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Hypnotically Induced Testimony: Credibility versus Admissibility

In *Harding v. State*, the testimony of a witness who had undergone hypnosis prior to trial to restore lost memory was ruled admissible into evidence. After this seminal decision by the Court of Special Appeals of Maryland, a line of cases in other courts admitted testimony induced by pretrial hypnosis. Finding various ways to reject the use of pretrial hypnosis as an aid to memory recall, however, some state courts recently have broken the trend toward the admission of hypnotically induced testimony. The split among courts on this issue was widened considerably by another Maryland case, *Polk v. State*. The Maryland court retreated from its trend-setting decision in *Harding* by holding that hypnosis was not a generally acceptable scientific technique. As a result of the *Polk* decision, agreement among jurisdictions on the proper role of hypnosis in the law may be difficult to achieve.

After providing some background information on hypnosis, this note analyzes the recent case law on the admissibility of testimony induced by pretrial hypnosis. This note will conclude that the recent court opinions rejecting the admissibility of hypnotically induced testimony are not based on sound legal reasoning. Further, the note will argue that

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3 Some courts have applied the test for scientific reliability announced in *Frye* v. United States, 293 F. 1013 (D.C. Cir. 1923). The standard articulated by the court in *Frye* demands that the technique have gained general acceptance in the field in which it belongs. See, e.g., Polk v. State, 48 Md. App. 382, 427 A.2d 1041 (1981); State v. Mack. Minn. 292 N.W.2d 764 (1980). Although *Frye* was not cited, the Court of Appeals of Michigan applied the *Frye* test in People v. Tait, 99 Mich. App. 19, 297 N.W.2d 863 (1980). Other courts have based their rejection of the use of hypnotically induced testimony on the unreliability of the technique without applying the *Frye* test or any other standard. See, e.g., State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981); State v. LaMountain, 125 Ariz. 547, 611 P.2d 551 (1980). Compare State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981), in which the court rejected the use of pretrial hypnosis based on the particular facts of the case, but set up procedural safeguards to insure the reliability of the process for use in future cases.
5 Id. at 394, 427 A.2d at 1048.
6 See note 3 supra. Several commentators have criticized the use of hypnotically induced testimony and expressed a concern about dangers associated with the techniques, but have
the case law reveals a need for a uniform set of procedural safeguards for the use of hypnosis, rather than a blanket exclusion of hypnotically induced testimony. Finally, the note concludes that the central issue raised by hypnotically induced testimony is credibility, rather than admissibility.

THE DEVELOPMENT OF HYPNOSIS

What Hypnosis Is

Since its development in the eighteenth century, hypnosis has generated a number of legends and myths. Writers have defined hypnosis differently; however, the current lack of knowledge about complex brain mechanisms makes it impossible to construct a sound scientific theory of hypnosis. Nevertheless, the increased use of hypnosis as a therapeutic tool has encouraged more concentrated research and, as a result, the ability to explain the hypnotic process has increased tremendously.

...
While under hypnosis the subject experiences physical manifestations such as an increase in rate of breathing and heartbeat along with drowsiness and fluttering of the eyelids. The subject in a hypnotic trance will respond to cues or suggestions by the hypnotist. The manner in which the subject responds is called suggestibility. If the hypnotist suggests that the subject is in the middle of a desert, the subject responds by altering his perception of reality in an attempt to experience the suggestion mentally. Although there is a heightened level of suggestibility, the subject is not completely under the control of the hypnotist.

Because a trance cannot be induced without the consent of the subject, the success of hypnosis depends on the relationship between the hypnotist and the subject. In order to make the subject more comfortable, and also to measure the level of susceptibility to hypnotic trance, the hypnotist will inquire into the subject's experience with hypnosis, including fears or expectations. The subject's response to suggestion depends, in part, on the depth of the hypnotic trance.

One commentator suggests that there are three basic stages of hypnosis, while others contend there are as many as ten different levels of trance. For the sake of simplicity, no more than four such stages will be discussed here. The first is the hypnoidal stage, characterized by a light trance in which the subject loses control of localized voluntary motions. If the hypnotist tells the "subject he will be unable to open his eyes, the subject will be unable to open his eyes." When the subject experiences a loss of some senses, he is in the second stage. While the sense of touch remains, the subject will be unable to feel pain. In this medium trance stage, upon suggestion by the hypnotist, the subject will be unable to remember his name. Positive hallucinations and loss of both touch and sense of pain characterize the third stage, while the ability...
to produce negative hallucinations is characteristic of the fourth stage, in which the subject will be “unable to perceive objects that are actually present.”

Collapsing the third and fourth stages into one category called “deep trance,” there are three basic stages of trance: light trance, medium trance, and deep trance. Although the subject’s vulnerability to suggestion increases with each progressive stage, at no time is the subject completely under the control of the hypnotist or unaware of what is being suggested.

**Techniques for Memory Recall**

The three most important techniques for the restoration of memory are post-hypnotic suggestion, age regression, and hypermnesia. The hypnotist using post-hypnotic suggestion suggests, during the trance, that upon awakening the subject will remember the event forgotten. Because the subject interprets the suggestion literally, the suggestion must be worded carefully. For example, if the purpose of the trance is to restore memory of a person’s facial features, the hypnotist must be careful to make the suggestion explicit. Suggesting that the subject remember height, weight, and general appearance may not restore memory of detailed facial features.

Instead of suggesting that the event be remembered upon awakening, age regression allows the subject to relive the event mentally, as if it were presently happening. On this basis, age regression is argued to be more accurate than testimony given in the waking state. If the subject is regressed to the past and told to relive it, the focus is not on recalling memory, but on replacing blank memory cells with the actual event as it is relived. It is “a special case of resurrection of memory traces.”

Arguably, memory refreshed by the use of age regression is free from conscious or subconscious distortions because the witness is testifying from the mental present. “Hypermnesia is a special case of remembrance.” While under the hypnotic trance, the subject receives instructions from the hypnotist and ex-

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27 Id.
28 L. WOLBERG, supra note 9, at 63.
29 M. TEITELBAUM, supra note 8, at 30.
30 Foster & Spector, supra note 6, at 572.
31 Note, Present Recollection, supra note 6, at 360.
32 Foster & Spector, supra note 6, at 573.
34 M. TEITELBAUM, supra note 8, at 114; L. WOLBERG, supra note 9, at 139.
35 See W. BRYAN, supra note 8, at 196-97; Note, Hypnosis in Court, supra note 6, at 274.
36 R. REIFF & M. SCHEERER, supra note 33, at 52.
37 See generally Note, Present Recollection, supra note 6, at 361.
38 R. REIFF & M. SCHEERER, supra note 33, at 34.
experiences an autobiographic index—a—the experience of personal continuity through time. What is remembered is always experienced as past events. Because they are similar techniques, age regression and hypermnnesia suffer from the same problems. The hypnotist gives the subject all instructions and elicits all information during the trance without any suggestion that the information is to be remembered after the trance. Thus, the conscious memory of the subject may not be improved. Upon awakening, the subject may not have any present recollection of the events remembered while hypnotized.

THE ACCEPTANCE OF HYPNOTICALLY INDUCED TESTIMONY

Trend-Setting Case Law

In 1897 an American court for the first time dealt with the use of hypnosis as an evidentiary tool. When an expert hypnotist was introduced as a witness by the defense in an attempt to enter into evidence the results of a hypnotic session with the defendant, the Supreme Court of California in People v. Ebanks responded by stating that hypnosis was not recognized by the law of the United States. Ebanks set the early trend for the relationship between the legal community and hypnosis.

Affirming a lower court decision that excluded a hypnotist’s testimony that the defendant had declared his innocence while hypnotized, the Supreme Court of North Dakota stated in 1950 that “[n]o case has been cited by either party relating to the admissibility of the evidence proffered and no case has been found. We think the evidence was clearly inadmissible . . . .” Thus, the advent of hypnosis as an evidentiary tool in the legal community was marred by its rejection in the courts; eighteen years later, however, hypnotically induced testimony was admitted into evidence in a state court.

39 Id.
40 Id. at 25.
41 Id.
42 Id. at 65.
43 See Note, Present Recollection, supra note 6, at 361.
44 Id.
45 Id.
46 117 Cal. 652, 49 P. 1049 (1897). While under hypnosis, the defendant, who was being tried for murder, denied his guilt. Id. at 665-66; 49 P. at 1053. It was this evidence that the defense sought to enter. Id. Even in the absence of the court’s statement about hypnosis, the evidence may have been excludable on hearsay grounds.
47 Id.
48 77 N.D. 860, 888, 46 N.W.2d 508, 522 (1950).
49 Between 1950 and 1968, there were cases that dealt with hypnosis, but not the issue of admissibility of testimony induced by pretrial hypnosis. E.g., Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447 (1969) (court allowed defense attorney to have client examined by hypnotist, but results were not offered as evidence); People v. Busch, 56 Cal. 2d 868,
Harding v. State\textsuperscript{50} considered the admissibility of testimony induced by pretrial hypnosis. Convicted of both assault with intent to commit rape and assault to commit murder,\textsuperscript{51} the defendant appealed, arguing that the testimony of the victim had been hampered by pretrial hypnosis\textsuperscript{52} and that the hypnotist did not possess the requisite qualifications to be certified as an expert.\textsuperscript{53} The Maryland Court of Special Appeals affirmed the conviction of the defendant and upheld the admission of the victim’s testimony and the testimony of the hypnotist as expert.\textsuperscript{54}

One critic of Harding argues that because the hypnotist who testified at the trial performed the hypnosis, it is hard to imagine that he would deny the reliability of the technique.\textsuperscript{55} Nevertheless, the court was satisfied that a proper foundation had been laid.\textsuperscript{56} One commentator believes that

\textsuperscript{50} 366 P.2d 314, 16 Cal. Rptr. 898 (1961) (court refused to allow doctor’s testimony concerning results of hypnotic session because no proper foundation had been laid for reliability of hypnosis and qualifications of doctor to perform hypnosis had not been established); People v. Modesto, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963) (court allowed psychiatrist’s testimony concerning state of mind of defendant based on hypnosis, because proper foundation had been laid for the reliability of the technique and qualifications of hypnotist). In these cases, the test for admission of testimony related to hypnosis became an objective standard based on laying a proper foundation for the reliability of the technique and the qualifications of the hypnotist. 59 Cal. 2d at 733, 382 P.2d at 39, 31 Cal. Rptr. at 231; 56 Cal. 2d at 874, 366 P.2d at 319-20; 16 Cal. Rptr. at 903-04.

\textsuperscript{51} After refusing to have sexual relations with Harding, the victim was shot and left on the roadside. Id. at 232, 246 A.2d at 304. Harding later returned and raped her. Id. at 235, 246 A.2d at 305-06. The victim was found, in a state of shock, on the side of the road two or three miles from where she was shot. Id. at 233, 246 A.2d at 304.

\textsuperscript{52} While in the hospital, the victim could not remember some of the details about the incident. Id. at 234, 246 A.2d at 305. After being released from the hospital, she was hypnotized. Id. As a result, her memory was restored and she identified the defendant as the one who shot and raped her. Id. at 235, 246 A.2d at 305-06. This was her testimony at trial. Id. The hypnotist also testified concerning the hypnotic process. Id. at 237-44, 246 A.2d at 306-10. A critic of the Harding decision pointed out that besides semen found on the victim, the testimony induced by pretrial hypnosis constituted the bulk of the evidence for conviction. See Diamond, supra note 7, at 322.

\textsuperscript{53} 5 Md. App. at 235, 246 A.2d at 306.

\textsuperscript{54} Dilloff, supra note 7, at 20. Mr. Dilloff argued that the hypnotist was not impartial because he was hired by the police; further, the fact that the hypnosis took place at a police barrack made the entire procedure biased. Id. at 7-8, 19. The victim was also interviewed, while under hypnosis, by a state trooper whose only interest was in identifying the assailant. See id. at 19. The probability of confabulation was increased because the witness changed her story after hypnosis. Id. Counsel for the suspect was not present at the time of the hypnosis; there was no chance to cross-examine the subject during hypnosis. Id.

\textsuperscript{55} 5 Md. App. at 236, 246 A.2d at 306. The court noted that the hypnotist was a clinical psychologist employed as chief clinical psychologist at a state hospital and that he had qualified to testify as an expert in the field of psychology in Baltimore and in a number of Maryland counties. Id. at 235-36; 246 A.2d at 306. "[H]e was familiarized with hypnosis or hypnotherapy as a form of treatment." Id. at 236, 246 A.2d at 306. Finally, the court pointed out that the record of the trial court disclosed that psychologists and the medical profession used hypnosis as an analytical tool and technique to assist patients in recovering lost memory. Id.
“if the Harding trial and appellate courts had been presented a more accurate description of the nature of hypnosis and the extreme vulnerability of the subject to suggestion, they might have been less disposed to admit the evidence.” The record of the trial court, which was examined on appeal, however, indicated that the hypnotist was questioned as to the suggestibility of the subject under hypnosis. Although he admitted the subject was vulnerable to limited suggestibility, the hypnotist, in the opinion of the court, was able to show that the technique was reliable enough to justify admission of the testimony.

The defendant’s objection also was based on the fact that the hypnotist had not graduated from a school of hypnotism. Citing the fact that formal training in hypnosis was provided in the hypnotist’s “education as a psychologist and his use of hypnosis for four years,” the court concluded that the trial judge properly admitted his testimony. Formal training is unnecessary as long as the record shows that the hypnotist is “possessed of any knowledge or information which would elevate his opinion above the level of conjecture or personal reaction.” With respect to this analysis of expert testimony, the court is supported by Federal Rule of Evidence 702. This rule states that experts may be qualified by “skill, experience, training, or education;” thus it is the presence of specialized knowledge that is the issue, not the source of that knowledge.

After undergoing pretrial hypnosis, the victim in Harding testified that the defendant was the one who shot and raped her. Because the witness testified from her present recollection, the court framed the issue as one of credibility rather than admissibility. Hypnosis was used as a device to refresh memory and the court properly left to the jury the question of the weight to be given the resulting testimony.

The victim’s testimony at trial, after hypnosis, differed from her prior statements. One commentator suggests that these inconsistencies are evidence of possible confabulation—filling in gaps in memory with fantasy. While confabulation is possible, witnesses who have not undergone hypnosis have been known to make prior inconsistent statements.

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57 Diamond, supra note 7, at 323.
58 See id.
59 Id. at 235, 246 A.2d at 306.
60 Id.
61 Id.
62 Id.
63 Id.
64 FED. R. EVID. 702.
65 5 Md. App. at 235, 246 A.2d at 305-06.
66 Id. at 236, 246 A.2d at 306.
67 Id.
68 See id. at 233, 235, 246 A.2d at 304-05.
69 Dilloff, supra note 7, at 19.
statements, and the jury in such instances is charged with giving the testimony its proper weight. There is no reason for the inconsistent statements of a witness who has undergone hypnosis to be treated any differently. Although warnings about the dangers inherent in the use of hypnosis are desirable, they are necessary only to the extent that juries and courts should be warned about possible defects in any form of testimony.

A major criticism of hypnotically induced testimony is that the hypnotic subject, after awakening, cannot "recognize that a suggestion implanted intentionally or unintentionally by the hypnotist is not the product of his own mind." This being true, the most vigorous cross-examination will not reveal the existence of suggestion to the witness or the interrogator. The shortcomings associated with hypnotically induced testimony are not unique, however. When a witness testifies from his own memory, without the influence of hypnosis, there is also a danger of confabulation, vulnerability to suggestion, and distortion of memory. Regardless of the presence or absence of pretrial hypnosis, a witness may be unable to recognize that a suggestion is not a function of his own mind. Assuming that testimony taken from two witnesses, only one of whom has been subjected to pretrial hypnosis, is the result of a suggestion implanted by the interrogator, the effect of the suggestion on both witnesses is less reliable testimony. The question becomes the degree to which the testimony is unreliable, which is a question of fact properly left for the jury.

In order to facilitate the factfinding duty of the jury, the court in *Harding* gave a special instruction relating to the testimony induced by pretrial hypnosis. The jury was warned against giving such testimony any greater weight than any other testimony heard at trial. Moreover, the record contains evidence of some of the safeguards recommended by

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70 Diamond, *supra* note 7, at 334.

It is very difficult for human beings to recognize that some of their own thoughts might have been implanted and might not be the product of their own volition. It is only with the severely mentally disturbed, as in schizophrenia and in obsessive-compulsive neuroses, that one's thoughts and resultant behavior are experienced as alien. Normally, mental processes are rationalized and experienced as the product of free will, even when it should be obvious that they are not.

*Id.* at 333-34.

71 *Id.* at 334.


73 See generally 5 Md. App. at 244, 246 A.2d at 310.

74 5 Md. App. at 244, 246 A.2d at 310.
commentators on pretrial hypnosis. For this reason, Harding has been recognized for its appreciation of the problems peculiar to hypnotically induced testimony. Harding provided the cornerstone for other courts inclined to be favorably disposed to the development of hypnosis as an aid to memory recall.

Growth in Acceptance of Hypnotically Induced Testimony

Only three years after the decision in Harding, a line of cases upheld the use of pretrial hypnosis to restore lost memory. Citing Harding, the Oregon Court of Appeals in State v. Jorgensen approved such use of hypnosis. As a result of trauma, the witness in Jorgensen had lost all memory of the events of the crime. A combination of hypnosis and sodium amytal partially restored lost memory.

Jorgensen used much the same language as the Harding opinion in support of admitting the testimony. The "witnesses gave their testimony . . . in open court and were subjected to prolonged and rigorous cross-examination by defendant's counsel before the jury." This worked as a safeguard against the dangers of hypnotically induced testimony. The court did not "believe that the fact [witnesses] had been subjected to certain psychiatric procedures . . . prior to testifying, which were fully disclosed in the evidence, would be a basis for disallowing their testimony." The court held that objections raised by the defendant went to the weight of the testimony rather than its admissibility: "Credibility of . . . witnesses [is] for the jury."

The evidence adduced at trial was as follows: (1) the hypnosis procedure was fully exposed in the evidence; (2) the man who induced the hypnosis was a professional psychologist and gave his opinion that there was no reason to doubt the truth of the witness' statement; (3) there was sufficient corroboration of the witness' testimony; (a) male sperm was found in the victim's vagina, (b) the accused was one of two males shown to have been found when the crime was committed, (c) the accused was seen in a station wagon immediately prior to the time the crime was committed. In addition a precautionary instruction was given.

Id. at 247, 246 A.2d at 312. For a commentator's recommendation of similar safeguards, see e.g., Comment, Safeguards, supra note 6.

See, e.g., Note, Present Recollection, supra note 6, at 367.

8 Or. App. 1, 492 P.2d 312 (1971) (defendant appealed from conviction of one count of second degree murder and one count of first degree murder).

Id. at 9, 492 P.2d at 315.

Id.

It would appear from the language of the opinion that Harding did "set the trend for subsequent rulings that pretrial hypnotism affects credibility but not admissibility of the evidence," Diamond, supra note 7, at 322.

8 Or. App. at 9, 492 P.2d at 315. See also State v. Brom, 8 Or. App. 598, 494 P.2d 434 (1972) (expressly followed Jorgensen although no discussion of hypnotic evidence was contained in the opinion).
In *Wyller v. Fairchild*, the United States Court of Appeals for the Ninth Circuit held that hypnosis was not inherently unreliable. After pretrial hypnosis was used to restore lost memory, the testimony of a witness was admitted into evidence. Much of the language of the opinion was borrowed from the *Jorgensen* and *Harding* opinions. The court emphasized the cross-examination of the witness and the availability of a precautionary instruction, which the defendant had not requested. "The Court thus implicitly recognized that cross-examination of the hypnotist is essential to expose possible suggestion [and] to expose failure on the part of the hypnotist to take appropriate steps to assure that the subject was actually hypnotized."  

The next state court to defend pretrial hypnosis against its critics was the Supreme Court of North Carolina in *State v. McQueen*. *McQueen* was decided four years after the decision in *Wyller*. Following the courts in Maryland, Oregon, and the Ninth Circuit, *McQueen* held that testimony induced by pretrial hypnosis was admissible. The court distinguished hypnosis from lie-detector tests, which invade the province of the jury by attempting to prove the credibility or noncredibility of the testimony offered. In contrast, hypnosis, as it was used in *McQueen*, only aided the witness in restoring lost memory. Citing *State v. Peacock*, a case in which the use of memoranda for the purpose of refreshing memory was involved, the court in *McQueen* stated:

> It is quite immaterial by what means the memory is quickened; it may be a song, or a face, or a newspaper item, or a writing of some character. It is sufficient that by some mental operation, however mysterious, the memory is stimulated to recall the event, for when set in motion it functions quite independently of the actuating cause.

In the opinion of the court, although hypnosis was an unusual device to refresh memory, the legal effect was the same as if a document had been used to revive memory. The court apparently drew no distinction between hypnosis and any other memory recall device.

On the grounds that the court failed to employ proper procedural safeguards, *McQueen* has been severely criticized. One commentator has argued that the court did nothing to insure that the testimony of the
witness was free of suggestion. However, the court stated that the defendant did not seek to cross-examine the witness concerning the hypnotic procedure. Furthermore, no effort was made by the defense to call the hypnotist, who was available, to testify. Although prior to trial a tape of the entire hypnotic session was available, the defense apparently did not choose either to question the technical aspects of the procedure or to view the tape. The defense failed to attack the reliability of hypnosis with regard to the admissibility or credibility of the testimony.

One year after Wyller and McQueen, the Court of Appeals for the Ninth Circuit made an important pronouncement with respect to the foundation necessary for hypnotically induced testimony. In United States v. Awkard, the defendants were convicted of a prison murder. The government's witnesses had undergone pretrial hypnosis to refresh their recollections of individual names of the participants in the incident. Admissibility of their testimony was upheld by the court. The court not only held that "[t]he fact of hypnosis, if disclosed to the jury, may affect the credibility of evidence, but not its admissibility," but went significantly further. On the issue of laying a proper foundation for the reliability of hypnosis, the court stated that "[p]retrial hypnosis of witnesses [has been] permitted in this circuit in both criminal and civil cases. . . . In jurisdictions in which the admissibility of hypnotically refreshed evidence is still an open question, a foundation . . . is no doubt necessary." Because the technique had been accepted in Wyller, "there [was] no need for a foundation concerning the nature and effects of hypnosis."

While the decision in Awkard represents a significant pronouncement with respect to the necessity of laying a foundation for the use of hypnotically induced testimony, a recent North Carolina case shows a will-

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9 Note, Present Recollection, supra note 6, at 368-69.

Although quoting Kline [523 F.2d 506 (9th Cir. 1974)] to the effect that "[the witness] was present and personally saw and heard the occurrences," the court disregarded the fact that in McQueen the only evidence that the witness was actually present came from her own hypnotically refreshed testimony, whereas in Kline, the witness' presence was independently established. . . . Although purporting to rely on Jorgensen, the North Carolina Court admitted the procedure employed by the hypnotist in McQueen was never entered into evidence. The court cited Harding without any indication of why or how that case applied to McQueen.

Id.

9 Id. at 368-69.

91 Id.

92 Id.

93 Id.

94 Id.

95 295 N.C. at 120, 244 S.E.2d at 428.

96 Id.

97 597 F.2d 667 (9th Cir. 1979).

98 Id. at 669.

99 Id.

100 Id.

101 Id.

102 Id. (citation omitted).

103 Id.
ingness to go much farther. Ku Klux Klan and Nazi Party members were accused of murdering five Communist Worker's Party members during a rally in a black neighborhood in Greensboro, North Carolina. Laura Blumenthal, a news reporter, was an eyewitness for the state in the trial. Unknown to the defense, Blumenthal was hypnotized prior to trial to refresh her memory of the incident. After learning of the hypnosis, the defense made a motion for a mistrial. The trial judge cited State v. McQueen and said that the question was one of credibility rather than admissibility. Subsequently, the court admitted into evidence a ninety-minute videotape of the hypnosis session, not only for the purpose of proving lack of suggestion, but as substantive evidence as well. The jury could "consider it [the tape] as if Blumenthal had been testifying under oath." Thus, the court's action is tantamount to allowing in-court hypnosis to be admitted into evidence, which has never been done before by an American court.

AN ANALYSIS OF DECISIONS REJECTING HYPNOTICALLY INDUCED TESTIMONY

Cases Reversing the Trend on the Basis of Frye

The reliability of hypnosis as an aid to memory recall appeared to be established in the legal community by 1979; however, beginning in 1980, a widespread re-evaluation of pretrial hypnosis began. Reversal of the trend toward the admission of hypnotically induced testimony was led by the Supreme Court of Minnesota. Before determining the existence of probable cause in a prosecution for alleged aggravated assault and criminal sexual conduct in the first degree, the Minnesota trial court certified to the state supreme court the question of the admissibility of hypnotically induced testimony in the case of State v. Mack. The supreme court held that a witness previously hypnotized could not testify in criminal proceedings concerning subject

104 The Daily Times-News (Burlington, North Carolina), August 18, 1980, at 1, col. B. At this juncture, the writer has found no other source to cite other than local newspaper accounts of the trial. There is no published opinion of the case.
105 The Daily Times-News (Burlington, North Carolina), August 20, 1980, at 1, col. B. Allowing the tape as substantive evidence is tantamount to allowing in-court use of hypnosis, which has never been permitted in an American court.
106 Id.
107 Id.
108 Id.
109 Id.
110 Id.
111 See generally Note, Hypnosis in Court, supra note 6.
112 See text accompanying notes 46-103 supra.
113 Minn. ___, 292 N.W.2d 764 (1980).
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matter adduced from pretrial hypnosis. The court accepted the defendant's argument that the admissibility of the testimony was governed by the general scientific reliability test announced in Frye v. United States. The test demands that "the thing from which the deduction is made must be sufficiently established to have gained acceptance in the particular field in which it belongs." The Mack court cited Greenfield v. Commonwealth for support and applied the strict standard of Frye to reject the testimony induced by pretrial hypnosis.

The Arizona Supreme Court's recent pronouncement about the reliability of hypnosis illustrates a lack of understanding about the technique. State v. LaMountain was similar to the Mack case in its holding. While the court rejected the use of hypnotically induced testimony, it did not expressly follow the Frye test. However, for the purpose of this analysis, it can be reasonably inferred from the language of the decision that the case can be grouped with those cases rejecting the use of pretrial hypnosis on the basis of Frye. The court said that "[a]lthough . . . hypnosis is a useful tool in the investigative stage, we do not feel the state of the science (or art) has been shown to be such as to admit testimony which may have developed as a result of hypnosis." Given the facts of the case, the rejection of the testimony induced by pretrial hypnosis was proper. The two basic requirements for hypnotically induced testimony were not met; first, the hypnotist had been practicing hypnosis for only about a year, and second, the state failed to lay a foundation for the reliability of hypnosis.

The Court of Appeals of Michigan also rejected the use of hypnotically induced testimony.

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114 Id. at ____, 292 N.W.2d at 765.
115 293 F. 1013 (D.C. Cir. 1923).
116 Id. at 1014.
117 214 Va. 710, 204 S.E.2d 414 (1974) (court utilized analysis similar to that in Frye to hold that hypnotic evidence was not admissible in criminal prosecution).
118 Under the Frye rule, the results of mechanical or 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. Although hypnotically-adduced 'memory' is not strictly analogous to the result of mechanical testing, we are persuaded that the Frye rule is equally applicable in this context, where the best expert testimony indicates that no expert can determine whether memory retrieved by hypnosis, or any part of that memory, is truth, falsehood, or confabulation—a filling of gaps with fantasy. Such results are not scientifically reliable as accurate.
119 Minn. at ____, 292 N.W.2d at 768.
120 125 Ariz. 547, 611 P.2d 551 (1980). The defendant was charged with first degree rape and lascivious acts. Unable to identify the defendant in a photographic lineup, the victim underwent hypnosis. After two sessions of hypnosis, the victim selected the defendant from a photographic lineup and later made an in-court identification. The defendant was convicted, and he appealed.
121 Id. at 551, 611 P.2d at 555.
122 See generally Teitelbaum, supra note 6; Note, Hypnosis in Court, supra note 6.
induced testimony. In People v. Tait, the defendant appealed from a conviction of assault with intent to commit murder. The court failed to distinguish hypnosis from lie detectors and voiceprints by holding that the test "required that general scientific recognition be established by testimony of disinterested and impartial experts or disinterested scientists whose livelihood was not intimately connected with the technique." Like the LaMountain court, the Michigan court used language closely paralleling that of the Frye test.

Given the facts of the case, the decision in Tait was proper. The witness, a deputy sheriff, was hypnotized by the prosecuting attorney, who was an amateur hypnotist. On that set of facts, even jurisdictions generally accepting hypnotically induced testimony would have refused to admit this testimony because of a lack of procedural safeguards. A further procedural flaw occurred when defense counsel attempted to examine the witness who had undergone pretrial hypnosis. The trial judge ordered both parties not to mention hypnosis in the presence of the jury. The trial court also refused to give the jury "instructions on the unreliability of hypnosis and the capability of a witness to fantasize while under hypnosis." As a result, the jury never knew that the witness had been hypnotized and that his memory had been refreshed through hypnosis. In the opinion of the court, this represented reversible error.

After a thorough analysis of the issue and citation to all the case law and literature, the Supreme Court of Pennsylvania in Commonwealth v. Nazarovitch rejected the use of hypnotically induced testimony. Although the court applied the Frye test, the opinion suggested that, given the right fact situation, hypnotically induced testimony might be admitted. The result in Nazarovitch was correct because there was no record of the subject's memory prior to hypnosis, both hypnotists were secured by the police authorities, the questioning was weighted in favor of the

123 Id. at ___, 297 N.W.2d at 854.
124 Id. at ___, 297 N.W.2d at 857. The court cited the case of People v. Barbara, 400 Mich. 352, 255 N.W.2d 171 (1977), which set the rule for lie detectors and voiceprints, as supplying the rule for hypnosis also. Mich. App. at ___, 297 N.W.2d at 857. The language of the test is not unlike the Frye test enunciated in the Mack case. Id. at ___, 297 N.W.2d at 856-57.
125 Mich. App. at ___, 297 N.W.2d at 855. For a criticism of partial hypnotists, see Dilloff, supra note 7, at 19-20. See also Minn. at ___, 292 N.W.2d at 771 n.14 (affidavit of Dr. Orne).
126 Mich. App. at ___, 297 N.W.2d at 855.
127 Id. at ___, 297 N.W.2d at 856.
128 Id. at ___, 297 N.W.2d at 857. But see United States v. Awkard, 597 F.2d 667 (9th Cir. 1979) (when admissibility of hypnotically induced testimony is no longer an open question, no foundation for reliability is necessary and jury does not have to be informed of use of hypnosis).
130 Id. at ___, 436 A.2d at 172-73.
131 See id. at ___, 436 A.2d at 178.
prosecution, and the subject had taken a hallucinogenic drug during the event she was trying to remember. These facts do not present the kind of situation in which pretrial hypnosis should be accepted.

Should Frye Apply?: The Lack of Sound Legal Reasoning

In the years between 1968 and 1980, hypnotically induced testimony fared well in several state courts and the Ninth Circuit; however, 1980 proved to be the year of re-evaluation. Some courts depended on the Frye test and similar standards, while others rejected hypnotically induced testimony in opinions that were "often devoid of legal reasoning or analysis." Commentators have argued that the use of the general scientific reliability test for hypnotically induced testimony is erroneous. The primary ground for the inadmissibility of results from lie detector tests (the subject matter of Frye) is that the results are offered for the purpose of ascertaining the guilt or innocence of the accused. Lie detector tests place factfinding responsibility in the hands of the machine and the examiner, yet procedural safeguards for the tests are not available. Because the province of the jury is invaded, one hundred percent reliability is required under the strict standard articulated in Frye.

The use of truth serums has the same effect on the role of the jury in the trial process. It is impossible to protect against problems with the reliability of truth serums for several reasons: first, each human body has a different chemistry and is subject to different reactions to the serum; second, the interrogation is done in private; third, equal depths of influence cannot be maintained; fourth, no adequate tests are available to measure depth of influence; and fifth, cross-examination is impossible because the condition cannot be maintained for long periods of time. It is the examiner who must be entrusted with the duty of factfinding when truth serums are used. As is the case with lie detectors, because the function of the jury as finders of fact is abrogated, one hundred percent reliability of the technique should be required. The connotation inherent in the names "truth serum" and "lie detector" is that the function of these techniques is to establish the truth of matters asserted. Such a function cannot be imputed to pretrial hypnosis.

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132 Id. at ___, 436 A.2d at 177. On this set of facts, not even the Ninth Circuit would be likely to admit the testimony.

133 Foster & Spector, supra note 6, at 579.

134 See generally note 6 supra.

135 293 F. at 1013.

136 See generally Foster & Spector, supra note 6; Teitelbaum, supra note 6, at 211.

137 See Teitelbaum, supra note 6, at 211.

138 Id.

139 Id. at 211-12.

140 Id.
In *Mack* the court stated that "no expert can determine whether memory retrieved by hypnosis . . . is truth, falsehood, or confabulation."\(^{141}\)

One of the most widely cited critics of pretrial hypnosis asserts that "psychiatric and psychological professionals highly skilled in the use of hypnosis for therapeutic purposes are apt to be naive in recognizing its limitations as a 'truth-telling' technique."\(^{142}\) Unlike *Mack*, the court in *State v. McQueen*\(^{143}\) recognized the critical distinction between hypnosis and lie detector tests. The *McQueen* court said: "Here we are concerned with the admissibility of testimony which the witness says is her present recollection . . ., the credibility of her testimony being left for the jury's appraisal."\(^{144}\) *McQueen* and some commentators\(^{145}\) have observed that hypnosis does not seek to establish truth of matters asserted and thus take away the role of the jury.

The availability of procedural safeguards supports a less restrictive standard for hypnotically induced testimony than for evidence derived from lie detector tests and truth serums for three reasons: first, an explanation of the dangers of suggestion associated with hypnosis may be given by the hypnotist; second, there is an opportunity for cross-examination; and third, the witness is testifying from his own substantive knowledge, if the procedure is conducted properly.\(^{146}\) In his affidavit, cited in the *Mack* case, Dr. Orne, the expert on hypnosis, made it clear that the most important safeguard against suggestion is the strict monitoring of all contact between the hypnotist and the subject.\(^{147}\) It is the hypnotist who is in the position to make the procedure highly suggestive or not suggestive at all.\(^{148}\) Complete objectivity on the part of the hypnotist is required; thus, the hypnotist should be a disinterested party who does not communicate personal attitudes to the subject at any time before or after the hypnotic sessions. Most important, his questions should never suggest an answer.\(^{149}\)

When the court in *State v. LaMountain*\(^{150}\) used the words "science" and "art" interchangeably to refer to hypnosis,\(^{151}\) a serious misconception of the technique was revealed. The comments of Dr. Orne make it clear that hypnosis is no mystical, magical spell that engulfs the hypnotized subject and controls his every thought. The subject retains thoughts and expres-
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sions of will that are present in the individual's character. If the hypnotist tries to suggest an idea that is foreign to the subject, the suggestion will, most likely, be refused. Hypnosis, because it is not a spell that completely controls the subject, is a cooperative effort between the hypnotist and the subject; thus, if the hypnotist tries to take advantage of the subject, the trance could be terminated by the subject.

Instead of making broad pronouncements about the reliability of hypnosis, as the court did in Mack and LaMountain, courts should engage in a case-by-case analysis of the admissibility of testimony induced by pretrial hypnosis. In each case the court should consider whether a proper foundation has been laid for pretrial hypnosis and whether the proper procedural safeguards have been used to ensure that the province of the jury has not been invaded. Since medicine is an inexact science, medical testimony is a calculated opinion based on evidence obtained by the use of approved methods of investigation. Therefore, "[t]o require a showing of greater accuracy than the science is capable of producing is unreasonable." If it can be shown that hypnosis is approved by the medical profession and that the results of hypnosis have reasonable medical accuracy, "the courts should not hesitate to allow such testimony if invoked by a qualified hypnotist."

The reasoning of the court in People v. Tait illustrates the lack of sound legal reasoning with respect to admissibility of hypnotically induced testimony. The court cited one other Michigan case that rejected the use of testimony influenced by pretrial hypnosis, People v. Hangsleben. Although the court gave no indication as to how heavily it relied on Hangsleben, it also failed to note that the facts of the case were distinguishable from the facts of Tait. Hangsleben involved an attempt by the defendant to introduce statements made "while under hypnosis to establish the truth of the statements he made while in a hypnotic trance." There was no attempt in Tait to introduce any statements made while under hypnosis. The witness had his memory refreshed by hyp-

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152 See L. WOLBERG, supra note 9, at 63.
153 Id. at 61.
154 Id.
155 Compare People v. Tait, 99 Mich. App. 19, 297 N.W.2d 853 (1980), with Commonwealth v. Nazarovitch, ___ Pa. ___, 436 A.2d 170 (1981). The Pennsylvania Supreme Court in Nazarovitch, for example, implied that it would deal with the admissibility of hypnotically induced testimony on a case-by-case basis by not establishing a per se rule against admissibility, id. at ___, 436 A.2d at 178.
156 M. Teitelbaum, supra note 6, at 212.
157 See id.
158 Id.
159 Id.
162 99 Mich. App. at 25, 297 N.W.2d at 856.
nosis and testified from his own present recollection. Therefore, *Hangsleben* did not apply and should not have been cited for support.

The Retreat by Maryland: A Questionable Interpretation

Perhaps the greatest blow to the defense of hypnotically induced testimony is the recent retreat by the Maryland Court of Special Appeals. In *Polk v. State*, the Maryland court reversed the defendant’s conviction of offenses stemming from sexual misconduct. On appeal the defendant alleged "that hypnotically induced testimony is *per se* inadmissible, and . . . that in this case the alleged victim’s testimony was hypnotically induced by an unqualified police investigator." That hypnotically induced testimony was not, as a rule, inadmissible had been established by the Maryland court in *Harding*. However, after a brief review of the holding in *Harding* and the cases subsequent to that decision which admitted hypnotically induced testimony, the court noted that "[t]en years after our decision in *Harding*, . . . the Court of Appeals of Maryland adopted for the first time the now familiar ‘general acceptance rule’ enunciated in *Frye v. United States*." The adoption of the *Frye* test for general reliability in the 1978 case of *Reed v. State* was deemed to compel a re-evaluation of the use of hypnotically induced testimony. *Polk* not only cited the Minnesota and Arizona Supreme Courts, but also followed their application of the *Frye* rule. The court reversed the appellant’s conviction and remanded the case for a new trial.

The result in *Polk* would invite less criticism if it could be reconciled with the same court’s decision in *State v. Temoney*, which also was decided after the adoption of the *Frye* rule in that jurisdiction. In *Temoney* the defendant was convicted of first degree rape, first degree sexual offense, robbery with a deadly weapon, and carrying a dangerous weapon openly with intent to injure. On appeal, the defendant objected to the


\^16\^ Id. at 389, 427 A.2d at 1045. The defendant also contended that the state was improperly permitted to call the witness who had undergone hypnosis without exposing in the evidence that hypnosis had been used, and that the defendant was improperly prevented from calling his own expert to testify about hypnosis. Id. at 389, 427 A.2d at 1046.

\^16\^ Id. at 391, 427 A.2d at 1046-47 (citation omitted).

\^16\^ 283 Md. 374, 391 A.2d 364 (1978) (holding that testimony based on voiceprints is inadmissible in Maryland). The court said that "before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert’s particular scientific field.” Id. at 381, 391 A.2d at 368. The Court of Appeals in *Reed* was divided four to three.

\^17\^ 48 Md. App. at 392-94, 427 A.2d at 1047-48 (citing *Mack* and *Mena*).

\^18\^ 48 Md. App. at 396, 427 A.2d at 1048.

\^19\^ 45 Md. App. at 569, 414 A.2d 240 (1980).

\^19\^ Id. at 570, 414 A.2d at 241.
trial court's admission of testimony induced by hypnosis. In the opinion of the court, "[t]he trial court did not err ... in admitting this testimony." Relying on Harding, the court said the fact that the witness "achieved her present knowledge after being hypnotized concerns the question of the weight of the evidence which the trier of facts, in this case the jury, must decide." It is interesting that the appellee in Temoney relied on the decision in Reed, as did the appellant in Polk one year later; however, the court in Temoney found the reliance on Reed "somewhat misplaced." Refusing to give the decision in Reed the broad reading advocated by the appellee, the court stated: "Assuming that the scientific validity of the hypnosis technique is in controversy, while such would preclude the admission of expert opinion deduced from the technique, ... it would not also preclude ... the admission of a description of the procedure used to hypnotize the victim or the hypnotically induced testimony itself." On the basis of this reading of the Reed opinion, the court held that the viability of Harding was not vitiating. In light of the Temoney opinion, the court's holding in Polk is questionable.

In Polk the court implied that the case was the first time, since the decision in Reed, that the issue of the general acceptability of hypnosis as an aid to memory recall was directly before the court. However, one of the appellee's contentions in Temoney was that "[h]ypnosis ha[d] not been established as an approved scientific method ..." under the standard of Reed. In the course of reasoning that Reed was limited in its application, the Temoney court made the assumption that "the scientific validity of the hypnosis technique [was] in controversy ...." In a footnote, the Polk court said that the applicability of Frye was raised in Temoney, but was limited to the admissibility of expert testimony based on hypnosis; however, Temoney held that Reed "would not ... preclude ... a description of the procedure ... or the hypnotically induced testimony itself." Not only was the issue of the scientific technique directly before the court in Temoney, the issue was settled by the court's narrow interpretation of Reed. It appears that in Polk the Maryland court misinterpreted the issue and the holding in the Temoney case.

\[\text{References}\]

171 Id.
172 Id. at 576, 414 A.2d at 244.
173 Id.
174 Id.
175 Id. (emphasis in original) (citation omitted) (footnotes omitted).
176 45 Md. App. at 577-78, 414 A.2d at 244 (emphasis in original) (footnotes omitted).
177 Id. at 577, 414 A.2d at 244.
178 Id. The court also noted that the hypnotist testified that there was such a controversy about the validity of hypnosis. Id. n.6.
179 48 Md. App. at 392, 427 A.2d at 1047 n.13a.
180 45 Md. App. at 577-78, 414 A.2d at 244 (emphasis in original) (footnotes omitted).
TOWARD A UNIFORM SET OF PROCEDURAL SAFEGUARDS

Only one case, State v. Hurd,\(^{181}\) has collected and adopted the most important procedural safeguards for the use of hypnotically induced testimony. The Supreme Court of New Jersey in Hurd affirmed the lower court's adoption and application of a set of procedural safeguards for the use of hypnotically induced testimony.\(^{182}\) The appeal involved the trial court's exclusion from evidence testimony induced by pretrial hypnosis.\(^{183}\) The trial court distinguished the traditional use of the Frye test of general scientific reliability by stating that "[i]t must be conceded that as a technique or procedure for determining 'truth,' hypnosis would fail the Frye test of general acceptance in the scientific community."\(^{184}\) However, the trial court went on to say that this inability to pass the Frye test did not mean that such testimony should always be rejected.\(^{185}\) Since hypnosis is an accepted technique in the medical community and allows subjects to regain lost memory, the trial court said that "[i]n this limited sense hypnosis has met the test imposed by Frye."\(^{186}\)

Referring to the trial court's analysis of the Frye rule, the New Jersey Supreme Court stated:

> Unlike the courts in Mena . . . and Mack, . . . the court below did not demand, as a precondition of admissibility, that hypnosis be generally accepted as a means of reviving truthful or historically accurate recall. We think this was correct. The purpose of using hypnosis is not to obtain truth, as a polygraph or 'truth serum' is supposed to do. Instead, hypnosis is employed as a means of overcoming amnesia and restoring the memory of a witness.\(^{187}\)

If hypnosis is employed in this fashion, testimony of a witness subjected to pretrial hypnosis is as reliable as the testimony of any other witness.\(^{188}\) Since the purpose of pretrial hypnosis is not to prove the truth of matters asserted, the supreme court was "satisfied that the use of hypnosis to refresh memory satisfies the Frye standard in certain instances."\(^{189}\) That there exist potential problems with the use of pretrial hypnosis was fully recognized, but the court felt that "a rule of per se inadmissibility [was] unnecessarily broad and [would] result in the exclusion of evidence that [would be] as trustworthy as other eyewitness testimony."\(^{190}\) Although the reliability of the particular procedures used in each case may be

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\(^{182}\) Id. at 549, 432 A.2d at 90.
\(^{183}\) Id. at 529, 432 A.2d at 88.
\(^{185}\) Id.
\(^{186}\) Id.
\(^{187}\) 86 N.J. at 537, 432 A.2d at 92 (citations omitted) (footnotes omitted).
\(^{188}\) 86 N.J. at 538, 432 A.2d at 92 (citations omitted) (footnotes omitted).
\(^{189}\) Id.
\(^{190}\) 86 N.J. at 541, 432 A.2d at 94.
challenged by the introduction of expert testimony, "the opponent may not attempt to prove the general unreliability of hypnosis."\textsuperscript{194}

In order to provide guidelines for the case-by-case evaluation of the hypnotic procedures used, the New Jersey Supreme Court adopted the following procedural safeguards:

First, a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session.

Second, the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense.

Third, any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or another suitable form.

Fourth, before inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them.

Fifth, all contacts between the hypnotist and the subject must be recorded. The use of videotape, the only effective record of visual cues, is strongly encouraged but not mandatory.

Sixth, only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and the post-hypnotic interview.\textsuperscript{192}

The procedural safeguards adopted by the New Jersey Supreme Court are appropriate. These procedures provide an excellent opportunity for courts in other jurisdictions to resolve open questions concerning the use of hypnotically induced testimony. However, while the New Jersey Supreme Court would only strongly suggest the use of videotape as a means of recording all contacts between the hypnotist and the subject, videotaping should be made mandatory. The court and the jury, in most instances, must rely exclusively on the testimony of the hypnotist concerning the hypnotic session. In the Nazi-Klan trial,\textsuperscript{193} for example, as a result of the admission of the videotape, the court and the jury could decide whether the procedure was free of suggestion without relying totally on the testimony of the hypnotist. Moreover, the demeanor of the witness could be judged.\textsuperscript{194} Therefore, there are considerable grounds for making the use of videotape mandatory.

\textbf{CONCLUSION}

The case law reveals that the relationship between hypnosis and the legal community has progressed remarkably since 1897. Because of disagreement among the state courts over the standard to use in judging

\textsuperscript{191} Id. at 543, 432 A.2d at 95.
\textsuperscript{192} Id. at 545-46, 432 A.2d at 97 (footnote omitted) (emphasis in original).
\textsuperscript{193} See text and accompanying notes 104-111 supra.
\textsuperscript{194} See id.
the admissibility of hypnotically induced testimony, however, the progress of the last eighty-five years may be in grave danger.

Starting with Harding, and continuing with the sound reasoning of Hurd, the issue with respect to hypnotically induced testimony has been framed accurately in terms of credibility rather than admissibility. What is needed is a uniform set of procedural safeguards capable of restoring consistency and reasoning to opinions on the subject. Hurd has provided a foundation for such uniformity. Building on the meager case law dealing with pretrial hypnosis and an objective analysis of the applicability of the Frye rule, Hurd formulated a set of procedural safeguards that should be adopted as a universal standard for the admissibility of hypnotically induced testimony. It remains to be seen whether other courts will follow the New Jersey Supreme Court's effort to bring order to the chaos concerning the admissibility of hypnotically induced testimony.

Octavis White