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**Evidence - The Admissibility of Hypnotically Refreshed Testimony
in New Mexico: State v. Beachum**

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EVIDENCE—THE ADMISSIBILITY OF HYPNOTICALLY REFRESHED TESTIMONY IN NEW MEXICO: *State v. Beachum*.

INTRODUCTION

In *State v. Beachum*,¹ the New Mexico Court of Appeals addressed the issue of whether hypnotically refreshed² testimony is admissible in a criminal prosecution.³ This issue was one of first impression in New Mexico. The court held that the hypnotically refreshed testimony offered in this case was inadmissible.⁴

In so holding, the court adopted six safeguards for the admission of hypnotically refreshed testimony. These safeguards were originally promulgated by the New Jersey Supreme Court in *State v. Hurd*.⁵ If the

1. 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981), cert. quashed, 98 N.M. 51, 644 P.2d 1040 (1982).

2. The court used the terms "refreshed," "induced," and "revived" interchangeably. "Refreshed," referring to present recollection refreshed, will be used in this Note.

There are several ways to refresh a witness' recollection. One common method is for counsel to hand the testifying witness a memorandum with which to refresh his recollection as to a particular matter. Almost anything that will refresh the witness' memory may be used. Present recollection refreshed should be distinguished from past recollection recorded. In past recollection recorded the witness has no present memory of a fact or facts. A witness in this situation may testify, for example, that he made the memorandum when the facts were fresh in his mind, although he now has no present memory of them. McCormick on Evidence § 9 (Cleary 2d ed. 1972). N.M. R. Evid. 612 governs the use of writings to refresh a witness' memory.

3. On appeal, the state framed the issues as whether the trial court abused its discretion in ruling that: (1) hypnosis was so unreliable a method of enhancing the memory of a witness and was so impermissibly suggestive that testimony following hypnosis was inadmissible; and (2) the identification procedures employed in this case were so suggestive that they were likely to lead to misidentification. 97 N.M. at 685, 643 P.2d at 249. This Note does not discuss the second issue, as it concerns issues unrelated to hypnotically refreshed testimony.

4. *Id.* at 689, 643 P.2d at 253. The New Mexico Supreme Court has heard argument on a case involving hypnotically refreshed testimony. *State v. Hutchinson*, No. 13,678 (filed May 25, 1981), is a direct appeal from a murder conviction and sentence of life imprisonment. *Hutchinson* raises issues similar to those raised in *Beachum*, and may provide an opportunity for the supreme court to accept or reject the reasoning of the *Beachum* court.

5. 86 N.J. 525, 432 A.2d 86 (1981). The safeguards are:

- (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

safeguards are complied with, then hypnotically refreshed testimony is admissible in New Mexico. The court failed, however, to apply the safeguards to the facts before it. Instead, the court affirmed the trial court's order suppressing the testimony on grounds that the lower court's order was supported by substantial evidence.⁶ In affirming the trial court's order, the court of appeals noted that the trial judge has discretion to decide whether the prejudicial effect of evidence outweighs its probative value.⁷

A more informative approach in *Beachum* would have applied the newly adopted standards to the particular facts before the court. Because the court did not perform this analysis, additional litigation will probably be required to determine exactly how courts should apply the safeguards. This Note will provide an overview of the nature of hypnotically refreshed testimony and case law concerning its admissibility. The Note will also examine the reasoning of the New Mexico Court of Appeals with specific attention focused on the adopted safeguards and their application to the *Beachum* fact situation.

STATEMENT OF THE CASE

Early in the morning on July 8, 1980, an assailant sexually assaulted the victim in her bedroom.⁸ The assailant, armed with a knife, forced her to engage in sexual intercourse and then robbed her.⁹ Some time later the defendant, Ronald Beachum, was arrested on an unrelated charge of criminal sexual contact.¹⁰ While jailed on this offense, he voluntarily agreed to appear in a lineup.¹¹ At this lineup the victim identified Beachum by his voice as her assailant, but was unable to identify him by sight.¹²

avoiding adding any new elements to the witness' description of 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. Video tape 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.

Id. at —, 432 A.2d at 89-90.

6. 97 N.M. at 691, 643 P.2d at 255.

7. *Id.* N.M. R. Evid. 403 provides: "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 considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

8. 97 N.M. at 683, 643 P.2d at 247.

9. *Id.*

10. N.M. Stat. Ann. § 30-9-12 (Cum. Supp. 1982), defines the crime of criminal sexual contact.

11. The lineup consisted of the defendant and two other men. 97 N.M. at 691, 643 P.2d at 255.

12. *Id.* at 683, 643 P.2d at 247.

The Roswell Police Chief hypnotized the prosecutrix.¹³ Those present during the hypnotic session included the prosecutrix, the Police Chief, a police sergeant, and two other people.¹⁴ While under hypnosis, the victim viewed a photographic array which included a picture of Beachum.¹⁵ Both during the hypnotic session and immediately thereafter she identified Beachum's picture as that of her assailant.¹⁶

This identification resulted in four felony counts against Beachum for the rape and robbery of the prosecutrix. Prior to trial, Beachum learned that the victim had been hypnotized and moved to suppress her testimony.¹⁷ The motion asserted that: (1) hypnosis was not reliable as a scientific technique; (2) the hypnotic session itself was not scientifically conducted; and (3) the hypnotist was not qualified as an expert.¹⁸

At the suppression hearing the trial court heard testimony from prosecution and defense witnesses who were experts on hypnosis.¹⁹ The trial court ordered suppression of a substantial amount of the victim's testimony.²⁰ The state moved for an interlocutory appeal,²¹ which was granted,

13. *Id.* The sexual assault occurred on July 8, 1980; the police chief, Wisnieski, hypnotized the prosecutrix on August 28, 1980. Chief Wisnieski testified that he had attended a four-day training course on hypnosis, that he was a member of hypnosis related professional organizations, and that he had hypnotized 12 crime victims in previous cases. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Specifically, the defendant moved to suppress the prosecutrix's testimony, the testimony of the hypnotist and others present during the hypnotic session, and all evidence relating to the prosecutrix's statements during and subsequent to hypnosis. *Id.*

18. *Id.* The court of appeals stated that:

Additional grounds advanced by the defendant were that: the use of hypnosis denied the defendant the right to confront the witness against him and to adequately cross-examine her; defendant was denied due process of law because the hypnosis session was impermissibly suggestive to the witness; the defendant was denied effective assistance of counsel because he was not represented by counsel or present at the time of performing such hypnosis; and by hypnotizing the complaining witness, the State had in effect destroyed material evidence in the case, namely the prosecutrix' independent recollection of the events in question.

Id.

19. Dr. Bernard L. Diamond testified for the defense. Dr. Diamond is a psychiatrist with extensive training and experience in hypnosis. He is a law professor at the University of California at Berkeley (Boalt Hall) and is the author of *Inherent Problems in the Use of Pre-trial Hypnosis on a Prospective Witness*, 68 Calif. L. Rev. 313 (1980). Dr. Martin Reiser testified for the state. Dr. Reiser is a former psychology professor, and holds a Ph.D. in education and clinical psychology. Currently, he is Director of Behavioral Sciences at the Los Angeles Police Department, and Director of the Law Enforcement Hypnosis Institute. 97 N.M. at 684, 643 P.2d at 248.

20. The trial court ordered that (1) the prosecutrix could not make an in-court identification of the defendant; (2) she could not testify as to any evidence developed under hypnosis; and (3) she could testify as to events that occurred the morning of the assault and her voice identification of the defendant. 97 N.M. at 684, 643 P.2d at 248.

21. The court of appeals stated that the prosecution appealed pursuant to N.M. Stat. Ann. § 39-3-3(A)(3) (1978). This is not correct. The prosecution actually appealed pursuant to N.M. Stat. Ann.

and the court of appeals affirmed the trial court's suppression of the testimony.²²

DISCUSSION AND ANALYSIS

The court of appeals based its opinion in *Beachum* upon three lines of reasoning. First, the court discussed the nature of hypnosis, its benefits and pitfalls.²³ The court noted that although hypnosis has proven highly valuable in refreshing the memory of eyewitnesses, its principal drawback was that it can be highly suggestive.²⁴ In this context the court discussed how other jurisdictions have approached the admissibility issue.²⁵

Second, the court of appeals examined the New Mexico treatment of other scientific evidence, particularly polygraphic tests.²⁶ An analogy between polygraph tests and hypnotically refreshed testimony is useful because an analysis of their admissibility in evidence proceeds upon identical lines.²⁷ The *Beachum* court stated that because New Mexico admits polygraphic evidence with certain safeguards, courts should treat hypnotically refreshed testimony in the same manner.²⁸ Third, the court of appeals adopted, but did not discuss, the *State v. Hurd* safeguards for the admission of hypnotically refreshed testimony.²⁹

Survey of Hypnotically Refreshed Testimony Outside New Mexico

Opinion on the admissibility of hypnotically refreshed testimony is at best highly diverse.³⁰ Perhaps this is because of the perceived mystical nature of hypnosis and the general misconceptions surrounding it. For example, many people believe that a person's memory records and stores everything he sees, and that hypnosis merely helps a person retrieve what

§ 39-3-3(B)(2) (1978), which provides that the state may move for an interlocutory appeal from a decision or order of a district court suppressing evidence. N.M. Stat. Ann. § 39-3-3(A)(3) (1978), allows a criminal defendant to appeal an interlocutory order of a district court. The order must involve "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from such order or decision may materially advance the ultimate termination of the litigation." *Id.*

22. 97 N.M. at 691, 643 P.2d at 255.

23. *Id.* at 686, 643 P.2d at 250.

24. *Id.*

25. See *infra* text accompanying notes 30-49.

26. 97 N.M. 686-88, 643 P.2d at 250-52.

27. The analytical approach of the court of appeals was to first determine whether hypnotically refreshed testimony satisfied the *Frye* test. See *infra* text accompanying notes 49-51, for an explanation of the *Frye* test. Once the court found that hypnotically refreshed testimony did meet the *Frye* test, it was admissible provided that the proponent complied with certain safeguards. New Mexico courts use an identical analysis in considering the admissibility of polygraph evidence. See *infra* text accompanying notes 70-73.

28. 97 N.M. at 688-89, 643 P.2d at 252-53.

29. *Id.* at 689-90, 643 P.2d at 253-54.

30. See Annot., 92 A.L.R.3d 442 (1979).

he otherwise could not. Further, many people believe that a hypnotized person can tell only the truth. Both of these beliefs are incorrect.³¹

The apparent earliest reported decision considering the admissibility of hypnotically refreshed testimony is *People v. Ebanks*.³² In *Ebanks* the defendant was charged with murder. He attempted to introduce into evidence statements that he had made while under hypnosis which tended to show his innocence. In affirming the defendant's conviction, the California Supreme Court stated that "[t]he law of the United States does not recognize hypnotism."³³

Recent case law addressing the issue falls into two categories. In the first category, the defendant seeks to prove his innocence by attempting to introduce evidence of statements he made under hypnosis. Courts have uniformly rejected this type of offer of proof.³⁴ The second category involves cases in which a party seeks to introduce the hypnotically refreshed testimony of a witness. *State v. Beachum* falls into the latter category.

Courts which have addressed the issue of whether the hypnotically refreshed testimony of a witness is admissible at trial have generally followed one of three analyses. First, some courts have held that the fact that a witness was hypnotized goes to the weight accorded his testimony, not to the admissibility of the testimony.³⁵ These courts rely on the jury to give appropriate weight to a witness' testimony in light of the fact that he was previously hypnotized.³⁶ The danger of this approach is that the

31. Many experts on memory now reject the notion that experiences are permanently "recorded" in one's memory, opting instead in favor of a "reconstructive view" of memory. See E. Loftus; Eyewitness Testimony (1979); Loftus & Loftus, *On the Permanence of Stored Information in the Human Brain*, 35 Am. Psychologist 409, 415-19 (1980). But see Penfield & Perot, *The Brain's Record of Auditory and Visual Experience*, 86 Brain 595 (1963). Scientific studies and commentators also reject the notion that hypnotized persons can only tell the truth. See, e.g., Orme, *The Use and Misuse of Hypnosis in Court*, 27 Int'l J. Clinical & Experimental Hypnosis 311, 319-20 (1979) [hereinafter cited as Orme]; Rubenstein & Newman, *The Living Out of "Future" Experiences Under Hypnosis*, 119 Science 472, 473 (1954). For a general discussion of memory under hypnosis in the legal setting, and a summary of scientific literature in this area, see Note, *The Admissibility of Testimony Influenced by Hypnosis*, 67 Va. L. Rev. 1203, 1208-14 (1981) [hereinafter cited as Note, *The Admissibility of Testimony*].

32. 117 Cal. 652, 49 P. 1049 (1897).

33. *Id.* at ___, 49 P. at 1053.

34. See, e.g., *People v. Blair*, 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979); *Jones v. State*, 542 P.2d 1316 (Okla. Crim. App. 1975); *State v. Harris*, 241 Or. 224, 405 P.2d 492 (1965); *State v. Pierce*, 263 S.C. 23, 207 S.E.2d 414 (1974); *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974).

35. See, e.g., *United States v. Awkard*, 597 F.2d 667 (9th Cir.), cert. denied, 444 U.S. 885 (1979); *United States v. Adams*, 581 F.2d 193 (9th Cir.), cert. denied, 439 U.S. 1006 (1978); *Creamer v. State*, 232 Ga. 136, 205 S.E.2d 240 (1974); *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968); *State v. Jorgensen*, 8 Or. App. 1, 492 P.2d 312 (1971). Civil cases adhering to this position include *Kline v. Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975); *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974).

36. See *Harding v. State*, 5 Md. App. 230, ___, 246 A.2d 302, 306 (1968).

jury might be influenced by erroneous preconceptions concerning the reliability of hypnosis.³⁷

The second approach by courts is a constitutionally based analysis of the admissibility of hypnotically refreshed testimony. The constitutional issue is whether the admission of such testimony violates fourteenth amendment due process rights.³⁸ Testimony derived from a pretrial hypnotic session may be so suggestive that the defendant's due process rights are violated by its admission into evidence.³⁹ Due process requires that the defendant be afforded a fair trial. Testimony of a previously hypnotized witness precludes a fair trial when that testimony is so tainted by suggestion that it does not represent the witness' true recollection.⁴⁰

Courts which have used the constitutional analysis have examined the hypnotic session in light of the pretrial identification standard developed by the United States Supreme Court in *Stovall v. Denno*.⁴¹ *Stovall* involved the stabbing death of a Long Island doctor. During the attack, the deceased's wife attempted to help him and was seriously wounded. Because there was some question as to whether she would survive, the police brought the defendant to her hospital room, where she identified him as her husband's murderer.⁴² In affirming the defendant's conviction, the United States Supreme Court promulgated a test for measuring the suggestiveness of a pretrial identification procedure. The test mandates an inquiry into whether the identification procedure "was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law."⁴³ The Supreme Court further stated that this test should be applied to the totality of circumstances surrounding the identification procedure.⁴⁴ Courts applying this test to pretrial hypnotic sessions examine the hypnotic procedures in detail. In *People v. Hughes*⁴⁵ for example, the court required a pretrial hearing to consider whether the hypnotic procedures utilized were impermissibly suggestive.

37. See *supra* text accompanying note 31. It is possible that voir dire could mitigate this problem.

38. See, e.g., Note, *The Admissibility of Testimony*, *supra* note 31, at 1218.

39. *Id.* at 1218-19.

40. *Id.*

41. 388 U.S. 293 (1967).

42. *Id.* at 295.

43. *Id.* at 302.

44. *Id.*

45. 99 Misc.2d 863, 417 N.Y.S.2d 643 (Onondaga County Ct. 1979). Although this case is a county court opinion, it is cited as authority by many jurisdictions that have considered the issue of the admissibility of hypnotically refreshed testimony. In *Hughes*, the defendant allegedly raped the prosecutrix. A clinical psychologist hypnotized her on two different occasions. At both sessions the prosecutrix identified the defendant as her assailant and related details of the event. The defendant, prior to trial, moved to suppress her identification testimony. The court held that a pretrial hearing to determine the suggestiveness of the hypnotic session in question was both proper and necessary. *Id.* at ___, 417 N.Y.S.2d at 649. See also *United States v. Narciso*, 446 F. Supp. 252, 279-82 (E.D. Mich. 1977); *State v. Greer*, 609 S.W.2d 423, 436 (Mo. 1980).

State v. Beachum did not follow either of the above analyses; it followed a third approach. This third approach to the admissibility of hypnotically refreshed testimony entails establishing that hypnosis is scientifically reliable and that therefore evidence obtained through its use is admissible in court. In New Mexico, as in most jurisdictions,⁴⁶ *Frye v. United States*⁴⁷ provides the standard for the admissibility of scientific evidence. In *Frye*, the defendant attempted to introduce evidence of the results of a systolic blood pressure test (polygraph examination) that he had taken. The results tended to prove his innocence. In affirming the rejection of the offered evidence, the circuit court stated that for such evidence to be admissible, the scientific method used "must be sufficiently established to have gained general scientific acceptance in the particular field to which it belongs."⁴⁸ If hypnosis satisfies this test, then hypnotically refreshed testimony is admissible; if it does not, the court suppresses the offered testimony. The *Beachum* court followed this analysis, implicitly finding that hypnosis satisfies the *Frye* test.⁴⁹

Hypnotically Refreshed Testimony in New Mexico

In *Beachum*, the New Mexico Court of Appeals began its analysis by discussing the nature of hypnosis and the hypnotic trance. Hypnosis may be defined as "an alteration in consciousness and concentration, in which the subject manifests a heightened degree of suggestibility, while awareness is maintained."⁵⁰ Bodily relaxation and concentration on specific stimuli induce hypnosis.⁵¹

After discussing the nature of hypnosis, the court of appeals noted that hypnosis has proven successful in medical treatment and therapy, as well as in criminal investigation. In this context the court cited the leading case of *People v. Smrekar*.⁵² In *Smrekar*, the defendant was convicted of

46. See Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. Ill. L.F. 1, 11; Note, *Evolving Methods of Scientific Proof*, 13 N.Y.L.F. 677, 682 n.15 (1967); see also cases collected in *State v. Washington*, 229 Kan. 47, —, 622 P.2d 986, 991 (1981).

47. 293 F. 1013 (D.C. Cir. 1923). The New Mexico Supreme Court quoted *Frye* "with approval" in *State v. Trimble*, 68 N.M. 406, 407, 362 P.2d 788, 789 (1961). The *Beachum* court noted that the *Trimble* court had relied on *Frye* in its decision. 97 N.M. at 688, 643 P.2d at 252. For a recent discussion of the *Frye* test as applied in New Mexico, see Simon Neustadt Family Center, Inc. v. Bludworth, 97 N.M. 500, 504, 641 P.2d 531, 535 (Ct. App. 1982). One commentator has suggested that New Mexico no longer applies the *Frye* test with respect to scientific evidence. Romero, *The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence*, 6 N.M.L. Rev. 187 (1970). The *Beachum* court noted that New Mexico does apply the *Frye* test. 97 N.M. at 688, 643 P.2d at 252.

48. 293 F. at 1014.

49. See 97 N.M. at 689, 643 P.2d at 253.

50. Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 Ohio St. L.J. 567, 570 (1977).

51. Comment, *Hypnosis—Its Role and Current Admissibility in the Criminal Law*, 17 Willamette L.J. 665, 667 (1981) [hereinafter cited as Comment, *Role and Current Admissibility*].

52. 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979).

shooting a couple in their home. The victims' next door neighbor heard a noise from their house. Moments later, she saw a person outside that house. Unable to remember the identity of that person, she underwent hypnosis. She subsequently identified the defendant as the person she saw at the scene of the killing.⁵³ The Illinois Court permitted the testimony, holding that the testimony of a witness was not automatically inadmissible because the witness had been previously hypnotized.⁵⁴ The *Beachum* court, citing the *Smrekar* case, recognized that hypnosis is useful in restoring memories of unpleasant past experiences that witnesses have repressed.⁵⁵

Rejection of a Per Se Inadmissibility Rule

Beachum argued for a per se inadmissibility rule.⁵⁶ In support of this argument he relied on three cases,⁵⁷ all from other jurisdictions, which held that hypnotically refreshed testimony was inadmissible. In all three cases, the basis for the rejection of the hypnotically refreshed testimony was that hypnosis did not satisfy the *Frye* test for the admissibility of scientific evidence. Decisions subsequent to *Beachum* indicate that these cases initiated a trend toward holding hypnotically refreshed testimony inadmissible.⁵⁸ Significantly, these later decisions also based their hold-

53. *Id.* at ____, 385 N.E.2d at 852.

54. *Id.* at ____, 385 N.E.2d at 855.

55. 97 N.M. at 685, 643 P.2d at 249 (citing 68 Ill. App. 3d at ____, 385 N.E.2d at 853).

56. See *supra* notes 17-18 and accompanying text.

57. *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981); *People v. Tait*, 99 Mich. App. 19, 297 N.W.2d 853 (1980); *State v. Mack*, 292 N.W.2d 764 (Minn. 1980).

In *State v. Mena*, the defendant was convicted of aggravated assault, escape, and disorderly conduct. The victim of the assault was hypnotized by two doctors at the insistence of the police. The Arizona Supreme Court in *Mena* reaffirmed its decision in *State v. La Mountain*, 125 Ariz. 547, 611 P.2d 551 (1980), in which one year earlier it had held that hypnotically refreshed testimony was per se inadmissible. The *Mena* court's rationale was that hypnosis did not satisfy the *Frye* test. 128 Ariz. at ____, 624 P.2d at 1280.

In *People v. Tait*, the defendant allegedly threatened a deputy sheriff with a pistol. The deputy was hypnotized to refresh his recollection of the incident. The prosecuting attorney, an amateur hypnotist, performed the hypnosis. The prosecution failed to disclose to defense counsel prior to trial the fact that the deputy had been hypnotized. The Michigan Court of Appeals held that "[h]ypnosis had not achieved that degree of general scientific acceptance which will permit its introduction." *Id.* at ____, 297 N.W.2d at 857.

In *State v. Mack*, the defendant allegedly sexually assaulted the prosecutrix with a switchblade knife. She was hypnotized by a self-taught lay hypnotist hired by the police. Two police officers were present during the hypnotic session, both of whom were intimately familiar with the facts of the case. The Minnesota Supreme Court held that hypnosis did not satisfy the *Frye* test and therefore hypnotically refreshed testimony was per se inadmissible. *Id.* at 768.

58. *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982); *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981); *Commonwealth v. Nazarovitch*, __ Pa. ____, 436 A.2d 170 (1981). All of these cases held that hypnotically refreshed testimony was inadmissible.

In *State ex rel. Collins v. Superior Court*, the defendant was indicted with forty felony counts of kidnapping and sexual assault. The indictment arose out of eighteen reported rapes over a three-year period, all following a similar pattern. Seven of the victims had been hypnotized. The defendant,

ings on a determination that hypnosis does not satisfy the *Frye* test.⁵⁹ The trend represents a minority view at the present time.

The court of appeals in *Beachum* recognized that a key inquiry is whether a particular hypnotic session is unduly suggestive.⁶⁰ Suggestiveness is undesirable because it might result in the falsification of a pertinent fact. The six safeguards promulgated in *State v. Hurd* represent a method of limiting suggestiveness in a hypnotic session.⁶¹ Therefore, if there is adherence to the safeguards, the admissibility of hypnotically refreshed testimony is justified. Indeed, the *Hurd* safeguards eliminate the justification for the per se inadmissible rule. The New Mexico Court of Appeals

relying on *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981), see *supra* note 57, filed a motion in limine to suppress the testimony of the previously hypnotized witnesses. The trial court granted the motion and the state appealed. The Arizona Supreme Court, reaffirming its holding in *State v. Mena*, found that hypnosis did not satisfy the *Frye* test. 132 Ariz. at 199, 644 P.2d at 1287. Therefore, hypnotically refreshed testimony was still per se inadmissible in Arizona. The court, however, retreated somewhat from its holding in *State v. Mena* and allowed the hypnotized witness to testify to facts recalled prior to hypnosis. *Id.* at 207, 644 P.2d at 1295.

In *People v. Shirley*, the prosecutrix and the defendant had had sexual relations. The dispute was whether he raped her or she consented. There were no eyewitnesses. The prosecutrix was both a heavy drinker and a daily user of tranquilizers. She was hypnotized three months after the alleged rape, apparently to improve her memory in preparation for trial. Evidence indicated that she had trouble remembering things from one day to the next. The hypnosis was performed by a deputy district attorney with another prosecutor present during the entire hypnotic session. For the California Supreme Court, the key inquiry was whether hypnosis satisfied the *Frye* test. The court held that it did not. 31 Cal. 3d at ___, 641 P.2d at 804, 181 Cal. Rptr. at 273.

In *State v. Palmer*, the defendant was convicted of robbing a coin shop and strangling its owner to death with an electric cord. Three of the state's witnesses had been hypnotized prior to trial. In reversing the defendant's conviction, the Nebraska Supreme Court held that:

[U]ntil hypnosis gains acceptance to the point where experts in the field widely share the view that memories are accurately improved without undue danger of distortion, delusion, or fantasy, a witness who has been previously questioned under hypnosis may not testify in a criminal proceeding concerning the subject matter adduced at the pretrial hypnotic interview.

210 Neb. at ___, 313 N.W.2d at 655. Therefore, although the court did not mention *Frye* by name, it implicitly found that hypnosis did not meet the *Frye* test.

Nazarovitch involved the murder of a twelve-year-old girl. Three years to the day after the murder, one Pamela Wilfong went to the police, saying she had experienced nightmares about the murder and that she felt she might know something about it. She was hypnotized on three separate occasions. Based on her hypnotically refreshed testimony, the defendants were indicted for the murder of the twelve-year-old girl. The Pennsylvania Supreme Court found that hypnosis did not satisfy the *Frye* test, therefore upholding the trial court's suppression of Pamela's testimony. ___ Pa. at ___, 436 A.2d at 177-78.

59. *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982), in which the California Supreme Court held hypnotically refreshed testimony inadmissible per se, see *supra* note 58, is noteworthy in two respects. First, the California court relied on the cases cited by *Beachum* in his argument for per se inadmissibility, as well as on the other recent decisions noted above. Second, the *Shirley* court, like the courts in *Mena*, *Tait*, and *Mack*, found that hypnosis did not satisfy the *Frye* test. Because these two factors differ from the *Beachum* court's reasoning, it is doubtful that the New Mexico Court of Appeals would have followed the *Shirley* position even if that case had been decided prior to *Beachum*.

60. 97 N.M. at 687, 643 P.2d at 251.

61. See *supra* note 5. An examination of the facts in *People v. Shirley*, see *supra* note 58, clearly indicates that the hypnotic session there did not come close to complying with the safeguards.

declined to accept Beachum's argument for per se inadmissibility.⁶² The court instead followed the "weight of authority"⁶³ and held that hypnotically refreshed testimony was admissible, although the court rejected the testimony offered in this case.

The Frye Standard

The court of appeals' analysis of hypnotically refreshed testimony followed two lines of reasoning. First, the court discussed the analogous cases in the area of narco-analysis⁶⁴ and polygraph testing, noting that New Mexico courts have applied the *Frye* test in determining whether to admit scientific evidence. The *Frye* test simply requires a finding that hypnosis has gained general scientific acceptance in its field.⁶⁵ Second, the court implicitly found that hypnosis satisfied the *Frye* test.⁶⁶ The court therefore held that hypnotically refreshed testimony was admissible provided that the *Hurd* safeguards were met.

The court began its analysis with cases involving scientific evidence analogous to hypnotically refreshed testimony. If scientific evidence does not satisfy the *Frye* test, the evidence is then per se inadmissible. In *State v. Lindemuth*,⁶⁷ the defendant attempted to introduce evidence of exculpatory statements he made under narco-analysis. The New Mexico Supreme Court applied the *Frye* test to the particular method used, injection of sodium pentothal. The court found that the use of sodium pentothal for the purpose of eliciting the truth had not achieved general scientific acceptance.⁶⁸ Therefore, the supreme court affirmed the trial court's re-

62. The court stated that "[a] rule of per se inadmissibility, we conclude, is unnecessarily broad and may result in the exclusion of evidence that may be valuable and accurate." 97 N.M. at 688, 643 P.2d at 252.

63. 97 N.M. at 686, 643 P.2d at 250. The court cited the following cases in support of this contention: *United States v. Akward*, 597 F.2d 667 (9th Cir.), cert. denied, 444 U.S. 885 (1979); *United States v. Adams*, 581 F.2d 193 (9th Cir.), cert. denied, 439 U.S. 1006 (1978); *United States v. Narcisco*, 446 F. Supp. 252 (E.D. Mich. 1977); *Clark v. State*, 379 So. 2d 372 (Fla. Dist. Ct. App. 1979); *People v. Smrekar*, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979); *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), modified. *Polk v. State*, 48 Md. App. 382, 427 A.2d 1041 (1981); *State v. Greer*, 609 S.W.2d 423 (Mo. App. 1980), vacated on other grounds, 450 U.S. 1027 (1981); *State v. Hurd*, 80 N.J. 525, 432 A.2d 80 (1981); *People v. Lucas*, 107 Misc. 2d 231, 435 N.Y.S.2d 461 (Sup. Ct. 1980); *People v. Hughes*, 99 Misc. 2d 863, 417 N.Y.S.2d 643 (Onondaga County Ct. 1979); *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978); *State v. Jorgensen*, 8 Or. App. 1, 492 P.2d 312 (1971). See also the civil cases of *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974), and *Connolly v. Farmer*, 484 F.2d 456 (5th Cir. 1973).

64. Narco-analysis, or narco-therapy, is a procedure in which the subject is injected with a drug such as sodium amytal (or sodium pentathol), popularly known as truth serum. Under the influence of the drug, the subject talks freely about previously repressed memories. *Campbell's Psychiatric Dictionary* 402 (5th ed. 1981).

65. See *supra* text accompanying notes 47-48.

66. 97 N.M. at 688, 643 P.2d at 252.

67. 56 N.M. 257, 243 P.2d 325 (1952).

68. *Id.* at 274, 243 P.2d at 336.

jection of evidence concerning statements made by the defendant under narco-analysis.

The court of appeals in *Beachum* next analyzed *State v. Dorsey*.⁶⁹ In *Dorsey*, the New Mexico Supreme Court held that the results of polygraph tests were admissible if certain safeguards were followed.⁷⁰ The significance of this holding to the decision of the court of appeals in *Beachum* was that evidence of polygraph results was admitted in a case in which certain safeguards were followed. The *Beachum* court stated that “[s]ince New Mexico permits the introduction of polygraph evidence with certain safeguards, we believe this same rationale should apply in the case of hypnotically refreshed recollection of a witness.”⁷¹

The next step was for the court of appeals to determine whether hypnosis satisfied the *Frye* test; if so, hypnotically refreshed testimony was admissible, as long as the proponent complied with the *Hurd* safeguards. The court of appeals saw the issue as whether hypnosis was reasonably reliable in refreshing a witness’ memory, as opposed to eliciting the truth. The court stated that “[b]y noting the crucial distinction between hypnosis (a memory stimulus) and polygraph testing and narco-analysis (truth elicitors), the concerns over the scientific unreliability of hypnosis as a truth elicitor can be dispelled.”⁷² In other words, hypnotically refreshed testimony should be thought of as simply another category of present recollection refreshed, in which hypnosis is the stimulus that jogs the witness’ memory. Based on such an analysis, the court found that hypnosis is reasonably reliable in yielding accurate recollections.⁷³ This reasoning constituted an implicit finding that hypnosis meets the *Frye* test.

69. 88 N.M. 184, 539 P.2d 204 (1975).

70. Requirements for the admission of polygraph evidence had originally been set out in *State v. Lucero*, 86 N.M. 686, 526 P.2d 1091 (1974). The requirements were: (1) the test was stipulated to by both parties; (2) no objection was made at trial; (3) evidence had sufficiently established the polygraph operator as an expert; (4) there was evidence establishing the reliability of the testing procedure; and (5) the validity of the test made on the subject had been established. *Id.* at 688, 526 P.2d at 1093.

At issue in *Dorsey* was whether requirements (1) and (2) were necessary. 88 N.M. at 185, 539 P.2d at 205. The court held that they were not. *Id.* Therefore to introduce polygraph evidence in New Mexico, one must only show that the latter three requirements were met.

71. 97 N.M. at 688–89, 643 P.2d at 252–53.

72. *Id.* at 687, 643 P.2d at 251 (quoting Comment, *Role and Current Admissibility*, *supra* note 51, at 675).

73. 97 N.M. at 688, 643 P.2d at 252 (quoting *State v. Hurd*, 86 N.J. at —, 432 A.2d at 92). This conclusion is sound. See Putnam, *Hypnosis and Distortions in Eyewitness Memory*, 127 Int’l J. Clinical & Experimental Hypnosis 437, 444–46 (1979). Putnam indicates that inaccurate recall under hypnosis can be significantly minimized by proper safeguards employed during the hypnotic session. Indeed, the problems with eyewitness testimony may be as great as those with hypnosis. See Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan. L. Rev. 969 (1977).

The Hurd Safeguards

After implicitly finding that hypnosis satisfied the *Frye* test, the court articulated the safeguards that would enable hypnotically refreshed testimony to be introduced at trial. As a threshold matter, the court of appeals recognized the need on the part of the proponent of the hypnotically refreshed testimony to establish the qualifications of the hypnotist as an expert.⁷⁴ This requirement was identical to the one imposed in *State v. Dorsey* with regard to polygraph evidence,⁷⁵ and is in addition to the *Hurd* safeguards. The *Beachum* court perceived the safeguards as a means of mitigating the inherent dangers of hypnosis. The court stated that "[t]o avoid or minimize the possibility of the improper application of hypnosis, we adopt the six-pronged test laid down by the New Jersey Supreme Court [in *State v. Hurd*] for admissibility of hypnotically induced testimony of a witness."⁷⁶

In *Hurd* the victim was attacked in the early morning hours in her bedroom and stabbed repeatedly. There was no sexual assault and she eventually eluded her attacker. The two prime suspects in the case were her husband, allegedly asleep in another room, and her former husband, the defendant.⁷⁷ The victim was either unable or unwilling to identify her assailant. She was hypnotized three weeks after the incident. A psychiatrist performed the hypnosis with two police officers present. While under hypnosis, a police officer questioned her in a highly suggestive manner.⁷⁸ After the hypnotic session, both the hypnotist and the police officers encouraged her to make an identification of her assailant.

The safeguards were originally enunciated in the New Jersey trial court by Dr. Martin Orne.⁷⁹ For testimony to be admitted in New Mexico, its proponent must establish two things. First, it must be established that the safeguards were complied with at the time when the witness was hyp-

74. 97 N.M. at 689, 643 P.2d at 253.

75. See *supra* note 70 and accompanying text.

76. 97 N.M. at 689, 643 P.2d at 253.

77. 86 N.J. at —, 432 A.2d at 88.

78. The trial court described part of the hypnotic exchange thusly:

In response to questions Mrs. Sell [Prosecutrix] recounted the events and partially described the clothing and some of the features of her attacker. Mrs. Sell then commenced to cry hysterically. At that point Pierangeli [police officer] asked Mrs. Sell if she knew the attacker. Mrs. Sell replied, "Yes." Pierangeli asked, "Is it David?" [meaning her husband David Sell] Mrs. Sell replied, "No." Pierangeli then asked, "Is it Paul?" [meaning her former husband Paul Hurd] Crying hysterically Mrs. Sell replied, "Yes."

173 N.J. Super. 333, —, 414 A.2d 291, 293-94.

79. Dr. Orne is a leading authority on hypnosis and is the co-author of an encyclopedia article on the subject. 9 *Encyclopedia Britannica* 133 (1974). A psychologist, he heads a major hypnosis research laboratory at the University of Pennsylvania. He is also Editor-in-Chief of the *Journal of Clinical and Experimental Hypnosis*. See *State v. Mack*, 292 N.W.2d 746, 766 (Minn. 1980).

notized.⁸⁰ Second, compliance with the safeguards must be demonstrated at trial by clear and convincing evidence.⁸¹

The principal purpose of the *Hurd* safeguards is to limit the suggestiveness of a particular hypnotic session. Suggestiveness is undesirable because it might result in the serious distortion of a person's recollection. The New Mexico Court of Appeals adopted the *Hurd* safeguards verbatim but failed to apply them to the facts before it. Had the court of appeals applied the safeguards, the same result would probably have been achieved. The testimony would have been inadmissible but the court would also have provided some guidance to the lower courts about the application of the safeguards.

The first safeguard requires that a psychiatrist or psychologist perform the hypnosis. The second safeguard requires that a hypnotist independent of the police or prosecution conduct the hypnotic session. The Roswell Chief of Police, who was neither a psychiatrist nor a psychologist, conducted the hypnotic session in *Beachum*. Therefore, the state had not complied with either of the first two safeguards.

The third safeguard requires that all information given to the hypnotist by law enforcement personnel prior to the hypnotic session be recorded. One purpose of this procedure is to facilitate later assessment of the suggestiveness of the hypnotic session.⁸² The hypnotist might question the subject in such a way as to suggest theories of the police as to, for example, the identity of the subject's assailant. There was no indication that such a record was made in *Beachum*.

The fourth safeguard requires that the hypnotist obtain a detailed statement of the facts from the subject before hypnosis. This procedure enables the hypnotist to learn what the subject can and cannot relate about the particular event in question. From this information, the hypnotist might be able to determine areas where the subject is particularly susceptible to suggestion.⁸³ Whether Chief Wisnieski took a detailed statement of the facts prior to hypnosis was not clear from the record.

The fifth safeguard requires that the hypnotic session be recorded. The preferred method of recordation is by videotape, which allows subsequent scrutiny to determine if the hypnotist suggested answers to the subject by mannerisms, body language, etc. In *Beachum* an audio tape of the hypnotic session was made; therefore the state technically complied with

80. 97 N.M. at 690, 643 P.2d at 254.

81. *Id.*

82. See, e.g., Teitelbaum, *Admissibility of Hypnotically Adduced Evidence and the Arthur Nobb Case*, 8 St. Louis U.L.J. 205, 213 (1963).

83. *Id.* For example, a subject/victim may think that she knows who her assailant was, but cannot identify or describe him. Such a person might be highly susceptible to suggestion concerning the identity of her attacker.

the fifth safeguard. An audio tape, however, does not allow the subsequent scrutiny afforded by a videotape.

The sixth safeguard requires that only the hypnotist and the subject be present during the hypnotic session. A hypnotic session where police officers or prosecuting attorneys are present could be unduly suggestive.⁸⁴ In *Beachum*, a police chief (the hypnotist), a police sergeant and two other people were present. The state therefore failed to comply with the sixth safeguard.

CONCLUSION

In *State v. Beachum*, the court of appeals stated that hypnotically refreshed testimony is admissible in New Mexico. The court implicitly found that such testimony meets the *Frye* standard for scientific evidence. Even though such testimony is admissible, the *Beachum* court stated that the proponent of hypnotically refreshed testimony must show that the six procedural safeguards set forth in *State v. Hurd*⁸⁵ were utilized during the hypnotic session. The safeguards adopted by the court of appeals are meant to reduce the suggestiveness of hypnotic sessions.

In *State v. Beachum*, the court of appeals upheld a trial court order suppressing the hypnotically refreshed testimony offered in that case. The court of appeals did so on the ground that the trial court order was supported by substantial evidence. Unfortunately, the court of appeals did not apply the newly adopted safeguards to the facts of the case. Therefore, the decision was incomplete. Additional litigation will probably be required to clarify the application as well as the significance of the newly adopted safeguards.

GREY HANDY

84. See, e.g., Orme, *supra* note 31, at 336. See also Note, *The Admissibility of Testimony*, *supra* note 31, at 1232 n. 157.

85. See *supra* note 5.