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NOTE

BORAWICK v. SHAY: THE ADMISSIBILITY OF HYPNOTICALLY-INDUCED MEMORIES

I. INTRODUCTION

In *Borawick v. Shay*,¹ the Second Circuit considered the circumstances under which an alleged victim of childhood sexual abuse may testify as to memories of abuse that surface following therapeutic hypnosis in adulthood.² In this case of first impression,³ the court held that admissibility of hypnotically-induced or -refreshed recollections should be determined on a case-by-case basis.⁴ In doing so, it propounded a totality-of-the-circumstances approach and considered a non-exclusive list of factors.⁵ Using this approach, the Second Circuit found that hypnotically-induced recollections of childhood sexual

1. 68 F.3d 597 (2d Cir. 1995) (per Judge Walker).

2. *Id.* at 598. "Hypnosis" is defined as an induced sleeplike condition in which an individual is extremely responsive to suggestions made by the hypnotist. THE AMERICAN HERITAGE DESK DICTIONARY 480 (1981). However, in the medical field, there is no generally accepted definition of hypnosis. Most authorities agree that hypnosis requires at least "superficial cooperation of the subject, the development of rapport, and the subject's focusing of attention." Council on Scientific Affairs, *Status of Refreshing Recollection by the Use of Hypnosis*, 253 JAMA 1918, 1919 (April 5, 1985). [hereinafter Council on Scientific Affairs]. A simple induction procedure follows which enables the subject to become responsive to the suggestions of the hypnotist. Thus, hypnosis involves the "focusing of attention, increased responsiveness to suggestions, suspension of disbelief with a lowering of critical judgment, potential for altering motor control and perception and the subjective experience of responding involuntarily." *Id.* at 1919.

3. *Id.* at 598.

4. *Borawick v. Shay*, 68 F.3d 597, 608 (2d Cir. 1995).

5. *Id.*

abuse were inadmissible when uncovered through hypnosis sessions conducted by an unqualified hypnotist who kept no record of the sessions.⁶

Numerous courts have addressed the issue of admissibility of hypnotically-refreshed testimony resulting from hypnosis specifically used to retrieve or enhance a memory of a particular known or suspected event.⁷ In such cases, courts have often been reluctant to admit hypnotically-refreshed testimony.⁸ Scientific literature has not conclusively demonstrated that therapeutic hypnosis is a consistently effective means to accurately retrieve repressed childhood memories of traumatic events.⁹ However, in light of the Second Circuit's holding in

6. *Id.* at 609.

7. *Id.* at 600. See *Rock v. Arkansas*, 483 U.S. 44 (1986) (hypnosis used to help criminal defendant recall events leading up to the murder for which she was charged); *McQueen v. Garrison*, 814 F.2d 951 (4th Cir. 1987) (hypnosis used to help eyewitness recall more clearly events leading up to a murder); *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984) (hypnosis used to help Texas Ranger identify defendant whom the Ranger already knew to be under suspicion); *Little v. Armontrout*, 819 F.2d 1425 (8th Cir. 1987) (hypnosis used to help a rape victim remember her assailant); *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112 (8th Cir. 1985) (hypnosis used to help driver of car recall whether he applied the brakes before an accident occurred); *Harker v. State*, 800 F.2d 437 (4th Cir. 1986) (hypnosis used to aid victim of a shooting in recalling his assailant); *Kline v. Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975) (hypnosis used to enable amnesia sufferer remember details of a car accident in which she was a passenger in one of the cars); *People v. Shirley*, 723 P.2d 1354 (Cal. 1982), *cert. denied* 459 U.S. 860 (1982) (hypnosis used to refresh recollection regarding the subject's claim of rape); *State v. Iwakiri*, 682 P.2d 571 (Idaho 1984) (hypnosis used to refresh witness' memory in a kidnapping case); *People v. Zayas*, 546 N.E.2d 513 (Ill. 1989) (hypnosis used to more closely recall a license plate number at the scene of a crime); *State v. Hurd*, 432 A.2d 86 (N.J. 1981) (hypnosis used to identify assailant in a stabbing); *State v. Tuttle*, 780 P.2d 1203 (Utah 1989) (hypnosis used on a witness to better recall details of the criminal defendant).

8. *Borawick v. Shay*, 68 F.3d 597, 600 (2d Cir. 1995). See *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984) (hypnotically-induced testimony not admitted because hypnotized subject knew that person he identified through hypnosis was already under suspicion); *Little v. Armontrout*, 819 F.2d 1425 (8th Cir. 1987) (hypnotically-induced testimony not admitted because it was violation of defendant's due process rights); *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112 (8th Cir. 1985) (hypnotically-induced testimony not admitted); *People v. Shirley*, 723 P.2d 1354 (Cal. 1982), *cert. denied* 459 U.S. 860 (1982) (hypnotically-induced testimony admissible if based on pre-hypnotic memories, otherwise, not admissible); *People v. Zayas*, 546 N.E.2d 513 (Ill. 1989) (hypnotically-induced testimony other than that of the defendant not admitted); *State v. Hurd*, 432 A.2d 86 (N.J. 1981) (hypnotically-induced testimony not admitted); *State v. Tuttle*, 780 P.2d 1203 (Utah 1989) (hypnotically-induced testimony not admitted).

9. *Borawick v. Shay*, 68 F.3d 597, 606-607 (2d Cir. 1995). According to the

Borawick, courts may be more flexible in their approach to the admissibility question concerning memories refreshed through hypnosis.¹⁰

This Note will trace the facts and history of the *Borawick* case.¹¹ This Note will then discuss reliability problems associated with hypnotically-induced memories as well as the various approaches to admissibility of hypnotically-refreshed testimony.¹² An explanation of the Second Circuit Court's analysis in *Borawick* follows.¹³ Finally, the Note will critique the Court's reasoning and suggest a possible remedy for the shortcomings of the Second Circuit's chosen approach to admissibility.¹⁴

II. FACTS

Joan Borawick alleged that her aunt, Christine Shay, and her uncle, Morrie Shay, sexually abused her in the Shay home during Borawick's 1961 and 1964 summer visits.¹⁵ At the time

Council on Scientific Affairs (*See supra* note 2), most studies of hypnotically-refreshed memory fail to provide corroboration of memories recovered in hypnosis and fail to establish that hypnosis was responsible for any effects observed. For example, one study simply included subjective impressions of investigators regarding the validity of the memories recovered. Another study found no clear evidence in clinical or experimental literature that hypnosis can improve memory. Other reviewers found that accurate memories can occur but that hypnosis can also lead to false recollections and confabulation. Council on Scientific Affairs, *supra* note 2, at 1920-21.

10. *Borawick v. Shay*, 68 F.3d 597, 609 (2d Cir. 1995). Here, the plaintiff relied heavily on the arguments in Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185 (1992) [hereinafter Kanovitz]. Kanovitz argued that hypnosis functions more reliably when used therapeutically than when it is used to refresh memory regarding a specific event. She concludes that courts should be more willing to accept testimony based on retrieval of repressed memories. Kanovitz at 1213. The Second Circuit acknowledged the arguments made by Kanovitz yet pointed out that no agreement as to the reliability of such testimony exists. Accordingly, the court was unwilling to assume that the risks of suggestibility, confabulation, and memory hardening are reduced when hypnosis is used for therapeutic purposes. *Borawick v. Shay*, 68 F.3d 597, 606-607 (2d Cir. 1995).

11. *See infra* notes 15-52 and accompanying text.

12. *See infra* notes 53-133 and accompanying text.

13. *See infra* notes 134-199 and accompanying text.

14. *See infra* notes 200-259 and accompanying text.

15. *Borawick v. Shay*, 68 F.3d 597, 598-99 (2d Cir. 1995). Valerian St. Regis, the hypnotist who treated Borawick, testified that while under hypnosis, Borawick described episodes of "ritual dancing" involving Christine Shay when Borawick was

of those visits, Borawick was four and seven years old, respectively.¹⁶

After years of psychiatric and psychological treatment for panic attacks, Borawick sought medical treatment for chronic physical illness in the spring of 1987 from Dr. Ronald Peters, a medical doctor in Santa Monica, California.¹⁷ Dr. Peters referred Borawick to Valerian St. Regis, a hypnotist working under his supervision.¹⁸ Peters believed that problems in childhood sometimes cause chronic illness in adulthood and, further, that such problems are susceptible to recall through hypnosis.¹⁹ Beginning in the summer of 1987 and continuing through the fall of 1988, Borawick underwent 12 to 14 hypnotherapy sessions with St. Regis.²⁰ Before and immediately after these sessions, Borawick had no recollection of any abuse by the Shays or by anyone else.²¹

Although St. Regis attended and gave lectures on the topic of hypnosis, and belonged to several recognized professional organizations centered on hypnosis, he did not hold a medical degree and had no education beyond high school.²² He was not licensed in California as a clinical psychologist²³ and was not

four years old, anal and vaginal object penetration by Christine Shay, and anal rape by Morrie Shay. *Id.* at 599.

16. *Id.* at 598.

17. *Id.* Borawick had been under the supervision of a number of physicians and therapists since 1980. During the fall of 1984, Borawick began to experience panic attacks. In 1985, she sought and received psychiatric treatment for the panic attacks on five or six occasions. Subsequently, a psychologist continued this treatment from April 1986 to July 1987. *Id.*

18. *Id.* at 598. Valerian St. Regis was 71 years old at the time of this action. At fifteen, St. Regis apprenticed with a retired Swiss psychiatrist, traveling in search of "faith healers." After apprenticing with the psychiatrist, St. Regis worked as a "stage hypnotist" on tour boats, and at nightclubs and resorts. He testified to being a hypnotherapist "on and off for 50 years." In 1987, Dr. Peters hired him as a consultant for the Pacific Medical Center, which St. Regis described as a "rather eclectic clinic." St. Regis had his own clinic, the St. Regis Modality Center. *Borawick v. Shay*, 842 F. Supp. 1501, 1507 (D. Conn. 1994).

19. *Borawick v. Shay*, 68 F.3d 597, 598 (2d Cir. 1995).

20. *Id.*

21. *Id.* at 598-99.

22. *Borawick v. Shay*, 842 F. Supp. 1501, 1507-1508 (D. Conn. 1994).

23. California Business & Professions Code § 2905 indicates that the "practice of psychology shall be defined as in Section 2903." California Business & Professions Code § 2903 states:

No person may engage in the practice of psycholo-

a member of the American Society of Clinical Hypnosis.²⁴ Furthermore, St. Regis had not previously appeared in court as an expert in hypnotherapy.²⁵ St. Regis testified that he kept no permanent records relating to his sessions with Borawick and that before hypnotizing her he had no expectation as to the type of information the hypnosis would uncover.²⁶ He used regression therapy to take Borawick back to the time between ages three and five.²⁷ St. Regis explained that he did not use hypnotic suggestion but instead asked broad questions such as

gy, or represent himself to be a psychologist, without a license granted under this chapter.... The practice of psychology is defined as rendering or offering to render for a fee to individuals, groups, organizations or the public any psychological service involving the application of psychological principles, methods, and procedures of understanding, predicting, and influencing behavior, such as the principles pertaining to learning, perception, motivation, emotions, and interpersonal relationships; and the methods and procedures of interviewing, counseling, psychotherapy, behavior modification, and hypnosis;...

The application of such principles and methods includes, but is not restricted to: diagnosis, prevention, treatment, and amelioration of psychological problems and emotional and mental disorders of individuals and group...

CAL. BUS. & PROF. CODE § 2903 (West 1995).

See also California Business & Professions Code § 2908 which states:

Nothing in this chapter [§ 2900 et seq] shall be construed to prevent qualified members of other recognized professional groups licensed to practice in the State of California, such as, but not limited to,...persons utilizing hypnotic techniques by referral from persons licensed to practice medicine,...from doing work of a psychological nature consistent with the laws governing their respective professions, provided they do not hold themselves out to the public by any title...[incorporating the word "psychology"].

CAL. BUS. & PROF. CODE § 2908 (WEST 1995).

24. Borawick v. Shay, 842 F. Supp. 1501, 1507 (D. Conn. 1994).

25. *Id.* at 1507.

26. Borawick v. Shay, 68 F.3d 597, 599 (2d Cir. 1995).

27. Borawick v. Shay, 842 F. Supp. 1501, 1507-1508 (D. Conn. 1994). The court considered St. Regis' credentials highly suspect. *Id.* See also Council on Scientific Affairs, *supra* note 2, at 1919. In regression therapy, hypnosis is used to re-experience feelings associated with a traumatic event. Subjects may behave in a manner that seems appropriate for the age when the traumatic event allegedly occurred. Sometimes these events are relived intensely, so that a person may describe the event in great detail. *Id.* at 1919.

“what happened?”²⁸ He claimed that during these sessions Borawick described episodes of ritual sexual abuse by Christine Shay and later by Morrie Shay.²⁹ St. Regis further testified that he did not reveal Borawick’s descriptions of the abuse to her because he felt to do so would have been “devastating” and because he believed that the memories would most likely surface in time.³⁰

Borawick testified that she experienced her first non-hypnotic memory of childhood sexual abuse by her father in February 1989, almost one year after her final session with St. Regis.³¹ In that same month, Borawick experienced her first non-hypnotically-induced memory of abuse by Christine Shay.³² Borawick stated that her first memory of abuse by Morrie Shay surfaced in 1990.³³ She also claimed to recall abuse by numerous others, including family members and her father’s friends.³⁴ Specifically, Borawick testified that she recalled being raped and sexually abused at the age of three by men whom she believed to be members of the Masons, and that she also remembered being forced to drink blood at a ritual involving a dead pig and people dressed in black

28. *Borawick v. Shay*, 68 F.3d 597, 599 (2d Cir. 1995).

29. *Id.*

30. *Id.*

31. *Id.* at 599. Borawick’s father was not a defendant in this matter. *Id.* Borawick had her first recollection of sexual abuse by a family member while driving in her car after a troublesome appointment with a holistic doctor. She continued to have additional memories every day or every other day thereafter. Two days later, Borawick had a telephone conversation with her sister who was living in a halfway house. During this conversation, Borawick’s sister revealed an incident of abuse by Christine Shay. Upon hearing of this alleged abuse, Borawick experienced a “flashback” and felt like her “lungs were collapsing,” causing her to “gasp for breath.” *Borawick v. Shay*, 842 F. Supp. 1501, 1502-1503 (D. Conn. 1994).

32. *Borawick v. Shay*, 68 F.3d 597, 599 (2d Cir. 1995). Subsequent memories of abuse surfaced in “bits and pieces.” Later on the night of Borawick’s conversation with her sister in February 1989 and at times thereafter until 1990 or 1991, Borawick had additional memories of grotesque sexual abuse by her aunt, Christine Shay. Later in 1990-1991, Borawick experienced further memories of abuse by Christine Shay. *Borawick v. Shay*, 842 F. Supp. 1501, 1503 (D. Conn. 1994).

33. *Borawick v. Shay*, 68 F.3d 597, 599 (2d Cir. 1995).

34. *Id.* at 609. The Second Circuit stated that Borawick’s testimony was too incredible to be believed. The court remarked that Borawick leveled “fanciful accusations” of sexual abuse against numerous people both familiar and unfamiliar to her and that these wild, uncorroborated accusations “erodes [their] confidence” in the allegations against the Shays. *Id.*

gowns.³⁵

III. PROCEDURAL HISTORY

On January 24, 1992, more than three years after her final session with St. Regis and almost three years after her first post-hypnotic recollections of sexual abuse, Borawick commenced an action against Christine and Morrie Shay.³⁶ Borawick alleged willful, wanton, and malicious sexual exploitation by the Shays in 1961 and 1964 and sought compensatory and punitive damages from the defendants.³⁷

Subsequently, the Shays filed an in limine motion seeking to exclude Borawick's testimony concerning her alleged hypnotically-refreshed memories.³⁸ The magistrate noted the existence of three different approaches to the question of admissibility of testimony of a previously hypnotized individual.³⁹ These approaches included per se admissibility, per se inadmissibility, and the procedural safeguards theory.⁴⁰ Relying on the procedural safeguards theory, the magistrate recommended granting the Shays' in limine motion, principally on the ground that St. Regis lacked appropriate qualifications.⁴¹

While Borawick's objections to the magistrate's in limine ruling were pending in the district court, the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals*,⁴² which defined the proper standard for the admission of expert testimony.⁴³ Borawick moved for reconsid-

35. *Id.* at 609.

36. *Borawick v. Shay*, 842 F. Supp. 1501, 1501 (D. Conn. 1994).

37. *Id.*

38. *Id.* at 1502.

39. *Id.* at 1504.

40. *Id.* These approaches are discussed at length in the background section of this note. See *infra* notes 53-133 and accompanying text.

41. *Borawick v. Shay*, 842 F. Supp. 1501, 1508 (D. Conn. 1994). The magistrate judge made an initial ruling on the in limine motion on March 24, 1993, setting forth the procedure that would be followed in deciding the in limine motion. The magistrate judge issued a ruling on May 26, 1993, after receiving further submissions from the parties. *Borawick v. Shay*, 68 F.3d 597, 599 (2d Cir. 1995).

42. 509 U.S. 579 (1993).

43. *Id.* In *Daubert*, the Supreme Court held that the test set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) for determining the proper standard for admission of expert testimony was superseded by the Federal Rules of Evi-

eration of the in limine ruling in light of *Daubert*, maintaining that *Daubert* set a new standard for admitting scientific evidence.⁴⁴ She claimed that the testimony resulting from her therapeutic use of hypnosis should be admitted because it satisfied the *Daubert* requirements for admission of scientific evidence.⁴⁵ The magistrate reconsidered the motion and reaffirmed her earlier ruling to exclude the post-hypnotic testimony.⁴⁶ The district court adopted the magistrate's recommendation.⁴⁷

The Shays subsequently moved for summary judgment, which the magistrate recommended granting.⁴⁸ The district court adopted this recommendation and entered summary judgment in favor of the Shays on May 10, 1994.⁴⁹ Borawick appealed that judgment to the Second Circuit.⁵⁰

On October 17, 1995, the Second Circuit affirmed the summary judgment for the Shays after considering the due process and other claims raised by Borawick.⁵¹ The United States Supreme Court denied certiorari in May 1996.⁵²

dence. The Court ruled that judges must determine whether an expert's testimony is scientifically valid before the testimony may be admitted. The flexible inquiry included examination of whether the theory had been tested, whether it had been subjected to peer review, what the potential or known error rate is, what sort of standards control the technique's operation, and whether the theory or technique has been generally accepted. *Id.* at 585-89. The Court assigned judges a "gatekeeping role" for the admissibility of scientific evidence. *Id.* at 597.

44. *Borawick v. Shay*, 68 F.3d 597, 599-600 (2d Cir. 1995). The Second Circuit did not believe that *Daubert* was directly applicable to the issue in Borawick's case. The court pointed out that *Daubert* concerned the admissibility of data derived from scientific techniques or expert opinions. However, the issues in *Borawick* were whether the plaintiff was a competent witness or whether her lay testimony was admissible. *Id.* at 610.

45. *Id.* The influence of the *Daubert* decision will be examined further. See *infra* notes 190-99 and accompanying text.

46. *Borawick v. Shay*, 842 F. Supp. 1501, 1509 (D. Conn. 1994).

47. *Id.* at 1501.

48. *Borawick v. Shay*, 68 F.3d 597, 600 (2d Cir. 1995).

49. *Id.*

50. *Id.* at 597.

51. *Id.* at 610. See *infra* notes 134-199 and accompanying text.

52. *Borawick v. Shay*, 116 S.Ct. 1869 (1996).

IV. BACKGROUND

Although the American Medical Association recognized hypnosis as a valid therapeutic technique in 1958, the accuracy of hypnotic recall has no established foundation.⁵³ Further, no consensus exists regarding the ability of hypnosis to enhance memory.⁵⁴ Generally, scientists fall into two categories concerning the issue of the effectiveness of hypnosis for memory enhancement.⁵⁵ One group of scientists optimistically regards hypnosis as simply an enhancement of the memory retrieval process and believes that the brain stores information like a videotape.⁵⁶ According to this theory, loss of memory is the inability to play back that videotape; hypnosis simply facilitates that retrieval.⁵⁷ Another group of scientists rejects this theory and views memory as much more complex.⁵⁸ These scientists espouse a "constructionist theory"⁵⁹ of memory which holds that many factors influence a memory as the brain creates representations of perceived events.⁶⁰ The constructionists believe that because memory is so malleable, hypnosis could actually distort memory over time.⁶¹

53. Council on Scientific Affairs, *supra* note 2, at 1918. See also *Rock v. Arkansas*, 483 U.S. 44 (1987). In this case, the United States Supreme Court held that, on constitutional grounds, a state's legitimate interest in barring unreliable evidence did not justify a per se exclusion of hypnotically-induced testimony by a criminal defendant. A criminal defendant has a constitutional right, derived from the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment and the Fifth Amendment privilege against self-incrimination, to testify in his or her own behalf. Further, the court held that the testimony must be corroborated and subject to several procedural safeguards. *Id.*

54. Council on Scientific Affairs, *supra* note 2, at 1918.

55. *Borawick v. Shay*, 68 F.3d 597, 602 (2d Cir. 1995); See generally Council on Scientific Affairs, *supra* note 2.

56. *Borawick v. Shay*, 68 F.3d 597, 602 (2d Cir. 1995). See also *Harker v. Maryland*, 800 F.2d 437, 439 (4th Cir. 1986); *United States v. Valdez*, 722 F.2d 1196, 1200 (5th Cir. 1984); *Little v. Armontrout*, 819 F.2d 1425, 1429 (8th Cir.), *aff'd* 835 F.2d 1240 (8th Cir. 1987) (en banc), *cert. denied*, 487 U.S. 1210 (1988).

57. *Borawick v. Shay*, 68 F.3d 597, 602 (2d Cir. 1995).

58. *Id.*

59. *Id.*

60. *Id.* (citing *United States v. Valdez*, 722 F.2d 1196, 1200 (5th Cir. 1984)). This memory evolves over time as additional input is received. *Borawick v. Shay*, 68 F.3d 597, 603 (2d Cir. 1995).

61. *Id.* at 603.

A. RELIABILITY PROBLEMS ASSOCIATED WITH HYPNOTICALLY-INDUCED MEMORIES

Although scientists differ on the effectiveness of hypnosis as a memory-enhancing tool, courts identify several problems with the reliability of hypnotically-refreshed recall.⁶² Memories resulting from hypnosis are subject to enhancement in the form of suggestibility,⁶³ confabulation⁶⁴ and memory hardening.⁶⁵ As a result of these phenomena, memories recalled by hypnosis can be a "mosaic of (1) appropriate actual events, (2) entirely irrelevant actual events, (3) pure fantasy, and (4) fantasized details supplied to make a logical whole."⁶⁶

A person undergoing hypnosis becomes more susceptible to suggestion.⁶⁷ Further, a hypnotized person may confabulate, that is, fill in gaps in a memory to make it understandable.⁶⁸ Suggestibility and confabulation spring from a desire to experience a successful hypnosis session and to have complete memories, thereby pleasing the hypnotist.⁶⁹ Hypnosis can also result in a phenomenon called memory hardening, which gives the subject enhanced confidence in the facts remembered, regardless of whether the facts are true or false.⁷⁰ Finally, after

62. *Borawick v. Shay*, 68 F.3d 597, 603 (2d Cir. 1995).

63. "Suggestible" is defined as easily influenced or led by suggestion. THE AMERICAN HERITAGE DESK DICTIONARY 927 (1981).

64. "Confabulate" is defined as to talk informally; to chat. THE AMERICAN HERITAGE DESK DICTIONARY 218 (1981). Confabulate means to fill in the gaps in memory to make the memory comprehensible. *Borawick v. Shay*, 68 F.3d 597, 603 (2d Cir. 1995).

65. *Borawick v. Shay*, 68 F.3d 597, 603 (2d Cir. 1995). "Memory hardening" causes enhanced confidence in the facts remembered, whether true or false. *Id.*

66. *Id.* (quoting Bernard L. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313, 335 (1980)).

67. *Borawick v. Shay*, 68 F.3d 597, 603 (2d Cir. 1995). A hypnotist may intentionally or unintentionally give verbal or nonverbal cues to a subject, who then may incorporate that cue into the recalled memory. Suggestibility may be enhanced by the desire to make the hypnosis session successful thereby pleasing the hypnotist. *Id.*

68. *Id.* The gaps are filled with irrelevant or unrelated facts and pure fantasy. As with susceptibility, confabulation can occur because of a desire to have complete and comprehensible memories to please the hypnotist. *Id.*

69. *Id.*

70. *Id.* This increased confidence is not indicative of the accuracy of the memory recalled through hypnosis and makes it more difficult for the jury or an expert to determine the credibility of the testimony. *Id.*

using hypnosis to refresh memory, individuals may lose the ability to distinguish between accurate and inaccurate memories.⁷¹

B. APPROACHES TO THE QUESTION OF ADMISSIBILITY OF HYPNOTICALLY-INDUCED TESTIMONY

With these reliability problems in mind, courts generally follow one of four different approaches to the question of admissibility of hypnotically-induced testimony: per se admissibility, per se inadmissibility, the procedural safeguards theory, and the totality-of-the-circumstances theory.⁷² The Second Circuit examined each of these approaches.⁷³

1. Per se admissibility approach

Some courts treat hypnotically-refreshed testimony as per se admissible under the theory that hypnosis goes to the question of witness credibility, not witness competence.⁷⁴ The 1968 Maryland case, *Harding v. State*,⁷⁵ followed this approach which permitted hypnotically-refreshed testimony resulting from hypnosis performed by a qualified professional.⁷⁶

Admitting hypnotically-induced testimony without restriction, even while informing the jury of the potential problems of

71. *Id.* The subject becomes more prone to speculation than if the subject had relied on normal memory recall. This phenomenon may also result in "source amnesia" where the subject believes that a statement heard prior to hypnosis is a product of the subject's memory. *Id.*

72. *Borawick v. Shay*, 68 F.3d 597, 604-605 (2d Cir. 1995).

73. *Id.* at 604-609.

Id. See, e.g., *Kline v. Ford Motor Co.*, 523 F.2d 1067, 1069 (9th Cir. 1975) ("That present memory depends upon refreshment claimed to have been induced under hypnosis goes to the credibility of [the witness'] testimony not to [the witness'] competence as a witness.").

75. *Harding v State*, 246 A.2d 302 (Md. 1968).

76. *Id.* This case involved a rape and shooting victim who recalled a more clear picture of the events surrounding her experience with the accused after undergoing hypnosis. The court held that the testimony of the victim was sufficient to support the jury's verdict, since the hypnosis procedure was performed by a qualified professional under circumstances which leaned toward credibility. Although this case is credited as being the first to espouse the per se admissibility approach, the court's reasoning is remarkably similar to that used in determining admissibility under the procedural safeguards theory. For a discussion of the procedural safeguards theory, see *infra* notes 102-115. *Id.*

such testimony, creates the danger of having a lay jury speculate as to the consequences of the use of particular hypnosis techniques.⁷⁷ The *per se* admissibility approach requires great faith in the jury's ability to accurately weigh the credibility of the previously hypnotized witness' testimony in light of cross-examination, jury instructions, and expert testimony relating to hypnosis.⁷⁸ However, popular misconceptions regarding the accuracy and reliability of hypnotically-refreshed memory may cause a jury to believe that hypnosis is a "panacea for lost memory."⁷⁹ Consequently, the jury may disregard expert testimony suggesting the inaccuracy and unreliability of hypnotically-induced testimony.⁸⁰ The *per se* admissibility approach, therefore, could be inadequate to protect defendants in civil or criminal cases from unfounded charges.⁸¹

Moreover, witnesses who have undergone hypnosis are virtually immune to effective cross examination due to memory hardening, suggestibility, or confabulation.⁸² Although the *per se* admissibility approach was popular when courts initially addressed the admissibility question, courts have increasingly disfavored this approach and have rarely followed it since 1980.⁸³

2. *Per se* inadmissibility approach

At the other end of the spectrum, some courts adopt the *per se* inadmissibility approach when considering hypnotically-refreshed testimony, presuming that the witness is incompetent to testify to such matters.⁸⁴ Courts using this approach cite the possible distortion of memory due to hypnosis as im-

77. *Borawick v. Shay*, 68 F.3d 597, 607 (2d Cir. 1995).

78. *Id.* at 604. *See also* *People v. Zayas*, 546 N.E.2d 513 (Ill. 1989).

79. *People v. Zayas*, 546 N.E.2d 513, 516 (Ill. 1989).

80. *Id.* *See also* 27 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6011 at 124, 127 (1990) [hereinafter WRIGHT & GOLD].

81. *Borawick v. Shay*, 68 F.3d 597, 607 (2d Cir. 1995).

82. *People v. Zayas*, 546 N.E.2d 513, 516 (Ill. 1989).

83. *Borawick v. Shay*, 68 F. 3d 597, 604 (2d Cir. 1995). *See also* *People v. Zayas*, 546 N.E.2d 513, 516 (Ill. 1989).

84. *Borawick v. Shay*, 68 F. 3d 597, 604 (2d Cir. 1995). *See also* *People v. Shirley*, 723 P.2d 1354 (Cal. 1982), *cert. denied*, 459 U.S. 860 (1982); *People v. Zayas*, 546 N.E.2d 513, 516 (Ill. 1989).

possible to circumvent and so substantial that "the game is not worth the candle."⁸⁵ Advocates of this approach deem the evidence inadmissible, reasoning that no safeguards can adequately ensure reliability.⁸⁶

Use of the per se inadmissibility approach avoids the problem of reliability altogether but ignores Federal Rule of Evidence 601 which contains a presumption of witness competence.⁸⁷ Further, per se exclusion risks the elimination of reliable testimony.⁸⁸

A landmark case construing this approach is *People v. Shirley*.⁸⁹ This California Supreme Court case involved testimony of a previously hypnotized witness regarding the events of the night she was allegedly raped.⁹⁰ The court held that because hypnosis is so widely viewed as unreliable, the witness' testimony as to all matters relating to events remembered after the hypnosis was inadmissible.⁹¹ The *Shirley* court distinguished the Maryland decision in *Harding* by noting that analysis of the admissibility question in *Harding* simply reiterated that hypnosis goes to the weight, and not to the admissibility, of the testimony.⁹²

85. *Borawick v. Shay*, 68 F.3d 597, 604 (2d Cir. 1995) (citing *People v. Shirley*, 723 P.2d 1354 (Cal. 1982), cert. denied, 459 U.S. 860 (1982)).

86. *Borawick v. Shay*, 68 F.3d 597, 604 (2d Cir. 1995).

87. *Id.* at 607. Federal Rule of Evidence 601 states:

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

FED. R. EVID. 601.

Federal Rule of Evidence 601 "abolished almost all grounds for witness disqualification based on new assumptions that took a more optimistic view of witness reliability and jury perceptiveness." WRIGHT & GOLD, *supra* note 80, at 124.

88. *Borawick v. Shay*, 68 F.3d 597, 607 (2d Cir. 1995).

89. *People v. Shirley*, 723 P.2d 1354 (Cal. 1982), cert. denied, 459 U.S. 860 (1982).

90. *Id.*

91. *Id.* at 1375.

92. *Id.* at 1364.

Subsequent to early decisions involving hypnosis, courts began to acknowledge the dangers inherent in the use of hypnosis to refresh memory.⁹³ Although certain courts developed safeguards permitting the admission of such testimony,⁹⁴ the *Shirley* court declared that no amount of safeguards could eliminate these dangers.⁹⁵ Accordingly, the *Shirley* court applied the per se inadmissibility approach and did not allow hypnotically-induced testimony into evidence.⁹⁶

With regard to previously hypnotized criminal defendants, the United States Supreme Court ruled that Arkansas' per se inadmissibility rule was unconstitutional.⁹⁷ In *Rock v. Arkansas*,⁹⁸ the Court acknowledged the problems involved in hypnosis, but concluded that certain procedural safeguards could reduce the impact of potential problems.⁹⁹ The Court held that per se inadmissibility was largely an "arbitrary" rule that violated a criminal defendant's right to testify on his or her own behalf.¹⁰⁰ The Court explicitly limited its holding that

93. *Id.* at 1364-65. These dangers include memory hardening, suggestibility, and confabulation. See *supra* notes 62-71 and accompanying text.

94. For example, the Ninth Circuit suggested several safeguards for use in criminal cases to eliminate "potential for abuse." See *United States v. Adams*, 581 F.2d 193, 198-199 (9th Cir. 1978). In *United States v. Awkard*, 597 F.2d 667, 669 (9th Cir. 1979), the court explained, in another footnote, that the purpose of the *Adams* safeguards is "to ensure that post-hypnosis statements are truly the subject's own recollections." Procedural safeguards continued to gain acceptance in other courts. See *People v. Smrekar*, 385 N.E.2d 848 (Ill. 1979) (where the court held admissible the testimony of a previously hypnotized witness only because a number of factors in the record indicated reliability). The procedural safeguards theory became more elaborate and was finally enunciated as a test in *State v. Hurd*, 432 A.2d 86 (N.J. 1981); see *infra* notes 102-115 and accompanying text.

95. *People v. Shirley*, 723 P.2d 1354, 1365-1366 (Cal. 1982), cert. denied, 459 U.S. 860 (1982).

96. *Id.* at 1366, 1386-87.

97. *Rock v. Arkansas*, 483 U.S. 44 (1987).

98. *Id.* Here, a criminal defendant was hypnotized in order to refresh her memory of the precise details of a shooting. *Id.*

99. *Id.* at 49-53. The Supreme Court found that, like the truthfulness of other witnesses, the defendant's veracity regarding post-hypnotic testimony could be adequately tested by cross-examination. *Id.* at 52.

100. *Id.* at 51-53, 61. The Supreme Court, while not completely prepared to endorse the use of hypnosis as an investigative tool, stated that Arkansas had not justified the exclusion of the whole of a defendant's testimony that the defendant is unable to prove as being the product of pre-hypnosis memory. Further, the Court found that wholesale inadmissibility of a defendant's testimony is an "arbitrary restriction" on the right to testify in the absence of clear evidence by the State repudiating the validity of all post-hypnotic recollections. *Id.*

the per se inadmissibility approach is unconstitutional by refusing to address the appropriate rule for a witness other than a previously hypnotized criminal defendant.¹⁰¹

3. Procedural safeguards approach

The procedural safeguards approach, along with the totality-of-the-circumstances approach discussed *infra*, provides a middle ground for analyzing the admissibility question.¹⁰² In particular, this approach attempts to account for the shortcomings of the per se theories.¹⁰³

The New Jersey Supreme Court articulated the procedural safeguards theory in the seminal case of *State v. Hurd*.¹⁰⁴ The New Jersey Court established and required adherence to a certain set of safeguards to ensure reliability of hypnotically-refreshed memories before admission of the testimony.¹⁰⁵ According to the court's opinion, the inflexible rule of per se inadmissibility allowed the possibility of excluding evidence equally as trustworthy as eyewitness testimony.¹⁰⁶

In order to allow testimony based on hypnotically-refreshed memories, the court adopted several procedural safeguards.¹⁰⁷ First, a psychologist or psychiatrist experienced in the use of hypnosis must conduct the hypnosis session.¹⁰⁸ Second, the hypnotist should be independent of, and not regularly employed by, either party to the action.¹⁰⁹ Third, any information given to the hypnotist by the parties or by law en-

101. *Id.* at 58 n.15.

102. *Borawick v. Shay*, 68 F.3d 597, 605 (2d Cir. 1995).

103. *Id.*

104. 432 A.2d 86 (N.J. 1981).

105. *Id.* at 96-97.

106. *Id.* at 94.

107. *Id.* at 96-97. The court adopted these requirements on the suggestion of Dr. Martin Orne, a renowned expert witness in the area of hypnosis. The court stated that "[b]efore [a party] may introduce hypnotically-refreshed testimony, the party must demonstrate compliance with these requirements." *Id.* at 96.

108. *Id.* at 96. The hypnotist should also be qualified as an expert to aid the trier of fact in evaluating the procedures used in the session. *Id.*

109. *State v. Hurd*, 432 A.2d 86 (N.J. 1981). This safeguard attempts to ensure that bias does not motivate the professional to ask leading questions or engage in other suggestive conduct with the subject. *Id.*

forcement officials prior to the hypnosis session must be recorded.¹¹⁰ Fourth, a detailed record of any pre-hypnosis memories elicited from the subject must exist before hypnosis begins.¹¹¹ Fifth, all contact between the subject and the hypnotist during the hypnosis session must be recorded.¹¹² Sixth, during all phases of the hypnosis, from the pre-hypnosis interview to any post-hypnotic discussion, only the hypnotist and the subject may be present.¹¹³

The *Hurd* court further required the assessment of the reliability, and consequently the admissibility, of such testimony according to a non-exclusive list of considerations.¹¹⁴ These considerations include the type of memory loss that the hypnosis restored as well as the specific technique used, whether the memory loss is likely to result in normal recall if hypnosis is properly used, and whether the witness has any discernible motivation for remembering a false version of events.¹¹⁵

4. Totality-of-the-circumstances approach

The totality-of-the-circumstances approach is the theory most often used by the federal courts in cases that examine the admissibility of hypnotically-induced testimony.¹¹⁶ This flexi-

110. *Id.* at 96. This safeguard helps the court determine the type of information the hypnotist could have given to the subject during the session either directly or through suggestion. *Id.*

111. *Id.* With this description, the hypnotist can avoid influencing the facts as the subject remembered them before hypnosis and can also avoid adding new details. *Id.*

112. *Id.* at 97. With this safeguard, a record will exist of the pre-hypnosis interview, the hypnotic session itself, and the post-hypnotic discussion. This record will enable the trier of fact to determine the reliability of the procedures used during the sessions. *Id.*

113. *Id.* Although other people more familiar with the situation may be better able to conduct some of the questioning, the risk of unacceptable questions resulting in suggestibility is high. *Id.*

114. *State v. Hurd*, 432 A.2d 86, 95-96 (N.J. 1981).

115. *Id.* at 97. Several courts have followed the *Hurd* safeguard theory or a theory modeled on the *Hurd* factors. See *House v. State*, 445 So. 2d 815, 826-827 (Miss. 1984); *State v. Weston*, 475 N.E.2d 805, 813 (Ohio 1984).

116. *Borawick v. Shay*, 68 F.3d 597, 605 (2d Cir. 1995). See also WRIGHT & GOLD, *supra* note 80, at 171-73. Cases following the totality-of-the-circumstances approach include *McQueen v. Garrison*, 814 F.2d 951 (4th Cir. 1987) *cert. denied*, 484 U.S. 944 (1987); *Wicker v. McCotter*, 783 F.2d 487 (5th Cir. 1986) *cert. denied*, 478 U.S. 1010 (1986); *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112

ble approach to the admissibility question avoids the rigidity of the other approaches.¹¹⁷ In particular, this approach focuses on the issue of reliability, and therefore admissibility, of the proffered hypnotically-induced testimony.¹¹⁸

The totality-of-the-circumstances approach allows a judge to examine all relevant circumstances that affect reliability.¹¹⁹ The approach requires a factual inquiry into the hypnosis procedures used to evaluate reliability.¹²⁰ Corroborating evidence, if present, must be examined to further balance the effect of the testimony that results from hypnosis.¹²¹ In addition, the court must assess the purpose of the hypnosis, the possibility of pre-hypnotic suggestions, the presence of a permanent record of the session, the qualifications of the hypnotist, the subject's susceptibility to hypnosis, and the expert testimony regarding reliability.¹²² The court should weigh these factors when exercising its discretion whether to admit the hypnotically-induced testimony.¹²³

The totality-of-the-circumstances approach is preferable to the strict procedural safeguards theory because the presence or absence of procedural safeguards may not always mitigate the problems associated with hypnotically-induced testimony, such as suggestibility, confabulation, and memory hardening.¹²⁴ If the court applies the procedural safeguard approach, hypnosis may take on an "aura of reliability" which may mislead the jury to disregard the potential dangers.¹²⁵ A finding of the presence of the *Hurd* procedural safeguards does not compel admission of hypnotically-induced testimony and, conversely, a finding of the absence of the safeguards does not require the

(8th Cir. 1985) *cert. denied*, 475 U.S. 1046 (1986).

117. *Borawick v. Shay*, 68 F.3d 597, 607 (2d Cir. 1995).

118. *Id.*

119. *Id.* at 608.

120. *Id.*

121. *Id.*

122. *Borawick v. Shay*, 68 F.3d 597, 608 (2d Cir. 1995). Essentially the *Borawick* court followed approaches used by the Fourth Circuit in *McQueen v. Garrison*, 814 F.2d 951 (4th Cir. 1987) and by the Eighth Circuit in *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112 (8th Cir. 1985).

123. *Borawick v. Shay*, 68 F.3d 597, 608 (2d Cir. 1995).

124. *Id.* at 607.

125. *Id.* (quoting *WRIGHT & GOLD*, *supra* note 80, at 169-170).

conclusion that the hypnotically-induced testimony is unreliable.¹²⁶

Although federal courts recognize the benefits of the *Hurd* procedural safeguards, many conclude that courts should have discretion to balance all factors in determining the reliability of hypnotically-refreshed testimony, including weighing such testimony's probative value against its prejudicial effect.¹²⁷ The *Hurd* guidelines generally represent the type of inquiry into reliability which is required, but a court need not automatically rely on these safeguards to determine admissibility.¹²⁸ Even if all of the *Hurd* safeguards are satisfied, a party may still demonstrate by expert testimony that hypnosis distorted a witness' memory.¹²⁹ On the other hand, even when flawed hypnosis procedures exist, a court may decide that a witness' testimony was, nonetheless, not affected by the dangers associated with hypnosis.¹³⁰

By following the totality-of-the-circumstances theory, the *Borawick* court avoided the inflexibility associated with per se approaches.¹³¹ The court determined that per se rules of inclusion or exclusion were "too blunt a tool" with which to address concerns regarding the admissibility of hypnotically-refreshed testimony.¹³² Ultimately, the Second Circuit relied on the totality-of-the-circumstances theory to evaluate the admissibility of *Borawick's* testimony.¹³³

126. *Id.* at 607. The Second Circuit found that even if hypnosis procedures are flawed, a trial court may still find indicia of reliability sufficiently independent of the dangers associated with hypnosis. *Id.* at 608. (citing *McQueen v. Garrison*, 814 F.2d 951, 958 (4th Cir. 1987)).

127. *Id.* at 605. The Second Circuit adopted this theory of admissibility after examination of the other three approaches. *Borawick v. Shay*, 68 F.3d 597 (2d Cir. 1995).

128. *Borawick v. Shay*, 68 F.3d 597, 606 (2d Cir. 1995) (citing *McQueen v. Garrison*, 814 F.2d 951, 958 (4th Cir. 1987) (referring to Bernard Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313 (1980)).

129. *McQueen v. Garrison*, 814 F.2d 951, 958 (4th Cir. 1987).

130. *Id.*

131. *Borawick v. Shay*, 68 F.3d 597, 609 (2d Cir. 1995).

132. *Id.* at 607.

133. *Id.* at 607-608.

V. COURT'S ANALYSIS

The Second Circuit began its analysis of *Borawick* by acknowledging that it presented a case of first impression in the Circuit.¹³⁴ Although state and federal courts had previously considered the issue of admissibility of testimony of memories elicited as a result of hypnosis, nearly all of these cases dealt with the issue in the context of hypnosis specifically intended to enhance a memory of a particular known or suspected occurrence.¹³⁵ *Borawick*, however, addressed the issue of whether a court should admit testimony about memories of childhood sexual abuse recalled for the first time in adulthood as a result of hypnosis administered as part of a general psychotherapy session.¹³⁶

A. THE DISTRICT COURT'S APPROACH USING MANDATORY SAFEGUARDS

The district court approached the issue of admissibility of hypnotically-induced testimony by evaluating the facts of *Borawick's* case in light of specific procedural safeguards.¹³⁷ These safeguards necessitated a showing that the hypnotist possessed the appropriate qualifications, avoided adding elements to the subject's recollections during hypnosis, and made available a permanent record of the hypnosis sessions.¹³⁸ An additional safeguard required that the hypnotically-induced testimony be accompanied by corroborating evidence.¹³⁹

In evaluating *Borawick's* testimony according to these safeguards, the district court found that although the evidence did not show that St. Regis added anything to *Borawick's* recollections, he lacked proper qualifications as a hypnotist.¹⁴⁰ Further, St. Regis could not produce a record of the hypnosis

134. *Borawick v. Shay*, 68 F.3d 597, 598 (2d Cir. 1995).

135. *Id.* at 600. *See supra* note 7.

136. *Borawick v. Shay*, 68 F.3d 597, 600 (2d Cir. 1995).

137. *Borawick v. Shay*, 842 F. Supp. 1501, 1505 (D. Conn. 1994). *See also* *State v. Hurd*, 432 A.2d 86, 95-96 (N.J. 1981).

138. *Id.* at 1505.

139. *Id.*

140. *Id.* at 1507-1509.

sessions.¹⁴¹ At this stage, the court did not decide the question of corroborating evidence.¹⁴² The cornerstone of the court's decision to grant the in limine motion excluding Borawick's testimony of sexual abuse was St. Regis' lack of appropriate qualifications.¹⁴³

B. THE SECOND CIRCUIT'S REVIEW OF THE DISTRICT COURT'S DECISION: THE TOTALITY-OF-THE-CIRCUMSTANCES APPROACH

The Second Circuit found the procedural safeguards approach, which the district court extracted from *Hurd*, to be too rigid.¹⁴⁴ After reviewing the possible approaches to the admissibility of hypnotically-refreshed testimony,¹⁴⁵ the Second Circuit settled on the more flexible totality-of-the-circumstances approach as the most appropriate because it avoided the strict admissibility rules of the alternative approaches.¹⁴⁶

The Second Circuit provided two rationales for choosing the totality-of-the-circumstances approach.¹⁴⁷ First, reliance on procedural safeguards as the sole criteria of admissibility may not sufficiently illustrate the problems associated with hypnosis.¹⁴⁸ In particular, a simple set of safeguards may give hypnotically-refreshed testimony an "aura of reliability" in the eyes of the jury.¹⁴⁹ Second, relying on the Fourth Circuit's decision in *McQueen v. Garrison*,¹⁵⁰ the Second Circuit acknowledged the drawbacks of the procedural safeguards theory.¹⁵¹ The *McQueen* court reasoned that although the safeguards are relevant to whether the hypnotically-induced testi-

141. *Id.*

142. *Borawick v. Shay*, 842 F. Supp. 1501, 1508 n.15. (D. Conn. 1994).

143. *Id.* at 1507-1509.

144. *Borawick v. Shay*, 68 F.3d 597, 607 (2d Cir. 1995). The Second Circuit reviewed the district court's grant of the in limine motion under a *de novo* standard. *Id.* at 601.

145. *See supra* notes 72-133 and accompanying text for a discussion of the approaches to the admissibility of hypnotically-induced testimony. The four approaches to admissibility include per se admissibility, per se inadmissibility, the procedural safeguards theory, and the totality-of-the-circumstances theory.

146. *Borawick v. Shay*, 68 F.3d 597, 607-608 (2d Cir. 1995).

Id. at 607-608.

148. *Id.* at 607.

149. *Id.* *See also* WRIGHT & GOLD, *supra* note 80, at 169-170.

150. 814 F.2d 951 (4th Cir. 1987).

151. *Borawick v. Shay*, 68 F.3d 597, 605-606 (2d Cir. 1995).

mony is properly admitted, admissibility must not rest exclusively on the reliability of the procedures used in hypnosis.¹⁵² That court explained that notwithstanding the presence of all safeguards, a party may still use expert testimony to demonstrate that hypnosis distorted a witness' memory.¹⁵³ The *McQueen* court further reasoned that if flawed hypnosis procedures exist, a court might nonetheless find through other corroborating evidence that the witness' testimony is sufficiently removed from the dangers associated with hypnosis and is therefore admissible.¹⁵⁴

An Eighth Circuit decision, *Sprynczynatyk v. General Motors Corp.*,¹⁵⁵ supports the Fourth Circuit's decision in *McQueen*.¹⁵⁶ In *Sprynczynatyk*, the Eighth Circuit instructed district courts, in cases involving hypnosis, to conduct pretrial hearings on procedures used during hypnosis sessions to assess the effect of hypnosis on the reliability of the associated testimony.¹⁵⁷ Although the *Sprynczynatyk* court adopted the *Hurd* safeguards in its analysis, it limited district courts to a determination regarding the degree to which hypnotists followed the safeguards.¹⁵⁸ The court's analysis of the admissibility question continued with consideration of several extrinsic factors.¹⁵⁹ Finally, it directed district courts to determine, on a case-by-case basis and "in view of all the circumstances," whether the proposed testimony is sufficiently reliable.¹⁶⁰ In effect, courts must determine whether the risk that the testimony reflects a distorted memory is so great that the probative

152. *McQueen v. Garrison*, 814 F.2d 951, 958 (4th Cir. 1987).

153. *Id.*

154. *Id.*

155. 771 F.2d 1112 (8th Cir. 1985).

156. *Id.*

157. *Id.* at 1122-23. The proponent of the hypnotically-enhanced testimony bears the burden of proof during this proceeding. *Id.* at 1123.

158. *Id.* at 1123.

159. *Id.* These factors include the appropriateness of using hypnosis for the kind of memory loss involved and whether any evidence exists to corroborate the hypnotically-refreshed testimony. *Id.*

160. *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1123 (8th Cir. 1985).

value of the testimony is destroyed.¹⁶¹

The *Borawick* court followed the flexible approach used in the Fourth and Eighth Circuits, consisting of an examination of non-exclusive factors based on all relevant circumstances.¹⁶² This examination embodies the totality-of-the-circumstances approach.¹⁶³ Determination of the admissibility of hypnotically-refreshed testimony requires balancing these factors on a case-by-case basis.¹⁶⁴

1. Non-Exclusive Factors

After deciding on the totality-of-the-circumstances approach to analyze the question of the admissibility of hypnotically-refreshed testimony in *Borawick*, the Second Circuit suggested a non-exclusive list of factors for a district court to weigh on a case-by-case basis when ruling on admissibility.¹⁶⁵ These factors, while more refined and not mandatory, resemble the procedural safeguards enunciated in *Hurd*.¹⁶⁶

A court should consider whether the refreshed memory concerns a known public event experienced by the subject or whether it is refreshed, albeit not deliberately, as a result of therapy.¹⁶⁷ A court should also consider whether, before or during the hypnosis, the hypnotist made any extraneous suggestions regarding the subject of hypnosis which may have become part of the witness' memory.¹⁶⁸ Further, a court should consider the presence or absence of a permanent record of the hypnosis sessions to ascertain whether the hypnotist

161. *Id.* The Eighth Circuit ruled that the evidentiary problem created by hypnosis is directly within the control of the district courts. The district court, not the jury, has authority to make a preliminary determination of admissibility as it does with other evidentiary questions. *Id.*

162. *Borawick v. Shay*, 68 F.3d 597, 608 (2d Cir. 1995). The Fourth Circuit decision is *McQueen v. Garrison*, 814 F.2d 951, 958 (4th Cir. 1987). The decision from the Eighth Circuit is *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112 (8th Cir. 1985).

163. *Borawick v. Shay*, 68 F.2d 597, 607-608 (2d Cir. 1995).

164. *Id.* at 608.

165. *Id.*

166. *Id.* See also *State v. Hurd*, 432 A.2d 86, 96-97 (N.J. 1981).

167. *Borawick v. Shay*, 68 F.3d 597, 608 (2d Cir. 1995).

168. *Id.*

used reliable procedures.¹⁶⁹ Also, a court should consider the hypnotist's qualifications.¹⁷⁰ Additionally, the court should weigh any corroborating evidence that tends to support the reliability of the hypnotically-refreshed memories.¹⁷¹ Further, evidence of the subject's ability to be hypnotized may be relevant.¹⁷² A court should also consider any expert evidence offered by the parties as to the reliability of the procedures used by the hypnotist.¹⁷³ Lastly, a court should hold a pretrial evidentiary hearing to enable the parties to present expert evidence and to test credibility through cross-examination.¹⁷⁴

The Second Circuit held that while exercising its discretion whether to admit the post-hypnotic testimony, the trial court should weigh the factors in favor and against the reliability of the hypnosis procedure.¹⁷⁵ The party seeking to admit the hypnotically-refreshed testimony has the burden of persuading the district court that the factors lean toward admissibility.¹⁷⁶

2. Conclusion of the *Borawick* Court

The Second Circuit found the district court's approach to the admissibility question too rigid because it did not adequately address the problems associated with hypnotically-induced testimony and because it created a risk of exclusion of reliable testimony.¹⁷⁷ Nevertheless, the Court affirmed the district court's ruling on the in limine motion to exclude Borawick's hypnotically-induced testimony.¹⁷⁸ The appellate court used the totality-of-the-circumstances theory to exclude Borawick's testimony of childhood sexual abuse.¹⁷⁹ The perceived incredibility of Borawick's allegations further strengthened the court's decision.¹⁸⁰

169. *Id.*

170. *Id.*

171. *Id.*

172. *Borawick v. Shay*, 68 F.3d 597, 608 (2d Cir. 1995).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 608-609. *See also State v. Hurd*, 432 A.2d 86, 97 (N.J. 1981).

177. *Borawick v. Shay*, 68 F.3d 597, 607-608 (2d Cir. 1995).

178. *Id.* at 609.

179. *Id.*

180. *Id.* Borawick made far-fetched and wild accusations against many people,

The Second Circuit acknowledged that St. Regis lacked appropriate qualifications as a hypnotist.¹⁸¹ Although Borawick and Dr. Peters stated that they considered St. Regis to be fully qualified, the Court noted that his education ended in high school and that he had no formal training in psychiatry or psychotherapy.¹⁸² In addition, the Court emphasized that St. Regis kept no permanent record of his sessions with Borawick and did not provide any written explanation of the procedures he used.¹⁸³ As a result, the Second Circuit acknowledged that the district court had no means to evaluate whether St. Regis made suggestive remarks to Borawick, possibly affecting her recollections during hypnosis.¹⁸⁴

Finally, the Court noted that, prior to testifying, St. Regis read portions of Borawick's deposition transcript.¹⁸⁵ This caused the Second Circuit to doubt St. Regis because of the possibility that his testimony may simply have reflected his reading of Borawick's deposition rather than his true experience.¹⁸⁶

Borawick presented corroborating evidence in support of her allegations, including letters in which Borawick's sister recounted her own experiences with childhood sexual abuse.¹⁸⁷ However, the Second Circuit found this evidence too weak to overcome the strong evidence against admissibility.¹⁸⁸ For the foregoing reasons, the Second Circuit held that the totality-of-the-circumstances theory barred Borawick from testifying regarding her memories of sexual abuse.¹⁸⁹

some familiar to her and some unfamiliar. These allegations, including sexual abuse by men whom Borawick believed were members of the Masons as well as rituals involving dead pigs and people dressed in black robes, reinforced the Second Circuit's decision to exclude her testimony. *Id.*

181. Borawick v. Shay, 68 F.3d 597, 607-609 (2d Cir. 1995).

182. *Id.* at 609.

183. *Id.*

184. *Id.*

185. *Id.*

186. Borawick v. Shay, 68 F.3d 597, 609 (2d Cir. 1995).

187. *Id.*

188. *Id.*

189. *Id.*

C. APPLYING THE *DAUBERT* STANDARD FOR ADMISSION OF SCIENTIFIC EVIDENCE

After affirming the in limine motion excluding Borawick's testimony, the Second Circuit gave cursory consideration to Borawick's argument that the Supreme Court's recent decision in *Daubert v. Merrell Dow Pharmaceuticals*¹⁹⁰ rendered her testimony admissible.¹⁹¹ In *Daubert*, the Supreme Court ruled that a judge should undertake a preliminary evaluation of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning and methodology properly can be applied to the facts at issue.¹⁹² Pertinent factors include whether the scientific theory in evidence could be tested, whether it had been subjected to peer review and publication in the scientific community, whether the known or potential rate of error is considerable, whether the controls used were adequate, and whether the theory had gained general acceptance in the relevant scientific community.¹⁹³

The Second Circuit held that the *Daubert* decision did not apply directly to the instant case because *Daubert* created standards addressed to the admissibility of data derived from scientific techniques or expert opinions.¹⁹⁴ By contrast, the *Borawick* court was concerned with the question of whether the plaintiff was a competent witness and whether her testimony was admissible.¹⁹⁵

190. 509 U.S. 579 (1993).

191. *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995).

192. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592-593 (1993). This duty of assessment derives from the Federal Rules of Evidence, especially Rule 702. *Id.* at 595.

Federal Rule of Evidence 702 reads:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702.

193. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593-594 (1993).

194. *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995).

195. *Id.*

Although the Second Circuit held that *Daubert* did not directly apply, the court maintained that its position was consistent with the *Daubert* decision.¹⁹⁶ In *Daubert*, the Supreme Court articulated a system by which a court rules on the admissibility of scientific evidence by weighing various considerations on a case-specific basis.¹⁹⁷ Further, *Daubert* provides for admission of expert scientific testimony, regardless of whether it is generally accepted, if its reliability can be sufficiently demonstrated.¹⁹⁸ If Borawick had presented some indicia of reliability regarding the methods used in and the results of her hypnosis, the Second Circuit might have been more sympathetic to her *Daubert*-based argument.¹⁹⁹

VI. CRITIQUE

The *Borawick* decision is important because it addresses the admissibility of memories induced through clinical hypnosis as a part of psychotherapy, a use of hypnosis not widely considered by other courts.²⁰⁰ Previously, courts primarily considered testimony resulting from forensic hypnosis used to enhance memory of a specific event.²⁰¹ Generally, courts and parties have failed to recognize the differences between these uses of hypnosis.²⁰²

A. COURTS SHOULD UTILIZE DIFFERENT EVIDENTIARY STANDARDS DEPENDING ON THE PURPOSE OF THE HYPNOSIS

Forensic and clinical hypnotists use similar memory enhancing techniques to attain different ends.²⁰³ The forensic hypnotist uses hypnosis to retrieve specific memories which will be helpful in reconstructing the past in a legal proceeding.²⁰⁴ A clinical hypnotist uses hypnosis to better understand a subject's subjective perceptions of the past rather than to pre-

196. *Id.*

197. *Id.*

198. *Id.*

199. *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995).

200. *Borawick v. Shay*, 68 F.3d 597, 600 (2d Cir. 1995).

201. *Id.* See *supra* note 7.

202. *Kanovitz*, *supra* note 10, at 1192 n.17.

203. *Id.* at 1217.

204. *Id.* at 1217-18.

serve those memories for litigation.²⁰⁵ Accordingly, the clinical hypnotist runs a greater risk of emotional involvement in the subject's recovery and, therefore, may overstep the boundaries of interviewing neutrality.²⁰⁶ Since the forensic hypnotist approaches hypnosis with litigation in mind, he or she can more easily avoid giving direction to the hypnotized subject that would interfere with original memories.²⁰⁷ With this focus, the forensic hypnotist may maintain an emotional distance from the subject and not influence the emerging memory.²⁰⁸

The diverse approaches used by hypnosis professionals indicate the need for standards concerning admissibility of such testimony based on the purpose of the hypnosis. Clinical hypnotists are often not well informed about the legal implications of a hypnosis session conducted in a relaxed manner.²⁰⁹ Therefore, memories recalled in the clinical setting have a greater risk of contamination from suggestibility, confabulation, and memory hardening.²¹⁰ Conversely, forensic hypnotists may realize the legal implications of inaccurate or unbelievable memories.²¹¹ These hypnotists usually do not reveal any expectations to the subject in advance of the session or ask the subject leading questions.²¹²

As a result of the diverse approaches used by hypnotists, testimony resulting from forensic hypnosis, used to recall a specific event, may be more reliable and therefore should enjoy greater weight on the issue of admissibility. Memories recalled during clinical therapy for other reasons should be subject to

205. *Id.* at 1218.

206. *Id.* Leading questions and suggestions can slip into a clinical hypnotist's session without the awareness of the hypnotist because of this emotional attachment. The interview becomes more automatic than carefully orchestrated to preserve accurate memories. *Id.* at 1218-19.

207. Kanovitz, *supra* note 10, at 1217-18.

208. *Id.* at 1218.

209. *Id.* at 1218 n.141. Clinical hypnotists can be ignorant of the potential of hypnosis to change memory. Consequently, clinical literature is beginning to inform these therapists about the legal ramifications of hypnosis and to recommend integrating specified forensic procedural safeguards into hypnotic therapy sessions. Some writers suggest videotaping the clinical hypnosis session. *Id.* at 1218 n.141.

210. *Id.* See *supra* notes 62-71.

211. Kanovitz, *supra* note 10, at 1217-18.

212. *Id.* at 1219.

greater scrutiny before admission.

B. PROBLEMS ASSOCIATED WITH USE OF A TOTALITY-OF-THE-CIRCUMSTANCES TEST TO DETERMINE ADMISSIBILITY OF HYPNOTICALLY-INDUCED TESTIMONY

The totality-of-the-circumstances test provides an equitable forum in which to consider issues of reliability and admissibility because evaluating admissibility of hypnotically-induced testimony should warrant different evidentiary standards. These considerations should include an inquiry into the context, forensic or clinical, in which the subject recalls memories. However, the totality-of-the-circumstances test contains several problems, including witness competency, judicial discretion and detection of suggestibility and confabulation, which a court should bear in mind when balancing factors to determine admissibility.

1. Witness competency

Witness competency presents the first problem. Historically, American courts were reluctant to admit testimony uncovered by hypnosis.²¹³ In fact, the California Supreme Court in 1897 stated that "the law of the United States does not recognize hypnosis."²¹⁴ Currently, courts fail to apply uniform rules to the admission of hypnotically-induced testimony.²¹⁵ Most courts find a previously hypnotized witness competent if the witness' testimony is based on a hypnotically-refreshed recollection.²¹⁶ Some courts prohibit testimony from a witness who does not have an independent recollection of the events described but who merely testified concerning memories explored and revealed under hypnosis.²¹⁷ Other courts bar testimony by a previously-hypnotized witness when the hypnotist used suggestive procedures.²¹⁸

213. R.T.C., *The Admissibility of Testimony Influenced by Hypnosis*, 67 VA. L. REV. 1203, 1204 (1981) [hereinafter R.T.C.].

214. *Id.* (citing *People v. Ebanks*, 49 P. 1049, 1053 (1897)).

215. R.T.C., *supra* note 213, at 1204.

216. *Id.* See, e.g., *United States v. Awkard*, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979).

217. R.T.C., *supra* note 213, at 1205. See also *State v. Mena*, 624 P.2d 1274 (Ariz. 1981).

218. R.T.C., *supra* note 213, at 1205. See also *State v. Hurd*, 414 A.2d 291

Federal Rule of Evidence 601, however, contains a strong presumption in favor of witness competency.²¹⁹ The Rule presumes that cross-examination, the oath and the jury's opportunity to observe a witness first-hand are sufficient safeguards against unreliable testimony.²²⁰

However, judges in some cases have concluded that Rule 601 leaves them with the discretion to disqualify witnesses with limited mental or moral capacities.²²¹ In decisions following the enactment of Rule 601, courts have conducted competency hearings and psychiatric evaluations although the Rule seemingly eliminated these powers.²²² As a result, most courts treat witness competency issues as they did before the

(N.J. 1980).

219. Federal Rule of Evidence 601 states:

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

FED. R. EVID. 601.

The advisory committee on the Federal Rules of Evidence characterized the Rule as a "general ground clearing," eliminating almost all categories of witness competency which operated as a bar to testifying at common law. FED. R. EVID. 601 Advisory Committee's notes.

220. See generally WRIGHT & GOLD, *supra* note 80, at 127. ("The only effect the oath can have, then, is to misleadingly cloak the testimony in the ceremonial garb of truthfulness"). See *State ex rel Collins v. Superior Court*, 644 P.2d 1266, 1274 (Ariz. 1982) (where a witness sincerely believes the truth of his or her memories, he or she will become immune to effective impeachment through cross-examination); *State v. Martin*, 684 P.2d 651, 656 (Wash. 1984) ("the subjective conviction in the truth of the memory...eliminates fear of perjury as a factor ensuring reliable testimony"). *But see Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (even in the case of a confident defendant, cross-examination is an effective tool for revealing inconsistencies).

221. Victor J. Gold, *Do the Federal Rules of Evidence Matter?*, 25 LOY. L.A. L. REV. 909, 911 (1992).

222. *Id.* See also *United States v. Odom*, 736 F.2d 104, 111 (4th Cir. 1984) (a district judge has "great latitude in the procedure he may follow in determining the competency of a witness to testify.").

enactment of Rule 601.²²³

In cases involving previously-hypnotized subjects, experts can advise the jury regarding the inherent problems associated with hypnosis.²²⁴ Unfortunately, the jury is in a poor position to weigh the testimony in light of those problems because neither the hypnotist nor the subject can separate the real memory from confabulation or memories resulting from suggestion.²²⁵

Some courts have adopted a modified per se witness incompetency approach to determine the admissibility of hypnotically-induced testimony.²²⁶ Under this approach, the witness is incompetent to testify except as to matters recalled prior to hypnosis.²²⁷ Some courts acknowledge, however, that even pre-hypnosis testimony may be adversely affected by subsequent hypnosis due to increased confidence in memory overall.²²⁸ The danger of hypnosis tainting pre-hypnosis memories seems greatest in the clinical setting due to possible emotional attachment of the hypnotist to the subject.²²⁹ For this reason, courts should examine the competence of clinical hypnosis subjects more closely even in light of Rule 601. Forensic hypnosis does not seem to present the same difficulties because the procedures used are carefully tailored for use in litigation.

223. Victor J. Gold, *Do the Federal Rules of Evidence Matter?*, 25 LOY. L.A. L. REV. 909, 911 (1992). See *supra* note 219 for Advisory Committee comment to Federal Rule of Evidence 601. The supreme court of at least one state has found that where a witness's testimony has been tainted due to hypnosis, the trial court has discretion to determine whether the witness is competent to testify as to matters untainted by the hypnosis. *State v. Iwakiri*, 682 P.2d 571, 579 (Idaho 1984).

224. WRIGHT & GOLD, *supra* note 80, at 127. These problems include suggestibility, confabulation, and memory hardening; see *supra* notes 62-71 and accompanying text.

225. *Id.* at 128.

226. *Id.* at 128-29.

227. *Id.* See also *People v. Shirley*, 723 P.2d 1354, 1384 (Cal. 1982), *cert. denied* 459 U.S. 860 (1982).

228. WRIGHT & GOLD, *supra* note 80, at 130.

229. Kanovitz, *supra* note 10, at 1218. See *supra* notes 203-212 and accompanying text.

2. Judicial discretion

A second problem with the totality-of-the-circumstances approach comes from the “unprincipled” discretion exercised in the application of the balancing test.²³⁰ The balancing test may invite courts to spend insufficient time weighing both sides to reach an equitable conclusion.²³¹ Since the test is subjective, a judge may not properly review all the evidence bearing on reliability.²³² The judge’s decision on admissibility may have more to do with which party presented the evidence rather than its reliability.²³³

In at least one case, a state supreme court advocated deference to the trial court record to determine the reliability of hypnotically-induced testimony and consequently avoided this problem.²³⁴ In *People v. Romero*, the court considered whether a previously-hypnotized witness’ trial testimony was sufficiently reliable and therefore admissible.²³⁵ The trial court in that case used a totality-of-the-circumstances approach to determine reliability.²³⁶ The state supreme court accepted the findings made by the trial court with respect to reliability and held that the record adequately supported the trial court’s decision to admit testimony from previously hypnotized witnesses.²³⁷

A court using the *Romero* approach avoids the problem of unprincipled judicial discretion on the part of a higher court by accepting the trial court record. A trial court has a better op-

230. WRIGHT & GOLD, *supra* note 80, at 175. See Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 61 (1984) (The grant of discretion contained in Rule 403 has been taken by the courts as “license for an unprincipled, ad hoc approach to each case. Most courts are content to conclude evidence has probative value or is unfairly prejudicial without considering the meaning of those terms.”).

231. WRIGHT & GOLD, *supra* note 80, at 175.

232. *Id.* See also Victor J. Gold, *Federal Rule of Evidence 403: Observations in the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 500-501 (1983) (most courts “utterly fail to conduct the required balancing test, or while purporting to balance, give no hint as to how or why a particular balance was struck”).

233. WRIGHT & GOLD, *supra* note 80, at 175.

234. *People v. Romero*, 745 P.2d 1003, 1017-18 (Colo. 1987), *cert. denied* 485 U.S. 990 (1988).

235. *Id.*

236. *Id.*

237. *Id.* at 1018.

portunity to view witnesses first-hand and to make individualized factual inquiries in each case to determine reliability and admissibility. Review by a higher court can then be under an abuse of discretion standard.

3. Detection of suggestion and confabulation

Under the totality-of-the-circumstances approach to admissibility, a fact finder weighs the effectiveness and thoroughness of the procedures used during hypnosis. However, the fact finder may never detect the presence of suggestion, confabulation, or memory hardening.²³⁸ Estimation of the presence of these phenomena is speculative at best and may be completely wrong, possibly violating a party's due process and confrontation rights by admission of unreliable hypnotically-induced testimony.²³⁹

This third problem, however, is not unique to hypnotically-induced testimony.²⁴⁰ For example, a witness could be susceptible to suggestion from his or her lawyer, from family members or from the media. Even idle conversation with another witness concerning the same event can lead to an alteration of a witness' memory.²⁴¹ Although the possibility of alteration of memory from hypnosis is greater than the possibility of alteration from talking to another witness, it remains a question of degree.²⁴² Since the modification of a witness' memory is not accurately measurable, a balancing test is necessarily inexact.²⁴³ Indeed, using Federal Rule of Evidence Rule 403, a court balances prejudicial value against probative value for all types of evidence.²⁴⁴

238. WRIGHT & GOLD, *supra* note 80, at 174. See also Bernard Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 337 (1980). ("No one, regardless of experience, can verify the accuracy of the hypnotically enhanced memory"). *Id.*

239. WRIGHT & GOLD, *supra* note 80, at 174.

240. *Id.*

241. *State v. Iwakiri*, 682 P.2d 571, 579 (Idaho 1984).

242. *Id.*

243. WRIGHT & GOLD, *supra* note 80, at 174.

244. Federal Rule of Evidence Rule 403 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 considerations of undue delay, waste of

Suggestion, confabulation and memory hardening are impossible to detect with certainty. Therefore, hypnotically-induced testimony should be subject to the balancing test provided by Rule 403 to the best of the court's ability.

In conclusion, the totality-of-the-circumstances test does not constitute a completely effective method for handling the problems of witness competency, judicial discretion, and detection of suggestibility and confabulation. Nonetheless, the totality-of-the-circumstances test remains a viable basis for determining admissibility of hypnotically-induced testimony. However, the test should be refined to better accommodate these concerns.

C. A PROPOSED SOLUTION TO REMEDY THE INADEQUACY OF THE TOTALITY-OF-THE-CIRCUMSTANCES APPROACH

The traditional totality-of-the-circumstances test contains a significant inadequacy in that the test neglects consideration of the subject's hypnotizability.²⁴⁵ Instead, the test focuses almost exclusively on the problems of suggestibility, confabulation and memory hardening, thereby ignoring the reality that a subject's hypnotizability presents another important problem with the reliability of hypnotically-induced testimony.

No more than 10 to 15 percent of the population is highly hypnotizable.²⁴⁶ In conducting research with these subjects,

time, or needless presentation of cumulative evidence.

FED. R. EVID. 403.

245. Kanovitz, *supra* note 10, at 1220, 1235 n.214.

246. Kanovitz, *supra* note 10, at 1235 n.214. The author of this law review article asserts that hypnotizability is a "stable trait that can be measured." *Id.* at 1220. She includes research into the susceptibility of highly hypnotizable subjects. An experiment, conducted by Laurence, Nadon, Nogrady and Perry, involved planting false memories into subjects especially selected for their high level of hypnotizability. Twenty-two percent of the subjects would accept a hypnotic memory transplant that they had been awakened by a loud bang on a particular night of the previous week. An additional 27 percent, who had previously been certain that they had slept through the night, were confused after the experiment about how well they had slept. The remaining 51 percent flatly rejected the attempt to alter their memory and stood by their initial sleep recollections. Attempts to repro-

hypnotists successfully plant false memories that will carry over into waking state.²⁴⁷ These highly hypnotizable subjects have "spirited imaginations" and "vivid powers of imagery."²⁴⁸ They tend to fantasize a great deal of the time and are usually able to see, smell, and touch the things they fantasize.²⁴⁹ Highly hypnotizable people have intense powers of imagination and often mistake what they have read, seen or heard for their own experiences.²⁵⁰ Moreover, these subjects are able to slip into self-hypnotic states without awareness or effort.²⁵¹

Problems of memory elasticity, or a modification in memory, result from cognitive changes that take place during hypnosis.²⁵² Cognitive changes occur according to hypnotizability.²⁵³ For example, evidence exists to show that only a highly hypnotizable subject is capable of experiencing hypnosis at levels which are deep enough to confuse events taking place in the mind with reality.²⁵⁴ Further, these highly hypnotizable subjects tend to be abnormally susceptible to suggestion.²⁵⁵ However, no conclusive evidence exists to establish that a hypnotist could successfully create "whole memories" of events never experienced by the subject.²⁵⁶ The fact remains, however, that highly hypnotizable subjects are more susceptible to the problems associated with hypnosis, especial-

duce results like these with subjects of normal hypnotizability have not been successful. *Id.* at 1236 (discussing Laurence et al., *Duality, Dissociation and Memory Creation in Highly Hypnotizable Subjects*, 34 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 295 (1986)).

247. Kanovitz, *supra* note 10, at 1235 n.214.

248. *Id.*

249. *Id.* (citing EUGENE BLISS, *MULTIPLE PERSONALITY, ALLIED DISORDERS AND HYPNOSIS* 73-81 (Oxford, 1986) [hereinafter BLISS] and ERNEST HILGRAD, *DIVIDED CONSCIOUSNESS: MULTIPLE CONTROLS IN HUMAN THOUGHT AND ACTION* 88 (John Wiley & Sons, 1977) [hereinafter HILGRAD]).

250. Kanovitz, *supra* note 10, at 1235 n.214.

251. *Id.*

252. *Id.* (citing BLISS, *supra* note 248, at 98-99 and HILGRAD, *supra* note 248, at 163-65). The cognitive changes which may occur as a result of hypnosis are increased responsiveness to suggestion, reduced critical judgment, increased capacity for fantasy formation, and diminished reality testing. *Id.*

253. *Id.*

254. *Id.* Memory hardening is a phenomenon which gives the subject enhanced confidence in the facts remembered, regardless of whether the facts are true or false. *Borawick v. Shay*, 68 F.3d 597, 603 (2d Cir. 1995).

255. Kanovitz, *supra* note 10, at 1235 n.214.

256. *Id.* at 1236.

ly confabulation.²⁵⁷

A more complete and accurate approach for courts to take when faced with the issue of admission of hypnotically-induced testimony would include an inquiry into the level of hypnotizability of the subject²⁵⁸ as well as the context in which the hypnosis took place, the competency of the witness, the detection of suggestion or confabulation and the adequacy of the trial court's analysis of reliability. A previously adopted approach, such as the *Hurd* procedural safeguards approach or the totality-of-the-circumstances test, best evaluates these inquiries. Trial courts could exclude hypnotically-induced testimony from highly hypnotizable subjects.²⁵⁹ By excluding this group of witnesses, the court can be more confident that testimony susceptible to the possibility of enhanced memory is eliminated as unreliable.

VII. CONCLUSION

In *Borawick v. Shay*,²⁶⁰ the Second Circuit held that the admissibility of hypnotically-refreshed recollections should be determined on a case-by-case basis using the totality-of-the-circumstances approach and considering non-exclusive factors.²⁶¹ Using this approach, the court ruled that Borawick's hypnotically-induced memories of child sexual abuse, recalled through the use of hypnosis conducted by an unqualified hypnotist who kept no record of the hypnosis sessions, were inadmissible.²⁶² The *Borawick* decision marked the first time that the Second Circuit addressed the question of admissibility of hypnotically-refreshed testimony regarding childhood sexual abuse recalled after hypnosis conducted for therapeutic purposes rather than after hypnosis conducted for the specific pur-

257. *Id.* at 1238.

258. *Id.*

259. "Hypnotic susceptibility testing can identify individuals who have the capacity to confuse fantasized events for real experiences." Kanovitz, *supra* note 10, at 1239 n.229.

260. 68 F.3d 597 (2d Cir. 1995).

261. *Borawick v. Shay*, 68 F.3d 597, 607-608 (2d Cir. 1995).

262. *Id.* at 609-610.

pose of recalling such memories.²⁶³ Consequently, this decision seems to expand the opportunities for admission of testimony recalled through clinical hypnosis, provided the totality-of-the-circumstances leaned toward reliability.

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263. *Id.* at 600.

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