

April 1984

## People v. Hughes: A Pretrial Procedure for Excluding Testimony Influenced by Hypnosis

Albert J. D'Aquino

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>

---

### Recommended Citation

Albert J. D'Aquino, *People v. Hughes: A Pretrial Procedure for Excluding Testimony Influenced by Hypnosis*, 4 Pace L. Rev. 705 (1984)

DOI: <https://doi.org/10.58948/2331-3528.1623>

Available at: <https://digitalcommons.pace.edu/plr/vol4/iss3/7>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

# ***People v. Hughes: A Pretrial Procedure for Excluding Testimony Influenced by Hypnosis***

## **I. Introduction**

In the past decade there has been a dramatic increase in the use of hypnosis as a tool of criminal investigation.<sup>1</sup> Typically, a victim of or a witness to a crime is hypnotized by law enforcement officials in an effort to elicit more information about the criminal event than the witness has previously been able to recall.<sup>2</sup> If the subject is able to recall additional information under hypnosis, the information may be used in two ways. Initially, the police may use the new lead to identify a suspect or to locate new evidence.<sup>3</sup> These are purely investigative uses.<sup>4</sup> Later, the hypnotically refreshed recollections may be included in the witness' testimony at a criminal trial.<sup>5</sup> This testimonial use has received conflicting treatment in the courts,<sup>6</sup> and the admissibility of hypnotically refreshed testimony remains a controversial subject.<sup>7</sup>

---

1. See Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 313 (1980) (calling the usage widespread and noting that in both small and large cities police are being trained to hypnotize and question witnesses). See also Feldman, *Hypnosis: Look Me in the Eye and Tell Me That's Admissible*, 8 BARRISTER No. 1, Spring 1981, at 5 (Los Angeles' "Investigative Hypnosis Program" reports new information obtained in 80% of sessions with witnesses).

2. "Witness" as used in this Note may also refer to the victim of a crime.

3. Diamond, *supra* note 1, at 316 n.7(f). See, e.g., an unreported 1977 Alameda County, California case, *People v. Woods*, in Brody, *Hypnotism v. Crime: A Powerful Weapon or an Abused Tool?*, N.Y. Times, Oct. 14, 1980, at C1, col. 1 (hypnotic recall of license plate numbers by victim of kidnapping led police to perpetrators).

4. Dr. Martin Orne, a noted expert in the clinical uses of hypnosis, has endorsed the investigative use of hypnosis with a qualification: "To the extent that the victim or witness, police, . . . and hypnotist alike share no preconceived bias about what might have occurred, the situation approaches the ideal case for hypnosis to be most appropriately employed: to develop investigative leads." Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. OF CLIN. & EXPER. HYPNOSIS 311, 328 (1979).

5. For cases utilizing hypnotically refreshed testimony, see cases cited *infra* note 50.

6. See *infra* text accompanying notes 45-73.

7. See Note, *The Admissibility of Testimony Influenced by Hypnosis*, 67 VA. L.

In 1983, the New York Court of Appeals held in *People v. Hughes*<sup>8</sup> that hypnotically refreshed testimony is inadmissible per se in a criminal trial.<sup>9</sup> The court also held that before a previously hypnotized witness may testify, a pretrial hearing is necessary to distinguish prehypnotic recollections from those recollections recalled through hypnosis.<sup>10</sup> The court stated that prehypnotic recollections are admissible only when the prosecutor<sup>11</sup> is able to prove at the pretrial hearing that his witness' prehypnotic recollections were not altered or otherwise affected by the hypnosis.<sup>12</sup>

After reviewing the nature of hypnosis and the legal treatment accorded hypnotically refreshed recollections in Part II, this Note reviews the factual and procedural history of *Hughes* in Part III. Part IV examines the court of appeals' holding and reasoning. In Part V, analysis of the case includes a review of alternative rationales that might have been used to find the testimony inadmissible, an examination of the procedure at the pretrial hearing, and a suggested approach concerning the content and operation of the hearing.

## II. Background

### A. Hypnosis

Hypnosis is a phenomenon that cannot be adequately explained in terms of scientific causation.<sup>13</sup> The American Medical Association has termed it a condition of altered attention,<sup>14</sup> but

---

REV. 1203, 1216-20 (1981).

8. 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983).

9. *Id.* at 545, 453 N.E.2d at 495, 466 N.Y.S.2d at 266.

10. *Id.* at 546, 453 N.E.2d at 496, 466 N.Y.S.2d at 267.

11. Prosecutorial use of hypnosis on witnesses is clearly the most common use in criminal cases, and was at issue in *Hughes*. This Note concerns only this usage. For use of hypnosis on a defendant, see Warner, *The Use of Hypnosis in the Defense of Criminal Cases*, 27 INT'L J. OF CLIN. & EXPER. HYPNOSIS 417 (1979).

12. 59 N.Y.2d at 547-48, 453 N.E.2d at 497, 466 N.Y.S.2d at 268. In this Note, hypnotic effect on prehypnotic recollection is termed "taint." "Taint" as used herein does not refer to or concern fourth amendment "fruits of the poisonous tree" or the exclusionary rule.

13. Diamond, *supra* note 1, at 321 (noting the concurrence of expert opinion that hypnosis is a phenomenon rather than an observable scientific process).

14. 168 J. A.M.A. 186, 187 (1958). This definition dispels the common myth that the subject is asleep during hypnosis.

it is best understood by noting the effects upon the hypnotized subject. The most pronounced effect is the subject's increased susceptibility to suggestions.<sup>15</sup> A leading authority on hypnosis noted that the "[subject's] dissociated attention is constantly sensitive to and responsive to cues from the hypnotist."<sup>16</sup> Furthermore, because most hypnotic subjects wish to please the hypnotist with their performance,<sup>17</sup> the subject may respond in a manner he perceives to be favored by the hypnotist.<sup>18</sup> Even the purpose of the hypnotic session may act as an agent of suggestion.<sup>19</sup> Although steps may be taken to minimize the planting of suggestions,<sup>20</sup> the subject will remain highly susceptible to them.<sup>21</sup> This phenomenon occurs because the subject's dissociated attention lacks the normal critical judgment necessary to distinguish the real from the imagined or from the suggested.<sup>22</sup>

Another common effect of hypnosis is the subject's increased confidence in recollections after the hypnosis has ended.<sup>23</sup> Such certitude is acquired during the hypnosis through "reviewing the events in the hypnotic context and having the memories legitimized by the hypnotist."<sup>24</sup> Legitimization occurs, for example, when the hypnotist suggests that the subject will accurately recall the desired information.<sup>25</sup> Whether the subsequent recall is accurate or not, the subject accepts, through suggestion,

---

15. C. CHEEK & L. LECRON, CLINICAL HYPNO-THERAPY 13 (1968). See also Diamond, *supra* note 1, at 314.

16. Spiegel, *Hypnosis: An Adjunct to Therapy*, in 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY § 30.4, at 1844 (A. Freedman, H. Kaplan & B. Sadock 2d ed. 1975).

17. Diamond, *supra* note 1, at 333, 335.

18. Orne, *supra* note 4, at 326. For example, a subject recalled the events of a certain date *in the future* when requested to do so by the hypnotist. *Id.* at 321-22.

19. Diamond, *supra* note 1, at 333. This point may have been important in *People v. Hughes*, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983), where the purpose of the hypnotic session was to identify a suspect.

20. See *infra* text accompanying note 68.

21. E. HILGARD, THE EXPERIENCE OF HYPNOSIS 9 (1968) (observing that the process is inherently suggestive, with the hypnotist's suggestions inducing and controlling the hypnosis).

22. Diamond, *supra* note 1, at 340.

23. Orne, *supra* note 4, at 332.

24. *Id.*

25. Diamond, *supra* note 1, at 340. See also *State v. Mack*, 292 N.W.2d 764, 769 (Minn. 1980) (hypnotist telling subject: "You will remember very clearly everything that happened on the 13th and 14th.").

his recall as accurate.<sup>26</sup> The result is a residual unwarranted confidence in hypnotic recollections.<sup>27</sup> The same is true of prehypnotic recollections repeated during hypnosis.<sup>28</sup>

Perhaps the most troubling effect of hypnosis, with regard to testimonial usage, is the subject's ability to confabulate in a convincing manner while hypnotized.<sup>29</sup> Confabulation occurs when the subject "imagine[s] incidents to fill memory gaps, by, for instance, imagining that he has experienced something he has simply heard from others. He may also intentionally fabricate events perceived to be beneficial to himself or those conducting the hypnotic session."<sup>30</sup> Compounding this problem of confabulation is the subject's inability to distinguish, after the hypnosis, between actual fact and confabulated "recollections."<sup>31</sup>

These effects of hypnosis, increased confidence in recollections, the risk of confabulation, and high susceptibility to suggestion, are germane to the admissibility of hypnotically refreshed testimony. Although researchers have noted other less common effects,<sup>32</sup> they all are attributable to these three.<sup>33</sup> Understandably, then, of the courts that have considered the issue of hypnotically refreshed testimony, all have focused on the three most common effects.<sup>34</sup>

## B. Case Law

Because hypnosis is an inherently suggestive method of identification,<sup>35</sup> federal<sup>36</sup> and state<sup>37</sup> due process questions may

---

26. Diamond, *supra* note 1, at 339-40.

27. *Id.* at 339.

28. *Id.* See also Orne, *supra* note 4, at 320. "Even though prior to hypnosis [the subject] had been very uncertain about his memory . . . he will now report his 'memories' consistently and with conviction" after repeating them while hypnotized. *Id.*

29. Diamond, *supra* note 1, at 337. See also Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567, 588 (1977).

30. Hughes, 59 N.Y.2d at 535, 453 N.E.2d at 489, 466 N.Y.S.2d at 260.

31. Diamond, *supra* note 1, at 335.

32. Other effects of hypnosis include role behavior, lack of planning initiative, and amnesia for what transpired during the hypnosis. See E. HILGARD, *supra* note 21, at 6-10.

33. See *supra* text accompanying notes 15-31

34. See, e.g., *United States v. Awkard*, 597 F.2d 667 (9th Cir.), cert. denied, 444 U.S. 885 (1979); *People v. Gonzales*, 417 Mich. 968, 336 N.W.2d 75 (1983); *State v. Koehler*, 312 N.W.2d 108 (Minn. 1981).

35. See *supra* text accompanying note 15.

be raised, since other types of suggestive identification methods have come under constitutional scrutiny in both the United States Supreme Court and the New York Court of Appeals. In *Stovall v. Denno*,<sup>38</sup> the Supreme Court held that a defendant's due process rights are violated when police use an impermissibly suggestive identification procedure<sup>39</sup> to test witness recollection. The point at which an identification procedure becomes impermissibly suggestive, the Court stated, is determined by the totality of the circumstances surrounding the identification event, and is thus a factual determination.<sup>40</sup>

The New York Court of Appeals, in *People v. Adams*,<sup>41</sup> stated that New York constitutional protections, as applied to pretrial identifications, go further than the federal standard.<sup>42</sup> In *Adams*, witnesses to a robbery were taken to a police station to view a line up consisting of only the suspects in custody. Furthermore, the witnesses had been told the suspects were in custody. The suspects were held from behind by police while the witnesses viewed them.<sup>43</sup> When the case reached the court of appeals, the court held that these impermissibly suggestive factors pervaded the subsequent identification and thus invalidated it.<sup>44</sup>

---

36. U.S. CONST. amend. XIV. The fourteenth amendment guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law." The Supreme Court applied a due process analysis to a suggestive identification in *Stovall v. Denno*, 388 U.S. 293 (1967). See Falk, *Posthypnotic Testimony — Witness Competency and the Fulcrum of Procedural Safeguards*, 57 ST. JOHN'S L. REV. 30, 56-59 (1983).

37. N.Y. CONST. art. I, § 6. "No person shall be deprived of life, liberty or property without due process of law." *Id.* Because confabulation ("recalling" false memories) is a known risk of hypnosis, the New York due process analysis may be applicable. See *People v. Schwartzman*, 24 N.Y.2d 241, 250, 247 N.E.2d 642, 648, 299 N.Y.S.2d 817, 825, cert. denied, 395 U.S. 949 (1969) (allowing possibly false evidence to remain uncorrected denies due process of law); *People v. Smith*, 117 Misc. 2d 737, 759, 459 N.Y.S.2d 528, 543 (Sup. Ct. Dutchess County 1983) (trial court due process analysis of hypnotically refreshed testimony). See also *infra* text accompanying notes 41-44.

38. 388 U.S. 293, 302 (1967).

39. In *Stovall*, the suspect was taken to the hospital where the attack victim was recuperating, for the purpose of possible identification. The Court held that this was permissibly suggestive since the victim could not travel to the police station to attempt identification in a line up with others. *Id.*

40. *Id.*

41. 53 N.Y.2d 241, 423 N.E.2d 379, 440 N.Y.S.2d 902 (1981).

42. *Id.* at 250, 423 N.E.2d at 383, 440 N.Y.S.2d at 906. See also *Hughes*, 59 N.Y.2d at 542, 453 N.E.2d at 493, 466 N.Y.S.2d at 267.

43. *People v. Adams*, 53 N.Y.2d at 249, 423 N.E.2d at 383, 440 N.Y.S.2d at 905.

44. *Id.*

In 1968, the Maryland Court of Special Appeals became the first court to rule on the admissibility of hypnotically refreshed testimony in a criminal case in *Harding v. State*.<sup>45</sup> In that case, the victim of a rape and shooting was unable to identify her attacker until she was hypnotized.<sup>46</sup> After testimony by the hypnotist that hypnosis does not render the subject susceptible to suggestion,<sup>47</sup> the court admitted the victim's hypnotically refreshed identification.<sup>48</sup> The court cautioned the jury, however, not to give undue weight to the testimony.<sup>49</sup>

*Harding* shifted judicial focus from questions of admissibility to issues of witness credibility and evidentiary weight. After *Harding*, an increasingly large number of courts followed this approach.<sup>50</sup> Since 1980, however, courts have begun to reject the *Harding* rule because of its failure to critically analyze the effects of hypnosis.<sup>51</sup>

45. 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied sub nom.* *Harding v. Maryland*, 395 U.S. 949 (1969). Other criminal cases have dealt with hypnosis in varying contexts. *See, e.g.*, *People v. Modesto*, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963) (with proper foundation presented for reliability, expert opinion on defendant's mens rea derived from hypnotic interview held admissible); *People v. Busch*, 56 Cal. 2d 868, 366 P.2d 314, 16 Cal. Rptr. 898 (1961) (expert opinion on defendant's mens rea derived from hypnotic interview, excluded for lack of proper foundation of reliability); *Cornell v. Superior Court*, 52 Cal. 2d 99, 338 P.2d 447 (1959) (defense counsel permitted to examine defendant while hypnotized as part of case preparation); *People v. Ebanks*, 117 Cal. 652, 49 P. 1049 (1897) (defendant's statement of innocence while hypnotized inadmissible). These cases are representative of other attempted uses of hypnosis. For an exhaustive review of other uses, see Note, *supra* note 7, at 1204-05.

46. *Harding v. State*, 5 Md. App. at 235, 246 A.2d at 304-05.

47. *Id.* at 240, 246 A.2d at 308. This observation is clearly contrary to the leading body of knowledge today. *Cf. supra* text accompanying notes 15-21.

48. *Harding v. State*, 5 Md. App. at 246-47, 246 A.2d at 312.

49. *Id.* at 244, 246 A.2d at 310.

50. *See, e.g.*, *United States v. Awkard*, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); *United States v. Adams*, 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); *Clark v. State*, 379 So. 2d 372 (Fla. Dist. Ct. App. 1979); *People v. Smrekar*, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979); *State v. Greer*, 609 S.W.2d 423 (Mo. App. 1980), *vacated on other grounds*, 450 U.S. 1027 (1981); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981) (*see infra* text accompanying notes 66-68); *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978); *State v. Jorgensen*, 8 Or. App. 1, 492 P.2d 312 (1971); *Chapman v. State*, 632 P.2d 1280 (Wyo. 1982). Two New York cases prior to *Hughes* allowed admission of hypnotically refreshed testimony if nine procedural safeguards were first met. *See People v. Lewis*, 103 Misc. 2d 881, 427 N.Y.S.2d 177 (Sup. Ct. N.Y. County 1980); *People v. McDowell*, 103 Misc. 2d 831, 427 N.Y.S.2d 181 (Sup. Ct. Onondaga County 1980).

51. *See cases cited infra* note 60.

In 1980, in *State v. Mack*,<sup>52</sup> the testimony of a victim, unable to remember her attacker until hypnotized, was admitted into evidence over the objection of defense counsel.<sup>53</sup> On appeal to the United States District Court for Minnesota, the court undertook a thorough review of the nature and effects of hypnosis.<sup>54</sup> The court then applied a variant of the test enunciated by the United States Circuit Court of Appeals for the District of Columbia in *United States v. Frye*.<sup>55</sup> The court in *Frye* stated that a scientific method, to be admissible, "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."<sup>56</sup> The *Mack* court determined, inter alia, that the results of "scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate."<sup>57</sup> The court held that, in view of its inherent dangers of suggestibility and confabulation, hypnosis could not pass this test.<sup>58</sup> Accordingly, the hypnotically refreshed testimony was held inadmissible.<sup>59</sup>

Several jurisdictions have followed the *Mack* approach and have reached a relatively uniform conclusion: hypnotically refreshed testimony is not scientifically accurate.<sup>60</sup> Notably, Maryland overruled the precedent established in *Harding* in the wake

---

52. 292 N.W.2d 764 (Minn. 1980).

53. *Id.* at 765.

54. The *Mack* court heard testimony of five expert witnesses and had before it amici curiae briefs from the California Attorneys for Criminal Justice and the Minnesota State Public Defender. *Id.* at 765-66. The court took note of the same effects that are reviewed *supra* at text accompanying notes 15-31.

55. 293 F. 1013 (D.C. Cir. 1923) (holding the results of a lie detector test inadmissible).

56. *Id.* at 1014.

57. *State v. Mack*, 292 N.W.2d at 768.

58. *Id.* at 768-72.

59. *Id.* at 772.

60. See, e.g., *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982); *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981); *State v. Collins*, 296 Md. 670, 464 A.2d 1028 (1983); *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E.2d 1190 (1983); *People v. Gonzales*, 417 Mich. 968, 336 N.W.2d 75 (1983); *People v. Wallach*, 110 Mich. App. 37, 312 N.W.2d 108 (1981); *State v. Koehler*, 312 N.W.2d 108 (Minn. 1981); *State v. Palmer*, 215 Neb. 273, 338 N.W.2d 281 (1983); *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981); *Commonwealth v. Taylor*, 294 Pa. Super. 171, 439 A.2d 805 (1982). As in *Mack*, these cases allow prehypnotic testimony, while holding hypnotically refreshed recollections inadmissible.

of the *Mack* decision, and held such testimony inadmissible.<sup>61</sup>

In *People v. Shirley*,<sup>62</sup> California went beyond simply rejecting hypnotically refreshed testimony. The California Supreme Court held that a previously hypnotized witness may not testify about any topics related to events discussed during the hypnotic session.<sup>63</sup> At least one commentator has suggested that this rule could significantly discourage the use of investigative hypnosis in California.<sup>64</sup> Law enforcement officials must consider *Shirley* before using investigative hypnosis, for even if no new information is recalled during the hypnosis, the witness cannot testify about original recollections if they were discussed during hypnosis.<sup>65</sup>

New Jersey has taken another approach, making the admissibility of hypnotically refreshed testimony conditional. In *State v. Hurd*,<sup>66</sup> the New Jersey Supreme Court held that hypnotically refreshed testimony may be admissible if certain procedural safeguards are followed at the hypnotic session.<sup>67</sup> The court suggested that:

(1.) The hypnotic session should be conducted by a psychiatrist or psychologist experienced in the use of hypnosis;

(2.) he or she should be independent, not regularly employed by either party;

(3.) any information given to the hypnotist should be recorded;

(4.) before inducing the hypnosis the hypnotist should obtain a detailed description of the facts the subject presently recalls, and should avoid influencing the description;

(5.) all contacts between the hypnotist and the subject should be recorded;

(6.) only the hypnotist and the subject should be present

---

61. *State v. Collins*, 296 Md. at 703, 464 A.2d at 1044-45.

62. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, cert. denied, 103 S. Ct. 133 (1982).

63. *Id.* at 66-67, 641 P.2d at 804, 181 Cal. Rptr. at 272-73.

64. This is the obvious logical inference in light of the court's holding. See generally Beaver, *Memory Restored or Confabulated by Hypnosis—Is it Competent?*, 6 U. PUGET SOUND L. REV. 155, 175-80 (1983).

65. *People v. Shirley*, 31 Cal. 3d at 66-67, 641 P.2d at 804, 181 Cal. Rptr. at 272-73.

66. 86 N.J. 525, 432 A.2d 86 (1981).

67. *Id.* at 545-46, 432 A.2d at 96-97.

during any phase of the hypnotic session.<sup>68</sup> Since these safeguards were lacking in *Hurd*, the testimony in that case was held inadmissible.<sup>69</sup>

Similarly, in New York, two lower courts have adopted nine procedural safeguards for admissibility.<sup>70</sup> These substantially mirror those given in *Hurd*, with the additional requirement that hypnotically recalled information be independently corroborated.<sup>71</sup>

Although there is presently a lack of uniform treatment of hypnotically refreshed testimony, the most recent cases indicate a trend toward finding the testimony inadmissible.<sup>72</sup> Many jurisdictions, however, have either not decided the issue<sup>73</sup> or cling to an earlier rule allowing the testimony to be admitted. For this reason, and because of the traditionally influential character of New York decisions, *Hughes* and the procedure it prescribes will be under careful scrutiny by the legal community.

### III. *People v. Hughes*

#### A. *Treatment at Trial*

Kirk Hughes was indicted by an Onondaga County grand jury on charges of first degree rape and burglary and of second degree assault.<sup>74</sup> He had been the prime suspect in the rape even before his victim was able to identify him for the first time at two hypnotic sessions.<sup>75</sup> In a pretrial motion the defendant

---

68. *Id.* But cf. *People v. Shirley*, 31 Cal. 3d at 39-40, 641 P.2d at 787-88, 181 Cal. Rptr. at 255-56. Criticizing the *Hurd* safeguards, the California court noted that "the game is not worth the candle." *Id.*

69. *State v. Hurd*, 86 N.J. at 548, 432 A.2d at 98.

70. *People v. Lewis*, 103 Misc. 2d 881, 883, 427 N.Y.S.2d 177, 179 (Sup. Ct. N.Y. County 1980); *People v. McDowell*, 103 Misc. 2d 831, 834-36, 427 N.Y.S.2d 181, 182-84 (Sup. Ct. Onondaga County 1980). These cases were later overruled by the *Hughes* decision.

71. *People v. Lewis*, 103 Misc. 2d 881, 883, 427 N.Y.S.2d 177, 179 (Sup. Ct. N.Y. County 1980); *People v. McDowell*, 103 Misc. 2d 831, 834-36, 427 N.Y.S.2d 181, 182-84 (Sup. Ct. Onondaga County 1980).

72. See cases cited *supra* note 60.

73. *E.g.*, *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969); *Strong v. State*, 435 N.E.2d 969 (Ind. 1982); *Lawson v. State*, 280 N.W.2d 400 (Iowa 1979); *Commonwealth v. A Juvenile*, 381 Mass. 727, 412 N.E.2d 339 (1980).

74. *People v. Hughes*, 99 Misc. 2d 863, 864, 417 N.Y.S.2d 643, 644 (Sup. Ct. Onondaga County 1979).

75. *People v. Hughes*, 59 N.Y.2d 523, 528, 453 N.E.2d 484, 486, 466 N.Y.S.2d 255,

moved to suppress<sup>76</sup> the victim's hypnotic identification; in the alternative, he requested a pretrial hearing<sup>77</sup> to determine whether the hypnosis was improper due to its suggestiveness.<sup>78</sup> The trial court denied the motion to suppress,<sup>79</sup> but ordered a pretrial hearing because "[t]he police initiated use of hypnosis is . . . properly the subject of a pretrial hearing to determine whether, under the totality of the circumstances, the procedures used were so impermissibly suggestive as to give rise to the very substantial likelihood of irreparable misidentification."<sup>80</sup>

At the pretrial hearing that followed,<sup>81</sup> the prosecutor's expert witness, who had conducted the two hypnotic sessions with the victim, testified that the victim had shown by her mannerisms and answers while hypnotized that she was not confabulating.<sup>82</sup> Based on the hypnotist's observations, corroborative statements made by the victim's neighbors,<sup>83</sup> and the victim's

---

257 (1983). The victim identified Hughes at both hypnotic sessions (recorded on video tape) with a hypnotist retained by the police. She was also hypnotized by a hypnotist she retained without police involvement, and she again identified Hughes as the rapist. This private hypnotist also administered sodium pentothal to the victim, and again she identified Hughes. *Id.* at 530-31, 453 N.E.2d at 486-87, 466 N.Y.S.2d at 257-58.

76. *Id.* at 527, 453 N.E.2d at 485, 466 N.Y.S.2d at 256.

77. *Id.* This pretrial request was based on New York Criminal Procedure Law §§ 710.20 and 710.30. The purpose of this statutory hearing is to suppress testimony at trial that "would not be admissible upon the prospective trial of such charge owing to an improperly made previous identification of the defendant by the prospective witness." N.Y. CRIM. PROC. LAW § 710.20(b)(5) (McKinney 1982). Compare this statutory hearing with the court of appeals' judicially required pretrial hearing, discussed *infra* at text accompanying notes 107-20.

78. *Hughes*, 59 N.Y.2d at 527, 453 N.E.2d at 485, 466 N.Y.S.2d at 256.

79. *Id.* at 531, 453 N.E.2d at 487, 466 N.Y.S.2d at 258. In denying the motion, the court stated: "Given a proper foundation of general acceptance in the scientific community and adequate procedural safeguards to insure reliability, this Court believes that evidence elicited through hypnosis can be valuable to the determination of guilt or innocence of those who have been accused of crimes." *People v. Hughes*, 99 Misc. 2d at 871, 417 N.Y.S.2d at 648.

80. *People v. Hughes*, 99 Misc. 2d at 872, 417 N.Y.S.2d at 649.

81. Onondaga County Court Judge Ormond N. Gale issued an unpublished memorandum/order, Index No. 78/873, November 26, 1979, which is reprinted in the appendix of Respondent's Brief to the Appellate Division. Brief for Respondent at A15, *People v. Hughes*, 88 A.D.2d 17, 452 N.Y.S.2d 929 (4th Dep't 1982).

82. *Id.* at A23.

83. Both expert witnesses agreed that corroboration is needed to show that the witness did not confabulate while hypnotized. To this end, the prosecutor offered statements by three of the victim's neighbors placing the defendant at the scene at the time of the rape. *Id.*

own prehypnotic statements, the court ruled that the People had met their burden of proving that the hypnotically refreshed testimony was reliable.<sup>84</sup>

Subsequently, the jury heard the victim identify Hughes as the rapist based on her hypnotic recollections.<sup>85</sup> The court charged the jury to consider the reliability of hypnosis in general and the victim's testimony in particular, emphasizing that both must be considered reliable for the testimony to be used as evidence of guilt.<sup>86</sup> The jury returned a verdict of guilty.<sup>87</sup>

### B. The Appellate Division

The Appellate Division, Fourth Department reversed and ordered a new trial.<sup>88</sup> The appellate court disagreed with the findings of the trial court that hypnosis satisfied the *United States v. Frye*<sup>89</sup> standard of admissibility.<sup>90</sup> In its view, hypnosis was not generally accepted as reliable in the scientific community.<sup>91</sup> The court went on to hold, without exposition, "that it does not follow that because she has been hypnotized, [the victim] is incompetent to testify to facts which she was able to recall prior to undergoing hypnosis."<sup>92</sup> Thus, the victim was free to testify about prehypnotic recollections, but all hypnotically recalled testimony was inadmissible.<sup>93</sup>

---

84. *Id.* at A24.

85. *People v. Hughes*, 88 A.D.2d at 19, 452 N.Y.S.2d at 930.

86. Brief for Respondent at A28-A29, *People v. Hughes*, 88 A.D.2d 17, 452 N.Y.S.2d 929 (4th Dep't 1982) (Judge Gale's charge regarding hypnotically-aided testimony).

87. *Hughes*, 59 N.Y.2d at 532, 453 N.E.2d at 488, 466 N.Y.S.2d at 259.

88. *People v. Hughes*, 88 A.D.2d at 22, 452 N.Y.S.2d at 932.

89. 293 F. 1013 (D.C. Cir. 1923). *See supra* notes 55-56 and accompanying text.

90. *People v. Hughes*, 88 A.D.2d at 21, 452 N.Y.S.2d at 932. The trial court, appellate division, and court of appeals all agreed that New York law required use of the *Frye* test. For prior New York cases applying *Frye*, see *People v. Middleton*, 54 N.Y.2d 42, 429 N.E.2d 100, 444 N.Y.S.2d 581 (1981) (results of bite mark test admissible); *People v. Tarsia*, 50 N.Y.2d 1, 405 N.E.2d 188, 427 N.Y.S.2d 944 (1980) (voice stress test admissible); *People v. Allweiss*, 48 N.Y.2d 40, 396 N.E.2d 735, 421 N.Y.S.2d 341 (1979) (evidence from hair comparison admissible).

91. *People v. Hughes*, 88 A.D.2d at 22, 452 N.Y.S.2d at 932.

92. *Id.* (452 N.Y.S.2d at 932 misquotes the official report of the opinion here).

93. *Id.*

## IV. Decision of the Court

A. *Hypnotically Refreshed Testimony*

In *People v. Hughes*, the court of appeals affirmed the appellate division in holding that hypnotically refreshed recollections are inadmissible as testimony. The court, however, disagreed with the conclusory statement of the appellate division that the witness was not incompetent to testify about prehypnotic recollections.<sup>94</sup> Rather, the court held that prehypnotic recollections must be proven free of taint in a pre-trial hearing before the witness may give testimony based on such recollections.<sup>95</sup>

After a thorough review of hypnosis and the case law surrounding it,<sup>96</sup> the court began its analysis by noting possible constitutional questions.<sup>97</sup> The court declined to decide the case on a constitutional basis, however, noting that any such decision would be limited to cases where the hypnosis involved state action.<sup>98</sup> The use of testimony resulting from the hypnosis of a witness without police participation, therefore, would not be addressed.<sup>99</sup> Noting that the "common law rules of evidence . . . are not so limited in their application and do not require an element of State action,"<sup>100</sup> the court rested its decision on evidentiary considerations rather than constitutional grounds.<sup>101</sup>

The court began its examination with the premise that any witness identification procedure must first establish "a very high level of reliability, tantamount to certainty, as a predicate for its admissibility."<sup>102</sup> To test hypnosis under this standard, the court framed the issue as "whether hypnosis has gained general ac-

---

94. *Id.* at 546, 453 N.E.2d at 496, 466 N.Y.S.2d at 267.

95. *Id.*

96. *Id.* at 533-40, 453 N.E.2d at 488-93, 466 N.Y.S.2d at 259-64.

97. *Id.* at 541-42, 453 N.E.2d at 493-94, 466 N.Y.S.2d at 264-65. See *supra* text accompanying notes 35-44. See also *Moore v. Illinois*, 434 U.S. 220, 224-25 (1977) (sixth amendment confrontation clause analysis of analogous suggestive identification).

98. *Hughes*, 59 N.Y.2d at 542, 453 N.E.2d at 494, 466 N.Y.S.2d at 265.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 542, 453 N.E.2d at 493, 466 N.Y.S.2d at 264. The court explained this requirement as "appropriate when the fallibility of the scientific procedure might directly affect the fact finder's assessment of eyewitness credibility." *Id.* See *People v. Allweiss*, 48 N.Y.2d 40, 50, 396 N.E.2d 735, 740, 421 N.Y.S.2d 341, 346 (1979).

ceptance in the scientific community as a reliable means of restoring recollection.”<sup>103</sup> Applying this test to the particular effects of hypnosis, the court categorically rejected hypnotically refreshed testimony by focusing on the danger that the subject will confabulate during hypnosis.<sup>104</sup> In the court’s view, the risk of actual confabulation was the determinative factor of admissibility: “No procedures have yet been devised for eliminating the common risk that the subject himself is more likely to confabulate or fantasize to fill in gaps in his memory as a result of the hypnotic process. Nor is there any scientific method for detecting this type of ‘recollection’ . . . .”<sup>105</sup> In view of these significant flaws, the court held that hypnotically refreshed testimony cannot be presented to the trier of fact.<sup>106</sup>

### B. The Pretrial Procedure

In holding hypnotic recollections inadmissible, the court raised two new issues in need of resolution: how to exclude hypnotic recollections from testimony, and how to treat testimony concerning prehypnotic recollections. As to this second question, the court was cognizant of the fact that hypnosis can affect prehypnotic recollections by tainting the witness with an increased confidence in the veracity of those original recollections.<sup>107</sup> Concerned that this unwarranted confidence could impair the defendant’s right of cross-examination, the court held that prehypnotic recollections must be free of this taint to be admissible.<sup>108</sup>

The court responded to the issues of how to exclude hypnotic recollections and how to treat potentially tainted prehypnotic recollections by requiring a pretrial hearing to resolve these matters.<sup>109</sup> The purpose of the hearing is to deter-

---

103. *Hughes*, 59 N.Y.2d at 543, 453 N.E.2d at 494, 466 N.Y.S.2d at 265.

104. *Id.*

105. *Id.* at 544, 453 N.E.2d at 495, 466 N.Y.S.2d at 266.

106. *Id.*

107. *Id.* at 546, 453 N.E.2d at 496, 466 N.Y.S.2d at 267. The court observed that “[t]he problem is greatest when the hypnotist suggests to the person under hypnosis that a certain event occurred or that the person will recall everything when he returns to the normal state of consciousness.” *Id.*

108. *Id.*

109. *Id.*

mine, in the words of the court, "the extent of the witness's prehypnotic recollection (which would establish the boundaries of admissible testimony) and whether the hypnotism was so impermissibly suggestive as to require exclusion of in-court testimony with respect to such prehypnotic recollection."<sup>110</sup>

It is at this juncture that *Hughes* parts company with case law by establishing a pretrial procedure to resolve these questions.<sup>111</sup> The uniqueness of such a pretrial hearing, however, presented the court with the task of prescribing procedure and guidelines for the hearing's practical operation.<sup>112</sup> The court responded by delegating to the trial courts the task of formulating specific procedural standards on a case-by-case basis,<sup>113</sup> within certain general guidelines.

First, according to the court, testimonial and documentary evidence relating to scope and content of prehypnotic recollections should be offered, with "full opportunity . . . afforded counsel to test the probative worth of the proof offered."<sup>114</sup> Second, detailed proof is needed to establish the procedures used at the hypnotic session.<sup>115</sup> To this end, the court suggested that proof of compliance with the standards adopted in *State v. Hurd*<sup>116</sup> would be relevant.<sup>117</sup> Third, the burden is on the People to prove by clear and convincing evidence<sup>118</sup> that the defendant's right of cross-examination has not been substantially impaired by an overly suggestive procedure at the hypnotic session.<sup>119</sup> Finally, the court held, if the prehypnotic testimony of

---

110. *Id.* (footnote omitted).

111. No reported cases were found which require a similar dual-purpose pretrial hearing.

112. The court noted that "[l]ittle reported authority is available as a basis on which to prescribe guidelines for such inquiry and resolution." *Id.* at 546-47, 453 N.E.2d at 496, 466 N.Y.S.2d at 267.

113. *Id.* at 547, 453 N.E.2d at 496, 466 N.Y.S.2d at 267.

114. *Id.* The court noted, by analogy to suppression hearings, that hearsay testimony is admissible at the pretrial hearing. *Id.* at 547 n.39, 453 N.E.2d at 496 n.39, 466 N.Y.S.2d at 267 n.39. See N.Y. CRIM. PROC. LAW § 710.60(4) (McKinney 1982).

115. *Hughes*, 59 N.Y.2d at 547, 453 N.E.2d at 496, 466 N.Y.S.2d at 267.

116. 86 N.J. 525, 432 A.2d 86 (1981). The *Hurd* standards are set forth *supra* at text accompanying note 68.

117. *Hughes*, 59 N.Y.2d at 548, 453 N.E.2d at 497, 466 N.Y.S.2d at 268.

118. *Id.* The clear and convincing standard is discussed *infra* at text accompanying notes 146-47.

119. *Hughes*, 59 N.Y.2d at 548, 453 N.E.2d at 497, 466 N.Y.S.2d at 268.

the witness is cleared for admission at trial, the defendant may present evidence at trial of the procedures used at the hypnotic session and expert testimony pertaining to the potential effects of hypnosis on the witness' recollections.<sup>120</sup> In addition, the defendant may request a charge to the jury concerning the risk of increased confidence by the witness in his or her recollections.<sup>121</sup>

## V. Analysis

### A. *Alternative Rationales for Inadmissibility*

The court did not have to decide *People v. Hughes*<sup>122</sup> by applying the per se rule of inadmissibility. Rather, the holding could have been much narrower if it had been confined to the facts of the case. Before her hypnosis, the victim had been inadvertently informed by her husband that Hughes was the only suspect in the rape.<sup>123</sup> The planting of this suggestion of the rapist's identity might have served for the basis of a narrower holding that hypnotic recall is inadmissible when so tainted by suggestion.

To have reached the broader holding of *Hughes*, the court must have believed that hypnotic recall is unreliable in any factual setting.<sup>124</sup> In this regard, it joins a growing number of courts<sup>125</sup> rejecting hypnotically refreshed testimony as unreliable.

Given the inherent suggestiveness of hypnosis<sup>126</sup> and the court's own strict due process scrutiny of suggestive identifications,<sup>127</sup> the court could have decided the case on constitutional grounds.<sup>128</sup> The suggestive nature of hypnosis could be perceived

---

120. *Id.* To facilitate this defense opportunity, the court required that the defendant be given pretrial notice of the prosecutor's intention to use the testimony of a previously hypnotized witness. *Id.* at 548 n.42, 453 N.E.2d at 497 n.42, 466 N.Y.S.2d at 268 n.42.

121. *Id.* at 548, 453 N.E.2d at 497, 466 N.Y.S.2d at 268.

122. 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983).

123. *Id.* at 529-30, 453 N.E.2d at 486, 466 N.Y.S.2d at 257.

124. *Id.* at 543, 453 N.E.2d at 494, 466 N.Y.S.2d at 265.

125. See cases cited *supra* note 60.

126. See *supra* text accompanying notes 15-22.

127. See *People v. Adams*, 53 N.Y.2d 241, 423 N.E.2d 379, 440 N.Y.S.2d 902 (1981). See *supra* text accompanying notes 41-44.

128. *Hughes*, 59 N.Y.2d at 542, 453 N.E.2d at 494, 466 N.Y.S.2d at 265. See *supra* text accompanying notes 96-101 (court's analysis of constitutional holding). See also

as impairing the accused's right to effective cross-examination, a right guaranteed by the confrontation clause of the federal Constitution.<sup>129</sup> The court, however, chose not to adopt this rationale.<sup>130</sup>

The wisdom behind making the rule on admissibility an evidentiary, rather than a constitutional, matter is to be applauded. First, the court eliminated the possibility that the Supreme Court would overrule *Hughes* on the constitutional issue.<sup>131</sup> Second, by making the rule an evidentiary matter, the court may have made *Hughes* applicable to civil as well as criminal cases.<sup>132</sup> Finally, the *Hughes* rule will apply where a witness employs a private hypnotist to facilitate additional recall, whereas a constitutional holding would apply only where there is the necessary element of state action.<sup>133</sup>

The court showed equal acumen in rejecting the *Hurd* safeguards<sup>134</sup> for admissibility as an alternative holding. Although the safeguards work to minimize suggestibility, the risk of confabulation remains, and these safeguards do little to detect or prevent subject confabulation.<sup>135</sup>

## B. *The Pretrial Procedure and Suggested Approaches*

Excluding hypnotically refreshed testimony necessarily requires defining the point at which the witness' unaided recollection ends and hypnotic recall begins. This is the purpose of the pretrial proceeding. In *Hughes* the task may appear deceptively simple, as the victim's identification of her attacker was clearly

---

*supra* text accompanying notes 35-37 (fourteenth amendment due process applicability to suggestive identifications).

129. U.S. CONST. amend. VI.

130. *Hughes*, 59 N.Y.2d at 542, 453 N.E.2d at 494, 466 N.Y.S.2d at 265. *See supra* text accompanying notes 100-01.

131. The New York Court of Appeals in *Hughes* observed that "[t]he vagaries of eyewitness identification have long been a concern of this court which has on occasion gone further than the Federal Constitution requires in order to further minimize the risk of mistaken identification." *Hughes*, 59 N.Y.2d at 542, 453 N.E.2d at 494, 466 N.Y.S.2d at 265. *See also* the *Stovall-Adams* comparison, *supra* text accompanying notes 38-44.

132. This proposition remains to be tested in New York.

133. *Hughes*, 59 N.Y.2d at 542, 453 N.E.2d at 494, 466 N.Y.S.2d at 265.

134. *See supra* text accompanying note 68.

135. *Hughes*, 59 N.Y.2d at 544, 453 N.E.2d at 494-95, 466 N.Y.S.2d at 265-66.

brought out through hypnosis.<sup>136</sup> Future cases, however, could present more difficult problems of delineation, such as in a situation where the previously hypnotized witness remembers additional information some days or weeks after the hypnosis.<sup>137</sup> The court stated, in a footnote, that "great care should be taken to assure that any such delayed recall was unaffected by and not a product of the hypnosis."<sup>138</sup>

Due to the nature of hypnosis, the previously hypnotized witness may be the least credible source of testimonial evidence at the hearing, and therefore cannot be relied upon in an attempt to isolate hypnotic recollections. This is so in part because the witness may demonstrate increased confidence in *all* recollections.<sup>139</sup> Secondly, the witness may be unable to distinguish between original and hypnotic recall.<sup>140</sup> For these reasons, the witness' testimony at this stage of the hearing is particularly susceptible to objection. Other methods will be necessary to distinguish admissible from inadmissible recollections. Proof of the safeguards employed at the hypnotic session seems pertinent, if not necessary.<sup>141</sup>

To preserve such proof for the hearing, the parties involved with the hypnotic session should record the session to facilitate isolating hypnotic recollections at the hearing. Although this was suggested in *Hurd* to promote admissibility,<sup>142</sup> recording seems equally appropriate for the purposes of the *Hughes* hearing.<sup>143</sup>

---

136. The victim twice named Hughes prior to hypnosis, stating "I saw Kirk" (Hughes' first name), when asked what had happened to her. These statements, however, were not made in the context of an identification. *Id.* at 528, 453 N.E.2d at 486, 466 N.Y.S.2d at 257.

137. This situation was presented in *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E.2d 1190 (1983). That court did not, however, rule on the propriety of such recollection. *See also*, Diamond, *supra* note 1, at 333. Professor Diamond argues convincingly that the witness cannot distinguish between original thoughts and those implanted during hypnosis.

138. *Hughes*, 59 N.Y.2d at 546 n.38, 453 N.E.2d at 496 n.38, 466 N.Y.S.2d at 267 n.38.

139. *See supra* text accompanying notes 23-28.

140. *See supra* text accompanying note 22.

141. *See supra* text accompanying notes 116-17.

142. *State v. Hurd*, 86 N.J. at 545, 432 A.2d at 96.

143. The victim's hypnotic sessions in *Hughes* were recorded with both audio and video equipment. *Hughes*, 59 N.Y.2d at 530, 453 N.E.2d at 486, 466 N.Y.S.2d at 257. *See supra* note 75.

Recording would aid in proving the absence of suggestiveness during hypnosis, and thus would further the People's case for admission of testimony concerning the witness' prehypnotic recollections.

Should the proof take the form of expert opinion concerning the degree of suggestiveness at the hypnotic session, the experts' conflicting conclusions could present a serious problem to the trial judge ill-equipped to weigh such testimony. For this reason, the Supreme Court of California rejected a *Hughes*-type hearing because the inquiry would involve "scientific issues so subtle as to confound the experts."<sup>144</sup> It must be noted that the California approach excludes potentially probative evidence to avoid the burdens its use would impose on the courts. Clearly, the *Hughes* court considered the burden worth the benefits attendant to preserving reliable prehypnotic testimony for consideration by the finder of fact.<sup>145</sup>

At the hearing the People have the burden of proving, by clear and convincing evidence, that the testimony is untainted.<sup>146</sup> This standard is higher than a preponderance of the evidence, albeit lower than beyond a reasonable doubt.<sup>147</sup> Yet there exists a significant incentive to meet the burden. For the prosecutor seeking to introduce prehypnotic testimony of a witness, the pretrial hearing is crucial. If prehypnotic testimony cannot be delineated and proven free of taint before trial, all testimony relating to the crime discussed during hypnosis will then be inadmissible.<sup>148</sup>

### C. Procedure at the Hearing

Concerning the order of issues to be addressed at the hearing, logic would dictate that severing tainted hypnotic recollections from untainted recall should be the initial step. If the court is unable to isolate these recollections, there is then no

---

144. *People v. Shirley*, 31 Cal. 3d 18, 40, 641 P.2d 775, 787, 181 Cal. Rptr. 243, 255, cert. denied, 103 S. Ct. 133 (1982).

145. See *Hughes*, 59 N.Y.2d at 539-40, 453 N.E.2d at 492, 466 N.Y.S.2d at 263.

146. *Id.* at 547, 453 N.E.2d at 496, 466 N.Y.S.2d at 267.

147. Accord *People v. Poblner*, 32 N.Y.2d 356, 368, 298 N.E.2d 637, 644, 345 N.Y.S.2d 482, 491 (1973). See also *Rosenthal v. Harnett*, 36 N.Y.2d 269, 274, 326 N.E.2d 811, 814, 367 N.Y.S.2d 247, 250 (1975).

148. *Hughes*, 59 N.Y.2d at 546-47, 453 N.E.2d at 496, 466 N.Y.S.2d at 267.

need to proceed to the second requirement of proving prehypnotic recall free of hypnotic taint.<sup>149</sup> If this second stage of the hearing is reached, the prosecutor is faced with the task of demonstrating by clear and convincing proof that the witness' testimony regarding prehypnotic recollection will be reliable and that "there has been no substantial impairment of the defendant's right of cross-examination."<sup>150</sup>

To this end, the prosecutor might employ the trial technique of bolstering the witness' credibility on recross-examination after the defense has attempted to impeach the witness on cross-examination. This may not be wholly adequate, however, since the defendant may object to the propriety of using the witness as a testimonial source<sup>151</sup> when the issue is in fact the same witness' veracity.<sup>152</sup> This objection would be based on the possibility that the witness had acquired an increased confidence in her recollections.<sup>153</sup> As the court suggests, perhaps the best way to overcome this defense objection is to prove the effectiveness of procedures used to minimize suggestive elements.<sup>154</sup> Proof in the negative may be helpful. Showing the absence of statements by the hypnotist which act as suggestions for accurate recall, for instance, would further the People's case.

If the prosecutor succeeds in proving that the prehypnotic testimony is free of taint, the defendant has two opportunities to attack the witness' credibility at trial. First, he may introduce proof relating to the procedures used for the hypnosis, as well as expert testimony with respect to the possible effects of hypnosis.<sup>155</sup> Second, the defendant may request a charge to the jury describing the possibility that the witness demonstrated undue confidence in her testimony while relating her recollections.<sup>156</sup> Because the general public has a favorable impression of a hyp-

---

149. *Id.*

150. *Id.* at 547, 453 N.E.2d at 497, 466 N.Y.S.2d at 268.

151. Expert opinion could be employed by the defense to highlight the danger of the witness' increased confidence in prehypnotic recollections. See *supra* text accompanying notes 23-28.

152. See *supra* text accompanying notes 23-28.

153. See *supra* text accompanying notes 23-28.

154. *Hughes*, 59 N.Y.2d at 547, 453 N.E.2d at 496, 466 N.Y.S.2d at 267.

155. *Id.* at 548, 453 N.E.2d at 496, 466 N.Y.S.2d at 268.

156. *Id.*

notist's ability to elicit truth,<sup>157</sup> the defendant must first overcome this presumption in the minds of the jurors. Care should be taken, however, not to overwhelm the jury with a mass of technical information. The *Hughes* court concluded that these two defense opportunities "represent a reasonable accomodation between the legitimate uses of hypnosis and the defendant's right of confrontation."<sup>158</sup> By providing these opportunities, however, the court is allowing the defendant to reargue matters before the jury that were presumably settled in the prosecutor's favor at the pretrial hearing (i.e., the veracity of the witness' testimony). If, at the hearing, the prosecutor has shown by *clear and convincing proof* that the prehypnotic testimony does not suffer from an impermissible taint, should not the defendant be precluded from rearguing this point in the jury's presence? To allow the defendant to reopen the issue seems to negate all that the prosecutor is required to prove at the hearing. Judging the weight to be accorded testimony, however, is the special province of the jury. Nevertheless, since the testimony was admitted only because it had been proven unaffected by the hypnosis, the jury should weigh the testimony as it would any other testimony based on normal recollections. Thus, the opportunity at trial to introduce evidence relating the hypnotic procedures used and to request a jury charge on increased confidence in recollections provides the defendant with an unfair advantage, to the detriment of the People's case.

## VI. Conclusion

It is evident that in the wake of *People v. Hughes*,<sup>159</sup> the use of hypnosis will not be favored by prosecutors, given the high hurdle that the pretrial hearing presents. In cases where hypnosis has been used and prehypnotic recollections are crucial to the case, the *Hughes* hearing serves to protect defendants from potentially false testimony by requiring the People to prove that the testimony is reliable before its introduction at trial.

Although ending for now the question of admissibility of

---

157. Orne, *supra* note 4, at 313.

158. *Hughes*, 59 N.Y.2d at 548, 453 N.E.2d at 497, 466 N.Y.S.2d at 268 (footnote omitted).

159. 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983).

hypnotically refreshed testimony, the New York Court of Appeals has opened the door to new questions about the pretrial procedure and its appropriate operation. The degree of protection from the use of potentially tainted prehypnotic recollections must now be established by the trial courts.

*Albert J. D'Aquino*