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NOTE

People v. Shirley: The Use of Hypnotically Enhanced Testimony at Trial

INTRODUCTION

The use of hypnosis has been helpful in enhancing the recollection of an individual's memory. Forensic hypnosis is the use of the scientific technique of hypnosis for benefit in both civil and criminal investigations. Hypnosis has been accepted for use in investigation purposes, however, its use for enhancement of testimony is debated. A minority of jurisdictions admit hypnotically enhanced testimony, while other jurisdictions condition the admissibility on an adherence to procedural safeguards initiated before, during, and after the hypnotic session. A majority of jurisdictions which have addressed the issue, have excluded such testimony because of the unreliability of hypnosis as a scientifically accepted technique.

Recently, in People v. Shirley, the California Supreme Court

1. W. Hibbard & R. Worring, Forensic Hypnosis, The Practical Application of Hypnosis in Criminal Investigations 3 (1981) [hereinafter cited as Hibbard & Worring]. For the purposes of this Note, the terms hypnosis and forensic hypnosis will be used interchangeably. See infra notes 10-11 and accompanying text for a more precise definition and explanation of the technique of hypnosis.


3. See infra notes 25-52 and accompanying text.

4. The minority rule which admits hypnotically enhanced testimony is composed of two distinct viewpoints. Under the first viewpoint, the rule is that hypnotically derived testimony is admissible evidence. This rule is followed by the Ninth Circuit in federal court as well as the jurisdictions of Florida, Louisiana, Missouri, North Carolina, North Dakota, Oregon, and Wyoming. See infra note 34 and accompanying text for a discussion of the major cases adhering to this viewpoint.

There are also jurisdictions following the minority rule concerning the use of pretrial hypnosis which condition the admissibility of the hypnotically enhanced testimony upon a set of procedural safeguards. This view has been followed in Illinois, New Jersey, New Mexico, Tennessee, Washington, and Wisconsin. See infra notes 91-102 and accompanying text for a discussion of these procedural safeguards.

5. The jurisdictions of Arizona, California, Georgia, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New York, Oklahoma, Pennsylvania, South Carolina, Texas, and Virginia have excluded the use of hypnotically enhanced testimony at trial. See infra note 25 and accompanying text for a discussion of applicable cases following this viewpoint.

6. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, mod. 31 Cal. 3d 918(a) (1982), cert. denied 103 S.Ct. 133 (1982).
ruled that hypnotically enhanced testimony is not admissible evidence.\(^7\) Shortly thereafter, the court modified its ruling granting an exception in situations where a criminal defendant testifies on his own behalf.\(^8\) In its modified opinion the Supreme Court of California has also deferred ruling on the retroactivity of the Shirley decision.\(^9\)

This Note will trace the scientific theory and legal application of the use of hypnosis, analyze the defendant exception rule for hypnotically enhanced testimony as enunciated in Shirley, and then propose safeguards for the defendant exception situations. In formulating these safeguards, particular reliance will be placed upon jurisdictions which admit hypnotically derived testimony. Finally, this Note will address the extent to which the Shirley decision should be applied retroactively in criminal cases.

I. THE SCIENTIFIC THEORY BEHIND HYPNOSIS

Hypnosis is a state of mind similar to sleep in which the subject is open to the suggestions and commands of the hypnotist.\(^10\) There are seven stages in the process of hypnosis.\(^11\) During these various stages, the memory recollection of a certain witness or vic-

\(^7\) Id. at 54, 641 P.2d at 796, 181 Cal. Rptr. at 265.
\(^8\) See infra notes 80-90 and accompanying text.
\(^9\) See the text of the modified decision on the retroactivity issue. 31 Cal. 3d at 67, n.53, 181 Cal. Rptr. at 273, n.53 (1982). The Shirley decision was modified in 31 Cal. 3d at 918(a), the California Reporter published the entire Shirley decision as modified. The decision as modified however, did not appear in the Pacific Reporter. For a discussion of the retroactivity problems remaining unaddressed as a result of Shirley, see infra notes 118-58 and accompanying text.
\(^11\) See Hibbard & Worrin, supra note 1, at 83. The seven stages of hypnosis are listed as follows:

1. Preparation and preinduction talk — This stage is for maximizing the favorable factors and minimizing the unfavorable factors in the ensuing hypnosis.
2. Induction proper — This stage is the initiation of the process wherein the subject is hypnotized.
3. Deepening — In this stage the hypnotist will maximize the hypnotic state of the subject.
4. Challenging and testing for trance depth — Here the hypnotist will question the subject to make certain that he is in a sufficient trance depth so as to elucidate hypnotic phenomena.
5. Elicitation of hypnotic phenomena — In this stage the hypnotic phenomena (such as enhanced memory recall) is actually produced.
6. Awakening — In this stage the hypnotist gradually begins to awaken the subject.
7. Postinduction — Finally, the hypnotist briefs the subject on the entire hypnotic session.
tim of a crime can be enhanced. It is thus apparent that hypnosis can be a powerful investigative and offensive tool for law enforcement officials.

The use of hypnosis has been acknowledged as a legitimate and scientific means of treatment in the medical community. This scientific acceptance of hypnosis for medical purposes, however, has not led to universal acceptance in the legal community.

Hypnosis in the legal field is used primarily for the purpose of enhancing the subject’s recollection of the alleged crime. Hypnosis could thus be described as a tool which aids the memory of the subject. Proponents of the use of hypnosis in the legal field rely on two factors to support their views. First, these proponents insist that all impressions relating to sensory perceptions are recorded and stored permanently in the memory, much in the same

12. W. BRYAN, JR., LEGAL ASPECTS OF HYPNOSIS 202-03 (1962) [hereinafter cited as BRYAN].


14. Present recollection refreshed is the use of a writing or a technique (i.e., hypnosis) to facilitate the memory of a witness. See 3 J. WIGMORE, EVIDENCE § 758 (Chadbourn Rev. 1982 Supp.) Note that present recollection refreshed should not be confused with past recollection recorded. The latter is generally a recognized exception to the hearsay rule. The witness on the stand is unable to testify as to the events in question based upon his present memory. The attorney, however, will attempt to introduce a written document of the event in question based upon the witness’ accurate impressions when the document was made. The document itself will be admitted into evidence as an exception to the hearsay rule if:

(1) The recollection was fresh in the memory of the witness when the recording was made.

(2) The witness verifies that the document is a correct record of the events in question although the witness need not have prepared the document himself.

(3) The original recording is provided if it is available.

(4) The record is shown to the opponent on demand for inspection and cross-examination.

(5) The record goes to the jury if requested.

(6) Present recollection of the witness testifying is lacking.

For a discussion of past recollection recorded see generally 3 J. WIGMORE, EVIDENCE §§ 738-54 (Chadbourn Rev. 1982 Supp.).

15. See BRYAN, supra note 12, at 202-03. But see Note, Admissibility, supra note 10, at 1208: “Laymen often think of hypnosis as an infallible and extremely powerful memory aid, but research has shown that this notion is not correct.”

Cf. Diamond, supra note 13, at 317:

The existence of various conflicting theories that attempt to explain the phenomenon of hypnosis does not mean that hypnotism is unscientific. As medical treatment it is indeed legitimate and scientific. This fact, however, has no relevancy whatsoever to its use in a legal context or to the question of the admissibility of testimony of witnesses who have had their recall manipulated by hypnosis. Unfortunately, this kind of uncritical leap, as well as reliance on unscientific claims, has typified legal treatment of hypnosis.

Id. (footnotes omitted).
manner as a picture is stored on a videotape machine.\textsuperscript{16} The theory is that hypnosis facilitates the reformulation of these impressions and brings them to the forefront.\textsuperscript{17} Second, the proponents assert that a hypnotic subject always tells the truth.\textsuperscript{18} What underlies this assertion is the theory that the hypnotic process is accurate and reliable.\textsuperscript{19} Many scientific studies, however, indicate that neither memory recall nor reliability for truthfulness support the assertions of the proponents of hypnotically derived testimony.\textsuperscript{20}

The conflicting viewpoints among the experts regarding the use of hypnosis in the legal field indicate that this issue must be analyzed rigidly. The use of hypnosis has been addressed by several jurisdictions in the United States. The fact that most of these jurisdictions have adopted conflicting standards regarding the use of pretrial hypnosis indicates that this issue is indeed perplexing.

II. **The Legal History of Hypnosis**

Hypnosis is a scientific technique.\textsuperscript{21} The admissibility of any scientific technique into evidence is governed by the case of *Frye v. United States*.\textsuperscript{22} In *Frye*, the Court of Appeals of the District of Columbia refused to permit a defendant charged with second degree murder to introduce a favorable result from a lie detector test into evidence.\textsuperscript{23} The *Frye* rule conditioned the admissibility of a new scientific method of proof into evidence upon a showing that the technique be accepted as reliable in the scientific community in which it developed.\textsuperscript{24} Several jurisdictions have excluded the

\textsuperscript{16} *See Bryan, supra* note 12, at 202-03. *See also* M. Reiser, *Handbook of Investigative Hypnosis* 158-60 (1980).

\textsuperscript{17} *Id.*

\textsuperscript{18} *Bryan, supra* note 12, at 245-46.

\textsuperscript{19} *Id.* at 275-76.

\textsuperscript{20} *See generally* Diamond, *supra* note 13 and Note, *Admissibility, supra* note 10. These studies indicate that the oversuggestive nature of the hypnotic process results in altered memories of those individuals hypnotized. The conclusion is that the use of hypnosis to refresh one's memory is not reliable.

\textsuperscript{21} *See Hibbard & Worrying, supra* note 1, at 3.

\textsuperscript{22} 293 F. 1013 (D.C. Cir. 1923).

\textsuperscript{23} *Id.* at 1014. The court stated the following regarding the new scientific lie detector test: "We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made." *Id.* Note the court's use of the term systolic blood pressure deception test. This term has been abandoned in modern case law for the more familiar term of lie detector test.

\textsuperscript{24} *Id.* See also Falk, *Posthypnotic Testimony—Witness Competency and the Fulcrum of Procedural Safeguards*, 57 St. John's L. Rev. 30, n.3 (1982) (citing application of the *Frye* test to the following scientific methods of crime detection); United States v. Kilgus, 571 F.2d 508, 510 (9th Cir. 1978) (forward-looking infrared system); United States v. Brown, 557 F.2d 541, 556-58 (6th Cir. 1977) (ion microprobic analy-
introduction of hypnotically enhanced testimony into evidence, reasoning that hypnosis is not sufficiently accepted in the scientific community to warrant admission at the present time. These jurisdictions have thus used the *Frye* rule to exclude such testimony.

Some jurisdictions, on the other hand, have ruled that hypnosis is accepted in the scientific community as a reliable method of proof when there has been an adherence to procedural safeguards. This viewpoint uses the *Frye* rule to admit hypnotically
derived testimony on the theory that by the use of procedural safeguards initiated before, during and after the hypnotic session, the reliability of the testimony is increased. Only testimony so scrutinized is admitted into evidence.

There are also jurisdictional viewpoints that the use of hypnotically enhanced testimony goes to the weight rather than the admissibility of evidence. The leading case adhering to this view is Harding v. State. In Harding, the defendant allegedly assaulted the victim with the intent to rape and murder her. The victim submitted to the use of hypnosis to refresh her vague recollection of the incident and was thereafter able to recall the events of the crime. At trial, the victim was permitted to testify against the defendant and the testimony helped to result in a conviction.

Maryland’s Court of Special Appeals affirmed the conviction. The court ruled that the use of hypnosis to enhance the victim’s memory only affected the weight of the testimony. Thus, under

845 (Ct. App. 1982). See also State v. Armstrong, 110 Wis. 2d 555, 329 N.W.2d 386 (1983) requiring a pretrial hearing to make certain that there was no impermissible suggestiveness during the hypnotic session. See infra notes 91-102 and accompanying text for a detailed discussion of the procedural safeguards adopted by these decisions before the hypnotically enhanced testimony is admissible as evidence.

See additionally, State ex rel. Collins v. Superior Court, 132 Ariz. 180, 192, 644 P.2d 1266, 1278 (1982) citing the procedural safeguards adopted by Illinois in People v. Smrekar, 68 Ill. App. 3d 379, 385 N.E.2d 848 (Ct. App. 1979). Smrekar established a four step requirement before hypnotically enhanced testimony would be declared admissible, the requirements were: (1) the hypnotist must be competent, (2) suggestion must not be used during the hypnotic session, (3) any identifications made by the use of hypnosis must be corroborated by other substantial evidence, and (4) the witness must have had an ample opportunity to view the defendant.

The jurisdiction of Tennessee has also required adherence to certain minimal procedures at hypnotic sessions. See State v. Glebock, 616 S.W.2d 897, 904 (Tenn. Crim. App. 1981) citing United States v. Adams, 581 F.2d 193, 199 n.12 (9th Cir. 1978) cert. denied 439 U.S. 1 (1978) (demographic records of hypnotic session should be the minimum requirement conditioning the admissibility of such evidence). Glebock also established an elaborate procedure whereby the hypnotist would also be called upon to testify in order to lay the foundation to condition the admissibility of the hypnotically enhanced testimony. The following factors were to be established in order to lay a proper foundation: (1) the hypnotist should be considered an expert in the use of hypnosis, (2) the expert should describe the manner in which the hypnotic session was conducted, (3) the expert should testify as to whether the subject under hypnosis has the increased capacity to remember as a result of the hypnotic session, (4) the expert should be questioned concerning the possibility to confabulate while under hypnosis, and (5) the expert should be questioned on whether the subject of the hypnotic session has the capacity for telling deliberate lies. State v. Glebock, 616 S.W.2d 897, 904-05 (Tenn. Crim. App. 1981).

27. See infra notes 91-109 and accompanying text.
29. Id. at 232, 246 A.2d at 304.
30. Id. at 234, 246 A.2d at 305.
31. Id. at 232, 246 A.2d at 304.
32. Id. at 247, 246 A.2d at 312.
33. Under Harding the threshold question regarding the admissibility of hypnotically derived testimony was determined as unnecessary. The court determined that

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Harding, hypnotically derived testimony was admissible evidence.\(^{34}\)

The Harding rule was essentially repudiated by Maryland in Polk v. State.\(^{35}\) In Polk, the defendant was convicted of sexual offenses committed against an eight-year-old.\(^{36}\) At trial, the child was permitted to testify about the incident after he had been subjected to hypnosis by the local authorities.\(^{37}\) The conviction was reversed on appeal.\(^{38}\) In this instance, Maryland's Court of Spe-

the testimony was admissible, however, the trier of fact would weigh the factor that the testimony of the witness was elicited by the use of hypnosis. Accordingly, the fact finder would be able to disregard the testimony of the witness if it so desired. An analogy can be drawn as to the competency of a witness to testify who is mentally incapable or immature. Most courts currently permit such a witness to testify while providing the jury with cautionary instructions that it must weigh such testimony accordingly. The Harding court apparently used the same approach for a witness who testifies after his recollection has been refreshed by the use of hypnosis. For a discussion of the competency of an immature or mentally incapable witness; see C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 62 (2d ed. 1972) [hereinafter cited as MCCORMICK].

34. The minority of jurisdictions which have addressed the hypnotic testimony issue have adopted the Harding rule. The Ninth Circuit has applied the Harding rule. See Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975); Wyler v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974). These two cases dealt with the weight, as opposed to the admissibility, of evidence derived from the use of hypnosis in civil cases. The Ninth Circuit extended this rule to criminal cases in United States v. Adams, 581 F.2d 193 (9th Cir. 1978), cert. denied 439 U.S. 1006 (1978). The Adams court, however, expressed the following concern regarding the use of pretrial hypnosis:

We are concerned, however, that investigatory use of hypnosis on persons who may later be called upon to testify in court carries a dangerous potential for abuse. Great care must be exercised to insure that statements [made] after hypnosis are the product of the subject’s own recollection, rather than of recollection tainted by suggestions received while under hypnosis.

Id. at 198-99 (footnotes omitted). See also United States v. Waksal, 539 F. Supp. 834, 838 (S.D. Fla. 1982); United States v. Narciso, 446 F. Supp. 252, 281-82 (E.D. Mich. 1977) both holding that hypnosis affects credibility but not admissibility. There are also state views following the Harding rule; see Clark v. State, 379 So. 2d 372 (Fla. Ct. App. 1979); but cf. Brown v. State, 426 So. 2d 76, 90 (Fla. Ct. App. 1983) in which the same court applied a relevancy balancing test to determine the admissibility of hypnotically enhanced testimony. Under Brown the appellate court held this issue must be examined on a case-by-case basis.

Other jurisdictions, however, have continued to adhere to the Harding rule. See e.g., Pearson v. State, 441 N.E. 2d 468 (Ind. 1982); State v. Wren, 425 So. 2d 756 (La. 1983); State v. Greer, 609 S.W.2d 423 (Mo. Ct. App. 1980), vacated 450 U.S. 1027 (1981); State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978); State v. Jorgenson, 8 Or. App. 1, 492 P.2d 312 (Ct. App. 1971); Chapman v. State, 638 P.2d 1280 (Wyo. 1982). See also People v. District Court, 652 P.2d 582 (Colo. 1982) (en banc) where the Supreme Court of Colorado refused to rule on the hypnotic testimony issue. See generally, Annot., Admissibility of Hypnotic Evidence at Criminal Trial, 92 A.L.R. 3d 444 (1979) for a thorough analysis of applicable case law concerning the admissibility of hypnotically derived evidence.

36. Id. at 382, 427 A.2d at 1041-42.
37. Id. at 385, 427 A.2d at 1043-44.
38. Id. at 396, 427 A.2d at 1049.
cial Appeals ruled that the use of hypnosis must satisfy the requirement of acceptability for the purpose of memory retrieval in the local scientific community before it would be admitted into evidence. The court thus used the Frye rule to nullify the earlier holding in Harding. It should be noted, however, that the Harding rule is followed in several jurisdictions.

The divergence of jurisdictional viewpoints regarding the use of hypnotically enhanced testimony has created some confusion in California. Traditionally, California held that such testimony was inadmissible at trial. In People v. Blair, however, the Supreme Court of California proposed that hypnotically derived testimony would be admissible if it were used to establish a basis for expert opinion. In Blair, the defendant was convicted of two counts of first-degree murder. At trial, the defense attempted to introduce into evidence statements given by a neighbor of the victims, induced while under hypnosis, regarding the physical description of the murderers. The trial court excluded the testimony and the defendant was convicted.

39. The fact that hypnosis was a scientific technique led the Polk court to analyze whether the use of hypnosis was acceptable as a scientific method of proof in the local community. See generally, Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

40. The Polk court did not expressly overrule Harding. The court distinguished Harding by stating that the Frye principle was not applicable in Maryland at the time the Harding decision was rendered. As such, the Polk court remanded the case so that the trial court could make a determination as to whether hypnosis was a scientifically accepted method of proof in the local community. Polk at 391, 427 A.2d at 1046-47. Harding was subsequently overruled. See Collins v. State, 52 Md. App. 186, 447 A.2d 1272 (Ct. Spec. App. 1982) in which the court held that hypnosis was not a scientifically accepted method of proof as measured by the Frye standard.

41. For views following the Harding rule, see supra note 34 and accompanying text.

42. See People v. Ebanks, 117 Cal. 652, 49 P. 1049 (1897).


44. Id. at 665, 602 P.2d at 754, 159 Cal. Rptr. at 834. In California, the origin of the rule that hypnosis could be used to establish a basis for expert opinion resulted from People v. Modesto, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963). The holding in Modesto, however, clearly recognized the discretion of the trial judge to weigh the probative value of the expert's opinion against the risk that the jury might consider such testimony as offered for its truth. The trial court judge thus had the discretion to exclude such testimony under Modesto.

45. Blair, 25 Cal. 3d at 640, 602 P.2d at 738, 159 Cal. Rptr. at 818.

46. Id. at 664-66, 602 P.2d at 753, 159 Cal. Rptr. at 833.

47. Id. Other courts have also excluded hypnotic testimony which would exculpate the defendant. See e.g., Greenfield v. Robinson, 413 F. Supp. 1113, 1120-21 (W.D. Va. 1976) (defendant's statements made while under hypnosis were held inadmissible and not contrary to constitutional principles). See also State v. Pusch, 77 N.D. 860, 46 N.W.2d 508 (1950) (defendant's hypnotically enhanced exculpatory statement was excluded). But cf., State v. Brown, 337 N.W.2d 138, 151 (N.D. 1983) (hypnosis affects credibility rather than admissibility of evidence). Note that North Dakota has now adopted the Harding rule. The Brown court, however, attempted to distinguish the Pusch case. The distinguishing feature was that Brown involved the issue of whether one may testify after memory recollection had been refreshed by the
The California Supreme Court affirmed the decision of the trial court in *Blair*. Although the testimony of the victims' neighbor derived by the use of hypnosis was inadmissible, the court proposed that hypnotically enhanced testimony would be admissible if offered to establish a basis for expert opinion. The Supreme Court of California expressly stated, however, that testimony elicited by the use of hypnosis would not be admissible to prove the truthfulness or accuracy of a statement.

Although *Blair* expressly excluded hypnotically enhanced testimony when offered for its truth; it was apparent that momentum was building in favor of admissibility of such testimony in California. The *Blair* decision opened the door and proposed to admit hypnotically derived testimony, albeit for the limited purpose of establishing a basis for expert opinion. This proposal would permit hypnotically enhanced testimony to be admitted into evidence in at least one instance. Additionally, at about the same use of hypnosis. The court concluded that such a witness may testify, however, the hypnotic session could affect the credibility of the testimony. *Brown*, 337 N.W.2d at 147. *Pusch*, on the other hand, involved the issue of whether recorded statements of the defendant—made while under hypnotic induction—could be used as substantive evidence. Thus, the *Brown* court determined that an entirely different issue was presented for resolution.

The *Brown* court also listed several factors to be considered in determining whether the testimony is credible. These factors included: (1) a valid investigatory purpose necessitating the use of hypnosis to refresh recollection, (2) a qualified and trained hypnotist conducting the hypnotic session, (3) whether a recording of the hypnotic session was made, (4) whether notice was provided to the defense that a state witness has been hypnotized, (5) whether the witness had an ample opportunity to view the alleged assailant, and (6) special jury instructions explaining that a witness was hypnotized and detailing the surrounding circumstances of the hypnotic session.

Note that among the *Brown* factors to be considered in weighing the credibility of the testimony is that notice be given to the defense that a state witness has been hypnotized. This requirement is seemingly consistent with constitutional principles. See, e.g., Brady v. Maryland, 373 U.S. 83, 87-88 (1963) (prosecutorial suppression of evidence favorable to the defendant is contrary to due process). See additionally, United States v. Miller, 411 F.2d 825, 831-32 (2d Cir. 1969); Emmet v. Ricketts, 397 F. Supp., 1025, 1040-41 (N.D. Ga. 1975) (prosecutor has a duty to disclose the fact that a hypnotic session was conducted with prosecution witnesses).

49. *Id.*, at 665, 602 P.2d at 754, 159 Cal. Rptr. at 834.
50. *Id.* Note that the statements made under hypnosis which the expert would use to form his opinion would not be hearsay. See *McCormick*, supra note 33, at § 246 offering the following definition of hearsay: "Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." Thus, any statement made under hypnosis which the expert would use to form an opinion would not be hearsay because the hypnotic statement would not be offered for its truth. The statement would merely be offered to show the basis for the expert's opinion.

51. See *People v. Ebanks*, 117 Cal. 652, 49 P. 1049 (1897) excluding hypnotically enhanced testimony in all cases. The *Blair* decision eroded this traditional rule to some degree.
time, hypnosis was being ruled as an adequate means of facilitating the memory recollections of witnesses in New York and New Jersey. Confusion was thus created, necessitating argument of the case of People v. Shirley before the California Supreme Court in 1982.

III. **The Case of People v. Shirley**

A. **The Alleged Crime**

The case of People v. Shirley presented the Supreme Court of California with the opportunity to rule once again on the issue of hypnotically enhanced testimony. In the case, Catherine Crump awoke on the evening of January 25, 1979 in her home and discovered Donald Lee Shirley standing in front of her naked. Shirley took Crump into a bedroom and thereafter raped her, as well as forcing the performance of various acts of oral copulation.

Crump was vaguely able to recall the events of the previous evening when she reported the incident to the authorities early the next morning. On April 30, 1979, Crump was hypnotized in order to refresh her recollection of the incident. After the hypnotic session, Crump was able to recall the details of the incident which she had previously been unable to remember.

Crump was permitted to testify against Shirley at trial which resulted in a conviction of rape. Shirley appealed to the


53. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, mod. 31 Cal. 3d 918(a) (1982), cert. denied 103 S.Ct. 133 (1982).

54. Id.

55. Id. at 24, 641 P.2d at 777, 181 Cal. Rptr. at 245.

56. Id.

57. Id. at 30, 641 P.2d at 781, 181 Cal. Rptr. at 249.

58. The hypnotic session was conducted after Crump had testified at the preliminary hearing. The use of the preliminary testimony would be inadmissible as substantive evidence as violative of the hearsay rule unless the declarant (Crump) were shown to be unavailable as a witness. See CAL. EVID. CODE § 1291 (West 1996). But see CAL. EVID. CODE § 1235 (West 1966) holding that a statement made by a witness is not made inadmissible if the statement is inconsistent with the testimony at the hearing (trial). Thus, such prior testimony at the preliminary hearing would be admissible if offered for impeachment purposes.

59. Shirley, 31 Cal. 3d at 30, 641 P.2d at 781, 181 Cal. Rptr. at 249.

60. Id. at 23, 641 P.2d at 776, 181 Cal. Rptr. at 244-45. There were two witnesses concerning this alleged crime; Crump as the complaining witness, and the defendant Shirley. The testimony of the two witnesses conflicted, however, the jury believed part of Crump's testimony as Shirley was convicted of rape but acquitted of oral copulation.

61. Id. at 18, 641 P.2d at 775, 181 Cal. Rptr. at 243.
Supreme Court of California which granted a hearing and rendered a decision on March 11, 1982.62

B. The Holding of Shirley

The California Supreme Court reversed Shirley’s conviction.63 In ruling that the testimony of a witness who submits to hypnosis in order to refresh his recollection of the incident is not admissible as evidence, the court adopted the Frye rule and excluded the testimony.64 The court reasoned that hypnosis was too unreliable a phenomenon to be admitted into evidence.65 Hypnosis as a scientifically accepted technique was not sufficiently accurate in the local community to justify admission as evidence at the present time.66 The justices looked to the treatment which other jurisdictions had given to the hypnosis issue and rendered new rules regarding the use of post-hypnotic testimony.67

The new rules as enunciated by the Supreme Court of California can be summarized as follows: 1) Hypnotically enhanced testimony is not admissible as evidence in a California court of law.68 A witness cannot testify as to the events in issue from the time of the hypnotic session forward;69 2) The rule rendered in Shirley would apply to all cases not yet final as of the date of the

62. Id.
63. Id.
64. The Frye rule conditions the admissibility of a new scientific method of proof upon a showing that the technique be accepted as reliable in the community in which it is used. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). See supra notes 22-26 and accompanying text for a discussion of the Frye rule.
65. Shirley, 31 Cal. 3d at 56, 641 P.2d at 798, 181 Cal. Rptr. at 266.
66. The Supreme Court of California has also invoked the Frye rule to determine the admissibility of other scientific methods of proof. See People v. Jones, 52 Cal. 2d 636, 343 P.2d 577 (1959) (en banc) excluding testimony derived by the use of truth serum. See also People v. Kelly, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976) excluding an identification made through the use of voiceprint analysis.
67. Shirley, 31 Cal. 3d at 66-67, 641 P.2d at 804, 181 Cal. Rptr. at 273. But see the limitations placed on this rule. A witness may testify on a topic wholly unrelated to the events that were the subject of the hypnotic session. Additionally, the court recognized the use of hypnosis for investigative purposes.
68. Id. The result of this ruling was a per se exclusion of the use of testimony derived from hypnosis. The rule was consistent with traditional California case law which excluded hypnotically enhanced testimony, see People v. Ebanks, 117 Cal. 652, 49 P. 1049 (1897). Additionally, the California Supreme Court distinguished the prior case law, apparently to the contrary, of People v. Modesto, 59 Cal.2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963) and People v. Blair, 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979) by stating that both Modesto and Blair held that testimony elicited by the use of hypnosis could only be used for the limited purpose of establishing expert opinion.
69. Shirley, 31 Cal. 3d at 66-67, 641 P.2d at 804, 181 Cal. Rptr. at 273. Under the rule in Shirley a witness is incompetent to testify when the testimony relates to the events that were the subject of the hypnotic session.
decision.\footnote{Id.}

Shortly thereafter, the California Supreme Court modified the holding in \textit{Shirley}.
\footnote{Id. at 67, 181 Cal. Rptr. at 273. According to this modification of \textit{Shirley}, if the defendant submits to the use of hypnosis, such a procedure will not result in the exclusion of his testimony at trial if he elects to testify on his own behalf.} The modifications were: 1) When a criminal defendant submits to pretrial hypnosis, the hypnotic session will not render his testimony inadmissible as evidence.\footnote{Id. at 67, 181 Cal. Rptr. at 273. According to this modification of \textit{Shirley}, if the defendant submits to the use of hypnosis, such a procedure will not result in the exclusion of his testimony at trial if he elects to testify on his own behalf.} This modification was made to avoid infringing upon the fundamental right\footnote{A fundamental right is either expressly enumerated within the first eight amendments to the Constitution of the United States or implicitly within the Ninth Amendment's general reservation of rights retained by the People although not expressly mentioned in any particular section or amendment to the Constitution. \textit{See generally}, Kent, \textit{Under the Ninth Amendment What Rights Are the "Others Retained By the People?"}, 29 FED. B. J. 219 (1970).} of an accused defendant to testify in his own behalf;\footnote{\textit{Shirley}, 31 Cal. 3d at 67, n.53, 181 Cal. Rptr. at 273 n.53. This modification was not printed in the unofficial Pacific regional reporter.} 2) The rule governing the admissibility of hypnotically enhanced testimony of a witness would only apply to those witnesses hypnotized as of the date of the \textit{Shirley} decision.\footnote{\textit{Shirley}, 31 Cal. 3d at 67, n.53, 181 Cal. Rptr. at 273 n.53. This modification was not printed in the unofficial Pacific regional reporter.} No position was taken at this time regarding witnesses hypnotized before the date of the \textit{Shirley} decision.\footnote{\textit{Id.}}

The modifications of \textit{Shirley} present several issues which must be addressed and analyzed: 1) the People of the State of California are denied due process of law when a defendant testifies on his own behalf after the use of pretrial hypnosis;\footnote{See \textit{People v. Robles}, 2 Cal. 3d 205, 466 P.2d 710, 85 Cal. Rptr. 166 (1970) where the defendant accused of a crime was permitted to testify on his own behalf contrary to advice given by counsel so as to prevent the infringement of one's fundamental right to testify in his own behalf.} 2) if the fundamental right of the defendant to testify on his own behalf outweighs the interest of the People to due process, the Supreme Court of California may wish to adopt procedural safeguards to be used when a defendant submits to pretrial hypnosis;\footnote{\textit{Id.}} and 3) the extent to which the \textit{Shirley} decision should be applied retroactively in
criminal cases. These issues will now be analyzed and addressed.

IV. THE DEFENDANT EXCEPTION RULE OF PEOPLE V. SHIRLEY

A. The Right of the People to Due Process of Law

In a criminal prosecution the People of the State of California are entitled to due process of law. It is unequivocally clear that the accuser, as well as the accused, has an interest in seeing that all due process requirements are met. The mere fact that this right is not explicitly mentioned in any particular section or amendment to the United States Constitution does not render this right immaterial. This right is implicitly within the Ninth Amendment’s reservation of rights.

Accepting the premise that the People acting collectively are entitled to due process of law in a criminal prosecution, the issue becomes whether permitting a defendant to testify on his own behalf after submission to pretrial hypnosis infringes upon the right of the People to due process. In Shirley, the California Supreme Court held that hypnosis was unreliable as a scientific method of proof because of oversuggestiveness, the desire of the subject to please the hypnotist, and the inability of the subject to distinguish real memory from distorted memory. The perceived problem is

79. See infra notes 118-58 and accompanying text.
80. The Supreme Court of the United States recognized the interest of the People in the administration of criminal justice in the case of United States v. Nixon, 418 U.S. 683 (1974) when the Court stated: “We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.” Id. at 713.
81. See Stein v. New York, 346 U.S. 156, 197 (1953): “The people of the State are also entitled to due process of law.”; Fay v. New York, 332 U.S. 261, 288 (1947): “Society also has a right to a fair trial.”; Snyder v. Massachusetts, 291 U.S. 97, 122 (1934): “But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.”
82. See Roe v. Wade, 410 U.S. 113, 152-53 (1973). A fundamental right to privacy exists in both the concept of liberty vis-a-vis the due process clause of the 14th Amendment and in the Ninth Amendment’s reservation of fundamental rights. See also Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring). The right to privacy is found within the penumbra of the Bill of Rights.
83. U.S. CONST. amend. IX reads as follows: “The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the People.” The Supreme Court of the United States recognized the due process interest that the People acting collectively maintain. See supra note 80 and accompanying text discussing the application of the case of United States v. Nixon, 418 U.S. 683 (1974).
the development by the subject of a distorted version of the incident due to the influence of the hypnotist. Additionally, the subject will have the conviction that his memory of the incident after the use of hypnosis is completely accurate. This distortion will render traditional legal techniques such as cross-examination much less effective. Stated another way, permitting the defendant to testify on his own behalf after the use of hypnosis may result in unreliable memory perceptions and thus render the prosecutor's tool of cross-examination ineffective. Such unreliability in the use of hypnosis and the reduction of the prosecutor's effectiveness during cross-examination can be interpreted as a denial of the People's right to due process of law.

There is a dichotomy between the fundamental right of a defendant to testify on his own behalf after the use of pretrial hypnosis, and the right of the People to due process in a criminal prosecution. One can state, however, that permitting the accused to testify on his own behalf after hypnosis is necessary in order to protect the defendant's liberty interest. Thus, the right

85. Id. at 65, 641 P.2d at 803, 181 Cal. Rptr. at 272.

86. See id.

87. The People are denied due process of law under the 14th Amendment regarding their interest in the administration of justice in a criminal prosecution when one may testify contrary to the established principles of evidence law. For example, a defendant may not testify if he refuses to take the oath on the stand. CAL. EVID. CODE § 710 (West 1966). Additionally, the defendant may not present hearsay testimony except as provided by law. CAL. EVID. CODE § 1200 (West 1966). See also People v. Shirley, 31 Cal. 3d 18, 77-78, 181 Cal. Rptr. 243, 279-80 (1982) (Kaus, J., concurring and dissenting) from the modified decision:

Finally, it seems to me that if the majority opinion is correct, then the exception which the opinion establishes for previously hypnotized defendants who wish to testify is unsustainable. Whether the right to testify in one's defense is "fundamental" . . . or constitutional . . . there can be no right to offer testimony which suffers from all of the potential vices which have triggered the majority's total ban on the testimony of hypnotized witnesses. While I have tried to explain why, in my opinion, the majority goes much too far, if the majority's reasoning is correct, I can see no basis for excepting the defendant on trial.

Id. (citations omitted).

88. For a discussion of the right of the criminal defendant to testify on his own behalf see supra note 74 and accompanying text.

89. The accused has a liberty interest that is affected since conviction of a crime could result in a prison sentence. For example, in California approximately two-thirds of all convicted felony offenders are sentenced to a prison or jail term. See generally POPE, SENTENCING OF CALIFORNIA FELONY OFFENDERS (National Criminal Justice Information and Statistics Service 1975). Additionally, the accused's liberty interest is protected by the United States Constitution. U.S. CONST. amend. XIV, § 1 reads in part as follows: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Due process has been defined with respect to liberty and justice. See Hebert v. Louisiana, 272 U.S. 312 (1926) offering the following explanation of due process: "What it [due process] does require is that state action, whether through one agency or another, shall be consistent with the fundamental
of the individual defendant to testify after the use of hypnosis may be greater than the interest of the People to due process in a criminal prosecution. The rationale for this statement lies in the fact that we hold a defendant's liberty to be superior to the interests of the People, collectively, to due process. Under this analysis, one can conclude that a defendant should be permitted to testify on his own behalf even after the use of pretrial hypnosis.

Even if the right of the accused to testify after pretrial hypnosis outweighs the interests of the People to due process in a criminal prosecution, the Supreme Court of California has failed to address how the reliability of such testimony will be increased. The solution to this problem may be to examine the rationale used by other jurisdictions to increase the likelihood that hypnotically enhanced testimony is reliable. These jurisdictions have adopted procedural safeguards to be used before, during and after the hypnotic session. It is believed that these procedural safeguards help to increase the reliability of testimony elicited through the use of hypnosis.

91. For a discussion of the procedural safeguards initiated in New Jersey see infra note 98 and accompanying text. Compare with People v. Lewis, 103 Misc. 2d 881, 883, 427 N.Y.S. 2d 177, 179 (Sup. Ct. 1980) and People v. McDowell, 103 Misc. 2d 831, 834-36, 427 N.Y.S. 2d 181, 182-83 (Sup. Ct. 1980) requiring the following safeguards:
(1) Hypnotist must be specially trained in the use of hypnosis, and preferably be a psychiatrist or psychologist.
(2) Specially trained person should not be informed of the case verbally. The hypnotist should receive written memoranda outlining the pertinent facts. Care should be exercised to avoid communication that might influence the hypnotist's opinion.
(3) Hypnotist should be independent of the prosecution and defense.
(4) All contact between the hypnotist and the subject should be videotaped from beginning to end.
(5) Representatives of the prosecution or defendant should not be in the same room with the hypnotist while he is working with the subject.
(6) Subject should be examined by a mental health professional prior to hypnosis to exclude the possibility that the subject is physically or mentally ill and to confirm that the subject possesses sufficient judgment and reason to comprehend what is happening.
(7) The hypnotist should elicit a detailed description of the facts as the subject believes them to be prior to the use of hypnosis.
(8) The hypnotist should avoid adding any new element to the subject's description of his experience, including any implicit or explicit cues during the pre-session contact, the actual hypnosis, and the post-session contact.
(9) Consideration should be given to any other evidence tending to corroborate or
B. Procedural Safeguards

I. Case Law Analysis

In State v. Hurd, a trial court in New Jersey examined the use of procedural safeguards to be followed during the hypnotic session. In Hurd, an individual was attacked and stabbed repeatedly in her apartment. The victim survived the ordeal but was unable to describe the assailant. The victim was hypnotized by the local authorities in order to refresh her recollection of the incident and was thereafter able to describe her assailant. The trial court did not admit the victim’s testimony into evidence.

The trial court in Hurd established a two-pronged test when determining whether hypnotically enhanced testimony may be admitted into evidence. First, the court adopted the following procedural safeguards to be used before, during and after the hypnotic session:

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, challenge the information garnered during the trance or as a result of the posthypnotic suggestion.

Note, that the procedural safeguards in New York are somewhat more stringent than those of New Jersey. The two trial courts in New York have essentially adopted the six procedural safeguards for the use of hypnotically enhanced testimony set forth by the New Jersey Supreme Court. New York, however, added the additional requirements of examination of the subject by a mental health professional, consideration of corroborative or contradictory evidence, and the warning that the hypnotist should avoid adding any new elements to the subject’s description of his experience. It should be noted, however, that the New York safeguards are only suggestions by two trial courts. This issue has recently reached the New York Court of Appeals. The Court of Appeals determined that hypnosis is not yet sufficiently reliable as a scientific method of proof to warrant its admission as evidence at the present time. See People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983). The Hughes court, however, expressly stated that a witness may be permitted to testify with respect to his prehypnotic recollection. Id. at 545, 453 N.E.2d at 495, 466 N.Y.S.2d at 266. The court held that the proponent of the testimony would assume the burden to establish by clear and convincing evidence that the testimony as to the prehypnotic recollection of the witness is reliable and that cross-examination would not be inhibited. Id. at 547, 453 N.E.2d at 497, 466 N.Y.S.2d at 268. Additionally, the jury should be instructed that a hypnotic session occurred and would be able to weigh that factor when deliberating.

93. Id. at 335, 414 A.2d at 293.
94. Id.
95. Id. at 335, 414 A.2d at 293-94.
96. Id. at 369, 414 A.2d at 309.
97. Id. at 363, 414 A.2d at 306.
so that subsequently the extent of the information the subject received from the hypnotist may be determined.

(4) Before induction of hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them, carefully avoiding adding any new elements to the witness’ description of the events.

(5) All contacts between the hypnotist and the subject should be recorded so that a permanent record is available for comparison and study to establish that the witness has not received information or suggestions which might later be reported as having been first described by the subject during hypnosis. Videotape should be employed if possible, but should not be mandatory.

(6) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the prehypnotic testing and post-hypnotic interview.98

The trial court in *Hurd* placed the burden of proof upon the party seeking to introduce the hypnotically enhanced testimony to establish by clear and convincing evidence99 that it had followed the standards of the procedural safeguards.100 Additionally, if the party introducing the hypnotically derived testimony had followed the procedural safeguards, the proponent would than have a second burden of showing that there was neither oversuggestiveness nor forceful conduct exerted by the hypnotist and those individuals conducting the hypnotic session.101 This second prong of the *Hurd* test for admissibility also required a showing by clear and convincing evidence in order to admit the testimony.102

The trial court’s application of the two-pronged test of admissibility to the facts in *Hurd* determined that the State, as the proponent of the use of hypnotically enhanced testimony in the case, had failed to comply with the procedural safeguards to be used during the hypnotic session and that the hypnotist and law enforcement personnel had coerced the victim to submit to hypnosis.103 Consequently, the trial court excluded the use of the

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98. *Id.* For a comparison of the *Hurd* - New Jersey procedural safeguards with those of New York, *see supra* note 91 and accompanying text. The *Hurd* safeguards have been adopted in New Mexico; *see* State v. Beachum, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1982).

99. This standard of proof is used in the traditional lineup cases which exclude evidence of a pretrial lineup identification if the procedures employed by the authorities were unnecessarily suggestive unless under the totality of the circumstances the State shows by clear and convincing evidence that the identification was reliable. *See* United States v. Wade, 388 U.S. 218, 240 (1967); Neil v. Biggers, 409 U.S. 188, 199 (1972).

100. *Hurd*, at 365, 414 A.2d at 306-07.

101. *Id.*

102. *Id.*

103. *Id.* at 367, 414 A.2d at 307-08. Analogy to procedural safeguards in criminal custodial interrogation cases can be helpful here. The Supreme Court of the United

https://scholarlycommons.law.cwsl.edu/cwlr/vol20/iss2/7
testimony as evidence.\textsuperscript{104}

The Supreme Court of New Jersey affirmed the decision.\textsuperscript{105} The court adopted the two-pronged test of admissibility enunciated by the trial court.\textsuperscript{106} The New Jersey Supreme Court recognized that the burden of establishing admissibility by clear and convincing evidence would place a great restraint on the use of hypnosis prior to criminal trials.\textsuperscript{107} The court justified the burden, however, by stating that the genuine oversuggestiveness present during the use of hypnosis created the necessity of adopting a strict burden of proof to condition the admissibility of such evidence.\textsuperscript{108} Such a burden would increase the likelihood that the evidence derived from pretrial hypnosis was reliable.\textsuperscript{109}

California, of course, is not limited to merely adopting the safeguards enunciated by New Jersey in \textit{Hurd}. Additional procedural safeguards could be employed which would further increase the reliability of the hypnotic testimony.

\textbf{2. Additional Procedural Safeguards}

The Supreme Court of California should first require the defendant to show that he has had an actual lapse in memory which necessitates the use of pretrial hypnosis.\textsuperscript{110} There should also be a requirement that an order from a magistrate be a necessary prerequisite before any pretrial hypnotic session with a defendant is conducted.\textsuperscript{111} Furthermore, the hypnotist could be required to instruct the subject immediately after he enters the hypnotic state to the effect that the hypnotist does not desire to be suggestive nor

\begin{footnotesize}
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\item States adopted the \textit{Miranda} warnings to be used as procedural safeguards prior to custodial interrogation in order to secure the privilege against self-incrimination and increase the likelihood that any confession obtained during interrogation was voluntary. \textit{See generally}, \textit{Miranda v. Arizona}, 384 U.S. 436 (1966).
\item \textit{Hurd}, at 369, 414 A.2d at 309.
\item \textit{Id.} at 545-49, 432 A.2d at 96-98.
\item \textit{Id.} at 546-47, 432 A.2d at 97. For a discussion that this burden on the admissibility of hypnotically enhanced testimony was not justified in \textit{Hurd}, see Comment, \textit{The Admissibility of Hypnotically Induced Recollection}, 70 Ky. L. J. 187 (1981-82). This Comment suggested that the use of hypnotically derived testimony should go toward the weight as opposed to the admissibility of the evidence.
\item \textit{Id.}, at 546-47, 432 A.2d at 97.
\item \textit{Id.}
\item This requirement would be consistent with \textit{State v. Hurd}, 86 N.J. 525, 432 A.2d 86 (1981). In \textit{Hurd}, the burden was on the proponent of the use of hypnosis to show that the procedural safeguards were followed. Here the burden would be on the proponent-defendant to show that he has an actual lapse in memory which requires the use of pretrial hypnosis to refresh his recollection.
\item \textit{See} Note, \textit{Admissibility, supra} note 10, at 1229-30. The Note suggests that a preliminary hearing before the use of pretrial hypnosis is permitted would help to increase the reliability of such testimony and provide more certainty in the hypnotic process.
\end{itemize}
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will the hypnotist be pleased unless the subject actually describes
the incident as he truly remembers. This instruction could
reduce the possibility that the subject would distort fact and fantasy
in order to please the hypnotist, thereby increasing the likelihood
that the hypnotized subject actually told the truth.

It has yet to be determined whether procedural safeguards will
absolutely increase the likelihood that the testimony derived is re-
liable. If a defendant is permitted to testify on his own behalf
after the use of pretrial hypnosis, some standards should be
adopted which will increase the likelihood that the testimony de-
Notes from which subject
term will be the hallmark of a well
designed instruction
rendered. The present rule as rendered in Shirley requires no procedural
safeguards. The California Supreme Court would do well to
adopt procedural safeguards for use when a defendant is
hypnotized.

Increased reliability by the use of procedural safeguards, of
course, cannot be the end of the discussion. A problem still arises
when the subject of retroactivity of the Shirley decision is con-
fronted. The Supreme Court of California left this issue un-
resolved in its modified decision. The problem must thus be
analyzed to determine the extent to which retroactivity should be
employed.

V. THE RETROACTIVITY OF SHIRLEY

A. Overruling Background

There are several overruling techniques that may be used by a
court of law. The Supreme Court of California has no consis-

113. Id. The instruction could alleviate the problems that are present during the
suggestive process of hypnosis. The instruction is necessary because the subject has a
desire to please the hypnotist while under the hypnotic state. The use of the instruc-
tion would inform the subject that the hypnotist would not be pleased unless the
subject actually told the truth. The theory is that the subject would thereby describe
the incident as he remembers it. There is thus an increase in the likelihood that the
testimony elicited is reliable.
114. See Diamond, supra note 13, at 333 stating that regardless of the manner in
which the hypnotic session is conducted, the hypnotized individual cannot be free
from heightened suggestibility and the hypnotist will be unable to avoid implanting
suggestions in the mind of the subject.
115. See supra notes 91-113 and accompanying text.
31 Cal. 3d 918(a) (1982), cert. denied 103 S. Ct. 133 (1982).
117. See supra notes 74-75 and accompanying text.
118. See Perello, Jr. & Golembiewski, Retroactivity of California Supreme Court
tent set of overruling standards, however the Supreme Court of the United States has established consistent overruling guidelines for new rules of law. The Fourth District Court of Appeals in California has followed the overruling guidelines established by the United States Supreme Court as a plausible approach to the retroactivity problem. Moreover, in People v. Williams the Fourth District Court of Appeals squarely addressed the issue of whether the Shirley decision should be retroactively applied.

B. A California Appellate Approach

In People v. Williams, the defendant was convicted of rape and robbery. The conviction was based almost entirely upon the testimony of a complaining witness who was hypnotized in order to refresh her memory of the events in issue. At the time the hypnotic session was conducted the Shirley rule had not yet been enunciated, however before review at the appellate level, the Shirley decision was rendered by the California Supreme

(footnotes omitted) [hereinafter cited as Perrello & Golembiewski, Retrospectivity]. The authors here suggest that the following overruling techniques can be employed:

1. Full Retrospectivity — The benefits of the new rule apply to all petitioners before the court and to all litigants to whom the former ruling has been or could be applied.
2. Final Judgement Rule — Applies the new rule to litigants before the court and to all cases still on direct review.
3. Prospectivity — Applies the new rule to the litigants before the court and to those cases still untried when the decision was announced.
4. Pure Prospectivity — Apply the new rule only to future cases so that even the petitioner to the present case does not receive the benefit of the overruling decision.
5. Prospective — Prospective Overruling — This technique applies when the court announces that it will change the law on a stated future date.
6. Prospective — Retroactive Overruling — Applies the new rule retroactively only if the legislature has not formulated a new law by a stated future date.

119. Perrello & Golembiewski, Retrospectivity, supra note 118, at 405. The Supreme Court of California has employed all of the six overruling techniques discussed in supra note 118, except the prospective — prospective and prospective — retrospective techniques. Prospectivity, however, has been employed for a majority of the cases in which a new rule has been announced.

120. See Linkletter v. Walker, 381 U.S. 618 (1965) requiring analysis of the following standards to determine whether retroactivity will be employed:
1. Examine the purpose to be served by the new standard.
2. Examine the extent of the reliance by law enforcement officials on the old standards.
3. Determine the effect on the administration of justice that retroactive application of the new rule would produce.

In Linkletter the issue was whether the exclusionary rule as enunciated in Mapp v. Ohio, 367 U.S. 643 (1961) was retroactive. The Court used the overruling guidelines listed above to determine that the Mapp rule did not require retrospective application.

121. 132 Cal. App. 3d 920, 183 Cal. Rptr. 498 (Ct. App. 1982).
122. Williams, at 924, 183 Cal. Rptr. at 500.
124. Williams, at 920, 183 Cal. Rptr. at 498.
125. Id. at 922, 183 Cal. Rptr. at 499.
Court. The Williams case thus presented the appellate court with the retroactivity problem which Shirley left unanswered. The Fourth District Court of Appeals examined the guidelines established by the United States Supreme Court for determining the extent to which a new rule of law should be retroactively applied.

Accordingly, the court first examined the purpose to be served by the new standard which excluded hypnotically enhanced testimony at trial. The purpose to be served by the rule in Shirley was the exclusion of the process of refreshing one's recollection by the use of hypnosis. The court reasoned that Shirley was a policy decision which applied to future cases in order to avoid the use of an unreliable scientific method of proof at trial. Retroactivity was thus denied under the purpose guideline.

Secondly, the extent of reliance by law enforcement authorities on the old standard was examined. The court discovered that hypnosis was widely used by the authorities to refresh the recollection of a witness. This wide use of hypnosis by law enforcement authorities indicated a great extent of reliance on hypnotically added testimony prior to Shirley. Consequently,

126. Id. at 922, 183 Cal. Rptr. at 498.
127. See supra notes 75-76 and accompanying text.
128. For a discussion of the overruling guidelines established by the United States Supreme Court see supra note 120 and accompanying text.
129. Williams, 132 Cal. App. 3d at 924, 183 Cal. Rptr. at 500. See State ex rel. Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982). This case involved the issue of whether a new rule excluding hypnotically enhanced testimony should be applied retroactively. The Collins court stated that complete retroactivity will only be granted when the major purpose of the new rule is to overcome an aspect of a criminal trial which substantially impairs the truthfinding function and thus raises questions regarding the accuracy of guilty verdicts. Id. at 189, 644 P.2d at 1275. The Arizona Supreme Court noted, however, that additional safeguards are present during trial which reduce the possibility that the truthfinding process is so totally damaged as to require retroactive application of the new rule. Although not expressly mentioned in Collins, an additional safeguard would be for the judge to instruct the jury as to the issues involved and the general principles of law that are to be applied. See generally, People v. Koontz, 7 Cal. App. 3d 30, 86 Cal. Rptr. 374 (Ct. App. 1970); People v. Fontes, 7 Cal. App. 3d 650, 86 Cal. Rptr. 790 (Ct. App. 1970); People v. Bevins, 54 Cal. 2d 71, 351 P.2d 776, 4 Cal. Rptr. 504 (1960).
130. Williams, at 924, 183 Cal. Rptr. at 500.
131. Id. at 925, 183 Cal. Rptr. at 500.
132. Id. See Collins, 132 Ariz. at 189, 644 P.2d at 1275. In examining the reliance guideline, if reliance on the old standards were not justified, then full retroactivity would probably be granted. For this guideline, however, the reliance of law enforcement officials in Arizona on the use of hypnosis prior to trial weighed in favor of prospective application. The case law in the area was divergent among the jurisdictions. Additionally, there was conflict among the experts regarding the reliability of hypnotically enhanced testimony. Thus, law enforcement officials in Arizona had a prior good faith reliance on the use of pretrial hypnosis.
133. Williams, at 924, 183 Cal. Rptr. at 500.
retroactivity was not granted under the *reliance* guideline.\(^{134}\)

Finally, the Court examined the effect that a retroactive application of *Shirley* would impose on the *administration of justice*.\(^{135}\) This guideline was the major component used by the *Williams* court in determining whether *Shirley* should be given retrospective treatment. A balancing test was employed to determine whether the retroactive application of *Shirley* would impose too great a burden on the administration of justice.\(^{136}\) In concluding that any retrospective treatment would hinder the effective administration of justice the court stated: “Obviously the determination as to retroactivity involves a balancing process. . . . In the balancing process as to retroactivity it appears to us that considerations of judicial policy and the effective administration of justice compel the determination that *Shirley* shall not be given retroactive application.”\(^{137}\) Thus, the *Williams* court used the United States Supreme Court’s overruling guidelines and a balancing test to determine that *Shirley* should be accorded prospective application.

The determination of the prospective application of a new rule may not completely solve the overruling problems involved. One can still determine that an application of a new rule need not be

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\(^{134}\) *Id.*

\(^{135}\) *Id.* at 924-25, 183 Cal. Rptr. at 500. See *Linkletter v. Walker*, 381 U.S. 618, 636 (1965). *Collins*, 132 Ariz. at 190, 644 P.2d at 1276 (1982). When examining the effect that a new rule would impose on the administration of justice both *Linkletter* and *Collins* stated that not every law requires the reversal of prior convictions. There is a need for finality in decisions and retroactivity will only be applied when there is a denial of a fundamental right of constitutional magnitude. For example, the right to counsel is so fundamental that any overruling decision involving this right is likely to be accorded retroactive treatment. See generally *Williams v. Alabama*, 341 F.2d 777 (5th Cir. 1965); Palumbo v. New Jersey, 334 F.2d 524 (3d Cir. 1964); United States ex rel. Craig v. Myers, 329 F.2d 856 (3d Cir. 1964). See also *Booker v. Phillips*, 418 F.2d 424 (10th Cir. 1969) holding that the application of federal double jeopardy provisions apply retroactively.

\(^{136}\) *Williams*, at 924-25, 183 Cal. Rptr. at 500. Additionally, see *Collins*, 132 Ariz. at 190, 644 P.2d at 1276 which stated that when the retroactive application of a new rule imposes a substantial burden on the administration of justice then retroactivity must be denied. The burden on the administration of justice is generally too great to mandate the retroactive application of the new ruling when the change in law is unforeseen. In *Collins*, the Arizona Supreme Court reasoned that since the change in law regarding the use of pretrial hypnosis was unforeseen, retroactivity had to be denied.

\(^{137}\) *Williams*, at 925, 183 Cal. Rptr. at 500. In the balancing approach employed by the *Williams* Court there was great reliance placed on the fact that the testimony of the hypnotized prosecution witness afforded the only basis for the conviction of the defendant. The court concluded that the retroactive application of *Shirley* would result in the defendant escaping responsibility for the crime which he allegedly committed. This factor was used in the balancing process when determining the burden that retrospective treatment of *Shirley* would impose on the administration of justice and finally in the court’s holding that *Shirley* was to be accorded prospective application.
purely prospective.138 Under this alternative approach, the point in time when the prospective application of the new rule will become effective must be determined.139 Although the California District Court of Appeals opted for the purely prospective application in Williams, the Arizona Supreme Court used an alternative approach for a new rule excluding hypnotically enhanced testimony in State ex rel. Collins v. Superior Court.140

C. Prospective Application — The Arizona Approach

In Collins, the defendant was charged with kidnapping, sexual assault, and rape.141 The defendant was apprehended primarily because several crime victims were hypnotized in an effort to aid the authorities in learning the identification of the assailant.142 Prior to trial, the Arizona Supreme Court ruled that hypnotically induced recall testimony was per se inadmissible as evidence.143

The Supreme Court of Arizona determined that the exclusion of hypnotically derived testimony would be applied prospectively. The court also focused on the point in time when the application would become effective.144 First, it was held that any witness hypnotized after the announcement of the new hypnotic testimony exclusion rule would be incompetent to testify.145 Second, the Collins court ruled that any witness hypnotized prior to the new rule would also be incompetent to testify.146 Finally, for any conviction that was within the appellate process and where the testimony, as well as the hypnosis, occurred prior to the announcement of the new rule, the issue must be examined on a case-by-case basis.147 This case-by-case analysis would be used to determine whether the use of the hypnotically enhanced testimony was harmless error.148

138. See infra notes 144-48 and accompanying text.
139. Id.
142. Id.
143. Id. The Supreme Court of Arizona had ruled that hypnotically enhanced testimony was not admissible as evidence in State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981). In Mena the Court determined that the use of hypnosis to refresh the recollection of a prosecution witness was a denial of the criminal defendant's constitutional right to confrontation. The court based this conclusion on the belief of several authorities that the hypnotism of a witness renders cross-examination ineffective. For a general discussion of this theory see supra notes 84-87 and accompanying text. For a discussion of a criminal defendant's constitutional right to confrontation see generally, Pointer v. Texas, 380 U.S. 400 (1965).
144. Collins, at 190, 644 P.2d at 1276.
145. Id.
146. Id.
147. Id.
148. Id. Harmless error is unaccompanied by prejudice or injury to the defendant.
The Collins court understood that its holding was not purely prospective in form, however it recognized the problems involved in the prospective decisionmaking process.\textsuperscript{149} The court focused on the large degree of judicial discretion involved when determining the time at which a new principle of law becomes effective.\textsuperscript{150} The harmless error test was thus determined to be a plausible solution to the overruling problems involved regarding the exclusion of hypnotically enhanced testimony in Arizona.

\textbf{D. The Overruling Solution}

The approaches to the overruling applications for the exclusion of hypnotically enhanced testimony applied by both the Arizona Supreme Court and the Fourth District Court of Appeals in California have similarities and differences.\textsuperscript{151} Arizona's approach to the problem is the superior solution. The use of a harmless error test on a case-by-case basis for all convictions within the appellate

and as such, it is not grounds for reversal on appeal. Conversely, prejudicial error would be that which affects the substantial rights of the party complaining. See generally 5 C.J.S. Appeal & Error § 1676 (1958). California uses a prejudicial error test to determine whether error in admitting testimony is reversible. See People v. Watson, 46 Cal. 2d 818, 299 P.2d 243 (1956). See also People v. Shirley, 31 Cal. 3d 18, 70, 641 P.2d 775, 806, 181 Cal. Rptr. 243, 275 (1982) stating the following regarding Watson:

We conclude that proper application of the Watson prejudicial error test in the present context requires the appellate court to determine whether it is reasonably probable that a result more favorable to the defendant would have occurred if the testimony of the previously hypnotized witness as to all matters relating to the events of the crime had not been admitted.

The differences between the harmless error and prejudicial error tests warrants discussion here. See McCormick, \textit{supra} note 33, at § 183 explaining the harmless error test. Note that before constitutional error can be held harmless, the court must determine that the error was harmless beyond a reasonable doubt. There would be a constitutional error involved in that the hypnotically enhanced testimony would be in violation of the defendant's constitutional right of confrontation. See U.S. Const. amend. VI requiring the defendant's right to confrontation. Under the prejudicial error test of Watson, however, the court need only determine whether it is reasonably probable that a more favorable result would have occurred had the error been omitted. Under this test it is clearly more difficult to obtain a reversal for the defendant's conviction. The proof required to maintain a conviction is lowered to the \textit{reasonably probable} standard under the prejudicial error test, while that of the constitutional harmless error test requires a higher standard of proof beyond a reasonable doubt to support the conviction.

\textsuperscript{149} Collins, at 190, 644 P.2d at 1276.  
\textsuperscript{150} Id.  
\textsuperscript{151} Both of the approaches used the overruling guidelines established by the Supreme Court of the United States in Linkletter v. Walker, 381 U.S. 618 (1965), to determine that a new rule excluding the use of hypnotically derived testimony should be accorded prospective treatment. The approach employed by the Supreme Court of Arizona in Collins differed from that of the appellate approach of California in Williams, however, in that Collins addressed the point in time when the prospective application was to become effective. Additionally, Collins expressly mandated the use of a harmless error test for all cases that were within the appellate process concerning the hypnotic testimony retroactivity issue.
process is more reliable than the approach used in *Williams*. It is best for each case to turn on its own unique set of facts and the harmless error test will permit courts to examine each case individually to determine whether the use of hypnotically adduced testimony is reversible error.\(^{152}\) Under the test employed by the Arizona Supreme Court in *Collins*, the rights of the defendant are more fully protected than by the approach used in *Williams*. The *Williams* approach accords the rule in *Shirley* pure prospective application as a result of a balancing of judicial policy.\(^{153}\) Any conviction resulting from hypnotically enhanced testimony prior to *Shirley* would thus remain intact.\(^ {154} \) Such would be the case even if the hypnotic testimony were the sole basis for supporting the conviction.\(^{155}\)

The approach taken by Arizona in *Collins* would determine whether the use of the hypnotic testimony was harmless with respect to the defendant’s conviction. Under *Collins*, a criminal conviction would be overturned where the use of hypnotically enhanced testimony was the major factor in supporting the conviction.\(^{156} \) The *Collins* test thus clearly protects the rights of the defendant in that it recognizes that convictions might be overturned in some instances. The test mandates that each case be examined individually to determine whether the hypnotic testimony was prejudicial to the defendant’s conviction.\(^{157}\)

The California Supreme Court should use the approach taken in *Collins* to determine that *Shirley* be given prospective application and in aiding the court in deciding the point in time at which the prospective application would become effective. The Supreme Court of California might first hold that any person hypnotized pre-*Shirley* but who testified post-*Shirley* will be incompetent to testify. Second, for convictions remaining in the process of appeal and where both the testimony and hypnosis occurred pre-*Shirley*,

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152. Note that the Supreme Court of California used a prejudicial error test to determine whether a new rule was reversible error in *Shirley*. For a discussion of this test *see supra* note 148 and accompanying text. The court can thus employ the same test when a party seeks the retroactive benefit of the new rule.

153. *See supra* note 137 and accompanying text.

154. The conviction would remain intact because *Williams* held that *Shirley* was prospective. If *Shirley* is not applied retroactively then any conviction resulting prior to *Shirley* would stand.

155. Note that the *Williams* court expressly stated that the hypnotic testimony was the major basis for the conviction of the defendant. The Court actually used this factor to the detriment of the defendant in order to uphold the conviction. For a discussion of the court’s rationale *see supra* note 137 and accompanying text.


157. *Id.* For a definition of prejudicial error *see supra* note 148 and accompanying text.
the court might employ a case-by-case analysis as used in Collins to determine whether the introduction of the hypnotically enhanced testimony was harmless error. Such a ruling would represent an equitable balance of the competing interests involved and be a logical place to draw the line.\textsuperscript{158}

It is thus apparent that any decision by the Supreme Court of California to apply the Shirley decision prospectively may create the additional problem of determining the point in time when the application will become effective. The Supreme Court of Arizona's approach to this problem would be a helpful aid in determining the solution to the problem. The California Supreme Court would be wise to follow such an insightful example.

VI. CONCLUSION

There has been substantial debate regarding the reliability of hypnotically enhanced testimony. The Supreme Court of California followed in the path of the majority of jurisdictions which have addressed the issue when it rendered such testimony inadmissible as evidence in People v. Shirley.\textsuperscript{159}

The California Supreme Court qualified this rule to permit a criminal defendant, who has submitted to pretrial hypnosis, to testify on his own behalf. The rationale employed by the court regarding this exception was to prevent the infringement of the fundamental right of an accused to testify on his own behalf.\textsuperscript{160} This qualification could infringe on the right of the People to due process of law in a criminal prosecution case.\textsuperscript{161} The Supreme Court of California may wish to balance the right of the People to due process against the right of an accused to testify after the use of hypnosis.\textsuperscript{162} If this balance favors the right of the accused to testify, the court could adopt requisite procedural safeguards for use before the pretrial hypnotically enhanced testimony would be introduced into evidence.\textsuperscript{163} Such procedural safeguards will increase the likelihood that the testimony elicited through the use of pretrial hypnosis is reliable.

Finally, the Supreme Court of California declined to rule on the extent to which the decision rendered in Shirley will be applied retroactively. Since the court has used several overruling tech-

\textsuperscript{158} Id.
\textsuperscript{159} 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, \textit{mod.} 31 Cal. 3d 918(a) (1982) \textit{cert. denied} 103 S.Ct. 133 (1982).
\textsuperscript{160} See supra notes 72-74 and accompanying text.
\textsuperscript{161} See supra notes 80-90 and accompanying text.
\textsuperscript{162} See supra notes 88-90 and accompanying text.
\textsuperscript{163} See supra notes 91-113 and accompanying text.
niques for the application of new rules in the past, the lack of uniformity can create confusion as to the extent of retroactivity to employ for the hypnotic testimony issue. The Supreme Court of California should examine the overruling techniques which other courts have used when addressing the retroactivity issue. Such an examination might lead to the conclusion that the rule in Shirley should be granted prospective application, the Supreme Court of California could exercise its judicial discretion when determining the point in time at which the prospective application would become effective.

Frank J. Ingrassia

164. See supra notes 118-19 and accompanying text.
165. See supra notes 123-58 and accompanying text.