testimony to her prehypnotic recollections as described to the neuropsychologist.²¹ Vickie Rock was subsequently

concentration upon some object" BLACK'S LAW DICTIONARY 668 (5th ed. 1979).

13. Joint Appendix at 44. At the pre-trial hearing conducted for the purpose of determining whether the court would allow the defendant's hypnotically enhanced testimony, Dr. Back testified that she was originally contacted by the defendant's attorney, Mr. Putman. *Id.* During both the initial phone conversation and later when he escorted the defendant to Dr. Back's office, Mr. Putman stated that the purpose of the hypnosis was to refresh the defendant's memory of "the details the night her husband was shot," and that the defendant couldn't remember "how the gun went off or what she did with the gun." *Id.*

14. Dr. Back hypnotized the defendant on two occasions. *Rock*, 107 S. Ct. at 2706.

15. Dr. Back made handwritten notes of the defendant's recollections of the evening of the shooting that were contained on one page of paper, front and back. Joint Appendix at 46-47. She evaluated Vickie Rock's recollections and recorded only those she considered pertinent to the evening of the shooting. *Id.* Dr. Back recorded the hypnotic sessions on audio tape, *id.* at 53, and testified that videotape was not used for either the pre-hypnosis conference or the actual hypnosis sessions, and is generally not used due to the expense. *Id.* at 52.

Based on these notes, Dr. Back testified that she formulated general, nonsuggestive questions intended to elicit responses free of fabrication to which hypnotically enhanced testimony is often subject. *Id.* During the first hypnotic session, Dr. Back limited her questions to general matters, which failed to elicit any additional details from Vickie Rock. *Id.* In the second session, Dr. Back used a less reliable method of questioning, asking specific questions, and a different method of questioning, asking Vickie Rock to recall as an observer rather than as a participant in the events. *Id.*

16. *Rock*, 107 S. Ct. at 2706-07. Although not recalling any details during either hypnotic session, after the second session the defendant was able to remember the details of the shooting. *Id.*

17. *Id.* at 2707. Based on the defendant's hypnotically enhanced memory, her attorney had a gun expert examine the gun. *Id.* The expert's examination of the gun revealed a defect that caused the gun to fire when dropped or jarred, without anyone actually pulling the trigger. *Id.*

18. *Id.* The prosecutor was not aware of the hypnosis sessions before they occurred, and upon learning of them, he filed a motion to exclude the defendant's testimony. *Id.* The record does not indicate specifically whether the prosecutor sought to exclude all of Vickie Rock's testimony, or only her post-hypnosis testimony. However, the trial court's order, *see infra* note 21, limited only her post-hypnosis testimony.

19. Brief for Respondent at 2, *Rock v. Arkansas*, 107 S. Ct. 2704 (1987) (No. 86-130). The state argued that "[h]ypnotically refreshed testimony is inherently unreliable." *Id.*

20. *Rock*, 107 S. Ct. at 2707. At the pre-trial hearing, Dr. Back testified, as did the defendant, on the conduct of the hypnosis sessions. Joint Appendix at 42.

21. *Rock*, 107 S. Ct. at 2707. The trial court's order stated in pertinent part:

convicted of manslaughter and was sentenced to ten years imprisonment and fined \$10,000.²²

Vicki Rock appealed her conviction, claiming that the trial court's exclusion of her hypnotically enhanced testimony violated her sixth amendment right to testify in her own defense.²³ The Supreme Court of Arkansas rejected her claim, holding that all hypnotically enhanced testimony is *per se* inadmissible.²⁴

The United States Supreme Court granted *certiorari*²⁵ to review the Arkansas Supreme Court's decision.²⁶ The Court addressed the issue of whether the *per se* exclusion of a defendant's hypnotically enhanced testimony reasonably insured the integrity of the truth-finding process when balanced against the defendant's constitutional right to testify.²⁷ The Court held that a defendant has a constitutional right to testify, subject to reasonable limitations that the state may place on that right to insure credible testimony.²⁸ The Court concluded that the *per se* exclusion of the defendant's hypnotically enhanced testimony was not a reasonable means of protecting the

Defendant cannot be prevented by the Court from testifying at her trial on criminal charges under the Arkansas Constitution, but testimony of matter recalled by Defendant due to hypnosis will be excluded because of inherent unreliability and the effect of hypnosis in eliminating any meaningful cross-examination on those matters. Defendant may testify to matter remembered and stated to the examiner prior to being placed under hypnosis. Testimony resulting from post-hypnotic suggestion will be excluded.

Id. n.3.

22. *Id.* at 2707. Despite the fact the defendant had no prior convictions and expressed remorse, the jury nonetheless recommended the maximum penalty under Arkansas law. Brief for Petitioner at 7, *Rock v. Arkansas*, 107 S. Ct. 2704 (1987) (No. 86-130).

23. *Rock v. State*, 288 Ark. 566, 573, 708 S.W.2d 78, 84 (1986).

24. *Rock*, 107 S. Ct. 2707-08. The Arkansas Supreme Court concluded that the state's interest in assuring credible testimony outweighed the probative value of the testimony, and went beyond the trial court's pre-trial order and ruled that hypnotically enhanced testimony is inadmissible *per se*. The court rejected Vickie Rock's claim that exclusion of her testimony violated her constitutional rights. *Id.*

25. 107 S. Ct. 430 (1986).

26. *Rock*, 107 S. Ct. at 2708.

27. *Id.* at 2712.

28. These issues were not directly before the Court. The trial court acknowledged Vickie Rock's right to testify. Brief for Respondent at 2, *Rock v. Arkansas*, 107 S. Ct. 2704 (1987) (No. 86-130) (statement that criminal defendants "do not have an absolute right . . . to testify in whatever manner they please" infers that a defendant in fact has this right). The Arkansas Supreme Court also recognized this right. *Rock v. State*, 288 Ark. 566, 573, 708 S.W.2d 78, 84 (1986) ("[a] defendant's right to testify is fundamental, but even that right is not without limits"). The Court needed to address these issues, however, in order to determine the proper standard of review in this case. Once having determined this standard, the Court found that Arkansas had failed to properly analyze its rule. *Rock*, 107 S. Ct. at 2712 ("[t]he Arkansas Supreme Court failed to perform the constitutional analysis that is necessary when a defendant's right to testify is at stake"). The Court proceeded to the issue thus presented, whether the *per se* exclusion of Vickie Rock's testimony was a reasonable means to avoid prejudice.

state's interest in insuring credible testimony, and reversed the Arkansas Supreme Court.²⁹

The Court first noted the evolution of a defendant's right to testify. Beginning with the early common law prohibition against admission of an accused's testimony, the Court traced the development of the defendant's right to testify through the late nineteenth century, when such testimony became generally accepted.³⁰ The Court next determined that the fourteenth amendment's Due Process Clause³¹ served as a foundation for asserting the existence of such a right.³² The Court then noted that the sixth amendment's Compulsory Process Clause,³³ which guarantees the accused's personal right to call witnesses,³⁴ logically also includes the right of the defendant to testify.³⁵ Finally, the Court found that the fifth amendment's guarantee against self-incrimination³⁶ supported the right of the defendant to testify in her own defense.³⁷ The Court determined

29. *Rock*, 107 S. Ct. at 2714-15. The Court did not reach the defendant's other constitutional claims. See *supra* note 6 for defendant's other claims.

30. At early common law, all testimony by a party to the litigation was excluded as untrustworthy due to self-interest. *Rock*, 107 S. Ct. at 2708 (citing 2 J. WIGMORE, EVIDENCE §§ 576, 579 (1979)). Eventually, this practice was modified to allow criminal defendants to make unsworn statements, not subject to either direct or cross-examination. *Id.* Ultimately, by the end of the 19th century the federal government and almost all states had enacted competency statutes declaring criminal defendants competent to testify in their own defense. For a discussion of history of defendant's right to testify, see *Ferguson v. Georgia*, 365 U.S. 570, 577-87 n.6 (1961).

31. The 14th amendment's Due Process Clause states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

32. See, e.g., *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) (right of a criminal defendant to testify is "essential to due process of law in a fair adversary process"); *Ferguson v. Georgia*, 365 U.S. 570, 602 (1961) (Clark, J., concurring) (criminal defendant's right to choose between silence and testifying is secured by 14th amendment); *In re Oliver*, 333 U.S. 257, 273 (1948) ("an opportunity to be heard in his defense" is guaranteed to an accused by the 14th amendment).

33. See *supra* note 1 for text of the sixth amendment.

34. *Faretta*, 422 U.S. at 819 (constitutional guarantee of counsel to a criminal defendant also includes right to refuse counsel and represent oneself). See generally Recent Development, *Criminal Defendants at the Bar of Their Own Defense-Faretta v. California*, 13 AM. CRIM. L. REV. 335 (1975) The Court relied on dicta in prior cases, the traditionally liberal construction of the sixth amendment's criminal defendant guarantees, and early English and American history to support the recognition of the defendant's right to self-representation against the dissent's practical concerns over the procedural difficulties in implementing such a right. *Id.*

35. *Rock*, 107 S. Ct. at 2709. The Court stated that not only is the defendant the "most important witness for the defense in many cases," but that there was "no justification today for a rule that denies an accused the opportunity to offer his own testimony." *Id.*

36. The fifth amendment states in relevant part that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

37. *Harris v. New York*, 401 U.S. 222, 225 (1975) ("[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so"). See generally Note, *Harris v. New York*, 48 CHI-KENT L. REV. 124 (1971) (lack of *Miranda* warning did not render reliable statements and confession inadmissible for impeachment pur-

that a defendant's right to testify is a "necessary corollary to the fifth amendment's guarantee against compelled testimony."³⁸ Consistent with these conclusions, the Court also concluded that a defendant has a constitutional right to testify under the fourteenth, sixth, and fifth amendments.³⁹

After establishing that a defendant has a constitutional right to testify, the Court examined the state's power to limit or deny the exercise of that right.⁴⁰ The Court noted that a criminal defendant's right to testify⁴¹ must be balanced against the state's interest in promoting credible testimony.⁴² The Court then noted that state evidentiary rules designed to further this interest fail to satisfy this constitutional balancing test⁴³ when a court applies such rules

poses, but only inadmissible for truth of statements and confession).

38. *Rock*, 107 S. Ct. at 2710.

39. *Id.* at 2710-11.

40. The Court's discussion of state evidentiary rules that limit the personal right of an accused to present a defense, with all that right's permutations, began with *Washington v. Texas*, 388 U.S. 14 (1967). See generally Comment, *Constitutional Law- Right to Obtain Witnesses in One's Own Defense-Absorption Doctrine*, 13 N.Y.L.F. 426 (1967) (absorption doctrine, absorbing the Bill of Rights through the 14th amendment's guarantee of due process and making it applicable to the states, extended to a criminal defendant's right of compulsory process). In *Washington*, the state excluded testimony by principals, accomplices, or accessories in the same crime based on the old common law view that such evidence was so tainted by self-interest as to be completely untrustworthy. *Washington*, 388 U.S. at 21. However, the Court concluded that such reasoning had been rejected as early as 1918 on nonconstitutional grounds, *Rosen v. Unites States*, 245 U.S. 467, 471 (1918), and that the sixth amendment's guarantee of the defendant's right to present witnesses on his behalf required more than mere presence in the courtroom. *Washington*, 388 U.S. at 22. Therefore, the statute prohibiting testimony by co-defendants arbitrarily restricted a defendant's right to present his defense. *Id.* at 23.

Moreover, once a defense witness has taken the stand, the state cannot arbitrarily limit his testimony. *Chambers v. Mississippi*, 410 U.S. 284 (1973). A state evidentiary rule excluding hearsay combined with another rule that precluded cross-examination by the defense of the defense's witness prevented the accused from fully revealing to the jury the witness' confessions to the crime for which the defendant stood accused. *Id.* at 294. The Court held, in an often cited opinion, that while the defendant's right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process," that these rules "may not be applied mechanically to defeat the ends of justice." *Id.* at 295, 302. In reversing the conviction of the defendant, the Court specifically noted the justification for the hearsay exclusion — to prevent unreliable testimony — was inapplicable in a case where the testimony was trustworthy and included corroboration. *Id.*

41. *Rock*, 107 S. Ct. at 2711. The Court relied on *Chambers*, 410 U.S. at 295, in which a defendant accused of murder was precluded from cross-examining a witness who had orally confessed to crime on three separate occasions, and who had signed a sworn confession that he later repudiated. The state "voucher" rule against impeachment of one's own witness prevented the defendant from cross-examining the witness on both oral and signed sworn confessions. In addition, the state hearsay rule excluded testimony by third parties to whom witness had orally confessed. See *supra* notes 40 for a discussion of how the Court interpreted *Chambers* to find the existence of the right to testify.

42. *Rock*, 107 S. Ct. at 2711.

43. This is commonly referred to as a "balancing test" because it balances an individual's rights against the interests of the state. The *Chambers* Court indicated

arbitrarily.⁴⁴

The Court determined that witnesses requiring hypnosis to refresh or enhance their memories⁴⁵ create doubt concerning the reliability of their testimony. The Court noted that if hypnosis is successful and a witness remembers additional facts,⁴⁶ those new memories are subject to three types of credibility problems: 1) fabrication in an attempt to win approval;⁴⁷ 2) confabulation or filling in of existing memories for clarity and continuity;⁴⁸ and 3) "memory hardening,"⁴⁹ a confidence that the new memories are true, which makes cross-examination difficult.⁵⁰ The Court found, however, that traditional truth-finding methods such as corroboration,⁵¹ cross-examination to challenge credibility,⁵² and education of

that when a state denies or impairs a defendant's constitutional rights the appropriate standard requires that the "competing interest be closely scrutinized." *Chambers*, 410 U.S. at 295.

44. See, e.g., *id.* at 295 (state hearsay rule combined with "voucher" rule to preclude cross-examination of witness on subject of alleged confessions was arbitrary denial of accused's right to present defense in light of trustworthiness and corroboration of testimony); *Washington v. Texas*, 388 U.S. 14, 23 (1967) (state rule excluding testimony by principals, accomplices, or accessories, based on old common law rule of untrustworthy self-interest, was arbitrary restriction of accused's right to present a defense, and, therefore, an unconstitutional denial of accused's rights).

45. *Rock*, 107 S. Ct. at 2713. Although trained professionals have used hypnosis as a therapeutic device since 1958, it has yet to be generally defined or explained. The use of hypnosis is still unsettled. *Id.* (quoting Council on Scientific Affairs, *Scientific Status of Refreshing Recollections by the Use of Hypnosis*, 253 J.A.M.A. 1918, 1918-19 (1985)).

46. Hypnosis on occasion produces no change in memories. See *Rock*, 107 S. Ct. at 2713.

47. M. Orne, D. Dinges, & E. Orne, *The Forensic Use of Hypnosis*, NAT'L INST. JUST., Dec., 1984, reprinted in Center for Responsive Psychology Staff, Brooklyn College, CUNY, *Postmortem: The Beginning of the End of Hypnotically Induced Evidence, Social Action and the Law* 49, 50 (Vol. 12, 1986) [hereinafter *Forensic Use of Hypnosis*]. Hypnosis creates a heightened suggestibility in the subject and temporarily suspends critical judgment. *Id.* During this state, the subject is intensely focused on the hypnotist, and experiences an increased desire to please the hypnotist. *Id.* As a result, the subject reacts to the explicit, as well as the subtle, cues and suggestions that the hypnotist communicates to the subject during the session. *Id.* The result is the fabrication of false memories in an effort to please the hypnotist. *Id.*

48. Confabulation is the creation of details to "fill in" gaps in memory. *Forensic Use of Hypnosis*, *supra* note 47, at 50.

49. The subject becomes very confident of his memories after hypnosis, thus improving the impact of his testimony, because he accepts his hypnotically enhanced memories as fact. *Id.*

50. See generally M. ORNE, D. SOSKIS, D. DINGES, & E. ORNE, HYPNOTICALLY REFRESHED TESTIMONY: ENHANCED MEMORY OR TAMPERING WITH EVIDENCE? (1985); Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 333-42 (1980).

51. *Rock*, 107 S. Ct. at 2714. Courts can use corroborating evidence to verify specific facts recalled under hypnosis, making those hypnotically enhanced memories highly accurate. *Id.*

52. *Id.* The memory hardening effect of hypnosis does not cure a witness' testimony of inconsistencies that cross-examination can reveal, and which reduces credibility. *Id.*

the jury as to the effects of hypnosis⁵³ are available to insure adequate jury consideration of the credibility of such testimony.⁵⁴ In addition, the Court noted with approval expert-recommended procedural safeguards⁵⁵ that are available to offset the hypnosis-created credibility problems. The Court held that the use of these procedural safeguards in the administration of hypnosis,⁵⁶ combined with the traditional means of testing credibility,⁵⁷ were adequate to pro-

53. *Id.* Courts can use both expert testimony and proper jury instructions to educate the jury as to the possible credibility problems occasioned by the use of hypnosis. The Court noted that unless a defendant's pre-hypnosis memories were clearly established, a defendant runs a danger of having the jury discount all of the credibility of her testimony as subject to the limitations produced by hypnosis. *Id.*

54. *Id.*

55. Based on the recommendations of Dr. Martin T. Orne, the New Jersey Supreme Court adopted the following six safeguards:

First, a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session

Second, the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense.

Third, the information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or in other suitable form

Fourth, before inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them

Fifth, all contacts between the hypnotist and the subject must be recorded. This will establish a record of the preinduction interview, the hypnotic session, and the post-hypnotic period, enabling a court to determine what information or suggestions the witness may have received

Sixth, only the hypnotist and the subject should be present during any phase of the hypnotic session, including the prehypnotic testing and post-hypnotic interview

State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981).

Various state courts have adopted these recommendations. *See, e.g.*, *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1122-23 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1263 (1986) (video tapes of hypnotic session admitted without jury instruction in automobile products liability claim held error); *House v. State*, 445 So. 2d 815, 828 (Miss. 1984) (remand for new trial to verify use of safeguards in hypnosis of statutory rape victim, and for error in admitting testimony of hypnotist on accuracy of witness' testimony); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86, 89-90 (1981) (court used hypnotically enhanced testimony of assault victim to establish guidelines for proper administration of hypnosis that are now used by most states requiring such safeguards); *State v. Beachum*, 97 N.M. 682, 689-90, 643 P.2d 246, 253-54 (N.M. App. 1981), *writ quashed*, 98 N.M. 51, 644 P.2d 1040 (1982) (hypnosis of burglary, armed robbery victim by chief of police at station with four others present, did not meet safeguard requirements, but pre-hypnosis identification of assailant's voice allowed); *State v. Weston*, 16 Ohio App. 3d 279, 287, 475 N.E.2d 805, 812 (1984) (witness in alleged murder trial allowed to testify after court consideration of type of memory loss, motives of witness, and safeguards followed despite administration by trained, independent state trooper); *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386, 394-95 n.23, *cert. denied*, 461 U.S. 946 (1983) (testimony of witness to alleged rape and murder allowed since safeguards followed and opposition allowed to challenge credibility on basis of hypnosis).

56. *Id.* Although not guaranteeing the accuracy of a witness's testimony, procedural safeguards provide a means of controlling overt suggestion. *Id.* *See supra* note 55 for a complete discussion of the procedural guidelines.

57. *Rock*, 107 S. Ct. at 2714. *See supra* notes 51-53 for a complete discussion of

tect the state's interest in assuring the integrity of the truth-finding process.⁵⁸

Applying this analysis, the Court held that Vickie Rock's hypnosis satisfied the minimum procedural safeguards. When combined with an expert's corroboration of the gun's defect, this compliance with procedural safeguards provided a reasonable basis for the trial court to find the hypnotically enhanced testimony of Vickie Rock reliable, and, therefore, admissible.⁵⁹ The Court concluded that Arkansas' *per se* rule excluding all hypnotically enhanced testimony arbitrarily denied Vickie Rock her constitutional right to testify.⁶⁰

Although the *Rock* Court ultimately reached the right conclusion, it failed to support its holding with an analysis of the purpose and proper application of evidentiary rules based on prejudice. This omission renders the Court's decision an ineffective guide for lower courts to follow because its decision provides no guidance in resolving the dilemma hypnotically enhanced testimony presents. Had the Court performed such analysis, two additional arguments would have emerged in support of its decision. First, the Arkansas *per se* exclusionary rule was inconsistent with the purpose of the prejudice

the traditional means of testing witness credibility.

58. *Rock*, 107 S. Ct. at 2714. Arkansas had not shown that hypnotically enhanced testimony is always unreliable, or always immune to traditional means of evaluating credibility. *Id.*

59. *Id.* The Court rejected the reasoning of both the trial court and the Arkansas Supreme Court that the defendant, in voluntarily choosing to undergo hypnosis, had also chosen to accept the adverse impact of the hypnosis on her defense. This theory was urged repeatedly by the prosecution, and was accepted by the Arkansas Supreme Court in *Rock* as justification for limiting the admissibility of evidence to only those pre-hypnosis memories documented in Dr. Back's notes or testimony. *Rock*, 107 S. Ct. at 2712 n.13. The Court noted that acceptance of this reasoning raised a separate due process question for failure to notify the defendant of the potential penalty for practicing hypnosis. *Id.* at 2712.

The Court concluded that Arkansas' reliance on evidentiary rules excluding hypnotically enhanced testimony adopted in other states was misplaced because those rules applied to the testimony of witnesses, not of the defendant. *Id.* Specifically, the Court distinguished *People v. Shirley*, 31 Cal. 3d 18, 723 P.2d 1354, *cert. denied*, 459 U.S. 860 (1982), which was the case relied on by the Arkansas court. *Rock*, 107 S. Ct. at 2712 n.15. In *Shirley*, the sole witness against the defendant in his trial for rape was the victim, who was hypnotized three months after the alleged incident. 31 Cal. 3d 18, 723 P.2d 1354. The hypnosis took place in the courthouse, was performed by a deputy district attorney in the presence of three other persons, and the victim's testimony after hypnosis remained vague, changeable, and contradictory. *Id.* The Court observed that in *Shirley*, California completely excluded the hypnotically enhanced testimony of a complaining witness as unreliable, but explicitly excepted the application of such a rule to testimony by a defendant. *Rock*, 107 S. Ct. at 2712 n.15. The Court, therefore, found that the Arkansas Supreme Court had failed to properly analyze its *per se* rule under the constitutional standards required when a state limits a defendant's fundamental right, such as the right to present testimony in her own defense. *Id.* at 2712-13.

60. The Court did not, however, endorse the use of hypnosis. *Rock*, 107 S. Ct. at 2714-15.

rule,⁶¹ upon which it was based, and, therefore, violated the defendant's constitutional right to testify in her own defense. Second, the *per se* exclusion of the defendant's testimony was not a reasonable means of protecting the state's interest, and arbitrarily deprived the

61. The rules of evidence rest on two axioms of admissibility, the first being "[n]one but facts having rational probative value are admissible," 1 J. WIGMORE, EVIDENCE § 9 (Tillers rev. ed. 1983). See, e.g., FED. R. EVID. 402 ("[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible"); ARK. R. EVID. 402 ("[e]vidence which is not relevant is not admissible"). The second axiom is "[a]ll facts having rational probative value are admissible, unless some specific rule forbids." WIGMORE *supra*, § 10. See, e.g., ARK. R. EVID. 403 ("[a]ll relevant evidence is admissible, except as otherwise provided by these rules or by other rules applicable in the courts of this State").

The meaning of the first axiom is that all evidence having probative value is presumed admissible, and that rules excluding evidence are an abnormal exception. WIGMORE, *supra*, § 10. See, e.g., *Blake v. Albion Life Assur. Soc'y*, 4 C.P.D. 94, 109 (1878) ("the law [of evidence] . . . with few exceptions on the ground of public policy, now is that all which can throw light on the disputed transaction is admitted—not of course matters of mere prejudice, nor anything open to real moral or sensible objection, but all things which fairly throw light on the case"); *State v. Benner*, 64 Me. 267, 283 (1874) ("[i]t is an axiom in the law of evidence that no testimony should be rejected unless greater evil is seen as likely to arise from its admission than from its rejection"); *Milne v. Leisler*, 7 H. & N. 786, 158 Eng. Rep. 686, 690 (Ex. 1862) ("the Courts, so far as they can, are disposed to receive in evidence whatever can throw any light on the matter in issue, and advance the search after truth"); *State v. Watkins*, 9 Con. 47m 53 (1831) ("[i]t is a universal rule of evidence, that all facts and circumstances, upon which reasonable presumption or inference can be founded, as to the truth of the issue or disputed fact, are admissible in evidence"); BEST, A TREATISE ON THE PRINCIPLES OF EVIDENCE § 2 (1849) ("[f]acts which come in question in courts of justice are inquired into and determined in precisely the same way as doubtful or disputed facts are inquired into and determined by mankind in general, except so far as positive law has interposed with artificial rules to secure impartiality and accuracy of decision, or exclude collateral mischiefs likely to result from the investigation"), quoted in WIGMORE ON EVIDENCE, *supra*, § 10.

Even absent a specific rule, a court may exclude evidence for undue prejudice. WIGMORE, *supra*, § 10a. See *supra* note 5 for text of FED. R. EVID. 403. Before a court can make such a determination, however, the danger of prejudice must be balanced against the probative value of the evidence. FED. R. EVID. 403. The probative value of the proffered evidence must be substantially outweighed by the danger of prejudice and less restrictive measures must be inadequate. *Id.* The court must consider the effectiveness of limiting instructions before concluding that exclusion is warranted. FED. R. EVID. 403 advisory committee note.

The trial court alone has discretion to determine what evidence may be excluded for undue prejudice. Federal Rule of Evidence 403, as proposed by the Supreme Court, contained both a mandatory and discretionary exclusion provision. Congress changed this language to eliminate the mandatory clause. The court has interpreted this change as clearly indicating that the trial judge be given "a very substantial discretion" in determining what evidence may be excluded. *United States v. Long*, 574 F.2d 761, 767 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978).

In the area of criminal cases, both constitutional and policy considerations restrict the exercise of this discretion, with the result that a court very rarely excludes evidence on the ground of prejudice and only after very cautious consideration. WIGMORE, *supra*, § 10a. The scope of a trial court's discretion as to relevant evidence for undue prejudice is more limited when the evidence is offered by an accused in a criminal case. *United States v. Wasman*, 641 F.2d 326, 329 (5th Cir. 1981).

defendant of her right to testify in her own defense.

First, an analysis of the purpose of the prejudice rule,⁶² upon which Arkansas based its *per se* exclusion, supports the Court's conclusion that the Arkansas rule violated a defendant's constitutional right to testify in her own defense. The primary purpose of the prejudice rule is to prevent jury error.⁶³ Presented with prejudicial evidence, a jury is likely to value the weight of evidence incorrectly, to apply substantive standards inconsistently with the substantive law, and to simply be confused.⁶⁴ The prejudice rule also promotes judicial economy and efficiency because it excludes both cumulative evidence and evidence with relatively minimal probative value.⁶⁵ In short, the prejudice rule insures that the jury hears only reliable evidence upon which to base its verdict. Although the Court failed to fully perform this analysis, it correctly concluded that Arkansas' *per se* exclusion of evidence removed potentially critical evidence from the jury.

The Court noted that the Arkansas' *per se* rule also denied the trial court the discretion to balance the prejudice against the probative value of the proffered evidence. The Court failed to explain, however, how this denial invalidated Arkansas' *per se* exclusion of a defendant's testimony as disproportionate to the purpose of the prejudice rule. Exclusion of evidence on the grounds of undue prejudice is exclusively a decision of the trial court,⁶⁶ and generally, a higher court will reverse such a decision only for abuse of that

62. See generally Dolan, *Rule 43: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220 (1976) (although initially resisted 40 years ago when first suggested, the prejudice rule in 1975 was accepted in 30 jurisdictions; it has replaced several rules, such as the rule of remoteness doctrine and the collateral question doctrine as a means of controlling the quality of evidence presented to the factfinders). See also *supra* note 5 for definition of the prejudice rule, and *supra* note 61 for discussion of its history and application.

63. Jury error is usually referred to as jury "misdecision," a term coined by Bentham. 6 J. BENTHAM, *THE WORKS OF JEREMY BENTHAM* 105-09 (1962).

64. JONES, *supra* note 5, § 4:6. The prejudice rule has three general goals: the avoidance of error by the jury members; the promotion of justice in the sense of fairness in the judicial system; and the promotion of judicial economy. *Id.* The jury error the prejudice rule seeks to eliminate arises from the bias of jurors against certain classes, and other similar emotional reactions. *Id.* The previous criminal record of the accused is a classic example of the type of relevant evidence that is normally excluded for prejudice. Dolan, *supra* note 62, at 226-30.

65. WIGMORE, *supra* note 61, § 10a. Relevant evidence is rarely excluded for time considerations. *Id.* § 10a n.14.

66. See *supra* note 5 for text of FED. R. EVID. 403 and *supra* note 66 for discussion of its language as demonstrating intent that trial court have discretion in determining undue prejudice. See, e.g., *United States v. Stirone*, 262 F.2d 571, 576 (3d Cir. 1958), *rev'd on other grounds*, 361 U.S. 212 (1960) ("[o]f course the trial judge may, in the exercise of his sound discretion, exclude evidence which is logically relevant to an issue other than propensity, if he finds that the probative value of such evidence is substantially outweighed by the risk that its admission will create a substantial danger of undue prejudice").

discretion.⁶⁷ At common law, early courts created this policy based on the premise that the trial judge occupies a superior position to evaluate such evidence.⁶⁸ The rule announced by the Arkansas Supreme Court entirely removed this discretion from the trial court.⁶⁹ Because the Arkansas *per se* rule excluding all hypnotically enhanced testimony ignored the discretion normally afforded to the trial court, the rule also contradicted the purpose of the prejudice rule.⁷⁰

The Court in *Rock* also failed to adequately explain how the Arkansas Supreme Court's failure to consider the constitutional limitations on a state's power resulted in the *per se* exclusion of the defendant's testimony that was disproportionate to the purpose of the prejudice rule.⁷¹ Constitutional and general policy considerations limit a trial court's discretion in excluding evidence on the ground of prejudice during a criminal trial.⁷² The clear abuse of discretion standard that a reviewing court normally applies to lower court rulings on evidentiary matters yields to a closer scrutiny applicable when a defendant bases a claim on a fundamental right—⁷³ in this

67. See, e.g., *United States v. Roe*, 670 F.2d 956, 970 (11th Cir. 1982), *cert. denied*, 459 U.S. 856 (1983) (trial court's determination of whether prejudicial effect of the evidence substantially outweighs the relevancy is reviewable only for an abuse of discretion); *Kaplan v. International Alliance*, 525 F.2d 1354, 1362 (9th Cir. 1975) (a ruling by the trial judge on the admissibility of evidence will not be disturbed unless there is a clear abuse of discretion); *Atlantic Mut. Ins. Co. v. Lavino Shipping Co.*, 441 F.2d 473, 476 (3rd Cir. 1971) (review of trial judge's discretionary determination governed by manifestly erroneous standard).

68. See, e.g., *United States v. Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976) (trial court's ability to observe actual effect of introduction of evidence places it in superior position to evaluate admissibility of evidence); *United States v. Weiss*, 491 F.2d 460, 468 n.2 (2d Cir.), *cert. denied*, 419 U.S. 833 (1974) (transcript of reviewing court cannot equal personal perspective of trial court for purposes of evaluating evidence); *Construction Ltd. v. Brooks-Skinner Bldg. Co.*, 488 F.2d 427, 431 (3d Cir. 1973) (trial court's familiarity with full array of evidence in case makes it particularly suited to determine admissibility of evidence).

69. *Rock*, 107 S.Ct. at 2712 n.12. The Attorney General conceded that the Arkansas *per se* rule allows the trial court no discretion in determining admissibility even if it is convinced that the testimony is reliable. *Id.*

70. The dissent in *Rock* is based entirely on the conclusion that the Court must defer to the decision of the lower court, in this case the Arkansas Supreme Court. 107 S. Ct. at 2715-16 (Rehnquist, J. dissenting). This conclusion ignores the basis of the rule of deference in the prejudice rule: the superior position of the trial court to determine questions of admissibility. The dissent's deference to the Arkansas *per se* rule is misplaced because it also ignores the duty of the Court to resolve constitutional questions involving the rights of criminal defendants.

71. The Court summarily dismissed the cases relied on by the Arkansas Supreme Court, which held that hypnotically enhanced testimony can be excluded *per se* as applicable to a witness', but not a defendant's, testimony. *Rock*, 107 S. Ct. at 2712. See *supra* note 2 for a list of the state court decisions that the Arkansas Supreme Court relied upon.

72. *United States v. Riley*, 550 F.2d 233, 236 (5th Cir. 1977) (court's discretion does not extend to the exclusion of crucial evidence necessary to the establishment of a defense in a criminal case).

73. The Court held that "[i]n applying its evidentiary rules a State must evalu-

case the defendant's right to testify.⁷⁴

This analysis demonstrates that Arkansas' interest in avoiding prejudice by adopting a *per se* exclusion rule did not outweigh the defendant's right to present relevant, probative evidence. The Arkansas *per se* exclusion rule was disproportionate to the purpose of the prejudice rule because the *per se* rule removed potentially credible evidence from the jury's consideration, denied the trial court discretion in deciding the admissibility of evidence, and failed to consider the constitutional limitations on a state's power to exclude evidence. Therefore, despite the Court's failure to perform this analysis, its conclusion that the Arkansas' *per se* rule impermissibly infringed upon a defendant's right to testify is correct because the rule was actually antagonistic to the purpose it was designed to serve.

Second, the Supreme Court's conclusion in *Rock* is correct because despite the Court's failure to fully analyze the application of Arkansas' *per se* exclusion of all hypnotically enhanced testimony, such analysis reveals that the rule was an arbitrary denial of the defendant's right to testify. Although the Court did not challenge the state's power to adopt exclusionary rules of evidence to protect the truth-finding process,⁷⁵ the Court determined that the Arkansas Supreme Court exercised this power without completing the constitutional analysis necessary when a defendant bases a claim upon the denial of a fundamental right.⁷⁶ Thus, although the Court correctly concluded that the Arkansas rule was an unreasonable and arbitrary denial of Vickie Rock's right to testify in her own defense, it failed to fully explain its conclusion.

The Court correctly concluded that minimal procedural safeguards sufficiently controlled overt suggestions so as to render the hypnotically enhanced testimony free of fabrication.⁷⁷ An analysis of the limitations of hypnosis, and of memory in general,⁷⁸ supports this conclusion. Hypnosis is merely an aid to refresh memory and

ate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify," and that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock*, 107 S. Ct. at 2711.

74. In *Rock*, the Court recognized a defendant's right to testify in her own defense. 107 S. Ct. at 2708-10.

75. *Id.* at 2711. The Court relied on *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973), in concluding that "the right to present relevant testimony is not without limitation." *Id.*

76. *Id.* at 2712.

77. *Id.* at 2714. The Court specifically recognized that the safeguards could not control the subject's own motivation, a conclusion consistent with the explanation of the normal fallacies of memory noted at note 80 *infra*.

78. See generally E. LOFTUS & J. DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* (1987) (discussing factors determining perception and the limitations on memory).

does not guarantee truth.⁷⁹ Non-hypnotized witnesses are as likely to fabricate and confabulate as are witnesses whose memories have been hypnotically enhanced.⁸⁰ Hypnotically refreshed testimony obtained in compliance with the guidelines⁸¹ can be more reliable than non-enhanced testimony obtained without safeguards.⁸² Without explaining this relationship between the procedural safeguards and the inherent limitations of memory, the Court nevertheless correctly concluded that Vickie Rock's hypnotically enhanced testimony⁸³ satisfied the minimum procedural safeguards.

Although the Court only briefly mentioned the corroboration⁸⁴ of Vickie Rock's testimony as a factor in assessing its credibility, it weighed heavily in the Court's determination that her testimony was reliable, and, therefore, admissible.⁸⁵ The Arkansas court's rationale

79. Sites & West, *Judicial Approaches to the Question of Admissibility of Hypnotically Refreshed Testimony: A History and Analysis*, 35 DEPAUL L. REV. 77, 112 (1985) (tracing the history of admissibility of hypnotically enhanced testimony and the three current judicial positions: *per se* admissibility, conditional admissibility, and *per se* exclusion).

80. *Id.* at 113. The selective process of memory, with new information constantly added over time, distorts original perceptions and intermixes them with subsequent memories:

Memory is imperfect. This is because we often do not see things accurately in the first place. But even if we take in a reasonably accurate picture of some experience, it does not necessarily stay perfectly intact in memory . . . The memory traces can actually undergo distortion. With the passage of time, with proper motivation, with the introduction of special kinds of interfering facts, the memory traces seem sometimes to change or become transformed. These distortions can be quite frightening, for they can cause us to have memories of things that never happened.

Id. (citing E. LOFTUS, MEMORY 37 (1980)).

81. See *supra* note 55 for guidelines recommended by the New Jersey Supreme Court. Most guidelines are based on the recommendations of Dr. Martin T. Orne, see *supra* note 50, who opposes the use of hypnosis to refresh the memories of witnesses. Even Orne, however, indicated that such testimony, if independently verified, was very useful and had minimal risk. See Sites & West, *supra* note 79, at 100 n.151 (citing Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 318 (1979)).

82. See Sites & West, *supra* note 79, at 114 (emphasis in original).

The array of complexities inherent in the attempt to glean accurate information, while relying upon the functioning of errant human faculties, encourages support for the courts' responsiveness to testimony retrieved through pretrial hypnotic induction. A witness whose memory has been refreshed through hypnosis may be able to recount an observed event more fully and accurately than any other witness.

Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567, 590 (1977).

83. An independent neuropsychologist examined Vickie Rock in her office without observers. *Rock*, 107 S. Ct. at 2707 n.3. The prehypnosis session was recorded in notes, with the actual hypnosis recorded on audio tape. *Id.*

84. Vickie Rock's hypnosis allowed her to remember that she had never fired the gun. An expert examined the gun and found it to be defective. *Rock*, 107 S. Ct. at 2707. The expert testified that the gun would fire when dropped or jarred, as when Frank Rock struck Vickie Rock's arm. *Id.*

85. *Id.* at 2714.

for excluding Vickie Rock's testimony was its inherent unreliability because it was hypnotically induced.⁸⁶ Corroboration, which by definition confirms evidence already given,⁸⁷ rebuts this rationale.⁸⁸ Due to the self-apparent weight of corroboration in assuring reliability, further analysis was unnecessary. The Court was, therefore, correct in concluding that because corroborated testimony cannot be inherently unreliable, Arkansas' *per se* exclusion of all hypnotically enhanced testimony was arbitrary.

Although the Court listed the traditional means used to challenge a witness' credibility,⁸⁹ and concluded that these means can effectively offset any credibility problems associated with hypnotically enhanced testimony, the Court failed to fully explain how these means accomplish that result. Of all the traditional means of challenging a witness' credibility, the use of hypnosis impairs only cross-examination.⁹⁰ The use of hypnosis does not diminish the effectiveness of expert testimony⁹¹ and cautionary jury instructions⁹² in avoiding jury error.⁹³

Cross-examination serves the dual purposes of destroying the

86. *Id.* at 2711-12. The Arkansas Supreme Court's *per se* exclusion of all hypnotically refreshed testimony is based on the conclusion that such testimony is always unreliable. *Id.*

87. Corroborating evidence is "evidence complementary to evidence already given and tending to strengthen or confirm it, additional evidence of a different character on the same point." BARRON'S LAW DICTIONARY 103 (2d ed. 1984).

88. Corroboration provides an exception to the both the rejection of testimony for proven prior false testimony, and the discretion of the jury in determining the weight to be given the testimony of a bad reputation for truthfulness. In both cases the court can instruct the jury to give full credit to the testimony. JONES, *supra* note 5, § 29:12-13.

89. See *supra* notes 51-53 and accompanying text for discussion of the traditional means of establishing witness credibility.

90. The purpose of cross-examination is "to clarify or discredit testimony already given." BARRON'S LAW DICTIONARY 111 (2d ed. 1984). See M. Graham, *Cross-Examination-Attacking Credibility: An Overview*, 20 CRIM. L. BULL. 521, 522 n.2 (1985) (evidence and trial advocacy workshop). See *supra* note 49 for an explanation of the effect of memory hardening on cross-examination.

91. An expert cannot comment on the accuracy of truthfulness of the specific witness' memories. See, e.g., *House v. State*, 445 So. 2d 815, 817 (Miss. 1984) (error to allow hypnotist to testify as to accuracy of hypnotically refreshed witness' testimony, but allowed to discredit the hypnosis procedure generally by explaining its problems); *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386, 389, *cert. denied*, 461 U.S. 946 (1983) (hypnotically enhanced testimony allowed if safeguards observed and opportunity for opposition to expose credibility problems created by use of hypnosis).

92. A jury instruction regarding the weight of hypnotically enhanced testimony was not possible in this case because the Arkansas Constitution forbids comment on the weight that a jury should accord testimony. Brief for Respondent at 19, *Rock v. Arkansas*, 107 S. Ct. 2704 (1987) (No. 86-130).

93. The Court observed that the education of the jury as to the risks of hypnosis, and resulting the reduction in weight given the hypnotically enhanced testimony could spill over onto the prehypnosis memories of the witness unless care was taken to establish the extent of the witness' memory prior to the hypnosis. *Rock*, 107 S. Ct. at 2714.

credibility of the witness,⁹⁴ and of revealing the biases, prejudices, or motivations of the witness in testifying.⁹⁵ Despite the potential for memory hardening, Vickie Rock's hypnotically enhanced testimony was subject to impeachment. Her testimony was automatically subject to credibility challenges because her ability to remember was admittedly faulty by her very need for hypnosis. Expert testimony regarding the credibility problems of Vickie Rock's hypnotically enhanced testimony could have reinforced her inability to accurately remember events.⁹⁶ In addition, Vickie Rock's biases are equally subject to challenge.⁹⁷ The prosecution's ability to introduce evidence on the problems of hypnosis furthered, rather than diminished, the purposes of the cross-examination, which was to challenge Vickie Rock's credibility and demonstrate her biases. Accordingly, procedural safeguards, corroboration, jury education, and cross-examination provide adequate means to insure witness credibility. Thus, the Court correctly concluded that the Arkansas *per se* rule was an arbitrary denial of Vickie Rock's right to testify in her own defense.

In conclusion, the *Rock* Court established the right of a criminal defendant to testify, as well as the proper standard for balancing this right against the state's power to limit individual rights in furtherance of the truth-finding process. The Court correctly concluded that Vickie Rock's right to testify in her own defense was impermissibly infringed by the Arkansas Supreme Court's *per se* exclusion of her hypnotically enhanced testimony. The Court failed, however, to correctly analyze the facts presented in *Rock*.

94. Credibility is composed of the willingness of the witness to tell the truth and upon his ability to accurately do so. See Graham, *supra* note 90, at 523. Such ability is a combination of the witness':

[P]hysical and mental capacity to perceive, record, and recollect the matter described and his ability to narrate. Impeachment of a witness may be directed to one or more components of credibility. Thus the objective being sought in any given situation may be to draw into question the accuracy of the witness's perceptions, recordation, recollection, or narration or his sincerity.

Id.

95. Often an attack on a witness' biases or motivation can be more damaging to the witness than a general attack his credibility. Note, *The Sixth Amendment Right to Confrontation Where Reliability or Credibility of a Witness is at Issue: The Extent and Scope of Cross-Examination*, 43 CATH. U. L. REV. 1267 (1985) (citing Springer v. United States, 388 A.2d 846 (D.C. 1978)). Limitations have been placed on this line of questioning for introduction of juvenile criminal records, or self-incriminating questions. *Id.* However, "bias is always a proper subject of cross-examination." *Id.* (quoting Hyman v. United States, 342 A.2d 43, 44 (1975)).

96. See *supra* note 91 discussing effect of presentation of expert opinion on jury's perception of hypnotically enhanced testimony.

97. This is particularly true in a case such as *Rock* where the witness offering the hypnotically enhanced testimony is the defendant. In *Rock*, the prosecution asserted that Vickie Rock's motivation in assisting her attorney to prepare her defense as contributing to or causing the hypnotic confabulation effect. Brief for Respondent at 15, *Rock v. Arkansas*, 107 S. Ct. 2704 (1987) (No. 86-130).

The Court also failed to adequately establish guidelines for assessing the reasonableness, both in relation to purpose and in application, of state evidentiary rules that conflict with a criminal defendant's constitutional rights. If the Court had performed such analysis, its decision could have had a potentially broad impact in the area of individual rights because future courts could have analogized and applied such guidelines to other issues subject to a similar standard of review. If the Court had more fully explained its conclusion, its reasoning on the subject of hypnotically enhanced testimony could have served as a guideline to lower courts in resolving the problem of admissibility of hypnotically enhanced testimony by both defendant and non-defendant witnesses, and eliminated some of the present disparity in treatment, which ranges from *per se* admissibility to *per se* exclusion. Unfortunately, although its decision was correct, the omission of the supporting analysis and application of the analysis to the facts strips the *Rock* Court's decision of precedential value, and limits the holding to its facts.

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