1985

Criminal Procedure - The Admissibility of Evidence Obtained through Hypnosis - *State v. Peoples*

Sharon L. Hartman

Follow this and additional works at: https://scholarship.law.campbell.edu/clr

Part of the Criminal Procedure Commons

**Recommended Citation**


This Note is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized editor of Scholarly Repository @ Campbell University School of Law.
CRIMINAL PROCEDURE—THE ADMISSION OF EVIDENCE OBTAINED THROUGH HYPNOSIS—State v. Peoples.

INTRODUCTION

Throughout history hypnosis has been a phenomenon\(^1\) surrounded by an aura of mystery, evil and controversy. Often, hypnosis has been the subject of theatrical presentations and English and American novels reinforce the popular image of the hypnotist as a mysterious, evil person.\(^2\) However, since the 1970's hypnosis has become a tool often used by law enforcement in criminal investigations.\(^3\) Increasingly, witnesses and victims are hypnotized to enhance or "refresh" the memory of an event which may have happened too quickly or was too traumatic.\(^4\) As a result, the courts have been forced to consider the admissibility of hypnotically influenced testimony when these witnesses are subsequently called to testify at trial.\(^5\)

1. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313, 321 (1980). Professor Diamond is considered a leading expert on hypnosis and the legal implications of hypnotically induced testimony. His article is often cited by courts and in subsequent articles on the subject. In State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984), the subject of this Note, the North Carolina Supreme Court relied heavily on this article in reaching their decision.

2. *Id.* at 320. The monk Rasputin, for example, has often been identified in literature with evil hypnotic influence.


5. *Pretrial Hypnosis, supra* note 3, at 336. It is important to note that no court allows testimony while under hypnosis or evidence of what a subject said during hypnosis. State v. Collins, 296 Md. 670, 681, 464 A.2d 1028, 1034 (1983). Hypnotically refreshed testimony refers to the testimony of a witness who was previously hypnotized and who takes the stand to testify to present recollection. However, the trial court in State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984), the subject of this Note, did allow a videotape of the hypnotic session to be played for the jury. The court of appeals and the supreme court subsequently
Decisions on admissibility of such evidence have fallen into three categories. A majority of courts have allowed hypnotically "refreshed" testimony to go to the jury. These courts have held that hypnosis affects weight and credibility, not admissibility. Other courts have allowed hypnotically influenced testimony to be admitted only if a series of "safeguards" have been followed during hypnosis. Still other courts have held that testimony based on hypnotically refreshed memory is inadmissible, finding hypnosis generally unreliable.⁶ In State v. McQueen⁷ the North Carolina Supreme Court adopted the majority rule and allowed hypnotically refreshed testimony to go to the jury, holding that hypnosis affects credibility, not admissibility.⁸

Since McQueen was decided, much literature regarding hypnosis has emerged casting doubt on the reliability of evidence influenced by hypnosis.⁹ This literature has emphasized that flaws in the hypnotic process contribute to inaccurate recollections. These flaws include the subject's suggestibility to the words and actions of the hypnotist, the desire to accommodate the hypnotist and the inability to distinguish between actual memory and memory arising from hypnosis.¹⁰ As a result, the North Carolina Supreme Court has reevaluated the rule adopted in McQueen. In State v. Peoples¹¹ the court reversed its position and held that hypnotically refreshed testimony is inherently unreliable and thus inadmissible.¹² A witness may only testify about those facts related before the hypnotic session was conducted.¹³

This Note examines the problems bearing on admissibility of hypnotically induced or refreshed testimony in view of the literature discussing the effects of hypnosis on the witness. It focuses on whether the rule on inadmissibility adopted in Peoples should be a per se rule or should be subject to limited exceptions. Finally it

determined this to be inadmissible.

⁶ Peoples, 311 N.C. at 518-19, 319 S.E.2d at 179; see also, Ruffra, supra note 4, at 293-94.
⁷ 295 N.C. 96, 244 S.E.2d 414 (1978).
⁸ Id. at 119, 244 S.E.2d at 427.
⁹ Peoples, 311 N.C. at 519, 319 S.E.2d at 180; Pretrial Hypnosis, supra note 3, at 340.
¹⁰ Peoples, 311 N.C. at 519, 319 S.E.2d at 180-81 (citing Diamond, supra note 1, at 333-34; Orne, The Use and Misuse of Hypnosis in Court, 27 INT. J. CLINICAL AND EXPERIMENTAL HYPNOSIS 311, 316-27 (1979)).
¹¹ Peoples, 311 N.C. 515, 319 S.E.2d 177.
¹² Id. at 533, 319 S.E.2d at 187-88.
¹³ Id. at 534, 319 S.E.2d at 188.
considers the effect of the decision on criminal investigations and law enforcement.

The Case

In the early morning hours of May 26, 1980, Bruce Crockett Miller and two other men participated in the armed robbery of the Borden Chemical Plant in Fayetteville, North Carolina. These men took several buckets of almost pure silver valued at over $90,000. The silver was used by the plant to manufacture formaldehyde. The defendant, Elmer Leroy Peoples, Sr., was arrested on April 29, 1981 in connection with the robbery. The shift supervisor at the company, an eyewitness to the robbery, identified the defendant as one of the robbers. The defendant was charged with armed robbery and conspiracy to commit armed robbery.

Bruce Miller was arrested on March 27, 1981 in connection with another unrelated armed robbery. On April 15, 1981, he gave police officers a statement concerning the robbery of the Borden Chemical Plant in which he implicated the defendant and the third man, Robert Peele. This statement was never introduced at defendant's trial.

On October 8, 1981, Detective S.C. Sessoms, Jr. of the Fayetteville Police Department hypnotized Miller. The hypnosis was conducted to seek additional recall of the Borden Chemical Plant robbery which Miller did not have in a normal state. Prior to hypnotizing Miller, Sessoms had not read any of Miller's previous statements concerning the robbery. In Sessoms' opinion, he successfully hypnotized Miller although Miller testified that he did not believe he had been hypnotized. The session lasted about one hour and Miller related facts which he subsequently testified to in defendant's trial.

Miller testified against Peoples, who was tried with Robert Peele, pursuant to a plea agreement in an unrelated case. He out-

14. Id. at 517, 319 S.E.2d at 178.
15. Id.
16. Id.
19. Id.
20. Id.
21. Id.
22. Id. at 516, 319 S.E.2d at 178.
lined in detail the planning of the robbery in which the three men participated. He testified that the defendant telephoned him in April or May 1980 and asked if he would like to make "some easy money." The three men met a number of times to discuss the robbery. On May 24, 1980, the defendant called Miller and they met to complete plans for the robbery. According to Miller, the defendant told him that there was a large amount of silver at the plant, the number of people at the plant was reduced on Sunday evenings and company policy prohibited guns on the premises.

On Sunday evening, the three men went to the plant. Miller went to the supervisor's office armed with a gun and instructed the supervisor to take him to the building where the silver was kept. All three men then loaded a number of buckets containing silver into a car. Some of the silver was subsequently sold and the remainder was divided among the robbers.

The trial court admitted the above hypnotically "refreshed" testimony and also admitted a videotape recording of the hypnotic session which was played for the jury. As a result, defendant was convicted of armed robbery and conspiracy to commit armed robbery. Judge Robert L. Farmer sentenced defendant to a minimum term of seven years and a maximum term of ten years.

The North Carolina Court of Appeals affirmed the trial court's decision and found no error in the denial of defendant's motion to suppress Miller's testimony. The court based this decision on several factors: (1) defendant's attorney was given ample opportunity to cross-examine Miller and Detective Sessoms; (2) the jury was fully advised that Miller had been previously hypnotized; and (3) the defendant did not contend that the hypnotism was suggestive or in any way influenced Miller's responses. Following State v. McQueen, the court held that the fact of pretrial hypnosis bears upon weight and credibility of the evidence and not competency.

However, the court of appeals found admission of the video-

23. Id.
24. Id. at 517, 319 S.E.2d at 178-79.
25. Id. at 517, 319 S.E.2d at 179.
26. Id.
27. Id. at 535, 319 S.E.2d at 189.
28. Id. at 518, 319 S.E.2d at 179.
30. Id. at 483, 299 S.E.2d at 314.
31. Id.
tape to be error. The court held that the competency of the videotape was not established by the State through a proper foundation.\textsuperscript{32} However, the error was deemed harmless because there was "the overwhelming presence of competent evidence centering on defendant's guilt of the crime with which he was convicted."\textsuperscript{33}

On appeal, the North Carolina Supreme Court reversed the decisions of the trial and appellate divisions.\textsuperscript{34} The court held that hypnotically refreshed testimony is inherently unreliable and inadmissible in judicial proceedings.\textsuperscript{35} Witnesses who are hypnotized will only be permitted to testify to facts related before hypnosis. The party attempting to offer this testimony will bear the burden of proving that the facts were related prior to hypnosis.\textsuperscript{36} As a result, the defendant was granted a new trial because Miller's testimony was in a large part responsible for defendant's conviction and there was no evidence concerning his pre-hypnosis statement.\textsuperscript{37}

\section*{Background}

The three methods of analyzing the admissibility of hypnotically influenced testimony can be placed on a continuum.\textsuperscript{38} At the far left of the continuum are the cases allowing the "refreshed" testimony of a previously hypnotized witness. Somewhere in the middle are the cases which admit the testimony only if a certain number of safeguards were followed before, during and after the hypnotic session. At the far right are those cases in which the testimony was excluded because it was found to be inherently unreliable. These three analyses are virtually irreconcilable and the rationale for rejecting one approach becomes the rationale for adopting one of the others.\textsuperscript{39}

\section*{I. The Credibility Approach}

The first reported case concerning the use of hypnosis to enhance a witness' memory of an event was a Maryland case, Har-
A victim of rape and assault with intent to commit murder was hypnotized by a psychologist to enhance her memory of the crime. At trial, the witness testified that she was reciting events from her own recollection. The jury was informed that she was previously hypnotized and the psychologist testified at length concerning the session. Most important was the fact that the psychologist testified that hypnosis does not dispose the subject to suggestion. The court admitted the testimony and stated that the fact of pretrial hypnosis was a question of weight and credibility for the jury.

Harding sparked a trend in the state and federal courts; one after another ruled hypnotically enhanced testimony admissible. The North Carolina courts followed this trend in State v. McQueen. McQueen was found guilty of two murders and sentenced to life imprisonment. A witness to the murders was placed under hypnosis at her request and defense counsel was given a tape of

41. Id. at 234, 246 A.2d at 305.
42. Id. at 236, 246 A.2d at 306.
43. Id. at 236-45, 246 A.2d at 306-10.
44. The hypnotist testified, "I seriously doubt suggestibility in the way we think of, in that you have an influence and the person subjects himself to your influence." Id. at 240, 246 A.2d at 308.

Professor Diamond suggests that this is a common assertion made by prosecution-oriented hypnotists which directly contradicts all scientific evidence. He suggests that if the Harding court had been presented with accurate facts concerning the nature of hypnosis, the evidence may not have been admitted. As a result, the trend that followed the case may have been different. Diamond, supra note 1, at 322-23.

45. Harding, 5 Md. App. at 236, 246 A.2d at 306.
48. Id. at 97-98, 244 S.E.2d at 415.
the hypnotic session the day before she testified. The hypnotist was not called as a witness and there was no testimony concerning the procedure followed during hypnosis. Furthermore, there was no testimony as to what the witness said while under hypnosis and she was not cross-examined concerning the procedure. The North Carolina Supreme Court upheld the trial court’s ruling that the testimony was admissible. Again the reason was that the fact of hypnosis was an issue of credibility for the jury.

The rationale supporting the credibility approach is that traditional legal devices purportedly enable the jury to evaluate and properly weigh the witness’ testimony. These legal devices include: (1) cross examination of the witness; (2) full disclosure to the jury of the hypnotism; (3) expert testimony concerning hypnosis and its limitations; and (4) limiting instructions from the court. The effect is to treat the testimony as any other present recollection of past events merely refreshed by the hypnosis.

II. THE SAFEGUARDS APPROACH

Some courts have allowed hypnotically influenced testimony only if the procedures used before, during and after hypnosis complied with a checklist of “safeguards.” After Harding was decided, several courts expressed concern over the jury’s ability to evaluate the credibility of hypnotically enhanced testimony. As a result, the trial judge must rule on admissibility based upon a set of procedural safeguards to protect against unreliability. This middle ground is exemplified by State v. Hurd.

In Hurd, the New Jersey Supreme Court recognized the general problems associated with hypnosis including the suggestibility of the subject and the loss of critical judgment. However, the court also recognized that a per se rule mandating exclusion would result in the exclusion of relevant and “trustworthy” evidence.

49. Id. at 119-20, 244 S.E.2d at 427.
50. Id.
51. Id. at 122, 244 S.E.2d at 429.
52. Peoples, 311 N.C. at 524, 319 S.E.2d at 183, citing Ruffra, supra note 4, at 298-99.
53. 311 N.C. at 524, 319 S.E.2d at 183.
54. Ruffra, supra note 4, at 299.
55. 86 N.J. 525, 432 A.2d 86 (1981); Pretrial Hypnosis, supra note 3, at 344. See also Peoples, 311 N.C. at 527-29, 319 S.E.2d at 184-86.
56. 86 N.J. at 540, 432 A.2d at 93-94.
57. Id. at 541, 432 A.2d at 94.
a result, the court adopted the two-prong test used by the trial court. First, it adopted the following procedural safeguards which must be met during hypnosis:

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.68

The court imposed on the State the burden of establishing by clear and convincing evidence that it had complied with each of these safeguards. If these safeguards had been followed, the State would have an additional burden of showing that the conduct by the hypnotist and law enforcement personnel was not "impermissibly suggestive or coercive."59

The purpose of the safeguards approach is to minimize the factors which make hypnotically influenced testimony unreliable. Some courts and commentators have adopted the safeguards set out in Hurd. Some courts have adopted even more stringent safeguards to ensure reliability.60 However, other courts have determined that even these safeguards do not protect against the inherent problems involved in hypnosis and adopt an inadmissibility

58. Id. at 533, 432 A.2d at 89-90.
59. Id., 432 A.2d at 90. This burden must also be shown by clear and convincing evidence.
60. Pretrial Hypnosis, supra note 3, at 345-46.
The current trend in American courts is to adopt an inadmissibility position concerning hypnotically influenced testimony. Courts which have adopted this view reject both the idea that the fact of hypnosis goes only to credibility of the witness and the notion that reliability problems can be corrected through procedural safeguards. These courts have recognized that the exclusion of hypnotically refreshed testimony may result in the exclusion of relevant and probative evidence. However, because of the unreliability of the procedure, these courts have concluded that the fairest practice is to exclude hypnotically refreshed testimony from judicial proceedings.

The inadmissibility approach relies upon the standard adopted in Frye v. United States. The Frye test admits expert testimony on a scientific technique only when that technique has "gained general acceptance in the particular field in which it belongs." Courts relying on this standard scrutinize scientific testimony and literature on hypnosis to determine whether it has "gained such standing and scientific recognition among [the] authorities as would justify the courts in admitting" hypnotically influenced testimony. As a result, a procedure or scientific test is not admissible unless experts in the field agree that the results are scientifically accurate and reliable.

Applying the Frye test, the courts adopting the inadmissibility


63. Id.

64. 293 F. 1013 (D.C. Cir. 1923).

65. Id. at 1014.

66. Id.

67. Id.
approach have determined that hypnosis is not generally accepted as reliable in the scientific community as a trustworthy memory retrieval device.\(^{68}\) However, courts that have adopted the rule of inadmissibility do not apply the rule in the same manner. Some courts adopt a rule of per se inadmissibility.\(^{69}\) Professor Diamond, a leading expert on hypnosis and its legal ramifications, advocates this approach. He asserts 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."\(^{70}\) Other courts allow the witness to take the stand and testify only about matters "wholly unrelated" to the events discussed under hypnosis.\(^{71}\) Other courts allow the witness to take the stand and testify to matters which he related before hypnosis.\(^{72}\)

Within this background of case law, the North Carolina Supreme Court readdressed the admissibility of hypnotically refreshed testimony.

**ANALYSIS**

In *State v. Peoples*,\(^{73}\) the North Carolina Supreme Court reversed the position previously held by the court that hypnotically influenced testimony is admissible. The court followed the current trend of American courts and held that hypnotically induced testimony is inherently unreliable and inadmissible.\(^{74}\) To reach this result, the court applied the theory behind the *Frye* test without specifically adopting the rule.\(^{75}\) As a result, a witness may not testify to any fact not related before the hypnotic session.\(^{76}\) This rule is to be applied retroactively to any case which has not been finally

---

69. See *Id.* at 76 n.3, 181 Cal. Rptr. at 279, 641 P.2d at 810, (Kaus, J., concurring and dissenting).
70. Diamond, *supra* note 1, at 314.
73. 311 N.C. 515, 319 S.E.2d 177.
74. See *supra* note 61.
75. *Peoples*, 311 N.C. at 532, 319 S.E.2d at 187. This approach was also used to exclude evidence of polygraph examination. State v. *Foye*, 254 N.C. 704, 708, 120 S.E.2d 169, 172 (1961).
76. *Peoples*, 311 N.C. at 533, 319 S.E.2d at 188.
determined on direct appeal as of the certification date of the opinion. To understand the decision of the court, an understanding of the nature of hypnosis is first necessary.

I. THE NATURE OF HYPNOSIS

Hypnosis has been defined as "an artificially induced or sleep-like condition in which an individual is extremely responsive to suggestion." This definition is revealing when one considers the reliability problem involved in hypnotically induced testimony. A popular misconception concerning hypnosis is that it is a process which "organically" unlocks the unconscious secrets of human memory. Most experts agree and scientific studies demonstrate that history in the minds of human beings is not locked in or frozen in the brain for storage. Instead, the memory is continuously being altered in the interests of the present.

Hypnosis is a state of increased suggestibility. The subject's openness to suggestion is the basis of the process and the hypnotist's suggestions control the subject's train of thought. Subtle cueing by the hypnotist may result in the subject "remembering" what is "suggested by the hypnotist." The "attitude, demeanor and expectations of the hypnotist, his tone of voice and his body language may all communicate suggestive responses to the subject" intentionally or unintentionally. The possibility that this can "create an eyewitness where there was none" is the most dangerous characteristic of hypnotically aided recollection. This problem is particularly dangerous if law enforcement personnel conduct the session.

The hypnotized subject's memory may also be distorted by the desire to please the hypnotist. "Most hypnotic subjects aim to please." This desire to please results in "confabulation" or

77. Id. at 534, 319 S.E.2d at 189.
78. For a survey of the history of hypnosis, see Diamond, supra note 1, at 316-321.
80. Ruffra, supra note 4, at 294.
81. Id.
82. Id. at 295.
83. Id.
84. Diamond, supra note 1, at 333.
85. Ruffra, supra note 4, at 295-96.
86. Diamond, supra note 1, at 333.
“memories” invented to fill the gaps in the actual conscious memory. These pseudomemories developed in hypnosis may come to be accepted by the subject as actual recall of the original events. Once hypnosis has occurred, the subject is usually unable to distinguish pre- and post-hypnotic memories. The subject gains an increased and almost unshakable confidence in the truth of what was “remembered” under hypnosis. As a result, effective cross examination is all but destroyed.

Experts in hypnosis are also unable to distinguish actual memory from fantasy or “confabulation.” In fact, a subject can successfully feign hypnosis without detection by an expert. Further, “it is possible for a deeply hypnotized subject to willfully lie.” Hypnotically enhanced memories are not always false or distorted, but experts agree that there is no means to determine with certainty distortion introduced by hypnotism. Given the inability of an expert to evaluate the credibility of a witness’ testimony, it is certainly improper for the jury to make such a determination.

Another problem resulting from hypnosis is that the subject has no recollection of the procedure itself. In fact, many subjects refuse to believe they went into a trance or that hypnosis “worked.” As a result, opposing counsel is unable to question him about the hypnotic process. This creates a particular problem in criminal trials. In criminal proceedings a defendant has a constitutional right to confront the witnesses against him. When a witness has no memory of the hypnosis, the right of confrontation is completely frustrated.

II. THE DECISION

In rendering the decision in Peoples, the North Carolina Su-
The court rejected the position that procedural safeguards would effectively eliminate the dangers of hypnosis. However, the court adopted a rule which would allow a subject to testify to any statement made prior to hypnosis.

Given the well documented unreliability of hypnosis as a memory retrieval device, the decision to exclude hypnotically influenced testimony is proper. However, the exception drawn by the court is inconsistent with the court's conclusions concerning the inherent unreliability of hypnosis. The court found that a subject, once hypnotized, may have increased confidence in the truth and accuracy of his post-hypnotic recall. This precludes effective cross-examination of the subject. This problem would still be present when a witness is allowed to take the stand and testify to facts related by the witness before hypnosis. Even though the witness made the statement before hypnosis, after the hypnosis the witness will have a stronger conviction in its truth. The problems of ineffective cross-examination persist.

The exception drawn by the court is also inconsistent with the court's determination that hypnosis is inherently unreliable because the subject is unable to distinguish between pre- and post-hypnotic recall. If the witness cannot distinguish between actual memory and confabulation, he will be virtually unable to discern the degree of what he believed before and after hypnosis. Under hypnosis, he might supply more or different details than related in the previous statement. In order to prevent any change in testimony, the witness could be limited to reading only pre-hypnotic

100. Id. at 532, 319 S.E.2d at 187.
101. Id. at 533, 319 S.E.2d at 188.
102. Id.
103. Id. at 532, 319 S.E.2d at 187.
statements to prevent additional or different facts from emerging as a result of hypnosis. This approach is unlikely and would be impractical. Without this approach, however, opposing counsel will have to constantly object to answers given by the witness which were not related prior to hypnosis. This exception drawn by the court, therefore, will become an evidential nightmare for the trial judge and opposing counsel.

Given the acceptance by the court of the inherent unreliability of hypnotically influenced testimony, the only way to ensure that any testimony was not influenced by hypnosis is to adopt a per se rule of inadmissibility. A per se rule, however, would restrict law enforcement’s use of hypnosis as an investigative tool. Law enforcement officers could hypnotize a witness or the victim of a crime but the result would be to lose valuable testimony at trial. The risk for law enforcement would be too great if the hypnosis did not produce another witness or independent evidence which could prove the case.

III. THE EFFECT ON LAW ENFORCEMENT

The court stressed in Peoples that the decision “does not affect the use of hypnosis in criminal investigations.”104 However, this decision will have a profound effect on law enforcement and criminal investigations.

Under the exception to the inadmissibility rule adopted by the court, the party attempting to offer testimony by a person previously hypnotized has the burden of proving that the proffered testimony was related by the witness prior to hypnosis.105 In most cases, hypnosis is used in criminal cases to enhance a witness’ or victim’s memory who will be called subsequently by the prosecution to testify.106 The prosecution, therefore, is advised to proceed with caution in any future investigation involving hypnosis.

In order to prove that the witness related the facts prior to hypnosis, detailed records of all contacts with the witness must be kept. Any statements must be recorded in great detail by law enforcement personnel. Furthermore, a full record of the hypnosis must be maintained for comparison with pre-hypnosis statements, preferably through the use of video or audio recorders. Failure to keep complete records could result in the loss of important prose-

104. Id. at 534, 319 S.E.2d at 188.
105. Id.
106. See Diamond, supra note 1, at 313.
cution witnesses if the trial court is unable to make the necessary determination concerning facts related prior to hypnosis.

The North Carolina Supreme Court recommended that law enforcement follow the procedural safeguards adopted by some courts\(^{107}\) so that the court will have an adequate record concerning all contacts with the witness.\(^{108}\) These procedures insure that the court has some record on which to base its decision whether the witness will be allowed to testify. However, they certainly will have a profound effect on the manner in which law enforcement conducts investigations. Therefore the court’s assertion that this decision will not affect law enforcement and criminal investigations is short sighted.

This decision will also affect law enforcement’s use of hypnosis as a tool of investigation. Each time a law enforcement officer chooses to hypnotize a witness, all facts related after hypnosis are lost to the trier of fact. Hypnosis conducted early in an investigation could possibly result in the inadmissibility of information which might be subsequently remembered by the witness without hypnosis. Therefore, law enforcement is cautioned to use hypnosis only after all possible channels of refreshing recollection of the witness have been exhausted.

IV. THE FRYE TEST: WAS IT ADOPTED IN NORTH CAROLINA?

Most jurisdictions adopting an inadmissibility approach to hypnotically influenced testimony have used the test adopted in Frye v. United States.\(^{109}\) The Frye test admits expert testimony on a scientific technique only when the technique has “gained general acceptance in the particular field in which it belongs.”\(^{110}\) In State v. Peoples,\(^{111}\) Justice Exum said:

A number of the courts which have applied the Frye test and concluded that hypnotically refreshed testimony is inadmissible have used that test in other contexts. Although we have not specifically adopted the Frye test in this jurisdiction, we have used the theory underlying that decision. In holding that the results of polygraph examinations should not be admitted, we stressed that the poly-

\(^{107}\) See supra note 58 and accompanying text.
\(^{108}\) See 311 N.C. at 534, 319 S.E.2d at 188.
\(^{109}\) 293 F. 1013 (D.C. Cir. 1923). See supra notes 64-72 and accompanying text.
\(^{110}\) 293 F. at 1014.
\(^{111}\) 311 N.C. 515, 319 S.E.2d 177.
graph had "not yet attained scientific acceptance as a reliable and accurate means of ascertaining truth or deception." Furthermore, in our recent decision which changed our exception to this rule and held that the results of polygraph examinations could not be admitted even by stipulation, we stressed the "lack of general scientific recognition" as a major factor in our decision. 112

The questions remains, Has North Carolina in effect adopted the Frye test for determining the admissibility of scientific procedures and techniques?

Indeed, the court in Peoples relied heavily on the Frye test in rendering its decision. However, in State v. Bullard, 113 a subsequent North Carolina Supreme Court case, the majority qualified and explained the court's reliance on the Frye test in Peoples. 114 The majority stated that the supreme court has not adopted the Frye test even though the theory and spirit of the rule were relied upon in Peoples to rule hypnotically influenced testimony inadmissible and in State v. Foye 115 and State v. Brunson 116 to rule polygraph results inadmissible. 117

In Bullard, an anthropologist used a novel and relatively unknown procedure to identify a bloody bare footprint. 118 The trial court allowed the expert to testify as to the procedure. 119 On appeal the defendant objected that this method of identification was not accepted in the scientific community and was not reliable. 120 The defendant contended that Peoples and State v. Temple 121 mandated use of the Frye formula to determine admissibility of the expert testimony. 122

The North Carolina Supreme Court specifically stated that the Frye test had not been adopted in this jurisdiction even though the theory behind the decision had been employed to exclude hypnotically influenced testimony 123 and polygraph results. 124 Further-

112. Id. at 532-33, 319 S.E.2d at 187 (citations omitted).
114. Id. at 146-54, 322 S.E.2d at 380-84.
117. 312 N.C. at 151-52, 319 S.E.2d at 383.
118. Id. at 132, 322 S.E.2d at 372.
119. Id.
120. Id. at 137, 322 S.E.2d at 374.
122. 312 N.C. at 147, 322 S.E.2d at 380.
123. Peoples, 311 N.C. 515, 319 S.E.2d 177.
124. Foye, 254 N.C. 704, 120 S.E.2d 169; Brunson, 287 N.C. 436, 215 S.E.2d

https://scholarship.law.campbell.edu/clr/vol7/iss3/6 16
more, the court stated that the heavy reliance on "general acceptance in the scientific community" in Peoples did not mandate the use of that standard in Bullard. Instead, the court drew a distinction among types of scientific evidence for purposes of admissibility of expert testimony. The court stated: "when the nature of the technique is more esoteric, as with some types of statistical analyses and serological tests, or when inferences from the scientific evidence sweep broadly or cut deeply into sensitive areas, a stronger showing of probative value should be required." Hypnosis, like the polygraph test, "attempts to prove the workings of the human mind and human behavior." These are particularly sensitive areas associated with a scientific aura which may cause jurors to give undue credibility to the testimony. On the other hand, footprint analysis, like fingerprint and handprint analysis and bite mark analysis, does not involve an esoteric analysis. The jury can use visual aids and make observations and visual comparisons to determine credibility.

The distinction drawn by the court is an important one for the practicing North Carolina attorney. The Frye test will be recognized in the North Carolina courts to determine admissibility of scientific procedure when (1) the procedure involves a particularly sensitive area—namely procedures involving the mental processes and human behavior; (2) the technique is esoteric; or (3) reliability of the procedure is highly questionable. This is a very limited recognition of the Frye standard and it will not be applied to novel and untested scientific techniques, methods or processes which appear to be reliable, demonstrate accuracy and aid in the ascertainment of truth. The court refused to use the novelty of a chosen technique as the exclusive test for admissibility into evidence. Therefore, the more stringent Frye test has very limited application to expert testimony in the North Carolina courts.

94.
125. 312 N.C. at 151, 322 S.E.2d at 383.
126. Id. at 152, 322 S.E.2d at 383.
127. Id., (citing McCormick on Evidence § 223, at 606 (3d ed. 1984) (citing State v. Catanese, 368 So. 2d 975, 981 (La. 1979))).
128. Id.
129. Id.
130. Id. at 153, 322 S.E.2d at 384.
131. Id. at 147-48, 322 S.E.2d at 380.
CONCLUSION

Given the reliability problem inherent in hypnosis, the North Carolina Supreme Court reversed its position that hypnotically influenced testimony is admissible. Unless and until the process is generally accepted in the scientific community as a reliable memory retrieval device, the potential harm of allowing such testimony outweighs the risk of excluding potentially relevant evidence from the trier of fact. However, the exception adopted by the court, admitting testimony of pre-hypnotic memory, is inconsistent with its decision concerning unreliability inherent in the process. The result creates a procedural and evidential nightmare for the courts. There is no way to ensure that subsequent testimony of a witness will not be affected and influenced by the hypnosis. Once a witness is hypnotized, the "well has been poisoned." Therefore, the court should have adopted a per se rule of inadmissibility.

The effect of this decision on law enforcement is profound. The decision to hypnotize a potential witness as an investigative tool will not be a decision taken lightly. Complete records of all contacts with a potential witness will be necessary if that witness is to be hypnotized. Furthermore, a heavy burden will be placed on the prosecution to prove that a witness had knowledge of facts before hypnosis occurred and to prove the extent of the facts known. Therefore, this decision will certainly play a role in the manner of criminal investigations and criminal trials.

Sharon L. Hartman