Before the

BOARD OF EXECUTIVE CLEMENCY

IN RE: JOSEPH R. SPAZIANO

IN SUPPORT OF EXECUTIVE CLEMENCY

APPENDIX

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APPENDICES

PROBATION &
PAROLE
SERVICES

Governor
BOB GRAHAM
Secretary
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May 4, 1983

Hon. S. James Foxman
125 E. Orange Avenue
Daytona Beach, Florida 32014

RE: STANO, GERALD EUGENE
Docket #83-188-CC and
Docket #83-189-CC

Dear Sir:

Attached please find Presentence Investigation reference the above-captioned individual as requested by the Court.

If we may be of further assistance in this matter, please advise.

Sincerely,

Edward C. Seltzer
Probation and Parole Officer

ECS/mld
cc: ASA Lawrence J. Nixon
APD Howard Pearl
Clerk of the Court (letter only)

Filed in Open Court
Seventh Judicial Circuit,
Volusia County, Florida
JUN 6 1983
V. Y. SMITH, CLERK
By [signature] D.C.

EXHIBIT ENTERED BY THE COURT,
PRESENTENCE INVESTIGATION

560

FLORIDA DEPARTMENT of CORRECTIONS

FLORIDA DEPARTMENT OF CORRECTIONS

PRESENTENCE INVESTIGATION

COUNTY Volusia

E	STANO, GERALD EUGENE	DOCKET #	83-188-CC and #83-189-CC
NAME	Same	CIRCUIT #	07-09daytona8ch DC # 079701
ESS.	Florida State Prison Starke, Florida	OFFENSE	MURDER IN THE FIRST DEGREE (CAPITAL OFFENSE); MURDER IN THE FIRST DEGREE, FELONY
31 DOB	9-12-51 RACE/SEX W/M	☐ ADJUD.	☐ ADJ. W/H DATE:
RESIDENCE	Volusia County, Florida	ARREST DATE	2-3-83
AL SECURITY #	267-96-0691	BOND	NONE RELEASE DATE NONE
	S. James Foxman	DAYS IN JAIL	Since arrest
CUTOR	ASA Lawrence J. Nixon	ARRESTING AGENCY	Volusia County SO/*
NSE ATTY	APD Howard Pearl	DLE #	01000760
SITION		FBI #	641545ND DISP. DATE

~~FINGERPRINT CARD~~ * New Smyrna Beach PD

OFFENSE:

(a) INDICTMENT: The Grand Jury Indictment Case #83-188-CC charges that GERALD EUGENE STANO did, on or about the 20th day of December 1975, at or near Spruce Creek, within Volusia County, Florida, then and there unlawfully, from a premeditated design to effect the death of one Susan Bickrest, a human being, kill and murder Susan Bickrest by manual strangulation and drowning the said Susan Bickrest, in violation of Florida Statute 782.04.

The Grand Jury Indictment Case #83-189-CC charges that GERALD EUGENE STANO did, on or about the 11th day of November 1977, at or near New Smyrna Beach, within Volusia County, Florida, then and there unlawfully, from a premeditated design to effect the death of one Mary Kathleen Muldoon, a human being, kill and murder Mary Kathleen Muldoon, by shooting the said Mary Kathleen Muldoon with a pistol and drowning the said Mary Kathleen Muldoon, in violation of Florida Statute 782.04.

(b) COURT APPEARANCES: The defendant last appeared in Open Court on 3-11-83 and entered a plea of Guilty to the charge of Murder in the First Degree under Volusia County Case #83-188-CC and #83-189-CC. A Presentence Investigation was then directed and the defendant was remanded to custody.

(c) PLEA NEGOTIATIONS: No plea negotiations have been noted in this case. This information was based on contact with both the Office of the State Attorney and the Public Defender.

(d) CO-DEFENDANT STATUS: No co-defendant noted.

(e) CIRCUMSTANCES:

CASE #83-188-CC

Circumstances of this crime involves the report of a body floating in Spruce Creek on 12-20-75, at approximately 4:45 P.M. Reports indicate that Pete Rosen, age 39, 207 Cambridge Drive, Port Orange and Larry Gump, Route 3, #3, Port Orange, were fishing underneath the East Bridge of Spruce Creek on I-95. While fishing, they apparently observed a body floating face down in the water. Mr. Rosen and Mr. Gump advised officers that the body was floating face down in an easterly direction. The two further advised officers that the individual was wearing blue jeans, maroon jacket, platform [illegible] and had long blond hair. Deputies noted this report and recovered the body, at 5:45 P.M. When the victim's body was recovered from the river, it was stiff, arms extended to the front at about shoulder height. The victim apparently had foam about the mouth and nasal area.

The body in question was then transported to the Halifax Hospital Morgue for autopsy. Medical Examiner Arthur Schwartz, M.D., noted that the victim had lacerations to the bridge of the nose, the tip of the nose and around the

nostrils. A laceration to the lower lip and a minor laceration to the chin was also noted. A small abrasion beneath the victim's left eye was reported. Pathological findings of this report determined the cause of death from drowning, as a result of foam in the tracheobronchial tube. A second cause of death was listed as manual strangulation with extensive abrasions and bruises noted. Dr. Schwartz' report also indicated that the victim had been in water for approximately 6 to 8 hours prior to recovery. This body was later identified as Susan Bickrest, age 24.

On 8-15-82, Investigator C. Hudson of the Volusia County Sheriff's Office received a call from Sgt. Paul Crow, Daytona Beach Police Department, with regard to the Bickrest murder. Further inquiry revealed that on August 15, 1982, the defendant provided a confession to Sgt. Crow.

The contents of this confession provided the indication that the defendant picked the victim up at the Derbyshire Apartments, 875 Derbyshire Road, Daytona Beach. Although unnoted in Sgt. Crow's report, the defendant provided this writer the indication that the victim was forced into the car at gun point. After entering the car, Stano apparently proceeded to the Spruce Creek area, striking the victim on the way. This confession further revealed that after continued conflict, the defendant strangled the victim.

This information was subsequently presented to the Fall Term of the Volusia County Grand Jury and resulted in the defendant's indictment on 1-18-83.

CASE #83-189-CC

Circumstances of this case involves the recovery of a body in a ditch on Turnbull Road, New Smyrna Beach, on 11-12-77. Reports indicate that Peggy Pope, 2807 North Sunset Drive, New Smyrna Beach, had contacted the New Smyrna Beach Police Department at aproximately 5:21 P.M. Ms. Pope apparently advised of a body laying face down in the ditch. The New Smyrna Beach Police Department then responded to the scene and roped off the perimeter. Reports indicate that the victim, Mary Kathleen Muldoon, age 23, was laying face down in approximately 9 inches of water. Reports further indicate that the victim was clothed with the exception of underpants and shoes. Miss Muldoon was then transported to the Halifax Hospital where an autopsy was conducted.

A review of the autopsy conducted by Medical Examiner Arthur Schwartz revealed a gunshot wound to the head. Dr. Schwartz later determined the defendant had died as a result of a penetrating bullet wound to the head, combined with drowning.

Records reflect that on 10-8-82, the defendant offered a handwritten confession to Detective Paul Crow. In this confession, the defendant advised that he had picked Miss Muldoon up outside the Silver Bucket and proceeded over the Port Orange Bridge. The defendant advised that the conversation later turned to sex, at which time the victim stated that she would have no part of it. This report indicates that the defendant then struck the victim and proceeded to the Turnbull Bay area. Once on Turnbull Road, the defendant reportedly ordered Miss Muldoon out of the car, at which time followed her by sliding over and getting out of the passenger side. The defendant advised that an argument again began and that he struck her a second time in the head. Subject then reportedly shot the victim in the right side of the head with a .22 caliber automatic weapon.

(f) DEFENDANT'S STATEMENT:

CASE #83-189-CC

On 4-18-83, the defendant was interviewed in the Brevard County Jail with respect to this homicide. Subject stated the circumstances of this crime were that on the evening of 12-20-75, he followed Miss Bickrest from PJ's Lounge to her apartment. Subject stated that upon arrival at the Derbyshire Apartments, he

forced Miss Bickrest into his car with a gun. Subject indicated that after departing the scene, the two proceeded down I-95 toward the Taylor Road area. Subject stated that while enroute to Port Orange, an argument ensued at which time he struck the victim with his fist.

Subject states that after arriving at the Port Orange location, he forced Miss Bickrest out of the car. Subject relates that a "bigger disagreement" then occurred, at which time he strangled Miss Bickrest. Subject stated that he then placed her at the edge of the water and covered her up with branches. Stano advised that he does not believe the victim was dead at the time he left the scene.

CASE #83-189-CC

Subject states that with respect to this case, on 11-11-77, he forced Miss Muldoon into his car at gun point. Subject states that while enroute to New Smyrna, an argument ensued concerning sex, at which time he struck the victim. Subject reports that when he produced the gun, Miss Muldoon became very cooperative and agreed to having sex with him. Stano states that after arriving at the crime scene in New Smyrna, he forced the victim out of the car. Stano then followed by sliding over and exiting the passenger door.

Mr. Stano stated that after Miss Muldoon exited the car, she began to run, at which time he fired a shot over her head. The victim then reportedly froze, Stano approached her and an argument again began. Stano states that he then forced the victim to the ground, at which time he fired a bullet into her brain. The defendant then reports placing the victim in a ditch and departing the scene.

This information was based on an interview with the defendant in the Brevard County Jail on 4-18-82.

PRIOR ARRESTS AND CONVICTIONS:

(a) JUVENILE: (Unverified)

Defendant states that at the age of thirteen (13), he was referred to Westchester County, New York Family Court for charges of pulling fire alarms. Subject also reports a second referral as a result of throwing rocks at cars from an overpass. The defendant indicates he was warned for these incidents.

According to Ron Giacco of the Westchester Clerk's Office, there is no record of these referrals.

(b) ADULT:

ESTING AGENCY	DATE	OFFENSE	DISPOSITION
achua County, Fl SO	03-21-73	CT I- Murder in the First Degree; CT II- Murder in the First Degree.	CT I -3/7/83- COMMITTED FOR LIFE TO FLORIDA DOC; CT II - COMMITTED FOR LIFE TO FLA DOC (Concurrent with Count I)

These sentences were handed down by Circuit Court Judge John J. Crews.

CIRCUMSTANCES: Circumstances regarding Count I involves the murder of Janie M. Ligotino, age 19, on 3-20-73. The body of Miss Ligotino had been located in the dirt road approximately 150 feet north of the intersection of Northeast 10th Avenue and 16th Street, Gainesville, Florida. Miss Ligotino had been beaten, strangled and stabbed a total of thirteen (13) times. These wounds included one (1) stab wound to the left breast, two (2) stab wounds in the right arm, one (1) stab wound under the

under the left arm, one (1) deep stab wound [illegible] one (1) stab wound and severe lacerations on the right hand, one (1) superficial stab wound on the back of the left shoulder and one (1) laceration on the right middle finger. Miss Ligotino also had bruises about the right side of the chin and throat. According to the Alachua County Medical Examiner, a 10-inch butcher knife was used during this crime.

CIRCUMSTANCES: Circumstances regarding Count II involves the murder of Ann E. Arceneaux, age 17, on 3-20-73. Miss Arceneaux was located approximately 200 feet from the intersection of Northeast 10th Avenue and 18th Street, Gainesville, Florida. Miss Arceneaux had been stabbed a total of five (5) times. The stab wounds included one (1) deep wound in the center of the chest, between the breasts, one (1) deep wound under the right arm, two (2) deep wounds to the back of the right shoulder and one (1) stab wound in the left finger.

Subsequent contact with Alachua County Medical Examiner revealed that the weapon was a butcher knife with a 10-inch blade.

ford County, Fl SO	09-06-73	First Degree Murder	3/7/83, COMMITTED FOR LIFE, F.A. DOC Consecutive to the previous sentence imposed in Volusia County

This sentence was handed down by Circuit Court Judge John J. Crews.

ard County, Fl SO	01-14-74	First Degree Murder	PENDING

CIRCUMSTANCES: Circumstances of this case allegedly involves the defendant murdering Kathy Lee Scharf, age seventeen (17), on or about 12-14-73.

According to records, the defendant provided a statement to Sgt. Paul [illegible] Sgt. Johnny Ramis, of the Brevard County Sheriff's Department, on 8-11-83. During the course of this statement, the defendant reportedly advised that he picked the victim up some time before dark, on 12-14-74. Stano apparently advised officers that the victim became "mouthy", criticizing his drinking and driving. The defendant allegedly advised officers that he "backhanded" the victim and proceeded to Brevard County. The defendant then allegedly drove to the end of a dirt road and advised Miss Scharf to "get out, this is the end of the line". Stano then advised officers that when he opened the girl's door, she started to run. The defendant reportedly then grabbed the girl's wrist, twisted it and stabbed her. During the course of this confession, the defendant could not recall the specific number of times which the victim was stabbed. Defendant did advise that it could have been "four or five times". Stano states that he then carried the victim's body down a little trail, dumped her on the bank of the ditch and covered her up with some branches.

Subject was indicted by the Brevard County Grand Jury on this charge and is presently scheduled to go to trial on 6-27-83.

ond Beach, Fl PD	11-07-74	CT I - Forgery; CT II- Uttering a False or Forged Instrument	CT I - Nolle Prossed, CT II- 1 yr. probation, 6/3/75.

CIRCUMSTANCES: On October 9, 1974, the defendant cashed a $60 check on the account of Black Beards By-the-Sea Motel. The check was made out to the order of Kermit Smith with James Kulzer being the maker of the check. The check was received by bank teller Marge Raupp. Mrs. Raupp had written down the last few digits of the car which the defendant was driving and the check also had the defendant's thumbprint on the back.

The check was reported as a forgery to the Ormond Beach Police Department on 11-7-74. Mr. James Kulzer, Manager of the Motel, was present at the time the police officers

initiated the investigation. Mr. Kulzer advised that Kermit Smith was no longer in his employ at the motel and at that time, was in Miami, Florida. Mr. Kulzer advised that the check that was forged was removed from the middle of the check book. The check was #284 with Mr. Kulzer advising that only checks through #160 had been written up until that date. Subsequent investigation revealed the defendant to be a suspect and on 11-7-74, Detective Legg, Ormond Beach Police Department, proceeded to the defendant's home where he was placed under arrest.

usia County, Fl SO	01-02-75	First Degree Murder	9-21-81, COMMITTED TO LIFE, FLA. DOC (Mandatory 25 years

CIRCUMSTANCES: Circumstances of this charge involve the murder of Nancy Heard, age 24, on 1-2-75. Miss Heard was located by hunters, Timothy Bard and Charles Hill, at approximately 8:00 A.M. on 1-3-75. The body of Miss Heard was located on a Florida Power and Light access road halfway between the Cisco ditch road and dirt extension of the old Dixie Highway, Ballough Creek Road, Ormond Beach.

The body of the victim was stripped from above the breast to below its knees. The body had on a blue jean jacket, a slip, tennis shoes and another garment pulled down around the shoes. The knees of Miss Heard were spread apart and the feet were together. Cause of death was determined by Medical Examiner Arthur Schwartz, M.D., as strangulation. It should be noted that the sentence in this case is to run consecutive with the sentence imposed in Volusia County Case #80-2489-CC and Volusia County Case #80 1046-CC.

This sentence was imposed by Circuit Court Judge S. James Foxman.

nd Beach, Fl PD	01-05-76	Reckless Driving	$25 fine
tona Beach, Fl PD	09-24-77	Prostitution	Nolle Prossed 1-16-78

CIRCUMSTANCES: Circumstances of this charge allegedly involved the defendant offering Susie Cunningham, Daytona Beach PD, $20 for sex. This incident is alleged to have occurred at the 100 block of North Atlantic.

On 1-16-78, Assistant State Attorney Lewis R. Starke dropped charges due to the results of a PSE examination administered on the defendant.

nd Beach, Fl PD	04-19-78	Child Abuse	Nolle Prossed 5-10-78

CIRCUMSTANCES: Circumstances of this charge involve a report filed with the Ormond Beach Police Department on 4-5-78. In this report, Betty Jane Miller, alleged that subject had transported her daughter to Pennsylvania and had gotten her pregnant. Ms. Miller's daughter, Christina, was fifteen (15) years of age.

On 5-10-78, Assistant State Attorney Richard Orfinger dropped charges due to problems in locating the victim.

ona Beach, Fl PD	02-20-79	Running a Red Light	$25 fine
nd Beach, Fl PD	04-28-79	Speeding	$25 fine
ona Beach, Fl PD	07-10-79	Petit Theft	No Information filed 10 5-79

CIRCUMSTANCES: Circumstances of this charge allegedly involved the theft of a purse on 7-10-79. This incident involved a report from Margaret Locke, who said the subject departed Sambo's Restaurant with her purse. Ms. Locke was apparently in subject's car prior to this incident.

On 10-5-79, a No Information was filed by Assistant State Attorney Ricky Williams due to problems in locating the victim

and, Fl PD	12-12-79	Speeding	$25 fine
tona Beach, Fl PD	01-12-79	Running a Red Light	$25 fine
tona Beach, Fl PD	09-27-79	Improper Left Turn	$25 fine
usia County, Fl SO	02-15-80	Murder in the First Degree	9/2/81, COMMITTED FOR LIFE, FLA. DOC (Mandatory 25 years)

CIRCUMSTANCES: Circumstances of this charge involve the murder of Toni Van Haddocks, age 26, on 2-15-80. Miss Haddocks remains had been recovered by law enforcement authorities on 4-15-80. Recovery of Miss Haddocks' remains was made on Primrose Lane, Holly Hill.

Records further indicate that Miss Haddocks suffered a total of fifteen (15) wounds to the back of the head, fourteen (14) wounds to the side of the head and two (2) wounds to the forehead. On 5-9-80, the defendant was interviewed at the Daytona Beach Police Department with regard to this incident. The defendant advised Detective Paul Crow that he had picked Haddocks up on Ridgewood Avenue, after an arrangement was made to have sex for the sum of $30. Stano advised Detective Crow that the two then proceeded to the Primrose Lane area to have sex. After this was completed, the defendant apparently reached under his seat, brought out a knife and stabbed Miss Haddocks. Defendant then reportedly retracted the knife with his right hand and repeatedly stabbed the victim. Subject then advised Detective Crow that he pulled the victim from his vehicle, at which time he stabbed her several more times. Subject then reportedly placed Miss Haddocks on the ground and covered her up with branches.

The aforementioned sentence was handed down by Circuit Judge S. James Foxman. This sentence is to run consecutive with that sentence imposed in Case #80-1046-CC.

tona Beach, Fl PD		First Degree Murder	9-2-81, COMMITTED TO FLA. DOC, FOR LIFE (Mandatory 25 years)

CIRCUMSTANCES: Circumstances of this charge involves the murder of Mary Carol Mahar on 1-20-80. Officers recovered Miss Mahar's body on 2-17-80, after it was accidently located by Kevin Wall and Kenneth Wilson.

Records reveal that the body had been left on a small dirt road running from Bellevue Road, Daytona Beach. The body in question had been covered with four (4) small pine tree branches. The body of Miss Mahar was then transported to the Woodward funeral home and an autopsy was later conducted. This autopsy revealed that Miss Mahar had suffered five (5) knife wounds to the chest, two (2) to the back and one (1) to the thigh.

During the interview with the defendant on 4-1-80, Sgt. Paul Crow was advised that the defendant was, in fact, responsible for this homicide. Stano advised Sgt. Crow that he had picked the victim up on Atlantic Avenue and proceeded down Mason Avenue. Stano advised Detective Crow that an argument subsequently ensued with respect to the question of sex. According to Stano, as the two were at the intersection of Clyde Morris and Mason Avenue, he reached under the seat of his vehicle and secured his knife. Stano then advised Detective Crow that he stabbed the victim in the chest. Miss Mahar then apparently slumped over as she was trying to go for the door. The defendant then reportedly pulled her back and she suffered the knife wound to the thigh. Miss Mahar then reportedly slumped forward and was struck two (2) additional times in the back.

The defendant was sentenced in this case by Circuit Court Judge S. James Foxman.

tona Beach,Fl PD 03-25-80 Aggravated Battery No Information filed

CIRCUMSTANCES: Circumstances of this crime allegedly involve an attack upon Donna Hensley, on 3-25-80. Miss Hensley advised detectives that she was a prostitute and had sex with the defendant on the night in question. Miss Hensley advised that, after the defendant was finished, he got up and stated that he hated prostitutes. The defendant then reportedly grabbed a knife and a bottle opener and proceeded to cut the victim.

Miss Hensley received thirty (30) stitches from the wounds and immediately contacted law enforcement authorities. This incident is alleged to have occurred at the Tower Motel, 317 North Ocean Avenue, #4. The victim allegedly fought the defendant off and escaped shortly before being doused with muratic acid.

Beacon Ambulance records reflect that the victim suffered ten (10) to twelve (12) puncture wounds during the course of this assault.

The aforementioned information was based on contact with the Westchester County Police Department, Westchester County Clerk's Office, Alachua County Sheriff's Department, Bradford County Sheriff's Department, Brevard County Sheriff's Department, Volusia County Sheriff's Department, Polk County Sheriff's Department, Pasco County Sheriff's Department, Hillsborough County Sheriff's Department, Pinellas County Sheriff's Department, New Smyrna Beach Police Department, Daytona Beach Police Department, Ormond Beach Police Department, Florida Department of Criminal Law Enforcement, Florida Department of Motor Vehicles and the Federal Bureau of Investigation.

Assistance and records checks were also provided by the Philadelphia Police Department, Norristown Police Department, Ambler Borough Police Department, Montgomery County Police Department and Pennsylvania State Police.

(a) DETAINERS AND OTHER KNOWN PENDING CHARGES:

Aside from local charges, the only outstanding charge is with the Brevard County Sheriff's Department. As previously mentioned, this charge involves the alleged murder of Kathy Scharf. Defendant is scheduled to go to trial for these charges on 6-27-83.

(b) OTHER REPORTED INCIDENTS: Pursuant to the Court's request, the following is a list and summary of other homicides which have been attributed to the defendant.

GAIL JOINER: Available information concerning this incident involves the possible homicide of a thirteen (13) year old girl during the year of 1972. Hillsborough County authorities advise that Miss Joiner was walking a pet raccoon when she disappeared in Hillsborough County. Hillsborough County authorities also advise that during October 1982, the defendant admitted responsibility for Miss Joiner's disappearance. Hillsborough County authorities further advised that although defendant admitted killing Miss Joiner, he subsequently changed his story. A PSE examination was administered concerning this matter in addition to sodium pentathol. The defendant reportedly passed the one and failed the other. Miss Joiner's body has not been found to date and charges have not been filed.

DIANA LYNN VALLECK: Available records suggest that Miss Valleck was reported missing in Tampa, Florida on 6-4-75. Miss Valleck apparently worked as a waitress at a Tampa bar, and frequently hitchhiked to work. Miss Valleck was located in a Pasco County citrus grove on 5-19-75. Miss Valleck's body was partially clothed as she was missing undergarments, slacks and her purse. Reports indicate that Miss Valleck was shot a total of seven (7) times with a .22 caliber pistol. According to Detective Crew, the defendant offered a taped confession to this murder in September, 1982. According to Beverly Andrews, Assistant State Attorney for Pinellas/Pasco County, this case is still under investigation.

SUSAN BASILE: Records reflect that Susan Basile, age 12, was reported missing in June 1975. Miss Basile apparently departed her school bus in Port Orange and never made it home.

On 10-1-82, the defendant offered Detective Paul Crow a taped confession concerning this incident. In this confession, the defendant stated that he had known Miss Basile from the skating rink and she, therefore, entered his car. Defendant further stated that he took Miss Basile to an area just west of the railroad tracks on Nova Road and strangled her. The defendant then reportedly left Miss Basile's body in a wooded area. This body has not been recovered to date.

LINDA HAMILTON: Information concerning the case of Linda Hamilton, age 16, involves a homicide in New Smyrna Beach, on 7-21-76. Miss Hamilton's completely nude body was recovered, face down in the sand, approximately 3/4 miles south of Turtle Mound. Available records reflect that Miss Hamilton had been beaten badly prior to being strangled.

On 3-12-81, the defendant offered a verbal confession regarding this incident. Subject advised Detective Paul Crow that he had picked Miss Hamilton up in the Boardwalk area in Daytona Beach. Stano stated that the two then headed to New Smyrna Beach, smoked some cannabis and drank a small amount of beer. Mr. Stano states that he then questioned Miss Hamilton regarding the possibility of having sex and an argument ensued. Defendant states that he then forced Miss Hamilton, nude, from his vehicle and strangled her on the beach in question. Local records further reflect that in view of the defendant's plea in Volusia County Cases #80-1046-CC, #80-2489-CC and #81-2508-CC, no charges were filed concerning this incident.

BONNIE HUGHES: Circumstances of this incident involves a homicide upon Bonnie Hughes, age 34, on 2-11-76. Miss Hughes had been located in an orange grove near State Road 536 east of Highway 27, in Polk County, Florida. Miss Hughes had apparently been beaten in the face by a blunt instrument.

According to Detective Crow, the defendant offered a taped confession concerning this incident in September, 1982. Contact with Polk County authorities reveal that no charges have been filed to date and no charges are anticipated to be filed.

ROSE OLIVER: Information concerning this homicide involves the recovery of Miss Oliver's body, age 22, on 3-31-76. Miss Oliver had been recovered approximately 200 yards from the area where Bonnie Hughes was recovered. Miss Oliver, a migrant worker, apparently suffered multiple stab wounds to the heart and vagina. Miss Oliver's clothes were torn open in the vaginal area.

According to Detective Crow, the defendant offered a taped confession to this homicide in September 1982. According to contact with the Polk County authorities, no charges have been filed to-date and no charges are anticipated to be filed.

RAMONA NEAL: Records indicate that the body of Ramona Neal, age 16, was recovered on 6-16-76. Miss Neal had apparently been reported missing on 5-29-76.

On 3-12-81, the defendant offered a taped statement to Detective Paul Crow, concerning this incident. During the course of this confession, the defendant stated that he picked Miss Neal up on the beach in front of the Holiday Inn Boardwalk, Daytona Beach. Defendant states that after Miss Neal entered his car, the two proceeded toward the Tomoka State Park, at which time they stopped and had sex. Defendant states that Miss Neal subsequently became "moody" and subsequently "upset" and pissed me off". Defendant then advised Detective Crow that he strangled her, in addition to possibly cutting her "once or twice". No charges were filed in this case due to the defendant's plea in Volusia County Case #80-1046-CC, #80-2489-CC and #81-2508-CC.

EMILY M. BRANCH: Information concerning this homicide involves the recovery of Miss Branch's body in August 1976. The body of Miss Branch, age 21, was recovered in an open field in Hillsborough County, Florida. The body in question was totally nude at the time it was discovered. A gunshot wound to the left temple was noted in this case.

According to Detective Crow, the defendant offered a taped confession in this incident in September, 1982. As of 3-21-83, Hillsborough County authorities had not filed any charges concerning this incident.

JOAN GAIL FOSTER: Information concerning this homicide involves the recovery of Miss Foster's body, age 18, on 9-26-77. Miss Foster's body had been recovered in an orange grove in Pasco County, Florida. Miss Foster suffered a gunshot wound to the left temple.

According to Detective Crow, the defendant offered a taped confession to this homicide in September, 1982. According to Beverly Andrews, Assistant State Attorney, Pinellas/Pasco County, no charges have been filed to date.

MOLLY NEWELL: Information concerning this case involves the recovery of Miss Newell's body, age 20, on 9-29-77. The body of Miss Newell was recovered off Gandy Boulevard, St. Petersburg, on 9-29-77. Miss Newell's body was clothed from the waist up with various other clothing missing. Miss Newell died as a result of a gunshot wound to the right temple from a .22 caliber weapon.

According to contact with Detective Paul Crow, the defendant offered a taped confession to this homicide in September 1982. According to contact with Assistant State Attorney Beverly Andrews, Pinellas/Pasco County, no charges have been filed to date.

PHOEBE WISTON: Information concerning this case involved the recovery of Miss Wiston's body on 3-27-79. Miss Wiston, age 23, had been reported missing since September 1977. Miss Wiston's body was recovered in a Polk County field. Medical records reflect that Miss Wiston also suffered gunshot wounds to the right temple.

According to Detective Crow, the defendant admitted to this homicide in September 1982. According to contact with Polk County authorities on 3-21-83, no charges have been filed in this case. The Polk County authorities also advise that they do not anticipate filing any charges concerning this homicide.

EMILY GRIEVE: Circumstances concerning this homicide involve the recovery of Miss Grieve's body on 10-21-77. Miss Grieve, age 38, was recovered off State Road 54 in Pasco County, Florida. A Missing Persons report was apparently filed on this individual on 10-10-77.

Reports indicate that Miss Grieve's body was in a bad state of decomposition at the time of recovery. Miss Grieve was nude from the waist down with her brassiere and pullover top intact. No other clothing was found at the crime scene as the victim's purse, shoes, etc. were missing. The Medical Examiner determined that Miss Grieve died as a result of a gunshot wound to the left temple. The weapon was also a .22 caliber pistol.

SANDRA DEBOSE: Circumstances concerning this homicide involves the recovery of the body of Miss Debose on 8-5-78, in Brevard County, Florida. Miss Debose, age 34, died as a result of a gunshot wound to the temple.

On 8-12-82, the defendant offered a confession to this homicide. As of 4-20-83, no charges have been filed by the Brevard County authorities. This case is reportedly still under investigation.

DORIS WILLIAMS: Circumstances concerning this incident involves the recovery of Miss Williams' body in Hillsborough County on 12-11-79. Miss Williams' body was found behind a Holiday Inn. Reports indicate that Miss Williams had been severely beaten and stabbed several times in the chest.

According to Detective Crow, the defendant offered a taped confession concerning this homicide in September 1982. As of 3/21/83, no charges had been filed by the Hillsborough authorities.

CHRISTINE GOODSON: Circumstances concerning this homicide involve the recovery of Miss Goodson's body in the St. Petersburg Bay, on 4-15-79. Miss Goodson, age 17, had apparently been kicked in the chest and pushed into the St. Petersburg Bay. Miss Goodson died as a result of drowning.

JANE DOE: Circumstances of this homicide involve the recovery of an unidentified body on 11-24-74. This body was recovered by the Altamonte Springs Police Department in a wooded area. This body was recovered approximately 3 to 4 weeks after the homicide occurred. Records indicate that the victim, age 25 to 40, had been stabbed twice in the abdomen and twice in the chest. The victim's sweater was pulled up around her neck and her pants were around her ankles.

According to the Seminole County State Attorney's Office, the defendant offered a confession to this homicide in September 1982. Seminole County State Attorney's Office advised that the defendant stated that he picked up a young white female, on Highway 436, Altamonte Springs. Records further suggest that the defendant then asked the victim to have sex, but she refused. According to the State Attorney's Office, the defendant then drove the victim to a wooded area in Altamonte Springs, forced her from the car and stabbed her several times with a hunting knife. As of 4-22-83, no charges had been filed regarding this incident.

JANE DOE: Circumstances regarding this homicide involve the recovery of an unidentified body on 11-5-80. Volusia County Sheriff's Department apparently recovered this body near Port Orange in a heavily wooded area. The body was discovered by Florida Department of Transportation employee, Edward Hayden.

Records indicate that the defendant offered a confession to this homicide on 2-12-81. Subject stated that during the year of 1978 or 1979, he picked the victim up on Main Street, Daytona Beach. The defendant reportedly offered to pay this individual for sex and the two departed the Main Street area. In his confession, Stano apparently advised that a disagreement occurred concerning money that was being transacted as a result of having sex. The defendant stated that during the course of this argument, he apparently choked her to death and hid her body in the woods in question. No charges were filed concerning this incident due to the defendant's plea in Volusia County Case #80-1040-CC, #80-2489-CC and #81-2508-CC.

JANE DOE: Information concerning this incident involves the murder of an unidentified female in Hillsborough County, Florida. According to the FBI, this body was recovered. The specifics of the recovery were not provided.

According to Detective Crow, the defendant offered a taped confession concerning this murder in September 1982. The defendant stated that he apperently killed the victim and dumped her body near the Leto High School, Northwest Tampa. As of 3-21-83, no charges have been filed concerning this incident.

According to Detective Crow, the defendant also offered confessions concerning two (2) homicides on the Garden State Parkway, Atlantic City, New Jersey. Contact was made with Sgt. Tom Kinzer, New Jersey State Police, who did confirm this information. Mr. Kinzer advised that, although the defendant did offer a confession, the specifics of the confession and the circumstances of the crime did not match. Mr. Kinzer is therefore still considering these homicides open.

It should also be noted that contact with Detective Crow indicates the defendant has also admitted to four (4) other "Jane Doe" murders. Detective Crow states that two (2) of these murders are believed to have occurred in Pasco County and two (2) of these murders are believed to have occurred in Orange County. Due to the inability of law enforcement authorities to locate a body, specifics concerning these alleged incidents were not pursued.

Reports additionally indicate that the defendant was suspected of four (4) additional homicides in Whitpain Township, Pennsylvania. The site where the defendant allegedly dumped the bodies is now a site of a Mall. Since there is little information concerning this matter and the bodies were never recovered, charges have not been pursued.

II. SOCIAL HISTORY:

(a) FAMILY HISTORY: Father, Eugene Stano, age 69, resides at 46 Country Club Drive, Ormond Beach, Florida. Mother, Norma Stano, age 64, also resides at the Country Club address. The defendant's father is a retired District Manager for the Consolidated Cigar Corporation. The defendant's mother is a qualified Registered Nurse but has not sought employment for several years. The defendant has one (1) brother, Roger Stano, age 29. The defendant's brother resides at 515 Eagle Drive, Holly Hill and is employed by a local lawn service installation firm.

The defendant was born in Schenectady, New York on 9-12-51. At six (6) months of age, the defendant was removed from his natural mother by the New York Child Welfare Department. Available records reflect that the defendant was removed from this home due to extreme neglect. The defendant was the fifth (5th) child of his natural mother. The four (4) other children in this family had also been removed by the New York Child Welfare Department. This information could not be confirmed with the Clerk of the Court in Schenectady.

Mr. and Mrs. Stano received the defendant from the Welfare authorities on 4-1-52 and continued caring for the subject until he was thirteen (13) months of age. The defendant's parents then returned with him to the New York Welfare Department in order to finalize the adoption. As a part of the adoption finalization process, the defendant was reportedly examined by a team composed of a Psychiatrist, Social Worker, Nurse, Physician and Psychologist. Contact with the defendant's mother indicates that this team subsequently ruled the defendant "unadoptable". With the assistance of Mrs. Stano's Case Worker and Staff Psychologist, this adoption was finally approved on 12-15-52. The defendant then remained in the Schenectady area until age twelve (12).

When the defendant was twelve (12) years of age, the family then relocated to Mount Vernon, New York. The defendant remained in Mount Vernon through age thirteen (13), at which time he went to the Hargrave Military School located in Chatham, Virginia. The defendant remained at the Hargrave Institute during the months of June, July and August 1965. While at this institute, the defendant began borrowing large sums of money from various cadets and refused to pay them back. The defendant was then pulled out of the Hargrave Academy and sent to his grandparents, Clyde and Della Durham.

In August 1967, the defendant returned to the home of his parents who were now in Ambler, Pennsylvania. Defendant entered school and remained at the home of his parents until age twenty-one (21). In September 1972, the defendant relocated nearby to Flowertown, Pennsylvania. The defendant remained in Flowertown until enlisting in the United States Navy in September 1973. The defendant then relocated to Great Lakes, Illinois, where he was discharged from the United States Navy. In November 1973, the defendant returned to the home of his parents which was located in Ormond Beach. Subject subsequently took residence at seven (7) separate local addresses, until his arrest on 4-1-80. Details concerning these residences are noted in a later section of this investigation. It should also be noted that the defendant has remained incarcerated since his initial arrest of 4-1-80.

The aforementioned information was based on contact with the defendant's parents, Mr. and Mrs. Eugene Stano, information received from the Florida Department of Criminal Law Enforcement and the Pennsylvania State Police.

(b) EDUCATION: From 8-26-74 through 12-20-75, the defendant attended Daytona Beach Community College where he enrolled in courses totalling 36 semester hours. Daytona Beach Community College records reflect that out of these courses, the defendant completed Introduction to Business and Sales Fundamentals. During this course of study, the defendant received a 1.33 GPA. Subject acquired a total of nine (9) semester hours during this course of study.
Beach
Daytona Community College records also reflect that from August 23, 1977 through December 16, 1977, the defendant attended classes in the Certificate Program. On August 23, the defendant entered a Marine Mechanic class and finished this

course with a 4.0 average.

On 1-9-77, the defendant entered a second class involving the repair of small gasoline engines. The course was listed as EMCO 25. Subject received an incomplete for this course which ended on 5-8-78.

From 6-21-71 through 10-6-71, the defendant attended the Maxwell Institute Incorporated Computer School, 2860 Dekalb Park, Norristown, Pennsylvania. This course of study was a Certificate Program in Computer Science. During this course of study, the defendant learned skills in the programming of Fortran, Assembly and Cobol. The defendant graduated from this institution on 10-6-71, with an average of 76.

From 9-2-68 through 6-9-71, the defendant attended the Wissahickon High School, Ambler, Pennsylvania. The defendant received his high school diploma on 6-9-71. Ambler school records reflect that during the 10th grade, the defendant was ranked 252 out of 360 students. During the 11th grade, the defendant ranked 274 out of 346 students.

During this course of study, the defendant was active in the band and chorus. Subject played the clarinet and various other woodwind instruments. Subject also indicates that he developed an interest in computer science during this course of study. Although unverified, the defendant reports one incident during which he was expelled, for fighting.

From 8-24-67 through 6-5-68, the defendant attended Shady Grove High School, Whitpain Township (Montgomery County), Pennsylvania.

From 8-30-65 through 6-5-67, the defendant attended Seabreeze Junior High School, 227 North Grandview, Daytona Beach, Florida.

From 6-16-65 through 8-30-65, the defendant attended the Hargrave Military Academy, Chatham, Virginia. Records at this school indicate that the defendant had a poor academic record.

This information is based on contact with Daytona Beach Community College and the Pennsylvania State Police.

(c) MARITAL: On 6-21-75, the defendant married Micheline Gionfriddo (DOB 10-30-52), at the Prince of Peace Catholic Church, 600 South Nova Road, Ormond Beach. Subject was married by Father Amelio G. Garcia, Pastor of the Prince of Peace Church. Available records indicate that this was the first marriage for both the defendant and his wife.

In September 1975, marital difficulties apparently began resulting from the defendant physically abusing his wife. One incident involving the defendant attempting to choke his wife's dog was noted during the course of this relationship. In March 1976, the defendant began attending psychological counseling with Robert Davis, M.D., 444 Seabreeze Boulevard, Daytona Beach.

During the course of this marriage, the defendant and his wife resided in a 24 X 60 foot mobile home located on Timbercrest Road. On 8-31-76, the subject's wife left him and eventually filed for a divorce on 9-22-76. On 11-9-76, Circuit Judge W. L. Wadsworth confirmed this dissolution which was eventually filed on 11-15-76. No children resulted from this union and there is no alimony as a result of the dissolution of the marriage. The only significant asset acquired during the course of this marriage was the 24 X 60 foot Mead Brook mobile home, which was valued at $10,000. According to Court records, at the time of the divorce, there was an outstanding mortgage of $5,150 on this dwelling.

This information is based on Volusia County Court records, contact with the defendant, Mr. and Mrs. Eugene Stano and with Ms. Gionfriddo.

(d) RESIDENCE: At the time of the defendant's arrest on 4-1-80, he was residing at the Riviera Motel, 1825 Ridgewood Avenue, Ormond Beach, Florida. Defendant rented a one (1) room apartment at this address. Subject also resided alone. Records indicate that the defendant began occupying this residence on 1-15-80.

From 11-1-78 to 1-15-80, the defendant resided at Barrington Apartments (formerly Derbyshire Apartments), 875 Derbyshire Road, Daytona Beach, Florida. Defendant rented a studio apartment at this address, paying rent in the amount of $150 per month. Defendant resided at this dwelling by himself.

According to contact with the present manager of the Barrington Apartments, Cathy Arnold, the defendant forfeited $20 of his security deposit due to damage to the door at this residence. Ms. Arnold stated that there were no other difficulties concerning the defendant during this period of residence.

From 4-1-78 through 10-30-78, subject resided at 921 Ridgewood Avenue, Daytona Beach, Florida. Subject resided in a one (1) bedroom, one (1) bath apartment, paying $150 per month rent. Subject resided at this address alone.

From August 1, 1977 through March 22, 1978, the defendant maintained residence at 1473 Wild Rose, Holly Hill, Florida. This residence was a three (3) bedroom, two (2) bath home which the defendant maintained for his father. While at this residence, the defendant paid $25 per week rent. Defendant resided at this residence by himself.

From February 1977 through July 1977, the defendant resided at 914 Flomich Avenue, Holly Hill, Florida. This residence was also a three (3) bedroom, two (2) bath home. This residence was also owned by the subject's father to whom he paid $25 per week rent. The defendant resided at this dwelling by himself and was responsible for maintaining this dwelling.

From August 1, 1976 through January 1977, the defendant occupied the home of his parents located at 48 Country Club Drive, Ormond Beach, Florida. This residence is a three (3) bedroom, two (2) bath home which was additionally occupied by Mr. and Mrs. Eugene Stano.

From 6-21-75 through 7-31-76, the defendant occupied a 24 X 60 foot mobile home on Timbercreek Road (formerly Hull Road), Ormond Beach, Florida. This residence is described as a two (2) bedroom, two (2) bath mobile home. Defendant departed this residence after his separation from his wife.

From November 1973 through 6-21-75, the defendant occupied the home of his parents, at 46 Country Club Drive, Ormond Beach.

From September 1972 through September 1973, the defendant resided at the Springfield Hotel located in Flowertown, Pennsylvania. Defendant resided in a private room at this residence.

From August 1967 through August 1972, the defendant resided at the h of his parents located at 1634 Old Arch Road, Ambler, Pennsylvania.

From August 1965 through July 1967, the defendant resided at 46 Country Club Drive, Ormond Beach, Florida. At the time, this was the residence of the defendant's grandparents, Clyde and Della Durham.

From 6-16-65 to 8-30-65, the defendant attended and resided at the Hargrave Military Academy, Chatham, Virginia.

In October 1960, defendant and his parents relocated to #4 Fairway Circle, Mount Vernon, New York. Defendant occupied this residence until his relocation to Hargrave Military School on 6-16-65.

This information is based on contact with the defendant, the Florida Department of Criminal Law Enforcement, Pennsylvania State Police and Mr. and Mrs. Eugene Stano.

(e) RELIGION: The defendant was raised as an Episcopalian and attended St. James Episcopal Church, 44 South Halifax Drive, Ormond Beach, Florida.

At the time of the defendant's marriage on 6-21-75, he began attending the Prince of Peace Catholic Church, 600 South Nova Road, Ormond Beach, Florida. Defendant attended this church periodically until the time of his separation in August, 1976. The defendant then discontinued any active interest in attending religious services. According to the Department of Corrections Chaplin W. L. George, the defendant presently professes to be a Catholic. The Department of Corrections authorities further advise that the defendant has displayed periodical interest in attending services since his incarceration.

(f) INTERESTS AND ACTIVITIES: Defendant states that since his incarceration, his activities have been limited to reading and watching television. The defendant enjoys reading National Geographic, Reader's Digest, Popular Mechanics and US Magazine. With respect to the defendant's interest in television, he states that his favorite shows include "Matthew Star", "T.J. Hooker", "Merv Griffin", "ABC Sports", "Lawrence Welk", "American Bandstand" and the "Channel 9 News".

Among the defendant's favorite movies are "Blazing Saddles", "Bad News Bears", "West Side Story" and "Gone With the Wind".

Subject states that prior to his incarceration, his main interest was roller-skating. Subject was actively involved in skating at the local Starlight Skating Centers. Subject also enjoys dancing and Disco music. Defendant states that, as a child, he took lessons in Ballroom dancing.

Defendant also enjoys music, electronics and auto mechanics. As a child, the defendant received lessons in violin, piano and clarinet. The defendant's interest in electronics and mechanics developed from contact with his grandfather.

The defendant smokes approximately two (2) packs of cigarettes per day; notes drinking approximately one (1) case of beer per week (while not incarcerated) and notes the occasional use of marijuana. Subject stated that although he was drinking at the time of each and every homicide, he was not intoxicated.

(g) MILITARY: (Verified)

On 9-27-73, the defendant enlisted in the United States Navy where he remained until 10-25-73. The defendant enlisted in Norristown, Pennsylvania and was discharged in Great Lakes, Illinois. Subject received an Honorable Discharge after twenty-nine (29) days, due to health reasons. According to the United States Navy, the defendant had an "improper enlistment" in that he had knee problems prior to enlisting in the service. Subject's Service Number is noted as 36-109-51-742.

(h) HEALTH:

(1.) PHYSICAL: The defendant is a white male who stands 5'9" tall, weighs 170 pounds, has brown eyes and black hair. The defendant has a 2-1/2" scar on his chin resulting from an altercation in Ormond Beach, approximately four (4) years ago. Subject also has a scar on his right knee resulting from knee surgery during the year of 1973.

The subject reports that his present health is good but indicates that he occasionally suffers from nervous disorders. Contact with authorities at Florida State Prison Medical Unit indicates that the defendant is presently classified as Grade-2 Medical. This classification apparently provides for eligibility of limited work within the Florida State Prison. Department of Corrections Medical Records also reveal that the defendant has 20/20 vision, but suffers from astigmatism. Subject has recently been issued eye-glasses by the Florida Department of Corrections.

Further medical records reveal that the defendant was admitted to Montgomery Hospital, Philadelphia, Pennsylvania on 4-17-73. Subject entered this hospital in order to have bone fragments removed from his knee. On 4-21-73, the defendant was discharged by Orthopedic Surgeon Ronald McGargle, M.D.

As a child, the defendant apparently suffered from mumps and frequent incidents of high fever. Reports further suggest that these fevers often exceeded 104 degrees. As a child, the defendant also apparently had difficulty with motor coordination and suffered numerous head injuries by running into walls and falling down stairs.

The defendant did not begin speaking until the age of two (2) and also had a heart defect which was corrected during early childhood. Reports suggest that at the time the defendant was taken away from his natural mother, he suffered from extreme neglect. Specifics of the defendant's adoption records have been requested from the New York authorities, but Schenectady authorities advise that no such records exist. This is based on contact with Barbara Galcski of the Family Court and Segregate Clerk's Office.

The above information is based on contact with the Florida State Prison, Pennsylvania State Police, Eugene and Norma Stano and the defendant.

(2) PSYCHOLOGICAL: The defendant's first contact with Mental Health authorities occurred at the age of five (5) months. This was a result of the New York State Welfare authorities removing the defendant from his natural mother. The New York Welfare authorities apparently conducted several evaluations on the defendant, but specifics of such are unknown. Available records do suggest that at the age of thirteen (13) months, the defendant was labeled "unadoptable".

In March 1976, the defendant had contact with Robert H. Davis, M.D., 444 Seabreeze Boulevard, Daytona Beach. Dr. Davis, a Psychiatrist, apparently had contact with the subject because he was physically abusing his wife and continually telling lies. Although specifics concerning the extent of Dr. Davis' prior contact with the defendant are unknown, the Court does have the benefit of the Psychiatric Evaluation conducted by Dr. Davis dated 6-12-81.

During the course of criminal proceedings against subject, five (5) separate Psychological Evaluations have been conducted. The following Evaluations are noted and attached to this Presentence Investigation:

(A) Psychological Evaluation submitted by Fernando Stern, M.D., 304 North Frederick, Daytona Beach, Florida;

(B) Psychological Evaluation submitted by Dr. N. McMillan, 506 Ridgewood Avenue, #5, Port Orange, dated 6-23-81;

(C) Psychological Evaluation submitted by Robert H. Davis, M.D., 444 Seabreeze Boulevard, #970, Daytona Beach, dated 6-12-81;

(D) Psychological Evaluation submitted by Frank Carrera III, M.D., dated 7-28-81;

(E) Psychological Evaluation submitted by Dr. George W. Bernard, M.D., dated 6-27-81.

(i) EMPLOYMENT: From 1-31-80 through 4-1-80, the defendant was employed by Hampton's Restaurant, 116 Mason Avenue, Daytona Beach, Florida. Defendant was employed

at this establishment in the capacity of a prep-cook, earning $3.50 per hour. Defendant terminated this employment at the time of his arrest.

According to contact with the defendant's employer, Joan Phillips, the defendant was a reliable individual and a great employee. Mrs. Phillips stated that she had no problems with the defendant during his period of employment.

From 9-5-79 through 1-15-80, the defendant was employed by the Canada Dry, Incorporated Bottling Company, 405 Flomich Avenue, Holly Hill, Florida. Defendant was employed at this establishment in the capacity of a delivery man. According to contact with Personnel Manager, Donna Keller, the defendant terminated this employment without notice. Due to this employment being on a commission basis, the specific amount of wages are unknown.

From 4-9-79 through 8-7-79, the defendant was employed by Zeno Marine, 400 Tenth Street, Holly Hill, Florida. Defendant was employed at this establishment in the capacity of an apprentice mechanic, earning $2.25 per hour. According to the defendant's supervisor, Crandall Sizemore, the defendant terminated this employment in order to return to the food service business.

Mr. Sizemore additionally stated that the defendant was a perfect gentleman in every way, had no drinking problem and was one of the finest individuals you would ever want to meet. Mr. Sizemore stated that he had additionally known the defendant for approximately three (3) or four (4) years prior to his employment at Zeno Marine.

From 4-12-78 through 4-4-79, the defendant was employed by the Howard Johnson's Restaurant, U.S. 95 and U.S. 1, National Gardens, Florida. Defendant was employed in the capacity of a cook/dishwasher, earning $3.35 per hour. According to contact with the defendant's former supervisor, Ida Younge, the defendant terminated this employment by quitting.

Ms. Younge advised that the defendant was a little temperamental, flighty, but reliable.

From 11-21-77 through 3-21-78, the defendant was employed by the Daytona Beach News-Journal, 901 Sixth Street, Daytona Beach, Florida. The defendant was employed at this firm in the capacity of a temporary part time bindery worker, earning $3.00 per hour. According to contact with the defendant's supervisor, Ken Wilson, the defendant terminated this employment due to his failure to report for work on 3-11-78.

Mr. Wilson advised that the defendant was a good worker who kept to himself and did not make too many friends while employed by the News-Journal. Mr. Wilson recalls that the defendant would complete any task that he was assigned and that he spent most of his break reading books on high technology.

From 4-10-77 through 8-9-77, the defendant was employed by Jerry's Restaurant and Catering Service located at the Regional Airport, Daytona Beach, Florida. Defendant was employed in the capacity of a kitchen helper, earning $3.75 per hour. According to the defendant's supervisor, Frank Prestwood, the defendant terminated this employment due to a mutual understanding concerning money shortages.

From 2-17-77 to 4-7-77, the defendant was employed by the Burger King Restaurant, 330 South Atlantic Avenue, Ormond Beach, Florida. Defendant was employed in the capacity of a kitchen helper, earning $2.30 per hour. This information was confirmed by Carol Lambert, Burger King, who advised that the defendant's records do not reflect a specific reason for termination.

From 6-21-75 through 6-10-76, the defendant was employed by Gianfreddo's Shell, U.S. 1 and Granada, Ormond Beach, Florida. Defendant was employed at this firm in the capacity of a service station attendant, earning $100 per week. This employment was with the defendant's former father in law, Orlando Gianfreddo. The defendant terminated this employment prior to the time he separated from his former wife. This information was confirmed by Orlando Gianfreddo

The only employment that remains unconfirmed by this writer is with the Daytona Inn (formerly the Riviera Red Carpet Inn), 219 South Atlantic Avenue, Daytona Beach, Florida. Prior Department of Corrections records do reflect that the subject was employed at this establishment for approximately three (3) weeks as a desk clerk. Department of Corrections records further reflect that the subject was terminated from this employment due to cash shortages in April 1975. This information was confirmed by the Manager, Mr. Green.

From 1-8-75 through 2-14-75, the defendant was employed as a credit collector for Century National Fidelity, 335 Third Street, Holly Hill, Florida. The defendant was employed at this firm in the capacity of a credit collector, earning $3.15 per hour plus 4% commission. According to Don Martin of United Fidelity, the defendant was terminated due to work shortage.

From 7-24-74 through 10-20-74, the defendant was employed at the Ballcure Beach Lodge, 187 South Atlantic Avenue, Ormond Beach, Florida. Defendant was employed at this firm in the capacity of a desk clerk, earning $1.90 per hour. Defendant was terminated from this employment due to theft of a payroll check on 10-9-74. This information was confirmed by the defendant's former supervisor, James Kulzer. Mr. Kulzer added that the defendant was a good employee and that he performed his duties in a satisfactory manner. Mr. Kulzer stated that the theft of the check necessitated his dismissal.

From 4-24-74 through 7-6-74, the defendant was employed by the Holiday Inn Surfside, 2700 North Atlantic Avenue, Daytona Beach, Florida. Defendant was employed at this establishment in the capacity of a desk clerk, earning $2.00 per hour. According to contact with Rose Godbold, Holiday Inn, records have since been destroyed and the defendant's reason for departure is unknown

From 12-29-73 through 4-19-74, the defendant was employed by Publix Super Market, Belair Plaza, Daytona Beach, Florida. The defendant was employed by this firm in the capacity of a stockperson, earning $3.00 per hour. This employment was terminated due to the resignation of the subject. This information was confirmed by Marie Harper, Publix Personnel Supervisor and Records Representative.

From 12-3-73 to 1-15-74, the defendant was employed by Jefferson Ward (formerly Montgomery-Ward), 1002 Volusia Avenue, Daytona Beach, Florida. Defendant was employed at this firm in the capacity of a stock person, earning $2.00 per hour. Stano was terminated from this employment due to suspected theft. This information was confirmed by Lee Hayes, Jefferson Ward Security Director.

From 9-5-72 through 8-27-73, the defendant was employed by the Burroughs Corporation, Computer Systems, Paoli, Pennsylvania. Defendant was employed in the capacity of a computer operator. The defendant was terminated from this employment due to frequent absences and suspected theft. One incident of minor harrassment involving a female employee was also noted in the defendant's personnel records. This information is based on contact with the Personnel Manager, Angelo Belace.

From 6-20-72 through 9-12-72, the defendant was employed at the Graduate Hospital of the University of Pennsylvania, 18th and Lombard, Philadelphia, Pennsylvania. Defendant was employed at this firm in the capacity of a computer operator. Defendant was terminated from this position due to running unauthorized jobs. This information was based on contact with Personnel Manager, Terry Matijosmitni.

From 11-2-71 through 6-6-72, the defendant was employed by the Bryn Mawr Hospital, Bryn Mawr Avenue, Bryn Mawr, Pennsylvania. Defendant was employed in the capacity of a computer operator. The defendant had resigned from this position due to "theft and alcohol related problems". This information was based on contact with the Assistant Personnel Director of Bryn Mawr Hospital, Richard Baldino.

Contact with Consolidated Cigar Corporation indicates that the defendant was employed in the capacity of a laborer from 6-11-69 through 8-16-69. Defendant was also employed from 12-24-69 through 1-1-70. A period of employment from 6-15-70 through 9-4-70 is also noted. This information was confirmed by Dave Goldfarb, Branch Manager of the Consolidated Cigar Corporation. Mr. Goldfarb additionally indicated that the defendant's work was always satisfactory and that it was accurate and always completed with no wasted motion. Mr. Goldfarb indicated that the defendant was very dependable, showing maturity beyond his years. Subject's absentee record was described as exemplary, in that the defendant was always in on time and never punched out before the precise quitting time. Mr. Goldfarb additionally stated that the defendant got along well with co-workers and his supervisors.

From 7-1-68 through 8-23-68, the defendant was employed by the Consolidated Cigar Corporation, 1414 Willow Avenue, Cheltenham, Pennsylvania. Subject was employed at this firm in the capacity of a laborer, earning minimum wage. Subject's responsibility during this period of employment involved the selection, checking, packing and shipping of cigar orders to local wholesalers and retailers. As previously noted, the defendant departed this employment on 8-23-68 due to his return to school.

(J) ECONOMIC STATUS: The defendant has no significant assets or liabilities.

COURT OFFICIALS AND OTHER PERSONAL STATEMENTS:

PROSECUTOR: Assistant State Attorney Lawrence J. Nixon advised that the State's position would be presented at the Sentencing Hearing.

DEFENSE ATTORNEY: Assistant Public Defender Howard Pearl stated: "I am now preparing for a Sentencing Hearing. I feel for a number of reasons, that Gerald Stano should not be sentenced to death. I also feel that the aggravating circumstances do not out-weigh the mitigating circumstances in this case. I will be prepared to present this position in detail, at the time of Sentencing Hearing".

LAW ENFORCEMENT:

CASE #83-189-CC

Investigating Officer in Case #83-189-CC, Lt. Don Goodson, New Smyrna Beach Police Department stated: "Due to the circumstances of this charge and the number of Murder convictions so far, I believe the Death Sentence is warranted in this case".

CASE #83-188-CC

Investigating Officer in Case #83-188-CC, David Hudson of the Volusia County Sheriff's Office stated the defendant should receive the Death Penalty in this case.

CASE #83-189-CC

VICTIM: Comment received from Mr. and Mrs. Bickrest is as follows: "The death of a family member or close friend is easier to accept when the cause is accidental or natural. But when our daughter, Susan, was murdered in 1975, we have had to live every day of our lives with this tragedy.

After 7 years, we were notified by the Florida Authorites that Gerald Stano had confessed to Susan's murder. Our first reaction was anger and revenge. Why would this man, a stranger, do such a thing?

We have followed the developments of the Stano case through newspaper clippings. It's hard to understand how a human being could deliberately murder so many innocent people and not feel any remorse. These deaths committed by a hateful animal that had no respect for human life.

Society should not take responsibility for any individual that knowingly commits such heinous crimes. Life in prison is not sufficient punishment. Gerald Stano

Neal, in addition to possibly cutting her "once or twice". No charges were filed in this case due to defendant's plea in Volusia County Case #80-1046-CC, #80-2489-CC and #81-2508-CC.

On 11-12-77, an eighth murder was committed by the defendant upon Mary Kathleen Muldoon, age 23. At the time of this incident, the defendant was unemployed and residing at 1473 Wild Rose, Holly Hill.

During the year of 1978 or 1979, a ninth murder was committed by the defendant upon Jane Doe, age unknown. The remains of this individual was recovered by the Volusia County Sheriff's Department on 11-5-80.

Records indicate that the defendant offered a confession to this homicide on 2-12-81. Subject stated that, during the year 1978 or 1979, he picked the victim up on Main Street, Daytona Beach. The defendant reportedly offered to pay this individual for sex and the two departed the Main Street area. In his confession, Stano advised that a disagreement occurred concerning the money that was being transacted as a result of having sex. Defendant stated that, during the course of this argument, he choked the victim to death and hid her body. No charges were filed concerning this incident due to the defendant's plea in Volusia County Case #80-1046-CC, #80-2489-CC and #81-2508-CC.

On 1-20-80, a tenth murder was committed by the defendant upon Mary Carol Mahar, age 20. At the time of the murder, the defendant was residing at the Riviera Hotel and was unemployed.

Records reflect that Miss Mahar suffered five (5) knife wounds to the chest, two (2) wounds to the back and one (1) to the thigh.

During an interview with the defendant on 4-1-80, Sgt. Paul Crow was advised that the defendant was, in fact, responsible for this homicide. Mr. Stano advised Sgt. Crow that he had picked the victim up on Atlantic Avenue and proceeded down Mason Avenue. Stano advised Detective Crow that an argument subsequently ensued with respect to the question of sex. According to Mr. Stano, as the two were at the intersection of Clyde Morris Boulevard and Mason Avenue, he reached under the seat of his vehicle and secured his knife. Stano then advised Detective Crow that he stabbed the victim in the chest. Miss Mahar then apparently slumped over as she was trying to go for the door. The defendant then reportedly pulled her back and she suffered the knife wound to the thigh. Miss Mahar then reportedly slumped forward and was struck two (2) additional times in the back.

On 2-15-80, the eleventh murder was committed by the defendant upon Toni Haddocks, age 26. Records further indicate that Miss Haddocks suffered a total of fifteen (15) wounds to the back of the head, fourteen (14) wounds to the side of the head and two (2) wounds to the forehead.

On 5-9-80, the defendant was interviewed at the Daytona Beach Police Department with regard to this incident. The defendant advised Detective Paul Crow that he had picked Haddocks up on Ridgewood Avenue, after an arrangement was made to have sex for the sum of $30. Stano advised Detective Crow that the two then proceeded to the Primrose Lane area to have sex. After this was completed, the defendant apparently reached under his seat, brought out a knife and stabbed Miss Haddocks. Defendant then reportedly retracted the knife with his righthand and reportedly stabbed the victim. Subject then advised Detective Crow that he pulled the victim from his vehicle, at which time he stabbed her several more times. Subject then reportedly placed Miss Haddocks on the ground and covered her up with branches.

In consideration of the disposition in this case, the Court may wish to note the circumstances of the Instant Offenses and the fact that these cases detail

should be sentenced to death. He could then experience the fear and helplessness that all of his victims felt when he chose to end their lives.

Like Gerald Stano, we would also feel no remorse upon his death, as he serves no purpose to us or our society". (dated April 14, 1983)

CASE #83-188-CC

VICTIM: The victim in this case, Kathy Muldoon, had been raised in Foster Homes in the State of Pennsylvania. Ms. Muldoon's parents passed away when she was fourteen (14) years of age and her brothers have since moved. Contact was made with Mr. and Mrs. Roger Hopkins, Route #1, Chadsford, Pennsylvania. Mr. and Mrs. Hopkins apparently raised the victim for approximately one (1) year, at the age of fourteen (14). Mrs. Hopkins stated that Ms. Muldoon kept in close contact with her but was actually on her own after graduating from high school. Mr. and Mrs. Hopkins hope that the defendant receives the Death Penalty for this crime.

YOUTHFUL OFFENDER:

The defendant does not qualify as a Youthful Offender.

PLAN:

The defendant's plan is to develop a Work Assignment within the Florida State Prison.

(a) MONETARY OBLIGATIONS:

(1) RESTITUTION: Not applicable.

(2) COST OF SUPERVISION: Not applicable.

(3) OTHER COSTS: Not applicable.

(b) SPECIAL CONDITIONS: None recommended.

I. SUMMARY AND ANALYSIS:

Before the Court is a 31 year old white male who has entered pleas of Guilty to charges of Murder in the First Degree.

Specifics in Case #83-188-CC involves the murder of Susan Bickrest, age 24, on 12-20-75. The body of Miss Bickrest was recovered floating in Spruce Creek, at approximately 4:45 P.M. According to the Medical Examiner, Miss Bickrest died as a result of drowning. A second cause of death is listed as "manual strangulation with extensive abrasions and bruises noted". Reports further indicate that Miss Bickrest suffered bruises to the bridge of the nose, tip of the nose and around the nostrils. A laceration to the lower lip and a minor laceration to the chin were noted.

According to contact with the subject, he picked up Miss Bickrest at the Derbyshire Apartments on 12-20-75. Subject advised that after forcing the subject into his car at gun point, the two proceeded to the Spruce Creek area. Subject stated that, while enroute, a small argument ensued and he struck the victim with his fist. After arrival at Spruce Creek, subject reportedly forced Miss Bickrest out of his car and a second incident ensued. At this point, Stano reports strangling Miss Bickrest and placing her body beside the water. Stano advised that, although Miss Bickrest showed no signs of life, he did not believe that she was dead when he left the scene.

During the course of conversation with the subject, he stated that he had been drinking, but was not intoxicated. When questioned concerning the victim's actions prior to the second incident, Stano advised that Miss Bickrest was "bitchy" as she was aware of her possible fate. Stano also advised that he had "some idea" that he would commit this homicide.

Specifics of Case #83-189-CC involves the murder of Mary Kathleen Muldoon, age 23, on 11-11-77. The body of Miss Muldoon was recovered on 11-12-77 from a ditch located on Turnbull Road, New Smyrna Beach. According to the Medical Examiner, Miss Muldoon died as a result of "a penetrating bullet wound to the head, combined with drowning".

According to contact with the subject, he picked Miss Muldoon up on Seabreeze Boulevard, on 11-11-77. Subject stated that he forced Miss Muldoon into his car at gun point, and the two proceeded to New Smyrna Beach. While enroute to Port Orange, the conversation turned to sex, at which time Miss Muldoon refused. Subject indicated that he then struck Miss Muldoon and proceeded to Turnbull Bay. Upon arrival at Turnbull Bay, Miss Muldoon was reportedly forced out of the car and subject followed. Subject advised that a second argument then ensued, at which time Miss Muldoon was again struck and forced to the ground. According to Stano, he then shot the victim in the right side of the head.

During the course of conversation with the subject, he advised that he had been drinking, but was not intoxicated. When questioned about the victim's actions prior to the second argument, subject advises that Miss Muldoon became "uncooperative" and was most likely aware of what would follow. Subject also added that he had "some idea" that he would commit this homicide.

As a juvenile, subject reports incidents in Westchester County, New York. Subject stated that, at the age of thirteen (13), he was referred to the Family Court for pulling fire alarms. Subject also reports a second referral for throwing rocks at cars from an overpass. This information was unable to be confirmed with the Clerk's Office of Westchester County.

As an adult, subject's first murder conviction occurred as a result of a double murder on 3-21-73. This incident involved the stabbing of Janie M. Ligotino, age 19, and Ann Arceneaux, age 17. Miss Ligotino had been stabbed a total of thirteen (13) times and Arceneaux had been stabbed a total of five (5) times.

According to the defendant, he had traveled from Pennsylvania to Gainesville in order to visit his sister-in-law, Janet Ottilini Stano. Defendant indicated that between 11:00 P.M. and 2:00 A.M., he saw two (2) white females hitchhiking somewhere east of the college. After some conversation, the two (2) entered the defendant's vehicle and proceeded to Northeast Avenue and 18th Street, Gainesville. The defendant advised Sgt. J. E. Plitch, that just prior to stopping the car, Miss Ligotino said something which he did not like. The defendant then reportedly reached under the seat, pulled out a hunting knife and stabbed Miss Ligotino a total of two (2) times in the chest. At that time, the defendant stated that Miss Arceneaux was having a hard time getting out of the car due to cylindrical escape-proof locks. Prior to Miss Arceneaux escaping, the defendant reportedly stabbed her once in the arm or hand and also once in the chest. The defendant then reportedly exited the car, chased Miss Arceneaux and finally caught her. The defendant then stated that he stabbed her several more times. Subject then reportedly returned to the car and located Miss ligotino fallen over in the seat, groaning. The defendant then reportedly stabbed Miss Ligotino a total of three (3) more times in the back.

On 9-6-73, a third murder was committed by the defendant upon Barbara Bauer, age 17. The defendant had recently been dismissed from the Burroughs Corporation and had traveled to Daytona Beach for a short vacation. Miss Bauer had apparently encountered car trouble at the Holly Hill Plaza and the defendant was able to pick her up. According to the written statement on 10-13-82, he suggested that after fixing Miss Bauer's car, he drive it in order to make sure it was running OK. The two reportedly left the Holly Hill Plaza and Miss Bauer reportedly began to get "a little uneasy". The defendant then reportedly struck Miss Bauer and advised that, if she did what he said, he would not kill her.

As the two (2) approached the Starke area, the defendant reportedly pulled off a dirt road and bound Miss Bauer's hands and feet with rope. In this statement, the defendant states that he then choked Miss Bauer to death and removed her from

her car. Subject additionally indicated that he did undo her pants, but did not take them off. On 4-10-74, Bradford County authorities located the skeletal remains of Miss Bauer.

On 12-14-73, it is alleged that a fourth murder was committed by the defendant upon Kathy Scharf, age 17. At the time of this alleged incident, the defendant had recently relocated to Daytona Beach and was residing with his parents.

In a report dated 8-11-82, the defendant stated that he apparently picked the victim up some time before dark, on 12-14-74. Stano advised Sgt. Johnny Manis, Brevard County Sheriff's Office, that Miss Scharf became "mouthy", criticizing his drinking and driving. The defendant allegedly advised officers that he then "backhanded" Miss Scharf and proceeded to Brevard County. Once in Brevard County, it is alleged that the defendant drove to an isolated area, advised Miss Scharf to "Get out, this is the end of the line".

On 1-2-75, a confirmed fourth murder was committed by the defendant upon Nancy Heard, age 24. At the time of this incident, the defendant was unemployed and residing with his parents.

The body of Miss Heard was located on a Florida Power and Light Access Road halfway between Cisco Ditch Road and dirt extension off the Old Dixie Highway, Blue Creek, Ormond Beach.

The body of Miss Heard was stripped from above the breast to below the knees. The body had on a blue jean jacket, a slip, tennis shoes and another garment pulled down around the shoes. The knees of Miss Heard were spread apart and the feet were together. The cause of death was determined by Medical Examiner Arthur Schwartz, M D. as strangulation.

On 12-20-75, a fifth murder was committed by the defendant upon Susan Bickrest, age 24. At the time of this homicide, the defendant was still residing with his wife and working for his father-in-law.

On 5 21-75, a sixth murder was committed by the defendant upon Linda Hamilton, age 16, in New Smyrna Beach. At the time, the defendant was employed by his father-in-law, Orlando Gianfreddo and residing with his wife.

Available records reflect that Miss Hamilton's nude body was recovered, face down in the sand, approximately one-quarter (1/4) mile south of Turtle Mound. Available records reflect that Miss Hamilton had been beaten badly prior to being strangled.

On 3-21-81, the defendant offered a verbal confession regarding this incident. Subject advised Detective Paul Crow that he picked up Miss Hamilton in the Boardwalk area of Daytona Beach. Stano stated that the two then headed to New Smyrna Beach, smoked some cannabis and drank a small amount of beer. Mr. Stano states that he then questioned Miss Hamilton regarding the possibility of having sex and an argument ensued. Defendant states that he then forced Miss Hamilton, nude, from his vehicle and strangled her on the beach in question. Local records further reflect that, in view of the defendant's plea in Volusia County Case #80-1045-CC, #80-2489-CC and #81-2908-CC, no charges were filed concerning this incident.

On 5-29-76, a seventh murder was committed by the defendant upon Karena Neal, age 18. At the time of this homicide, the defendant was still residing with his wife and employed by his father-in-law.

On 3-21-81, the defendant offered a taped statement to Detective Paul Crow, concerning this incident. During the course of this confession, the defendant stated that he picked Miss Neal up on the beach in front of the Holiday Inn Boardwalk, Daytona Beach. Defendant stated that after Miss Neal entered his car, the two proceeded to the Tomoka State Park, at which time they stopped and had sex. The defendant stated that Miss Neal subsequently became "edgey" and later "upset and pissed me off". Defendant then advised Detective Paul Crow that he strangled Miss

[illegible], GERALD [illegible]
[illegible] Investigati[illegible]

[illegible], in addition to [illegible] cutting her [illegible] No charges were [illegible] in this case due to defendant's plea in Volusia [illegible] Case [illegible] [illegible]-81-2519-CC.

[illegible] 11-13-77, an eighth murder was committed [illegible] defendant [illegible] Mary [illegible], age 23. At the time of this incident, the defendant was unemployed and residing at [illegible] Lola Rose, Holly Hill.

During the year of 1978 or 1979, a ninth murder [illegible] committed by the defendant upon Jane Doe, age unknown. The remains of this individual was recovered by the Volusia County Sheriff's Department on 11-[illegible].

Records indicate that the defendant offered a confession to this homicide on [illegible]-81. Subject stated that, during the year 19[illegible] or 1979, he picked the victim up on Main Street, Daytona Beach. The defendant reportedly offered to pay this individual for sex and the two departed the [illegible] area. In his [illegible], [illegible] advised that a disagreement occurred concerning the money that was to be transacted as a result of having sex. Defendant [illegible] that, during the [illegible] of this argument, he choked the victim to death and [illegible] her body. No charges were filed concerning this incident due to the defendant's plea in Volusia County [illegible] 80-[illegible]-CC, #80-2489-CC and #81-250[illegible]-CC.

[illegible], a tenth murder was committed by the defendant upon [illegible] Carr[illegible]. At the time of the murder, the defendant was residing at [illegible] and was unemployed.

[illegible] reflect that Miss [illegible] suffered five [illegible] wounds [illegible] to the [illegible] and one (1) to the thro[illegible]

[illegible] an interview with the defendant on [illegible] Paul [illegible] defendant was, in fact, responsible for this [illegible]. The defendant advised [illegible] that he had picked the victim up on [illegible] Avenue [illegible]. Stano advised Detective Crow that [illegible] subsequently [illegible] to the question of sex. According to [illegible] Stano [illegible] the intersection of Clyde Morris Boulevard and [illegible] Avenue [illegible] reached under the seat of his vehicle and secured his knife. [illegible] that he stabbed the victim in the chest. [illegible] was trying to [illegible] the door. [illegible] she suffered the knife wound [illegible] and was struck [illegible]

[illegible], the eleventh murder was committed by the defendant upon [illegible], age 26. Records further indicate that Miss [illegible] suffered [illegible] wounds to the back of the head, fourteen (1[illegible]) [illegible] and two (2) wounds to the forehead.

[illegible], the defendant was interviewed at the [illegible] in reference to this incident. The defendant advised Detective Paul Crow [illegible] [illegible] Haddocks up on Ridgewood Avenue, after [illegible] was [illegible] for the sum of $30. Stano advised Detective [illegible] that the two then [illegible] the Primrose Lane area to have sex. After [illegible] completed, the defendant [illegible] reached under his seat, brought out a knife and stabbed Miss Haddocks. [illegible] then reportedly retracted the knife with his right hand and [illegible] the victim. Subject then advised [illegible] that he pulled [illegible] from his vehicle, at which time he stabbed her several more times. [illegible] then reportedly placed Miss Haddocks on the [illegible] and [illegible]

[illegible] the disposition of this case [illegible] the instant [illegible]

a total of eleven (11) murders. In view of these factors, it is recommended that the Court consider the imposition of the Death Penalty in this case.

EREBY CERTIFY THAT THE ABOVE IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

ARTMENT OF CORRECTIONS

Edward C. Seltzer
Probation and Parole Officer

APPROVED BY:
Marvin E. Probst
Probation and Parole Supervisor II

E: 5/3/83

CONFIDENTIAL SECTION

e Presentence Investigation is not a public record and is available only to those sons as specified in Rule 3.712 of the Florida Rules of Criminal Procedure"

/mld

events, from the time of the hypnotic session forward for reason that hypnosis is generally acceptable in the relevant scientific community for the purpose of memory retrieval; (2) testimony of complaining witness, who had been previously hypnotized for purpose of restoring her memory of the events in issue, was inadmissible in rape trial; (3) error in admission of testimony of complaining witness was prejudicial since it constituted virtually the sole incriminating evidence against defendant; and (4) double jeopardy clause did not bar retrial of defendant.

Reversed.

Richardson, J., filed concurring opinion.

Kaus, J., filed concurring and dissenting opinion.

31 Cal.3d 18
181 Cal.Rptr. 243

The PEOPLE, Plaintiff and Respondent,

v.

Donald Lee SHIRLEY, Defendant and Appellant.

Cr. 21775.

Supreme Court of California, In Bank.

March 11, 1982.

Defendant was convicted in the Superior Court, Orange County, Mason L. Fenton, J., of rape and unlawfully entering complaining witness' apartment with intent to commit a felony, and he appealed. The Supreme Court, Mosk, J., held that: (1) testimony of a witness who had undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those

1. Criminal Law ⇐385

Statements made under hypnosis may not be introduced to prove truth of matter asserted because the reliability of such statements is questionable.

2. Criminal Law ⇐385

Testimony of a witness who had undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward, for reason that hypnosis is generally unacceptable in the relevant scientific community for the purpose of memory retrieval.

3. Criminal Law ⇐385

Testimony of complaining witness, who had been previously hypnotized for purpose of restoring her memory of the events in issue, was inadmissible in rape trial for reason that hypnosis was not generally acceptable in the scientific community for purpose of memory retrieval.

4. Witnesses ⇐35

A previously hypnotized witness is not incompetent in the strict sense of being unable to express himself comprehensively or understand his duty to tell the truth or of lacking the general capacity both to per-

ceive and remember; thus, if prosecution had wished to question such witness on a topic wholly unrelated to the events that were subject of hypnotic session, his testimony as to that topic would not be rendered inadmissible by virtue of fact that witness has undergone hypnosis for purpose of restoring his memory. West's Ann.Evid.Code § 701.

5. Criminal Law ⇐1169.1(7)

Error in admitting testimony of a previously hypnotized witness is not reversible per se; its effect must still be judged under the prejudicial error test.

6. Criminal Law ⇐1169.1(7)

Error in admission, in rape trial, of testimony of complaining witness, who had been previously hypnotized in order to restore her memory, was prejudicial since it constituted virtually the sole incriminating evidence against defendant. West's Ann. Const.Art. 6, § 13.

7. Rape ⇐57(1)

In view of state of the law concerning admissibility of testimony of hypnotized witnesses at time of defendant's rape trial, trial court did not err in denying defendant's motion for judgment of acquittal on grounds of insufficiency of the evidence since testimony of complaining witness, although vague and self-contradictory on a number of points, was not inherently incredible and would have constituted at least "substantial evidence" to support a verdict of guilt. West's Ann.Pen.Code § 1118.1.

8. Criminal Law ⇐753.2(3)

Purpose of a motion for judgment of acquittal on ground of insufficiency of the evidence is to weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case. West's Ann.Pen.Code § 1118.1.

9. Criminal Law ⇐193

Reversal of defendant's rape conviction on basis of erroneous admission of testimony of previously hypnotized witness did not prohibit retrial of defendant on double jeopardy grounds since the prosecution made a sufficient case under the law as it then stood. U.S.C.A.Const.Amend. 5.

10. Criminal Law ⇐193

Double jeopardy clause does not prohibit retrial after a reversal premised on an error of law. U.S.C.A.Const.Amend. 5.

John W. Carney, Deputy Atty. Gen., San Diego, for plaintiff and respondent.

Ephraim Margolin as Amicus Curiae on behalf of defendant and appellant.

Stephen C. Hosford, Garden Grove, for defendant and appellant.

MOSK, Justice.

The principal question on this appeal is whether a witness may be allowed to testify after he has undergone hypnosis for the purpose of restoring his memory of the events in issue. The question is new to this court, but has been often litigated in our sister states and extensively studied by medical science. In accord with recent and persuasive case law and the overwhelming consensus of expert opinion, we conclude that the testimony of such a witness should not be admitted in the courts of California.

I

The record discloses a classic case of conflicting stories. There were only two witnesses to the principal events: the complaining witness, Catherine C., told the jury that defendant compelled her by threat and force to submit to sexual intercourse and to orally copulate him; defendant testified, however, that Catherine willingly participated in the act of intercourse, and there was no oral copulation. The jury believed part of Catherine's story, as it convicted defendant of rape; but it also apparently found that she was lying when she described in detail the alleged act of oral copulation, as it acquitted defendant of that charge.[1] The jury doubtless had a difficult

1. In addition, defendant was convicted of the derivative charge of unlawfully entering Catherine's apartment with intent to commit a felony, presumably the rape. (Pen.Code, § 459.) The court stayed execution of the sentence on this count until completion of the sentence on

task, since Catherine's performance as a witness was far from exemplary: the record is replete with instances in which her testimony was vague, changeable, self-contradictory, or prone to unexplained lapses of memory. Indeed, on occasion she professed to be unable to remember assertions that she had herself made on the witness stand only the previous day.

In such circumstances it is particularly important that the testimony of the complaining witness be free of taint, lest a mistaken conviction result. Yet as we shall see, in the case at bar the prosecution contaminated Catherine's testimony by subjecting her to a hypnotic experience on the eve of trial for the purpose of "filling the gaps" in her story. To allow her to testify against defendant after that experience was error; and in the light of the entire record, we are of the view that the error caused a miscarriage of justice requiring reversal of the judgment. (Cal.Const., art. VI, § 13.)

A

Catherine was a 32-year-old bartender at a saloon named Bud's Cove, not far from the Camp Pendleton Marine base. The first prosecution witness, Marine Sergeant Charles Lockskin, testified that at 8:50 p. m. on January 25, 1979, he entered Bud's Cove and approached Catherine, whom he had known for several months. She was off duty, and "looked like she was feeling kind of bad." She had a half-consumed martini in front of her, was under the influence of alcohol, and staggered when she walked.

After talking with her for some 15 minutes, Lockskin offered to get her something to eat and take her home. They drove in his car to a take-out restaurant, purchased some food, and arrived at Catherine's apartment house at 9:30 p. m. She vomited when she got out of the car; as this was happening, defendant came up to Lockskin and addressed him by name; Lockskin asked him to leave, and defendant did so. Lockskin then helped Catherine into the apartment and went into the kitchen to prepare some drinks. When he returned to the living room, however, she had passed out on the couch and was fast asleep. After failing to rouse her by shaking her, he covered her with a blanket, turned out the lights, locked the front door, and departed. It was shortly before 10 p. m.

The next witness was Catherine. She testified that on the evening in question she went off duty at Bud's Cove at 6:30 p. m., ordered two martinis, and sat "relaxing" until Lockskin came in. Her testimony as to her activities with Lockskin generally corroborated his, and she admitted she could "feel" the alcohol she had consumed.

Catherine's version of the events occurring after she fell asleep was as follows: she testified that she awoke some time later, still lying on the couch fully clothed, and found defendant standing naked by the coffee table holding a butcher knife.[2] Defendant assertedly took her into the bedroom, ordered her to remove her clothes, and compelled her to orally copulate him for several minutes. The witness admitted that she felt "like I was in a dream" and events were moving in "slow motion."[3]

Catherine then stated that defendant made her get on her knees, tied her hands behind her back and gagged her with nylon stockings, put her head down on the bed, and had intercourse with her in that position for up to half an hour. When she tried to turn her head to see who he was, he struck her with his hand and ordered her not to look at him; later he put a pillow over her head for the same purpose, and struck her on the hip. She claimed the

the other, the stay to become permanent at that time.

2. Catherine later told the police that defendant was holding both a butcher knife and an "ice pick." She subsequently changed her story and described the latter as a large Phillips screwdriver. At trial the prosecution produced neither knife, ice pick, screwdriver, nor any other weapon.

3. As noted above, the jury impliedly found that her testimony describing the alleged act of oral copulation was false.

latter blow sobered her so that she no longer felt the effects of her prior drinking.

Until this point the apartment had remained totally dark, and she could see the intruder only as "a shadow." According to Catherine, however, defendant abruptly desisted from further intercourse, removed her bonds and gag, took her back into the living room, and turned on the lights.[4] For the next half hour the two sat naked on the couch, she on his lap, and chatted. Finally he asked her if she liked beer, and she replied that she did; he volunteered to get some from his apartment, and told her where he lived.[5] He dressed and left on this errand; on his return with the beer he took his clothes off again, she got back on his lap, and the conversation resumed.

After another quarter of an hour, defendant suggested they take a shower together, and she agreed. As they entered the bathroom, however, the telephone rang. The caller was assertedly a "girlfriend" of Catherine named Mickie, who announced she was coming over to the apartment. Catherine relayed this fact to defendant, and told him that he could return at another time and she would cook dinner for him. According to Catherine, defendant then got dressed, wrapped the knife and screwdriver in an extra T-shirt he had brought, thrust them down the front of his pants, and left when Mickie arrived. Catherine testified she told Mickie she had been raped by a Marine, and Mickie gave her a strong sedative—a 100-milligram dose of a drug called Mellaril.[6] Mickie stayed for half an hour, and immediately after she left Catherine called the police. According to Catherine, it was 10 minutes before 1 a. m.

On cross-examination Catherine admitted that during their long conversation in the living room defendant told her numerous personal details about himself, e.g., that he lived in the next apartment building, that his name was Don, that he was 22 years old, that he was married and had a child, that he was a Marine but was not happy in the service, and that the next morning he had to go to Bridgeport, California, for cold-weather training.[7] She claimed that she engaged defendant in the foregoing conversation only because she was afraid he would do her further harm; yet she conceded that when defendant went to get the beer he left the knife and the screwdriver on her living room floor but that she did nothing about them, and that while he was gone she remained sitting naked on the couch. Although she had a telephone she did not call the police or anyone else for help, nor did she dress and go to the nearby apartment of the building manager who was admittedly "a big guy," nor did she even lock the front door. She also acknowledged that she did not know Mickie's last name, address, or telephone number, or where she was at the time of trial, and indeed had never seen her since the night in question.[8]

On redirect examination Catherine testified that until defendant turned on the lights in the apartment, she thought the person having intercourse with her was an older man who resembled defendant and had flirted with her at the bar where she worked.[9]

Police Officer Russell Lane testified that the telephone call reporting the rape came

4. She claimed that as they entered the living room defendant told her he had intended to take her money but "he seen my bible on the nightstand next to the bed and changed his mind." The witness did not explain how defendant could have recognized a bible in the dark.

5. Defendant lived close by, in an apartment separated from Catherine's complex by a single building.

6. Catherine admitted that Mellaril had been prescribed for her to take four times a day, and that she had taken such a dosage for about six months. She denied, however, that she had used the drug within the previous 18 months.

7. As appeared from the testimony of the police officer who responded to her call and took a description, defendant also told Catherine exactly which company he was in at Camp Pendleton.

8. Not surprisingly, the prosecution did not produce Mickie as a witness.

9. Defendant testified that Catherine told him "she thought I was some major."

at 1:45 a. m., an hour later than Catherine claimed. He went immediately to her apartment and found her under the influence of alcohol: her breath had the smell of someone who "had been drinking quite heavily," her speech was slow and at times difficult to understand, and her walk was unsteady. She told the officer she had been brought home "very drunk" from Bud's Cove at midnight, that she fell asleep on the couch, and that she awoke in her bed at 12:30 a. m. She gave the officer a physical description of defendant, and repeated the personal information defendant had disclosed to her during their conversation. She then complained that her buttocks hurt, and the officer took her to a local hospital.

At the hospital she was examined by a physician. He testified that he found a bruise on her right hip and "crease marks" on her wrists. But although the latter were consistent with her hands having been tied by a fabric, he could not tell their cause and described them as the kind of marks one receives from sleeping on wrinkles in the bed linen. She reported to the physician that she used "occasional Mellaril and alcohol frequently." He testified that Mellaril is "a major tranquilizer," and that in doses of 100 milligrams or more per day it is prescribed primarily for psychotic states, schizophrenia, and manic-depressive cases.[10]

After the physical examination, Police Officer Leonard Goodwin took a statement of the evening's events from Catherine. The next morning Officer Lane went to defendant's apartment and arrested him as he was leaving to report for duty. When the officer announced the charges were burglary and rape, defendant became angry and said he had "picked up a drunk bitch at Bud's Cove and took her home and fucked her," and "now she wants to report that he raped her" and "that is all a bunch of bullshit."

Defendant took the stand in his own defense. He testified that a few days before these events Catherine had waited on him at Bud's Cove. On the evening in question he entered the bar and saw her sitting with Sergeant Lockskin, whom he recognized. When Lockskin went to the men's room, defendant approached her and asked how she was feeling. They had a brief conversation; according to defendant, she told him her name was Cathy, identified the apartment house in which she lived, and invited him to "grab a six-pack sometime and come over." When Lockskin returned, defendant left the bar and bought some beer at a liquor store. After failing to locate a friend of his, defendant walked to Catherine's apartment house. As he approached, Catherine and Lockskin drove up and defendant spoke briefly with the latter.[11] Defendant then returned to his own apartment for a while, drank some beer, and went back to Catherine's building. When asked why he did so, he explained, "Well, my wife was back home in Indiana. I was by myself. Kind of lonely. And I had an invitation to come to her apartment."

On his arrival, defendant knocked twice on Catherine's door; there was no response, but he thought he heard someone inside who was moaning as if ill. When no one answered further knocking, he called her name through the window and lifted off the screen. He testified that he believed someone inside was sick.[12]

At that point Catherine opened the front door and defendant asked, "Are you okay?" He handed her the screen; she put it next

10. The doctor's testimony concerning the uses of Mellaril was corroborated by another physician-witness, Dr. Donald Schafer. The remainder of Dr. Schafer's testimony is discussed below. (See Part I B, *post*.)

11. As noted above, Sergeant Lockskin corroborated defendant's testimony in this regard.

12. The defendant was not the first person who had removed that screen for the purpose of climbing through Catherine's bedroom window. In the prosecution's case-in-chief Sergeant Lockskin testified that he was the previous tenant of the same apartment; that Catherine had moved in with him for a month; and that about three weeks before the night in question he returned home with her and discovered he had lost his key. Lockskin testified he thereupon removed the screen on the bedroom window and climbed through it into the apartment.

to the front door, went back to the living room, and lay down on the couch. Defendant sat next to her and repeated his question, "Are you okay?" Her reply was to put her arms around his neck and begin kissing him. He responded, and at his suggestion they soon moved to the bedroom. There she cooperated in helping him remove her clothes; defendant returned briefly to the living room for his cigarettes, stripped down, and rejoined her on the bed. They proceeded to have intercourse in the "missionary position," then turned so that he entered her vaginally from behind. She abruptly asked defendant to stop and he did so. He inquired what was wrong, and she replied that she "couldn't be emotionally turned on by men."

Defendant's testimony as to the ensuing events was substantially the same as Catherine's. They sat unclothed on the living room couch talking for a half an hour, and he told her all about himself. In turn, she told him that she too was from Indiana, that times were hard for her and she was having problems, and that she had seven children in Knightstown Home for Children. She became upset and began to cry, saying that nobody loved her. As Catherine had testified, defendant went home to get some beer and then suggested they take a shower, but the evening ended when Mickie called on the telephone. He dressed and waited for the latter to arrive, feeling that Catherine "was just in a wrong state of mind to be left alone." After some minutes Mickie entered carrying a six-pack of beer under her arm, and defendant left.

Defendant acknowledged the angry denial he made when Officer Lane accused him of rape the next morning; and he further denied that he broke into Catherine's apartment, or threatened her with a knife or screwdriver, or tied her up or struck her, or had intercourse with her without her consent, or engaged in any act of oral copulation.

Finally, a number of Marine officers, including defendant's platoon commander, his company first sergeant, and his company commander, testified in his behalf. On the basis of their experience they unanimously expressed high personal regard for defendant's truthfulness and honesty, and reported that he had a good reputation for those traits of character. His first sergeant further testified that he was made aware of any altercations occurring in the company, and that defendant had no history of engaging in aggressive or violent behavior.

B

We relate next the evidence bearing on the issue of hypnosis. Prior to trial, counsel for defendant moved to exclude all testimony of the complaining witness that was the result of her having been hypnotized. He offered to prove that the case was originally set for trial on May 1, 1979, but was trailed because of the unavailability of an adequate jury pool; that in the evening of April 30, 1979, i.e., more than three months after the events in question, the deputy district attorney assigned to the case, Richard Fulton, had Catherine hypnotized by another deputy district attorney, Richard Farnell, at the courthouse and in the presence of Mr. Fulton and one Terry Moore; and that Catherine made certain statements under hypnosis which would cause her testimony at trial to be significantly different from her testimony at the preliminary hearing. Counsel then identified one such discrepancy, and argued that "this is an improper use of hypnosis" because "it is not in fact refreshing a witness's recollection" but "it is in fact manufactured evidence." He distinguished those cases in which hypnosis has been used for such purposes as helping an eyewitness to remember a license plate number. He denied that any court in this state had ruled the use of hypnosis permissible in all cases, and charged that here the People were attempting "to expand hypnosis into an area [in] which they cannot lay adequate foundation for its reliability" as a tool for refreshing recollection.

The trial court denied the motion, ruling that prior hypnosis of a witness affects the weight but not the admissibility of the testimony. Accordingly, the court directed that if Catherine gave evidence that she

could not remember—or did not exist—before she was hypnotized, the fact and circumstances of that hypnosis should be put before the jury.

Pursuant to this ruling, Catherine was allowed to testify to a number of matters that she assertedly had been unable to recall on two occasions prior to hypnosis, i.e., when she gave statements to the police on the night of the events in question, and when she testified at the preliminary hearing. For example, on those occasions she stated that after falling asleep in her clothes on the couch in her living room, she awoke in her bedroom and found herself lying naked on the bed, gagged and bound. At trial, as noted above, she testified instead that when she awoke she was still on the couch and fully clothed, and defendant then forced her to go into the bedroom and get undressed. Again, prior to hypnosis she stated that defendant had sexual intercourse with her before as well as after the alleged act of oral copulation, while at trial she testified that the oral copulation preceded any intercourse whatever. Prior to hypnosis she stated that her hands were tied during the oral copulation, while at trial she denied this claim. Finally, prior to hypnosis she stated that the first time she saw the knife in defendant's hand was when they returned to the living room after the sexual intercourse, while at trial she testified she saw it when she awoke on the couch before entering the bedroom.

Both counsel explored the nature and effect of Catherine's hypnotic experience. According to Catherine, before being hypnotized she recalled the events of the evening in question only "vaguely." She discussed the gap in her recollection with Deputy District Attorney Fulton, and consented to be hypnotized "for the purpose of going back over what occurred that night." She verified that she was hypnotized on April 30, 1979, in the courthouse, by Mr. Farnell; although the latter had "some training," he was not a psychiatrist or even a physician. She had not been hypnotized before, but she "just knew" that it enables a person to "remember more than normal."

Apparently she was not disappointed in that expectation. She agreed that the hypnosis at least partly "cured" her recollection as to "this sort of dreamlike period that we're talking about." She credited the hypnosis with causing her to "fill in the gap" in her memory, and also to recall that certain events took place in a different sequence. In particular, she specifically ascribed to the effect of hypnosis each of the above-listed changes between her testimony at trial and her pretrial statements to the police and testimony at the preliminary hearing.

The defense called Dr. Donald W. Schafer as an expert witness to testify on the subject of hypnosis. Dr. Schafer is a board-certified psychiatrist with 16 years of private practice and 10 years on the staff of the University of California at Irvine, where he is a clinical professor of psychiatry. He has had extensive training in hypnosis, and has used it in his practice for two decades.[13] Dr. Schafer acknowledged that hypnosis has certain valid medical uses, such as pain control and relief from various psychosomatic symptoms. In appropriate cases it can also be used for the treatment of neuroses, e.g., by assisting a patient to recover repressed memories of traumatic events, including rape.

Dr. Schafer warned, however, that there are grave risks in relying for other purposes on the accuracy of memories recalled under hypnosis. He explained that while no one knows exactly how the human mind stores information, it does *not* act like a videotape recorder, i.e., a machine capable of "playing back" the exact images or impressions it has received. Rather, "there are many things that alter the storage of exact mem-

13. In addition, Dr. Schafer is a past national president of the Society for Clinical and Experimental Hypnosis, a fellow of the American Society of Clinical Hypnosis, and the founding president of both the California Society of Clinical Hypnosis and the Orange County Society of Clinical Hypnosis. As well as using hypnosis in his psychiatric practice, he has taught advanced courses in medical hypnosis and hypnoanalysis. Finally, as of the date of trial he had written 10 to 15 professional articles on hypnosis.

ory." There is therefore no assurance, the doctor testified, that a memory recalled in hypnosis is correct. On the contrary, a person under hypnosis can be mistaken in his recollection, or can hallucinate, or can "confabulate," i.e., create a false or pseudomemory, or can even deliberately lie. Indeed, it may be easier to lie under hypnosis, because from the viewpoint of the person in the trance "the hypnosis would put the responsibility on the shoulders of the hypnotist."

Dr. Schafer made four additional important points. First, when a person is put under hypnosis and asked to recount an event, no one is able to determine whether he is telling the truth.[14] Second, when a person has a subconscious motive to distort the truth, e.g., in order to make himself look better in the eyes of others, that motive will usually operate even under hypnosis; indeed, "hypnosis would in a sense give [him] permission" to engage in such distortion. Third, the effect of hypnosis on a preexisting memory is usually additive, i.e., it may permit the recall of additional details; if instead the person remembers the event differently under hypnosis, the discrepancy implies either that his statement describing the preexisting memory was a lie or that the memory under hypnosis was a confabulation. Fourth, when a person has been asked to recall an event while under hypnosis, and after hypnosis is asked to remember the same event, the effect of the prior hypnosis is to remove all doubt he may have had about the event; such persons would be "convinced that what they had said in hypnosis was the truth."

On cross-examination Dr. Schafer testified that although the hypnotic induction in the case at bar was excellent from the viewpoint of technique, the hypnotist did not take into consideration Catherine's possible motivation to distort the truth under hypnosis; one of the factors leading Dr. Schafer to question that motivation was the above-discussed discrepancies in her testimony.

Summing up, Dr. Schafer had no doubt as to the unreliability of hypnosis for discovering the truth of a particular matter. He warned that "hypnosis in no way is a truth serum-like experience," and concluded "there is no way of assessing the reliability of something produced in hypnosis, as such."

The prosecution neither discredited Dr. Schafer's opinion on cross-examination, nor called any expert witness of its own.

II

While passing through periods of vogue and of disrepute, hypnosis has been practiced in one form or another for centuries.[15] Its use in legal proceedings is a relatively recent phenomenon, however, and the rules governing the admissibility of evidence induced by hypnosis are mainly found in the case law of the past two decades. The question of such admissibility has arisen primarily in two contexts: (1) efforts by the defendant to introduce, for the truth of the matter asserted, exculpatory statements made while under hypnosis; and (2) efforts by the prosecution to introduce incriminating testimony of a witness whose memory has assertedly been refreshed by hypnosis. As will appear, the law is well settled as to the former but in a state of flux as to the latter.

A

[1] We begin with a brief discussion of the cases excluding evidence of the truth of statements made under hypnosis, because

14. Dr. Schafer stated that this was not only his opinion but the consensus of his profession, and he attributed that consensus to the work of Dr. Martin T. Orne of Philadelphia. We cite Dr. Orne's work in some detail below. (See Part III D, *post.*)

15. For a brief summary of its history, see 9 Encyclopaedia Britannica (15th ed. 1974) Hypnosis, page 133; for more detailed historical overviews, see Gibson, Hypnosis: Its Nature and Therapeutic Uses (1977) chapter 2; Sheehan & Perry, Methodologies of Hypnosis: A Critical Appraisal of Contemporary Paradigms of Hypnosis (1976) pages 3-39; Handbook of Clinical and Experimental Hypnosis (Gordon ed. 1967) chapter 2.

the reason for their rule bears closely on the present inquiry. The point has recently been adjudicated by our court. In *People v. Blair* (1979) 25 Cal.3d 640, 664, 159 Cal.Rptr. 818, 602 P.2d 738, the defendant sought to introduce, over objection, tape-recorded statements favorable to him that were made by an eyewitness while she was under hypnosis during a pretrial interview. The trial court excluded the evidence, ruling that the statements were not admissible as past recollection recorded. On appeal the defendant conceded the latter ruling was correct,[16] but contended the statements should have been admitted in any event because they were critical to the defense and were likely to be trustworthy, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 298–302, 93 S.Ct. 1038, 1047–1049, 35 L.Ed.2d 297.

We unanimously rejected this contention, explaining that "the trial court's ruling did not elevate a fastidious adherence to the technicalities of the law of evidence over the right to a fair trial. For here, unlike *Chambers*, there was no solid assurance that the hearsay statements were reliable. It appears to be the rule in all jurisdictions in which the matter has been considered that *statements made under hypnosis may not be introduced to prove the truth of the matter asserted because the reliability of such statements is questionable.* While in California such statements—and those made under the influence of truth serum—may be used to establish a basis for expert opinion, the cases either state specifically or assume that they are not admissible to prove the truth of the matter therein contained. [Citations.]" (Italics added; 25 Cal.3d at p. 665, 159 Cal.Rptr. 818, 602 P.2d 738.) We further rejected the defendant's claim that the circumstances of *Blair* made it likely the witness was telling the truth: "The fact that she was a neutral person and had no reason to falsify her statements under hypnosis and that she intended to tell the truth are obviously insufficient to establish reliability, especially in the light of expert testimony that *there is no way to determine if a person under hypnosis is relating actual facts.*" (Italics added; *id.* at pp. 665–666, 159 Cal.Rptr. 818, 602 P.2d 738.)

As we observed in *Blair* (*id.* at p. 665, 159 Cal.Rptr. 818, 602 P.2d 738), "The rule is the same in other jurisdictions." Indeed, no court has held otherwise. Thus in the leading case of *Greenfield v. Commonwealth* (1974) 214 Va. 710, 204 S.E.2d 414 [92 A.L.R.3d 432], a defendant who had no memory of the events surrounding the crime nevertheless made statements relating to those events while hypnotized. In holding the statements inadmissible, the Virginia Supreme Court stressed that "Most experts agree that hypnotic evidence is unreliable because a person under hypnosis can manufacture or invent false statements. [Citations.] A person under a hypnotic trance is also subject to heightened suggestibility. [Citations.]" (*Id.* 204 S.E.2d at p. 419.) In subsequently denying habeas corpus relief to the same defendant, the federal district court stated that "the very reason for excluding hypnotic evidence is due to its potential unreliability." (*Greenfield v. Robinson* (D.Va.1976) 413 F.Supp. 1113, 1120.) Other courts have rejected hypnotic evidence expressly because of its lack of reliability,[17] while still others have simply declared such evidence inadmissible per se.[18]

Particularly relevant here are the cases that have excluded this evidence on the

16. A prior statement is admissible as past recollection recorded only if, inter alia, the witness testifies that it was true. (Evid.Code, § 1237(a), subd. (3).) In *Blair* the witness was unable to so testify.

17. *Emmett v. State* (1974) 232 Ga. 110, 205 S.E.2d 231, 235 ("the reliability of hypnosis has not been established"); *State v. Harris* (1965) 241 Or. 224, 405 P.2d 492, 498 (hypnosis "does not guarantee truthfulness"); *People v. Harper* (1969) 111 Ill.App.2d 204, 250 N.E.2d 5, 7 ("the scientific reliability of neither [hypnosis nor "truth serum"] is sufficient to justify the use of test results of either in the serious business of criminal prosecution").

18. *State v. Pierce* (1974) 263 S.C. 23, 207 S.E.2d 414, 418; *State v. Pusch* (1950) 77 N.D. 860, 46 N.W.2d 508, 521–522; *People v. Ebanks* (1897) 117 Cal. 652, 665–666, 49 P. 1049.

ground of the well-known *Frye* rule. (*Frye v. United States* (D.C.Cir.1923) 293 F. 1013.) That rule conditions the admissibility of evidence based on a new scientific method of proof on a showing that the technique has been generally accepted as reliable in the scientific community in which it developed. (*Id.* at p. 1014.) Finding that no such showing had been made with regard to hypnosis, the Oklahoma court held in *Jones v. State* (Okl.Cr.App.1975) 542 P.2d 1316, 1326–1327, that expert testimony as to the truthfulness of statements made by the defendant under hypnosis was inadmissible for the same reason that the results of lie detector and "truth serum" tests are excluded, i.e., because such tests "have not attained sufficient scientific and psychological accuracy nor general recognition as being capable of definite and certain interpretation." (*Id.* at p. 1326.)

Again, the Michigan court so held in *People v. Hangsleben* (1978) 86 Mich.App. 718, 273 N.W.2d 539, 543–544, declaring that the defendant's attempt to prove the reliability of statements made in hypnosis by showing the qualifications of the hypnotist "is an inadequate foundation for scientific evidence" under the Michigan version of the *Frye* rule. (*Id.* 273 N.W.2d at p. 544.) And in *Rodriguez v. State* (Fla.App.1976) 327 So.2d 903, 904, the Florida court excluded such evidence under its version of *Frye*, i.e., that the reliability of a new method of proof must be generally accepted by scientists or "'have passed from the stage of experimentation and uncertainty to that of reasonable demonstrability.'" Applying this test, the court held the evidence inadmissible because it was "unconvinced of the reliability of statements procured by way of hypnosis."

B

With this unanimous body of law in mind we turn to the second group of cases mentioned above, i.e., those addressing the admissibility of the testimony of a witness whose memory has assertedly been refreshed by hypnosis. The seminal case was *Harding v. State* (1968) 5 Md.App. 230, 246 A.2d 302. There the prosecuting witness, Mildred Coley, was found wounded by the roadside, the apparent victim of an aggravated sexual assault; she was in a state of shock and could not remember anything that had happened after being shot by the defendant, who had been riding with her in a car. Several weeks later she was taken to the police barracks to be hypnotized by a psychologist from the state hospital. The police furnished the hypnotist with the details of the case, and he informed Coley he was going to "get her memory back." After he put her under hypnosis he invited two state troopers in, and directed her to tell him "everything that happened" on the day in question. She related certain events incriminating the defendant, with occasional prompting by the hypnotist. He denied suggesting to her any answers to his questions, but did give her the suggestion that after she awoke she would relate the same events. He then brought her out of the trance, and under questioning by one of the state troopers she duly gave the same answers she had given while hypnotized; the hypnotist conceded that his posthypnotic suggestion had made her "want to do so." He testified that in his opinion her story under hypnosis was reliable because certain of her statements were corroborated, because "her recall afterwards was essentially the same," and because she had "no reason" to lie. On the witness stand Coley gave the story a third time, claiming that "When I was asleep it all came back to me."

On appeal from his conviction of assault with intent to commit rape, the defendant urged that the pretrial hypnosis rendered Coley's testimony inadmissible. Affirming the judgment, the Maryland Court of Special Appeals summarily dismissed this contention on the single ground that the *witness* believed her memory of the events was accurate: "The admissibility of Mildred Coley's testimony concerning the assault with intent to rape case causes no difficulty. On the witness stand she recited the facts and stated that she was doing so from her own recollection. The fact that she had told different stories or had 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." (*Id.* 246 A.2d at p. 306.)

In the ensuing 10 years these few sentences spawned a series of similar decisions permitting witnesses to testify to recollections that were assertedly refreshed by pretrial hypnosis. The Attorney General, naturally, relies heavily on those decisions in the case at bar. But an examination of the opinions discloses a significant evolution in the approach of the courts to this issue. In the earlier cases, as in *Harding*, the courts engaged in little or no analysis of the issue, and merely reiterated the general proposition that the fact of hypnosis "goes to the weight, not the admissibility" of the evidence. If they discussed the point at all, the courts simply noted that the witness believed he was testifying from his own memory and that his credibility could presumably be tested by ordinary cross-examination. (See *State v. Jorgensen* (1971) 8 Or.App. 1, 492 P.2d 312, 315; *Wyller v. Fairchild Hiller Corporation* (9th Cir. 1974) 503 F.2d 506, 509–510; *Kline v. Ford Motor Co., Inc.* (9th Cir. 1975) 523 F.2d 1067, 1069–1070; *State v. McQueen* (1978) 295 N.C. 96, 244 S.E.2d 414, 427; *Clark v. State* (Fla. App.1979) 379 So.2d 372, 375.)

As the decade drew to a close, however, the courts began to take notice of the dangers inherent in using hypnosis for this purpose, and developed increasingly complex procedural "safeguards" in the hope of forestalling those dangers. Thus until 1978 the Ninth Circuit Court of Appeals had applied the *Harding* rule only in civil cases (see *Wyller* and *Kline*, supra); in extending the rule in that year to criminal cases, the court warned: "We are concerned, however, that investigatory use of hypnosis on persons who may later be called upon to testify in court carries a dangerous potential for abuse. Great care must be exercised to insure that statements after hypnosis are the product of the subject's own recollections, rather than of recall tainted by suggestions received while under hypnosis." (*United States v. Adams* (9th Cir. 1978) 581 F.2d 193, 198–199.) In a footnote at this point the court proposed several safeguards that it apparently believed would eliminate such "potential for abuse." [19]

In *People v. Smrekar* (1979) 68 Ill.App.3d 379, 24 Ill.Dec. 707, 712, 385 N.E.2d 848, 853, the Illinois Court of Appeals followed the *Harding* rule but recognized that "the use of hypnosis is not without problems. 'Asking a patient to recall only real events, or to verify aspects of the material as true or false, reduces but does not remove the element of fantasy' [citation]. The hypnotized subject is also subject to suggestion by the hypnotist." Accordingly, the court held admissible the identification testimony of a previously hypnotized eyewitness only because of a number of factors in the record which the court impliedly viewed as guaranteeing reliability.[20]

In subsequent cases the required safeguards became very elaborate indeed.

19. "We think that, at a minimum, complete stenographic records of interviews of hypnotized persons who later testify should be maintained. Only if the judge, jury, and the opponent know who was present, questions that were asked, and the witness's responses can the matter be dealt with effectively. An audio or video recording of the interview would be helpful." (*Id.* at p. 199, fn. 12.) Although the court found those safeguards had not been observed in *Adams* and declared "we do not approve of the hypnosis methods used here" (fn. omitted; *id.* at p. 199), it nevertheless rejected the claim of error on the ground that the defendant had failed to object to the inadequate foundation.

In *United States v. Awkard* (9th Cir. 1979) 597 F.2d 667, 669, the court reaffirmed its holding in *Adams* and explained (at fn. 2) that the purpose of the *Adams* safeguards is "to ensure that posthypnosis statements are truly the subject's own recollections."

20. Thus the court stressed that the hypnotist was a physician with extensive experience in using hypnosis; only he and the witness were present at the hypnotic session; although the session was not recorded, the hypnotist denied he did anything to suggest the identification to the witness; the identification was corroborated; and the witness had had ample opportunity to see the defendant at the time of the crime. (Id. 24 Ill.Dec. at 713–714, 385 N.E.2d at pp. 854–855.)

Thus in *State v. Hurd* (1981) 86 N.J. 525, 432 A.2d 86, the eyewitness-victim was unable or unwilling to identify the defendant as her assailant, and did so only after being hypnotized three weeks later. The defendant moved before trial to suppress her proposed in-court identification, and extensive expert testimony was taken on the subject of the reliability of hypnotically induced recollection. The trial court ordered the testimony suppressed.

On appeal, the New Jersey Supreme Court held that the admissibility of hypnotically induced testimony must be judged by the *Frye* standard, but immediately qualified the rule to require only that in any case the hypnosis produce a recall that is, in effect, no more inaccurate than that of the average witness who has not been hypnotized. (*Id.* 432 A.2d at pp. 91–92.) The court recognized a number of dangers inherent in the hypnotic process which "explain why hypnosis, unless carefully controlled, is not generally accepted as a reliable means of obtaining accurate recall" (*id.* at p. 93); the dangers included the subject's extreme suggestibility, loss of critical judgment, tendency to confabulate, and excessive confidence in his new "memories." The court nevertheless declined to hold such testimony inadmissible per se, asserting that "the reliability of ordinary eyewitnesses reveals similar shortcomings." (*Id.* at p. 94.)

Yet to minimize if possible the admitted risks of hypnosis, the court went on to adopt an intricate set of procedural prerequisites to its use. First, the trial court should "evaluate both the kind of memory loss that hypnosis was used to restore and the specific technique employed, based on expert testimony presented by the parties." (*Id.* at p. 95.) The court should then inquire into "the amenability of the subject to hypnosis," because persons capable of entering deeper trances may be more suggestible. (*Id.* at p. 96.) In turn, the party offering the testimony must prove he has complied with no less than six additional procedural requirements, intended to furnish an adequate record and insure "a minimal level of reliability." (*Id.* at pp. 96–97.)[21]

Finally, in order to guarantee "strict compliance" with these prerequisites, the proponent of the testimony must establish its admissibility by "clear and convincing" proof. (*Id.* at p. 97.) "This burden," said the New Jersey court, "is justified by the potential for abuse of hypnosis, the genuine likelihood of suggestiveness and error, and the consequent risk of injustice." (*Ibid.*)[22] Because the court found that several of the listed procedural requirements had not been met on the record in *Hurd*, it affirmed the order suppressing the proposed testimony.[23]

C

After careful consideration, we decline to join in the foregoing effort to develop a set

21. The six requirements, suggested by Dr. Orne, are set out at pages 96–97 of 432 A.2d. They may be summarized as follows: (1) the hypnotist must be a psychiatrist or psychologist experienced in the use of hypnosis; (2) to avoid bias, the hypnotist must be independent of the prosecution or defense; (3) all information the police or defense give the hypnotist before the session must be recorded; (4) before the session the subject must describe in detail to the hypnotist the facts as he remembers them, and the hypnotist must avoid influencing that description; (5) all contacts between the hypnotist and the subject—i.e., the prehypnotic examination, the hypnotic session, and the posthypnotic interrogation—must be recorded, preferably on videotape; and (6) no person other than the hypnotist and the subject may be present during the session, or even during the prehypnotic examination and the posthypnotic interrogation.

22. Two justices refused to join in this opinion, believing that hypnotically induced testimony should not be admitted in a criminal trial under any circumstances: "To do so would have the defendant's innocence or guilt depend on the jury's speculating, on the basis of conflicting scientific-medical testimony, whether the identification was true recollection or implanted by the hypnosis." (*Id.* at p. 98 [conc. opn. of Sullivan, J.].)

23. Two New York trial courts have adopted an even more elaborate set of *nine* prerequisites to the admissibility of such testimony, derived from an unreported but widely cited ruling of a Wisconsin trial court in 1979. (*People v. Lewis* (County Ct. 1980) 103 Misc.2d 881, 427 N.Y.S.2d 177; *People v. McDowell* (County Ct. 1980) 103 Misc.2d 831, 427 N.Y.S.2d 181.)

of "safeguards" sufficient to avoid the risks inherent in admitting hypnotically induced testimony. To begin with, we are not persuaded that the requirements adopted in *Hurd* and other cases will in fact forestall each of the dangers at which they are directed.[24] Next, we observe that certain dangers of hypnosis are not even addressed by the *Hurd* requirements: virtually all of those rules are designed to prevent the hypnotist from exploiting the suggestibility of the subject; none will directly avoid the additional risks, recognized elsewhere in *Hurd*, that the subject (1) will lose his critical judgment and begin to credit "memories" that were formerly viewed as unreliable, (2) will confuse actual recall with confabulation and will be unable to distinguish between the two, and (3) will exhibit an unwarranted confidence in the validity of his ensuing recollection. (432 A.2d at pp. 93–94.) The Attorney General proposes no "safeguards" to deal with these knotty problems.

Lastly, even if requirements could be devised that were adequate in theory, we have grave doubts that they could be administered in practice without injecting undue delay and confusion into the judicial process. To be sure, it would usually be easy to determine if the hypnotist was an appropriately trained psychiatrist or psychologist. It might be harder to establish that he was sufficiently independent of the prosecution or defense to avoid subconscious bias. And it would certainly be far more difficult to prove strict compliance—which *Hurd* demands—with each of the remaining "safeguards." It strains credulity, for example, to believe that a conscientious defense counsel would meekly agree that the prosecution had recorded every bit of relevant information conveyed to the hypnotist prior to the session, or that the hypnotist had conveyed absolutely none of that information to the subject either while extracting the latter's prehypnotic version of the facts or while questioning him both during and after hypnosis, or that every single contact between the hypnotist and the subject, no matter how innocuous, had been preserved on videotape.[25]

On the other hand, it takes little prescience to foresee that these and related issues would provide a fertile new field for litigation. There would first be elaborate demands for discovery, parades of expert witnesses, and special pretrial hearings, all with concomitant delays and expense. Among the questions our trial courts would then be expected to answer are scientific issues so subtle as to confound the experts. (See, e.g., fn. 24, *ante*.) Their resolution would in turn generate a panoply of new claims that could be raised on appeal, including difficult questions of compliance with the "clear and convincing" standard of proof. And because the hypnotized subject would frequently be the victim, the eyewitness, or a similar source of crucial testimony against the defendant, any errors in ruling on the admissibilty of such testimony could easily jeopardize otherwise unimpeachable judgments of conviction. In our opinion, the game is not worth the candle.

For all these reasons, we join instead a growing number of courts that have abandoned any pretense of devising workable "safeguards" and have simply held that hypnotically induced testimony is so widely viewed as unreliable that it is inadmissible under the *Frye* test. This disposition, of

24. For example, one of the requirements set forth in *Hurd* is that all contacts between the hypnotist and the subject must be recorded, for the stated purpose of enabling the trial court to determine what "cues" the hypnotist may have conveyed to the subject by word or deed; and the opinion strongly encouraged the use of videotape to make such recordings. (432 A.2d at p. 97.) Yet as the same opinion recognizes elsewhere (at p. 93), "Because of the unpredictability of what will influence a subject, it is difficult even for an expert examining a videotape of a hypnotic session to identify possible cues." If even an expert cannot confidently make that identification, it is vain to believe that a layman such as a trial judge can do so.

25. The requirement that the prehypnotic examination, the hypnotic session, and the posthypnotic interrogation all be videotaped would make it difficult, moreover, to comply with the further requirement that the hypnotist and the subject be completely alone during each of those phases.

course, is consistent with the above-discussed case law uniformly excluding evidence of the truth of statements made under hypnosis. (See Part II A, *ante*.) And both rules, as we shall see, are supported by the overwhelming consensus of contemporary scientific opinion on hypnosis.

The first case to depart from the *Harding* approach was *People v. Hangsleben* (1978) supra, 86 Mich.App. 718, 273 N.W.2d 539. There, after he had confessed, the defendant was hypnotized and assertedly recalled the events of the crime for the first time, stating that a third party was the true culprit. He sought to prove at trial that the hypnosis had refreshed his recollection, in order to bolster his story on the witness stand and to explain his prior inconsistent admission to the police. The Michigan court distinguished *Harding*, and held that the evidence was properly excluded because the defendant "failed to establish the reliability of hypnosis as a memory-jogging device." (*Id.* 273 N.W.2d at p. 544.) His sole showing was to assert the qualifications of the hypnotist and to refer to the theory of memory restoration by hypnosis. Ruling "That does not demonstrate the general scientific acceptance" required by the Michigan version of the *Frye* test, the court rejected the evidence for lack of proof that hypnosis has been successful in restoring the memory of others, either by their testimony or that of experts. (*Id.* at p. 545.)

In *State v. La Mountain* (1980) 125 Ariz. 547, 611 P.2d 551, it was the prosecution that failed to prove the reliability of hypnosis used to restore a witness' recollection. The defendant was convicted of sexually assaulting a customer in a laundromat. At trial, two prosecution witnesses identified the defendant as the person who committed a similar assault in the same laundromat fifteen months earlier; one was the victim of that assault, and the other was a bystander who seized the assailant. Both witnesses, however, had been unable to identify the defendant from a photographic lineup until their memories were "refreshed" by hypnosis. The hypnotist was a deputy sheriff who had attended various law enforcement institutions giving instruction in hypnotism. He used a so-called "TV technique," asking the subject to visualize the events of the crime as if they were being played back on a videotape machine.

On appeal, the Arizona Supreme Court held it was error to allow the two witnesses to the prior assault to testify after they had been hypnotized. The court reasoned (611 P.2d at p. 555), "There was no expert testimony regarding the effect of hypnosis upon a person's memory, and we do not know from the record what effect the previous hypnotic identification had on the witness's later in-court testimony and identification. Although we perceive that 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 been developed as a result of hypnosis. A witness who has been under hypnosis, as in the case here, should not be allowed to testify when there is a question that the testimony may have been produced by that hypnosis." The court nevertheless affirmed the judgment, finding from the evidence that the result would have been the same if these witnesses had not testified.

The gap in proof identified in *Hangsleben* and *La Mountain* was quickly and thoroughly filled in the leading case of *State v. Mack* (Minn.1980) 292 N.W.2d 764. In that case the defendant met Marion Erickson in a bar, and eventually took her to a motel on his motorcycle. Thereafter he telephoned for an ambulance and told the drivers that he and Erickson had been engaged in intercourse when she started bleeding from the vagina. Erickson was drunk, her speech was unclear, and she had difficulty walking. At the hospital a single deep cut was found inside her vagina; she told one intern that fingers had been inserted in her vagina during sexual activity, and another that she had been in a motorcycle accident. After the doctors advised her they did not believe her explanations, she reported to the police that she had been assaulted. She could not, however, remember much of the events of the night in question.

Six weeks later the police caused Erickson to be hypnotized by a lay hypnotist without professional training. After placing her in a deep trance, the hypnotist invited the police investigator and another officer to join them. He then told Erickson that she would recall the events as though on a television screen. In the course of the session Erickson accused the defendant of stabbing her repeatedly in the vagina. At the end of the session the hypnotist gave her a posthypnotic suggestion to the effect that she would be able to remember very clearly everything that happened on the night in question. The next day she gave the same police investigator a written statement recounting as her present memory the events she had related under hypnosis.

The defendant was arrested and charged with aggravated sexual assault. The question of the admissibility of Erickson's proposed testimony was litigated at an extensive pretrial hearing. Following that hearing, and pursuant to Minnesota procedure, the trial court stayed the prosecution and certified to the state supreme court the question "whether a previously hypnotized witness may testify in a criminal proceeding concerning the subject matter adduced at the pretrial hypnotic interview." (292 N.W.2d at p. 765.) In a well-reasoned opinion the Minnesota high court unanimously answered in the negative, holding such testimony inadmissible as a matter of law.

The court began by emphasizing that no less than five experts on hypnosis and memory retrieval had testified at the hearing, making an extensive record on which to decide the legal issue. The court also observed that the record "demonstrates the truth of Dr. Orne's observation that a case-by-case decision on the admissibility question would be prohibitively expensive, and reveals the difficulty of getting experts qualified to testify about hypnosis as an investigative rather than a therapeutic tool." (*Id.* at p. 766.)

The defendant in *Mack* contended that Erickson's hypnotically refreshed recollection was too unreliable to merit admission, and that to allow such testimony would deny him the right to effective cross-examination. The state contended that the testimony should be admitted as long as certain "safeguards" can be established, relying on *Harding* and its progeny; the defendant, in turn, invoked *Frye*. The state argued that *Frye* is inapplicable to evidence that is not the direct product of a mechanical device such as a lie detector; and to be admissible, the testimony of a previously hypnotized witness need not be true provided it is based on what the witness actually perceived. Stressing the potentially drastic effect of hypnosis on a witness' testimony, however, the court ruled that "Although hypnotically-adduced 'memory' is not strictly analogous to the results of mechanical testing, we are persuaded that the *Frye* rule is equally applicable in this context" (*id.* at p. 768).[26]

The court turned to the record to determine whether, under *Frye*, the use of hypnosis to refresh a witness' memory has been generally accepted as reliable by the scientists working in the field. The court found that the exact opposite is true, i.e., that the consensus of informed expert opinion rejects the use of hypnosis for this purpose because it is "not scientifically reliable as accurate." (*Id.* at p. 768.)

The court gave a number of reasons for this conclusion, each drawn from the expert testimony before it. (*Id.* at p. 768.) First, "a hypnotized subject is highly susceptible to suggestion, even that which is subtle and unintended. Such suggestion may be transmitted either during the hypnotic session or before it," by such persons as police officers or doctors. This suggestibility is enhanced by the subject's natural "desire to please either the hypnotist or others who have asked the person hypnotized to remember and who have urged that it is important

26. Echoing scholarly criticism, the court rejected *Harding* on the ground that it was the product of gullible witnesses and courts uninformed about the scientific realities of hypnosis. (*Id.* at pp. 770–771.)

that he or she remember certain events." [27] The result is that "hypnosis can create a memory of perceptions which neither were nor could have been made" (*id.* at p. 769). And "Most significantly, there is no way to determine from the content of the 'memory' itself which parts of it are historically accurate, which are entirely fanciful, and which are lies." (*Id.* at pp. 768–769.)

The expert testimony also supported the defendant's claim of denial of effective cross-examination: "In addition to its historical unreliability, a 'memory' produced under hypnosis becomes hardened in the subject's mind. A witness who was unclear about his 'story' before the hypnotic session becomes convinced of the absolute truth of the account he made while under hypnosis. This conviction is so firm that the ordinary 'indicia of reliability' are completely erased, . . . It would be impossible to cross-examine such a witness in any meaningful way." (Fn. omitted; *id.* at p. 769.)

Summing up, the court recognized but declined to perpetuate the two inconsistent lines of cases discussed hereinabove (Parts II A and II B, *ante*): "We follow the best scientific authority, however, in rejecting as artificial and unprincipled any distinction between hypnotically-induced testimony offered by the defense to exculpate and that offered by the prosecution to make its case. Regardless of whether such evidence is offered by the defense or by the prosecution, a witness whose memory has been 'revived' under hypnosis ordinarily must not be permitted to testify in a criminal proceeding to matters which he or she 'remembered' under hypnosis." (*Id.* at p. 771.) [28]

Because the precise question certified to the Minnesota Supreme Court in *Mack* was limited to the admissibility of a previously hypnotized witness' testimony on the subject matter of the hypnotic session, the court did not resolve the larger question whether such a witness should be allowed to testify on other matters relating to the crime that were not expressly covered in the hypnotic session and were allegedly recalled without the aid of hypnosis. The latter question was soon answered, again in the negative.

In *People v. Tait* (1980) 99 Mich.App. 19, 297 N.W.2d 853, the defendant was charged with assaulting Deputy Sheriff Myers with intent to commit murder. At the preliminary hearing Myers testified that the defendant approached him, raised a pistol, and twice threatened to blow his head off; when the defendant ignored his orders to stop and came nearer, Myers shot him. At trial Myers told the same story, with one difference: whereas at the preliminary hearing he had testified that he did not see the defendant attempt to fire the pistol, at trial he testified that just before he shot the defendant he saw the latter move his hand to the top of the weapon. Defense counsel moved for a mistrial, stating he had not learned that Myers' memory had been refreshed by pretrial hypnosis until he so testified. The hypnotist had been the prosecuting attorney. Myers claimed that at the hypnotic session no one told him what to say, and that his trial testimony was his own recollection of the incident. The trial court denied the motion, and the defendant was convicted.

Reversing the judgment, the Michigan court began by recalling its 1978 decision in *Hangsleben*, supra, which held similar testi-

27. It is also enhanced by the subject's psychological "need to 'fill gaps.' When asked a question under hypnosis, rarely will he or she respond, 'I don't know.'" (*Id.* at p. 768.)

28. The court added that hypnosis could continue to be used as an investigative tool, i.e., to help a subject remember verifiable facts that can serve as "leads" for further investigation of the crime—such as a license plate number—"as long as the material remembered during hypnosis is not subsequently used in court as part of an eyewitness' testimony." (*Ibid.*) The court warned, however, that even when a witness is hypnotized for that investigative purpose alone, the session must be conducted under safeguards adequate "to assure the utmost freedom from suggestion" in the event the witness is later called to testify to "recollections *recorded before* the hypnotic interview." (Italics added; *ibid.*) In a footnote at this point the court "note[d], without adopting," the safeguards recommended by Dr. Orne. (See fn. 21, *ante*.)

mony inadmissible. The People argued that the *Frye* rule was inapplicable in this context because the witness' recollection was merely "refreshed" as permitted by law. The court rejected this contention, warning that "Investigatory use of hypnosis on persons who are later called on to testify in court carries a dangerous potential for abuse." (*Id.* 297 N.W.2d at p. 856.) The court then held the case governed by the Michigan version of the *Frye* rule, to wit, that "general scientific recognition [must] be established by testimony of disinterested and impartial experts or disinterested scientists whose livelihood was not intimately connected with the technique. [¶] In the instant case the technique is not new, but we believe the same requirements must be met as are required for the introduction of lie detector or voicewriter evidence or evidence influenced by them." (*Id.* at p. 857.) Applying that test, the court held (*ibid.*) that "Hypnosis has not 'achieved that degree of general scientific acceptance' which will permit its introduction," citing inter alia our decision in *People v. Kelly* (1976) 17 Cal.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240.

The question of disposition remained. The *Frye* error, noted the court, was compounded by the prosecution's failure to disclose before trial the fact that the witness had been hypnotized to restore his memory. The court then concluded, "By virtue of the prosecutor's improper actions in this case, deputy sheriff Kirk Myers' testimony has been *damaged to the extent that it cannot be used on retrial* of the case. In lieu of discharge, the case is remanded for retrial, but the prosecution shall be absolutely prohibited from in any way using *any* testimony of deputy sheriff Myers. The trial court is adjured to permit *no testimony of any kind as to what Myers may have seen or heard.*" (Italics added; 297 N.W.2d at p. 857.)

Any inference, however, that prosecutorial impropriety is a precondition to exclusion of the entire testimony of a previously hypnotized witness was firmly dispelled in the recent Arizona case of *State v. Mena.* There Stephen Koors was stabbed outside a bar by three men. Sometime later he went with a police officer to see two doctors who hypnotized him for the purpose of improving his memory of the assault. The doctors questioned him about the incident, and his answers contained more details than the statements he had previously given to the police. Before terminating the session the doctors told him that after he came out of hypnosis he would remember what he had related to them in the trance. At trial, the defendant moved to exclude Koors' testimony unless it could be shown that his memories of the event were his own recollection and not implanted by suggestions of the hypnotists. The motion was denied and the defendant was convicted.

At the first level of review the Arizona Court of Appeal affirmed the judgment, relying on the "respectable authority" of *Harding* and its progeny to find no fundamental error. (*State v. Mena* (1980) 128 Ariz. 244, 624 P.2d 1292, 1294.) Declining in effect to apply the *Frye* rule, the court reasoned that "hypnotically adduced evidence cannot be equated with, for example, the results of a lie detector examination since one can cross-examine the witness but cannot cross-examine the lie detector." (*Ibid.*)

On further review, however, the Arizona Supreme Court rejected both the authority and the reasoning of the court of appeal, vacated the portion of its opinion dealing with hypnosis, and reversed the assault conviction. (*State v. Mena* (1981) 128 Ariz. 226, 624 P.2d 1274.) The heart of its decision is a careful inquiry into the scientific realities of hypnosis and its effect on potential witnesses. In that inquiry the court relied on a number of scholarly articles as support for conclusions identical to those drawn in *Mack* from expert testimony: i.e., persons under hypnosis are prone to experience false memories, fantasies, and confabulations; these distortions are aggravated by the subject's tendency to respond in the way he believes the hypnotist desires, even without the awareness of either; the subject is unable to distinguish his true memories from pseudomemories implanted during hypnosis; and after hypnosis he will often

be more convinced of the accuracy of the latter than the former, making cross-examination ineffective. (*Id.* 624 P.2d at pp. 1276–1278.) On these grounds the court discredited *Harding* and its progeny, and instead quoted with approval from the above-discussed opinion in *Tait*.

The court then reiterated the Arizona version of the *Frye* rule (citing inter alia *People v. Kelly* (1976) supra, 17 Cal.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240), and stated, "We believe that the same standard should apply to the use of hypnosis to produce testimony by purportedly improving memory." (624 P.2d at p. 1279.) Applying the rule in this context, the court found that although hypnosis has certain approved therapeutic uses, its use "to aid in accurate memory recall is not yet generally accepted." (*Ibid.*) Reaffirming the holding of its 1980 decision in *La Mountain*, supra, the court therefore concluded (*ibid.*): "The determination of the guilt or innocence of an accused should not depend on the unknown consequences of a procedure concededly used for the purpose of changing in some way a witness' memory. Therefore, until hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion or fantasy, we feel that testimony of witnesses which has been tainted by hypnosis should be excluded in criminal cases."

In the course of its opinion the court quoted the published view of Dr. Bernard L. Diamond that a witness who has been hypnotized for the purpose of improving his memory is so contaminated that he is thereafter incompetent to testify. (*Id.* at p. 1277.) In its disposition the court adopted that view and the corresponding holding of *Tait*, ruling that after Koors had been hypnotized it was prejudicial error to allow him to testify at all. The court explained (at p. 1280) that "it will often be difficult to determine whether proferred testimony has been produced by hypnosis or has come from the witness' own memory, unaffected by hypnotic suggestion. In order to ensure against the dangers of hypnosis, therefore, this Court will consider testimony from witnesses who have been questioned under hypnosis regarding the subject of their offered testimony to be *inadmissible in criminal trials from the time of the hypnotic session forward.*" (Italics added.) In a footnote at this point the court recognized that "our decision today may place the state in the difficult position of choosing whether to use a particular witness' testimony at a criminal trial or to subject that witness to hypnotism as an investigatory tool. We do not pass at this time on the state's ability to preserve a witness' prehypnotic testimony" by means of deposition.

With the next case in this series, we come full circle. As we have seen, the sequence began in 1968 with the decision of the Maryland Court of Special Appeals in *Harding*; but in *Polk v. State* (1981) 48 Md. App. 382, 427 A.2d 1041, the same court has now repudiated *Harding* and held instead that *Frye* governs the question before us. This dramatic turn of events would appear to give the *coup de grace* to the moribund precedent relied on here by the Attorney General.

In *Polk* the defendant was charged with orally copulating an eight-year-old boy named Bobby, his next-door neighbor. Some five months after the incident Bobby was taken to the state police barracks to be hypnotized by Sergeant White, a police investigator with minimal experience in hypnosis.[29] Before the session began White was advised that the goal was to determine whether Bobby could remember any sexual contact with this defendant. Bobby's mother and the prosecuting attorney were present during the session. Under White's questioning, Bobby produced details of the alleged misconduct. The defendant moved before trial to suppress the testimony of Bobby and White on the ground that it

29. White's training in hypnosis consisted in attending a two-day seminar by a psychologist and reading three books on hypnotism. Prior to the incident in *Polk* he had hypnotized only two other persons for investigative purposes, and he had never qualified as a hypnosis expert in any court.

would be the product of "an inexact and unproven science" and hence was inadmissible as a matter of law. Counsel also contended that White was not qualified as a hypnosis expert, his questions to Bobby were improperly suggestive, and there was an impermissible delay between the incident and the hypnotic session. The trial court denied the motion, asserting that the fact of hypnosis goes to the weight rather than the admissibility of the testimony. This, of course, was the rule in Maryland since *Harding*.

Bobby's testimony at trial was substantially the same as the answers he gave under hypnosis. On cross-examination he stated he had no recollection of the incident and "forgot the nasty part" until he spoke with White. The prosecution did not call White, however, and did not introduce evidence of the hypnosis. For that reason the court refused to allow a defense expert to testify that hypnotically refreshed recollection is unreliable and White's hypnotic procedure was improper. The defendant's motions to strike Bobby's testimony and for acquittal or mistrial were denied, and he was convicted.

The appellate court acknowledged that Bobby's testimony would have been admissible under its 1968 decision in *Harding*, but held that decision had been undermined 10 years later when Maryland first adopted the *Frye* rule in the case of *Reed v. State* (1978) 283 Md. 374, 391 A.2d 364. The court in effect distinguished away *Harding* on the following rationale: "In *Harding*, we did not assess the *Frye* principle, the rule there enunciated not having been applied in this State until *Reed*; nor did we have occasion to probe the question—here directly raised on the authority of *Reed*—of the general acceptability of hypnotism as a reliable technique for memory retrieval within the relevant scientific community." (Fns. omitted; 427 A.2d at p. 1047.) [30]

To answer that question, the court quoted at length from both *Mack* and *Mena* (and cited *Tait* as being in accord), stressing their reliance on the *Frye* rule in judging the admissibility of hypnotically refreshed recollection. The court then reasoned (*id.* at p. 1048): "*Reed* speaks, of course, of expert testimony based upon the use of a scientific technique. The technique of hypnosis is scientific, but the testimony itself of the witness is the end product of the administration of the technique. The induced recall of the witness is dependent upon, and cannot be disassociated from, the underlying scientific method. Accordingly, we conclude, as did the Minnesota and Arizona Courts, that the *Frye* test must be applied in the instant case, *i.e.*, before Bobby's testimony can be admitted, there must be a determination of whether hypnosis is generally acceptable in the relevant scientific community for the purpose of memory retrieval."

Because that determination had been precluded below by the refusal to allow the defendant to prove the unreliability of hypnosis, the court reversed and remanded with directions to the trial judge to rule in the first instance on the general acceptability of this technique as shown by expert testimony and scholarly publications. Finally, adopting the *Mena* rule of total disqualification of any witness thus contaminated, the court also directed that if the technique is found inadmissible under *Frye*, Bobby must not be allowed to testify at all on the retrial "since the boy had no recollection of the alleged incident giving rise to the charges against the appellant *prior* to the hypnosis. *State v. Mena, supra.*" (*Id.* at p. 1049.)

In *Commonwealth v. Nazarovitch* (1981) —— Pa. ——, 436 A.2d 170, the Supreme Court of Pennsylvania not only joined the foregoing line of decisions barring hypnotically induced testimony, but expressly refused to follow *Hurd* in its attempt to sanitize such evidence by procedural "safeguards." The defendants in *Nazarovitch* were charged with murder on the basis of

30. Only the year before the same court had rejected the same argument, i.e., that the *Reed-Frye* rule undermined *Harding*. (*State v. Temoney* (1980) 45 Md.App. 569, 414 A.2d 240, 244.)

statements by a witness whom the police had caused to be hypnotized on three occasions prior to trial in an effort to refresh her memory of the events. Law enforcement officials were present during each hypnotic session, and furnished some of the questions asked of the witness. The defendants' pretrial motion to suppress the witness' testimony was granted, and the prosecution appealed.

In a unanimous opinion, the Pennsylvania high court held such testimony inadmissible and affirmed the suppression order. The court began by ruling that the admissibility of the challenged testimony must be judged by the *Frye* test, i.e., "whether hypnotically-refreshed testimony is generally accepted in the scientific community as yielding reasonably reliable results." (*Id.* 436 A.2d at p. 173.) As in *Mena*, the court answered the question by examining the published views of leading representatives of that community. From such studies the court concluded, as in both *Mena* and *Mack*, that the scientific community has "grave misgivings" about the reliability of hypnosis in forensic use, for a number of reasons inherent in the phenomenon itself: i.e., "the heightened suggestivity, the increased desire to satisfy the hypnotist, the tendency to confabulate, and the inability to distinguish in one's waking state the fact from the fantasy" (*id.* at p. 174). "Furthermore," the court observed, "the hypnotic subject, upon awakening, is often imbued with a confidence and conviction as to his memory which was not present before. Prehypnosis uncertainty becomes molded, in light of additional recall experienced under hypnosis, into certitude, with the subject unaware of any suggestions that he acted upon or any confabulation in which he engaged. The subject's firm belief in the veracity of his enhanced recollection is honestly held, and cannot be undermined through cross-examination." (*Ibid.*)

The court then carefully reviewed the reasoning and holding of its sister state in *Hurd*, but refused to accede to the urging of the prosecution that it adopt such an approach in Pennsylvania. Rather, the court explained, "we remain unconvinced that the trier of fact could do anything more than speculate as to the accuracy and reliability of hypnotically-refreshed memory. The *Hurd* court's rationale that hypnotically-refreshed recollection might as well be admissible since ordinary eyewitness accounts are also vulnerable to error and inaccuracies does not do full justice to the fact that 'the traditional guaranties of trustworthiness as well as the jury's ability to view the demeanor of the witness are wholly ineffective to reveal distortions of memory induced by the hypnotic process.' [Citation.] It is unchallenged that a jury can more critically analyze a witness' ability to perceive, remember, and articulate his recollections when such testimony has not been hypnotically-refreshed. The probative worth of the hypnotically-adduced evidence cannot overcome the serious and fundamental handicaps inherent therein." (*Id.* at pp. 176–177; accord, *State of Arizona ex rel. Collins v. Superior Court* (1982) 131 Ariz. ——.)

III

[2, 3] From the foregoing cases it appears that the correct analysis of the problem before us is to determine whether hypnotically recalled testimony is subject to the California version of the *Frye* rule, and if so, whether it meets the test of that rule. We proceed to such an analysis.

A

The *Frye* rule is deeply ingrained in the law of this state. It has repeatedly been invoked by our courts to determine the admissibility of evidence based, for example, on polygraph examinations (*People v. Wochnick* (1950) 98 Cal.App.2d 124, 127–128, 219 P.2d 70), "truth serum" (*People v. Jones* (1959) 52 Cal.2d 636, 653, 343 P.2d 577), Nalline testing (*People v. Williams* (1958) 164 Cal.App.2d Supp. 858, 860–862, 331 P.2d 251), experimental systems of blood typing (*Huntingdon v. Crowley* (1966) 64 Cal.2d 647, 653–656, 51 Cal.Rptr. 254, 414 P.2d 382), voiceprint analysis (*People v. Kelly* (1976) supra, 17 Cal.3d 24, 130 Cal.Rptr.

144, 549 P.2d 1240), human bite marks (*People v. Slone* (1978) 76 Cal.App.3d 611, 623–625, 143 Cal.Rptr. 61), and microscopic identification of gunshot residue particles (*People v. Palmer* (1978) 80 Cal.App.3d 239, 250–255, 145 Cal.Rptr. 466). We recently reviewed the several reasons for this rule in *Kelly* (17 Cal.3d at pp. 31–32, 130 Cal.Rptr. 144, 549 P.2d 1240), and need not repeat them here; it is enough to note our conclusion (*id.* at p. 32, 130 Cal.Rptr. 144, 549 P.2d 1240) that "we are persuaded by the wisdom of, and reaffirm our allegiance to, the *Frye* decision and the 'general acceptance' rule which that case mandates."

The Attorney General contends the *Frye* rule is inapplicable in the present context, making in essence the following argument: The rule is assertedly limited to cases in which (1) an expert witness gives his opinion (2) interpreting the results of a new technique for scientifically testing or analyzing physical evidence, and (3) that opinion goes directly to the existence or nonexistence of a disputed fact, which is often the ultimate issue in the litigation. By contrast, in cases such as the present it is not the expert (i.e., the hypnotist) who ordinarily testifies; the process involved (i.e., the hypnotizing of a potential witness to improve his recall) has nothing to do with testing physical evidence; if the expert does testify, he should not be asked to interpret the results of the technique (i.e., to give his opinion on whether the revived memories of the hypnotized subject are true) but simply to discuss its methodology (i.e., to explain how the hypnotic session was conducted); and the latter testimony evidently does not go to the disputed fact or ultimate issue (e.g., the identity of the culprit). Rather, in the typical case the witness is the person who actually perceived the event that is the subject of the litigation, and his testimony is the same as that of any other lay witness, i.e., he states his present recollection of that event to the best of his ability. It is true that his recollection has been refreshed by hypnosis, and that hypnosis does not guarantee truthful or accurate recall. But neither does any other method of reviving memory. That guarantee, as with all witnesses, comes from cross-examination, which permits the trier of fact to determine the truth and accuracy of the hypnotically refreshed testimony.[31]

The argument is unpersuasive for a number of reasons. First, it proceeds from an unduly narrow reading of the opinions invoking the *Frye* rule: as we said in *Kelly*, for example, the rule applies to evidence "developed by" or "based upon" new scientific techniques. (17 Cal.3d at p. 31, 130 Cal.Rptr. 144, 549 P.2d 1240.) Nor are those techniques necessarily limited to manipulation of physical evidence; we do not doubt that if testimony based on a new scientific process operating on purely psychological evidence were to be offered in our courts, it would likewise be subjected to the *Frye* standard of admissibility. In either case, the rule serves its salutary purpose of preventing the jury from being misled by unproven and ultimately unsound scientific methods. (*Kelly*, at pp. 31–32, 130 Cal.Rptr. 144, 549 P.2d 1240.)

Moreover, from the unchallenged expert testimony in the case at bar and the uniform findings of the jurisdictions that have inquired into the matter, it appears that hypnotizing a witness to improve his memory is not in fact like "any other method" of refreshing a witness' recollection. These sources reveal that the hypnotic process does more than permit the witness to retrieve real but repressed memories; it actively contributes to the formation of pseudomemories, to the witness' abiding belief in their veracity, and to the inability of the witness (or anyone else) to distinguish between the two. In these circumstances, as

31. On the assumption that *Frye* is inapplicable, the Attorney General contends the only issue is whether the use of hypnosis in this case was an impermissibly suggestive pretrial procedure that tainted Catherine's subsequent testimony, citing the *Wade-Neil* rule. (*United States v. Wade* (1967) 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149; *Neil v. Biggers* (1972) 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401.) Finding that defendant did not sustain his burden of proof under that rule, the Attorney General concludes the testimony was admissible.

noted above, the resulting recall of the witness "is dependent upon, and cannot be disassociated from" the underlying hypnosis. (*Polk v. State* (1981) supra, 48 Md.App. 382, 427 A.2d at p. 1048.) And if the testimony is thus only as reliable as the hypnotic process itself, it must be judged by the same standards of admissibility.

The question has in any event been decided in California. In *People v. Diggs* (1980) 112 Cal.App.3d 522, 169 Cal.Rptr. 386, the court held *Kelly* applicable in this context on essentially the same reasoning: "In view of the modification of memory and demeanor which generally follow from treatment by hypnosis, we are persuaded that posthypnotic testimony may in many instances properly be termed a product of the technique. The admissibility of evidence based upon a new scientific technique is governed by *People v. Kelly* .... [¶] The *Kelly* court was concerned with and sought to mitigate the dangerous tendency of lay jurors to give considerable and often undue weight to scientific evidence presented by experts with impressive credentials. (17 Cal.3d, at p. 31, 130 Cal.Rptr. 144, 549 P.2d 1240.) Such procedures are invested with a '"misleading aura of certainty which often envelops a new scientific process, obscuring its currently experimental nature."' (17 Cal.3d, at p. 32, 130 Cal.Rptr. 144, 549 P.2d 1240.) This is certainly true of hypnosis." (112 Cal.App.3d at pp. 530–531, 169 Cal. Rptr. 386.) We approve this portion of *Diggs*.[32]

In accord, therefore, with the courts of Michigan, Minnesota, Arizona, Maryland, and Pennsylvania, we hold that in this state the testimony of witnesses who have undergone hypnosis for the purpose of restoring their memory of the events in issue cannot be received in evidence unless it satisfies the *Frye* standard of admissibility.

B

It is the proponent of such testimony, of course, who has the burden of making the necessary showing of compliance with *Frye*, i.e., of demonstrating by means of qualified and disinterested experts that the new technique is generally accepted as reliable in the relevant scientific community. (*Kelly*, at pp. 36–40, 130 Cal.Rptr. 144, 549 P.2d 1240.) In the case at bar the prosecution did not take up that burden, and made no such showing. On this ground alone we would ordinarily be justified in holding the challenged testimony inadmissible. But while such a ruling would dispose of the appeal before us, it would provide the bench and bar with little guidance in other litigation presenting the same questions. Moreover, in the particular circumstances of this case the prosecution had little if any opportunity to make the required showing.[33] We there-

32. In *Diggs* the Court of Appeal went on to hold, however, that on the record before it "there was an adequate showing to establish the admissibility of [the witness'] posthypnotic testimony under *Kelly*" (*id.* at p. 531, 169 Cal. Rptr. 386). This appears to be a misreading of the requirements of *Kelly*, and therefore of *Frye*. According to the Court of Appeal, the psychiatrist who hypnotized the witness gave as his opinion that hypnotically enhanced testimony is reliable, while Dr. Bernard Diamond gave a contrary opinion, "bolstered by the introduction of several corroborating affidavits by other experts in the field." (*Id.* at p. 530, 169 Cal.Rptr. 386.) The court nevertheless deemed this conflict immaterial, reasoning that "Dr. Diamond's testimony to the contrary, it seems that the lower court here was presented with sufficient evidence of the reliability of the method used" (*id.* at p. 531, 169 Cal.Rptr. 386). Thus the court apparently believed that *Kelly-Frye* is satisfied whenever there is "sufficient evidence" from which the trial court could find that hypnotic memory enhancement is reliable—and under normal rules of proof the testimony of one witness is enough for this purpose, despite contradictory testimony. (See Evid.Code, § 411.)

Yet the *Kelly-Frye* requirement is not fulfilled merely by evidence that one expert personally believes the challenged procedure is reliable; the court must be able to find that the procedure is generally accepted as reliable by the larger scientific community in which it originated. (*Kelly*, at pp. 30–32, 37, 130 Cal.Rptr. 144, 549 P.2d 1240.) It is obvious that no such finding could be made on the record in *Diggs*. To that extent, accordingly, the decision is disapproved.

33. At the time of trial (June 1979) neither *Diggs* nor the leading out-of-state cases applying *Frye* in this context had yet been decided. The prevailing rule in other jurisdictions was still that of *Harding* and its progeny, i.e., the fact of

fore reach the *Frye* issue on its merits, both for reasons of precedent and considerations of fairness.

Yet it does not follow, as the Attorney General claims, that the record is inadequate to support a decision on the general admissibility of hypnotically aided testimony. Here the issue was fully raised by defendant. Not only did he make a timely pretrial motion on this ground, but on cross-examination of Catherine he probed critically into the purpose, method, and results of her hypnotic experience. By the testimony of Dr. Schafer, defendant then exposed the multiple risks in using hypnosis to restore a witness' memory; and he elicited from Dr. Schafer an unequivocal expert opinion that hypnosis is not reliable as a truth-seeking technique.

To be sure, in *Kelly* we doubted whether the testimony of a single witness, even if qualified, is sufficient to establish the views of an entire scientific community as to the reliability of a new procedure. (17 Cal.3d at p. 37, 130 Cal.Rptr. 144, 549 P.2d 1240.) As will appear, however, Dr. Schafer's testimony is supported by a substantial body of scholarly treatises and articles on the subject. The Attorney General complains that "literature is not evidence," and that it would be improper for this court to "pick and choose among that literature to decide issues of scientific fact." The remark betrays a fundamental misunderstanding of the task before us: our duty is *not* to decide whether hypnotically induced recall of witnesses is reliable as a matter of "scientific fact," but simply whether it is generally accepted as reliable by the relevant scientific community. We recognized in *Kelly* (*ibid.*) that "Ideally, resolution of the general acceptance issue would require consideration of the views of a typical cross-section of the scientific community, including representatives, if there are such, of those who oppose or question the new technique." But considerations of judicial economy make it impractical to require those views to be presented personally by each scientist testifying in open court: as pointed out in *Mack* (292 N.W.2d at p. 766), such a procedure would be prohibitively expensive, and would be frustrated in any event by the difficulty of finding local experts qualified to testify on hypnosis as an investigative rather than a therapeutic tool.

Accordingly, for this limited purpose scientists have long been permitted to speak to the courts through their published writings in scholarly treatises and journals. (*Kelly*, at p. 35, 130 Cal.Rptr. 144, 549 P.2d 1240; *Huntingdon v. Crowley* (1966) supra, 64 Cal.2d 647, 656, 51 Cal.Rptr. 254, 414 P.2d 382; *People v. Palmer* (1978) supra, 80 Cal.App.3d 239, 252–254, 145 Cal.Rptr. 466; *People v. Law* (1974) 40 Cal.App.3d 69, 75, 114 Cal.Rptr. 708; *United States v. Addison* (D.C.Cir.1974) 498 F.2d 741, 744–745.) The courts view such writings as "evidence," not of the actual reliability of the new scientific technique, but of its acceptance *vel non* in the scientific community. Nor do the courts "pick and choose" among the writings for this purpose. On many topics—including hypnosis—the scientific literature is so vast that no court could possibly absorb it all. But there is no need to do so, because the burden is on the proponent of the new technique to show a scientific consensus supporting its use; if a fair overview of the literature discloses that scientists significant either in number or expertise publicly oppose that use of hypnosis as unreliable, the court may safely conclude there is no such consensus at the present time.

That is the case before us. On the topic of hypnotically aided recall we have reviewed numerous scientific treatises and articles in scholarly journals.[34] From this re-

hypnosis "goes to the weight, not the admissibility" of the testimony. As we have seen, the trial court expressly relied on that rule in denying defendant's motion to exclude the posthypnotic testimony of the complaining witness. Believing that only credibility was in issue, the court refused to allow the prosecution to open up the subject of hypnosis in its case-in-chief.

34. We have also reviewed, but given little weight to, law review articles on this topic by authors who are exclusively members of the legal profession. A number of such articles are cited in *State v. Mack* (Minn.1980) supra, 292 N.W.2d 764, 765, footnote 4, and are discussed and criticized in Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospec-*

view it clearly appears that major voices in the scientific community oppose the use of hypnosis to restore the memory of potential witnesses, with or without procedural safeguards, on the ground of its intrinsic unreliability. This unreliability is due both to certain properties of human memory and to factors inherent in the nature of hypnosis. We begin with the former, which have been little mentioned in the cases.

C

The principal proponent of hypnotically aided recall is a police department psychologist, Martin Reiser, Ed.D.[35] According to his published writings, Dr. Reiser operates on the belief that human memory is like a videotape machine that (1) faithfully records, as if on film, every perception experienced by the witness, (2) permanently stores such recorded perceptions in the brain at a subconscious level, and (3) accurately "replays" them in their original form when the witness is placed under hypnosis and asked to remember them. (See, e.g., Reiser, Handbook of Investigative Hypnosis (1980), ch. 40; Reiser, *Hypnosis as a Tool in Criminal Investigation* [Nov. 1976] The Police Chief 36, 40; Reiser, *Hypnosis as an Aid in a Homicide Investigation* (1974) 17 Am.J. Clinical Hypnosis 84, 85.) With minor variations, this belief—or assumption—is apparently shared by police psychologists and "hypnotechnicians" at all levels of law enforcement, and serves as the theory on which such personnel base their practice of hypnotizing potential witnesses to improve their recall of crime-related events.

The professional literature, however, rejects this belief: the scientists who work in the field generally agree that, as Dr. Schafer testified at trial, the memory does *not* act like a videotape recorder, but rather is subject to numerous influences that continuously alter its content. This view has been expressed at least since the pioneer study of Sir Frederic C. Bartlett of Cambridge University, published a half-century ago. (Bartlett, Remembering (1932, reprinted 1964).) Using a different simile in that pretelevision era, Bartlett critically examined the conventional belief of his time that "traces" of every event were laid down in the mind and permanently stored until they were "re-excited" by a stimulus and reappeared as memories. Bartlett began his analysis by pointing out that "there are obvious difficulties. The traces are generally supposed to be of individual and specific events. Hence, every normal individual must carry about with him an incalculable number of individual traces. Since these are all stored in a single organism, they are in fact found to be related one to another, and this gives to recall its inevitably associative character" (*id.* at p. 203).

Less obvious but even more important was Bartlett's now-famous conclusion, drawn from his experimental work, that memory is productive rather than reproductive: "The first notion to get rid of is that memory is primarily or literally reduplicative, or reproductive.... In fact, if we consider evidence rather than presupposition, remembering appears to be far more decisively an affair of construction rather than one of mere reproduction." (*Id.* at pp. 204–205.) As had often been shown, "condensation, elaboration and invention are common features of ordinary remembering"

tive Witness (1980) 68 Cal.L.Rev. 313, 327–331 (hereinafter cited as Diamond, *Inherent Problems*). As Dr. Diamond concludes, the articles suffer generally from an underestimation of the scientific risks in using hypnosis to restore a witness' memory, and an overestimation of the ability of traditional legal devices (e.g., expert testimony, cross-examination) to avoid those risks. It appears as true of hypnosis as of voiceprint analysis that "This area may be one in which only another scientist, in regular communication with other colleagues in the field, is competent to express such an opinion [as to the view of the scientific community].... In considering the position of the scientific community, a court is bound to let scientists speak for themselves." (*Kelly*, at pp. 39–40 of 17 Cal.3d, 130 Cal.Rptr. 144, 549 P.2d 1240.)

35. Dr. Reiser is the director of behavioral science services of the Los Angeles Police Department. He is also the director of the Law Enforcement Hypnosis Institute, a proprietary school in Los Angeles that teaches courses in hypnotism to police and other law enforcement personnel.

(*id.* at p. 205). Expanding on the latter point, Bartlett reported that "our studies have shown us that all manner of changes in detail constantly occur in instances which every normal person would admit to be genuine instances of remembering. There are changes in order of sequence, changes of direction, of complexity of structure, of significance, . . ." (*Id.* at p. 312.) In summary, "Remembering is not the re-excitation of innumerable fixed, lifeless and fragmentary traces. It is an imaginative reconstruction, or construction, built out of the relation of our attitude towards a whole active mass of organized past reactions or experience . . . ." (*Id.* at p. 213.)

Bartlett's insight that "the past is being continually re-made, reconstructed in the interests of the present" (*id.* at p. 309) prevailed in due course among his colleagues, and is now the generally accepted view of the profession. Of the many works that support this view, we shall discuss but two as examples. In his analysis of the "permanent memory" hypothesis, Professor Douglas L. Hintzman observes that "Before even considering the relevant data, we can see a number of reasons for thinking that true forgetting does occur. Throughout our adult lives brain cells die and are not replaced. Even those that survive undergo continual change. There is a constant 'turnover' of the chemicals that make them up, just as there is in other parts of the body. And as we deal with our changing environment, it seems likely that we encode many new experiences by modifying trace structures originally developed to deal with old ones." (Hintzman, The Psychology of Learning and Memory (1978) p. 298.) He then examines the two phenomena most often cited as "evidence" for the permanent memory hypothesis.

The first is the work of Wilder Penfield, a neurosurgeon who has performed numerous brain operations on patients with advanced cases of epilepsy. In the course of those operations Penfield discovered that when he stimulated various locations in the brain with an electric probe, the patients—who were conscious during the procedure—reported experiencing vivid and detailed "flashbacks" reminding them of events that assertedly occurred in their childhood. To explain these reports, Penfield proposed a model of memory very similar to the "videotape recorder" theory espoused by the police psychologists.[36] Professor Hintzman points out several serious objections to Penfield's conclusions. First, on some occasions the patients report that they experience not a "memory" but a dream or a hallucination, or simply a feeling of *deja vu.* (*Id.* at p. 301.) It is difficult if not impossible to distinguish between these phenomena. Next, "There is never any independent verification of the reported 'memories'—nothing to indicate the experience is really an event from the patient's past. There is only the subject's statement that it seems familiar, and therefore must be something that happened at an earlier time." (*Id.* at pp. 301–302.) As we shall see, this lack of independent verification infects most of the claimed "evidence" of reliable hypnotic recall. Finally, "such reports have not been obtained from non-epileptic patients" (*id.* at p. 302), and hence form a scientifically inadequate basis for drawing conclusions about the memory processes of the large majority of the population.

The second phenomenon often cited as evidence for permanent memory is "hypnotic age regression." This is the procedure by which, under hypnotic suggestion, a subject appears to regress in mental age until an earlier date in his life, then seems to "relive" the events he experienced on that date and their accompanying emotions. Again Professor Hintzman finds little persuasive value in such demonstrations, stressing that the subject's claim to recall specific individ-

36. Dr. Reiser, for example, accepts Penfield's evidence at face value, and relates without question the latter's somewhat extravagant conclusion that "the brain functions much like a high fidelity recorder, putting on tape, as it were, *every experience from the time of birth, possibly even before birth,* and that these experiences and associated feelings are available for replay today in as vivid a form as when they first occurred." (Italics added; fn. deleted.) (Reiser, Handbook of Investigative Hypnosis (1980) p. 8.)

uals or events from his childhood is rarely if ever corroborated because of obvious difficulties in doing so. He also notes studies in which hypnotized subjects have instead undergone age "progression"—i.e., have been made to believe they are living 10 or more years *in the future*—and have reported their future "memories" with equal conviction and verisimilitude. "Good hypnotic subjects," the author explains, "will go to great lengths to comply with the hypnotist's requests, and this apparently includes constructing realistic scenarios and acting them out." (*Id.* at p. 303.) Professor Hintzman concludes that while the permanent memory hypothesis is tantalizing in its simplicity, the evidence offered in its support is weak and the hypothesis is probably incorrect. (*Id.* at p. 304.)[37]

Elizabeth F. Loftus, Ph.D., a highly experienced investigator in the field of memory, reaches similar conclusions in a number of her articles (e.g., Loftus & Loftus, *On the Permanence of Stored Information in the Human Brain* (1980) 35 Am. Psychologist 409) and in her valuable treatise, Eyewitness Testimony (1979). Adopting a different simile, she explains in the latter that "During the time between an event and a witness' recollection of that event—a period often called the 'retention interval'—the bits and pieces of information that were acquired through perception do not passively reside in memory waiting to be pulled out like fish from water. Rather, they are subject to numerous influences. External information provided from the outside can intrude into the witness' memory, as can his own thoughts, and both can cause dramatic changes in his recollection." (*Id.* at pp. 86–87.) Her reasons for this view deserve close attention. On the basis of her research Dr. Loftus identifies a number of the influences that can cause a memory to change during the retention interval without the witness' awareness: the witness may "compromise" the memory with a subsequently learned but inconsistent fact (*id.* at p. 56); he may "incorporate" into the memory a nonexistent object or event casually mentioned by a third party, e.g., in later questioning (*id.* at p. 60); post-event information may change the way the witness "feels" about the original incident, e.g., may affect his impression of how noisy or how violent it was (*id.* at pp. 70–72); because a witness is under great social pressure to be complete and accurate he may fill gaps in his memory by guessing, and thereafter "recall" those guesses as part of the memory;[38] and if the witness is subjected to repeated questioning, any erroneous statement he made early on may be "frozen into" the memory and reappear later as a fact (*id.* at pp. 84–86). There is no way to tell, moreover, whether any given detail recalled by the witness comes from his original perception or from external information that he subsequently acquired. (*Id.* at p. 78.)

From these studies Dr. Loftus has no doubt that postevent experiences can alter any witness' memory, subtly but irreversibly. The author then considers and rejects the permanent memory hypothesis. Observing that "People cling to highly suspicious evidence to support this belief" (*id.* at p. 115), she is particularly critical of the "evidence" allegedly provided by hypnotic age regression: "many investigators believe that hypnosis is unreliable and unpredictable, and is just as likely to create new memories as to recover old ones." (*Ibid.*) And because such accounts are ordinarily unverifiable, "Vivid memories may be produced, but who can say whether these have or have not been altered by subsequent experiences to which a person has been exposed." (*Ibid.*) Dr. Loftus concedes it

37. A leading scientific study is in accord. (O'Connell, et al., *Hypnotic Age Regression: An Empirical and Methodological Analysis* (Dec. 1970) 76 J.Abnorm.Psych. (monograph supp. pt. 2).)

38. In language particularly relevant to the risks of hypnotically inducing recall through the "videotape recording" technique, Dr. Loftus adds: "while an initial guess may be offered with low confidence, later, when the witness mistakes the guess for a real memory, the confidence level can rise. This seems to occur because a witness is now 'seeing' an item that he himself has constructed in memory." (*Id.* at p. 82.)

will never be possible to "prove" conclusively that a witness does *not* have an unaltered memory trace of a given event, for it can always be objected that the technique for unearthing it was inadequate—i.e., that "we did not dig deep enough." (*Id.* at p. 117.) Nevertheless, after careful investigation the author reports that "My colleagues and I have used a number of different techniques to try to induce such witnesses to reveal evidence of any traces of the original information. In all of these cases, we have been unable to provide *any* evidence that an intact original memory remains." (Italics added; *id.* at p. 118.)

The "videotape recorder" theory of law enforcement hypnotists also lacks empirical support for the third of its assumptions, to wit, that upon being unlocked by hypnosis the witness' repressed memories are "replayed" without further modification as he recalls the original event.[39] Once more the research results are otherwise: in this final stage of the process, known as "retrieval," the accuracy of the witness' memory may be adversely affected by outside factors even as he recalls it. Again Dr. Loftus identifies some of those influences as follows: the witness may subconsciously tailor his recall to conform to expectations implied by the person questioning him; those expectations may be conveyed, intentionally or not, either by such conduct of the questioner as tone of voice, emphasis, pauses, facial expression and other "body language" (*id.* at pp. 72–74), or by the particular method of interview used[40] or precise form of question asked[41] (*id.* at pp. 90–94); and the witness may be more likely to respond to such cues if the questioner is a status figure (e.g., a doctor or a law enforcement official) than if he is merely a passerby inquiring what happened (*id.* at pp. 97–98).

Lastly, Dr. Loftus warns there is no clear correlation between the witness' confidence in the accuracy of his recall and its accuracy in fact: indeed, studies have shown that in some circumstances "people can be more confident about their wrong answers than their right ones. To be cautious, one should not take high confidence as any absolute guarantee of anything." (*Id.* at p. 101.) The final distorting influence on memory retrieval, then, is a well-documented phenomenon: "Most people, including eyewitnesses, are motivated by a desire to be correct, to be observant, and to avoid looking foolish. People want to give an answer, to be helpful, and many will do this at the risk of being incorrect. People want to see crime solved and justice done, and this desire may motivate them to volunteer more than is warranted by their meager memory. The line between valid retrieval and unconscious fabrication is easily crossed." (*Id.* at p. 109.)[42]

D

We have dwelt on the reports of current research into the operation of human memory for two reasons. First, as we have seen, that research convincingly undermines the "videotape recorder" theory on which most law enforcement hypnosis of potential

39. The theory also lacks support for its initial assumption, i.e., that the witness is capable in the first instance of "recording" his every perception of the original event with complete fidelity. Extensive work by memory investigators (including Dr. Loftus) demonstrates that in this stage of the process, known as "acquisition" or "encoding," the witness is likewise subject to external and internal influences that tend to distort his perceptions at the very moment he experiences them. For present purposes, however, we need not discuss this phenomenon further: it occurs potentially in every witness, and has no immediate counterpart in the procedure of hypnotically aided recall.

40. The interrogatory method ("Did you see a gun?") produces recollections of lower accuracy but greater detail than the narrative method ("Tell me what you saw.").

41. The classic distinction is between asking the witness, "Did you see a gun?" and asking him, "Did you see the gun?" Other semantic differences with significant effects on accuracy have been reported in the literature. (See, e.g., Hilgard & Loftus, *Effective Interrogation of the Eyewitness* (1979) 27 Internat.J. Clinical & Experimental Hypnosis 342, 346–351.)

42. Such motivation may be all the more powerful, of course, when the witness to the crime is also its victim. In that event the natural desire to see "justice done" may be fueled by a deeper yearning for vengeance.

witnesses is premised.[43] Second, each of the phenomena found by such research to contribute to the unreliability of normal memory reappears in a more extreme form when the witness is hypnotized for the purpose of improving his recollection.[44]

We turn, then, to the professional literature on the latter topic. For present purposes we need not add to this already lengthy discussion by analyzing that literature in detail; it will be enough if we simply set forth its principal relevant conclusions, with citations to a representative sample of supporting studies. The conclusions will necessarily be oversimplified, but full explanations of each point can be found in the cited authorities and similar works.[45]

1. Hypnosis is by its nature a process of suggestion, and one of its primary effects is that the person hypnotized becomes extremely receptive to suggestions that he perceives as emanating from the hypnotist. The effect is intensified by another characteristic of the hypnotic state, to wit, that the attention of the subject is wholly focused on and directed by the hypnotist. The suggestions may take the form of explicit requests or predictions by the hypnotist; or they may be inferred by the subject from information he acquired prior to or during the hypnotic session, or from such cues as the known purpose of that session, the form of questions asked or comments made by the hypnotist, or the hypnotist's demeanor and other nonverbal conduct. The suggestions can be entirely unintended —indeed, unperceived—by the hypnotist himself.[46]

2. The person under hypnosis experiences a compelling desire to please the hyp-

43. On the basis of that research, for example, Dr. Orne flatly rejects the "videotape" model: "Suffice it to say that such a view is counter to any currently accepted theory of memory and is not supported by scientific data [citations]." (Orne, *The Use and Misuse of Hypnosis in Court* (1979) 27 Internat.J. Clinical & Experimental Hypnosis 311, 321 [hereinafter cited as Orne, *Use and Misuse*].) While he concedes that in working with the hypnotic subject the "videotape" imagery may at times be useful, he explains that "no competent hypnotherapist would, in using such a metaphor, confuse it with the manner in which memory is organized." (*Id.* at p. 325, fn. 7.)

44. For this reason we cannot subscribe to the theory of *Hurd* (432 A.2d at p. 92) that however untrustworthy hypnotically induced recall may be, it is at least no worse than ordinary memory if it is accompanied by six listed "safeguards." We explain above (Part II C, *ante*) why we find such "safeguards" both inadequate and impractical.

45. As will appear, the most persuasive spokesmen for the relevant scientific community are Drs. Diamond and Orne. Dr. Diamond, who is both Clinical Professor of Psychiatry and Professor of Law at the University of California, is well known to the legal profession. He is the author of numerous articles in the area of psychiatry and the law, and we have often relied on his views. (See, e.g., *People v. Burnick* (1975) 14 Cal.3d 306, 327, 328 & fn. 19, 121 Cal.Rptr. 488, 535 P.2d 352, where we describe Dr. Diamond as "a nationally known specialist in this field.")

Martin T. Orne, M.D., Ph.D., is equally well known and respected by that segment of the medical profession specializing in the theory and practice of hypnosis. He is at once an investigator, a clinician, and an educator: director of the Unit for Experimental Psychiatry at The Institute of Pennsylvania Hospital, one of the nation's most active laboratories of hypnosis research, he is also senior attending psychiatrist at the same hospital and Professor of Psychiatry at the University of Pennsylvania. In addition, Dr. Orne is the president of the International Society of Hypnosis, the editor of the International Journal of Clinical and Experimental Hypnosis, the senior author of the article on hypnosis in the Encyclopaedia Britannica (see fn. 15, *ante*), and the author of leading articles on hypnosis research in the scholarly journals. He has often testified as an expert on hypnosis, and his eminence in the field has repeatedly been recognized in the published opinions. (See, e.g., *State v. Mack* (Minn.1980) supra, 292 N.W.2d 764, 766; *State v. Hurd* (1980) 173 N.J.Super. 333, 414 A.2d 291, 296; *People v. Hughes* (1979) 99 Misc.2d 863, 417 N.Y.S.2d 643, 646.)

By relying primarily on Drs. Diamond and Orne, of course, we do not mean to denigrate the contributions of many other experts in hypnosis whose writings we have also consulted (e.g., Ernest R. Hilgard, Ph.D., director of the Stanford University laboratory of hypnosis research), some of whom we cite hereinafter. On the present issue, however, the majority are in full agreement with the essential findings and conclusions of Drs. Diamond and Orne.

46. Diamond, *Inherent Problems*, page 333; Orne, *Use and Misuse*, pages 322–327; Orne, *On the Simulating Subject as a Quasi-Control Group in Hypnosis Research: What, Why, and*

notist by reacting positively to these suggestions, and hence to produce the particular responses he believes are expected of him. Because of this compulsion, when asked to recall an event either while in "age regression" or under direct suggestion of heightened memory ("hypermnesia"), he is unwilling to admit that he cannot do so or that his recollection is uncertain or incomplete. Instead, he will produce a "memory" of the event that may be compounded of (1) relevant actual facts, (2) irrelevant actual facts taken from an unrelated prior experience of the subject, (3) fantasized material ("confabulations") unconsciously invented to fill gaps in the story, and (4) conscious lies—all formulated in as realistic a fashion as he can.[47] The likelihood of such self-deception is increased by another effect of hypnosis, i.e., that it significantly impairs the subject's critical judgment and causes him to give credence to memories so vague and fragmentary that he would not have relied on them before being hypnotized.[48]

3. During the hypnotic session, neither the subject nor the hypnotist can distinguish between true memories and pseudo-memories of various kinds in the reported recall; and when the subject repeats that recall in the waking state (e.g., in a trial), neither an expert witness nor a lay observer (e.g., the judge or jury) can make a similar distinction. In each instance, if the claimed memory is not or cannot be verified by wholly independent means, no one can reliably tell whether it is an accurate recollection or mere confabulation. Because of the foregoing pressures on the subject to present the hypnotist with a logically complete and satisfying memory of the prior event, neither the detail, coherence, nor plausibility of the resulting recall is any guarantee of its veracity.[49]

4. Nor is such guarantee furnished by the confidence with which the memory is initially reported or subsequently related: a witness who is uncertain of his recollections before being hypnotized will become convinced by that process that the story he told under hypnosis is true and correct in every respect. This effect is enhanced by two techniques commonly used by lay hypnotists: before being hypnotized the subject is told (or believes) that hypnosis will help him to "remember very clearly everything that happened" in the prior event, and/or during the trance he is given the suggestion that after he awakes he will "be able to remember" that event equally clearly and compre-

How, in Hypnosis: Research Developments and Prespectives (Fromm & Schor edits. 1972) pages 400–403 [hereinafter cited as *Hypnosis Research*]; Orne, *The Nature of Hypnosis: Artifact and Essence* (1959) 58 J.Abnorm. & Soc. Psych. 277, 280–286, 297; see generally Hilgard, Hypnotic Susceptibility (1965); Weitzenhoffer, Hypnotism: An Objective Study in Suggestibility (1953); Hull, Hypnosis and Suggestibility (1933).

47. In a recent California case, for example, the complaining witness underwent no less than four pretrial hypnotic sessions for the purpose of improving her memory of the crime. The sessions were conducted by a physician experienced in the use of hypnosis, and he was convinced that the witness was in fact hypnotized on each occasion. He was of the opinion, however, that the entire recollection produced by the witness while in the trance state was a deliberate lie. He explained that a hypnotized person "is able to lie, and will lie for the same reasons he would lie in a nonhypnotic condition." (*People v. Lopez* (1980) 110 Cal.App.3d 1010, 1017, 168 Cal.Rptr. 378.) The Court of Appeal accepted this explanation, and concluded that "the hypnotic sessions were not instrumental in refreshing the victim's memory. On the contrary, throughout those sessions she continued to repeat a fabricated tale." (*Id.* at p. 1018, 168 Cal.Rptr. 378.)

48. Diamond, *Inherent Problems*, pages 335, 337–338; Orne, *Use and Misuse*, pages 316–320; Putnam, *Hypnosis and Distortions in Eyewitness Testimony* (1979) 27 Internat.J. Clinical & Experimental Hypnosis 437, 446; Gibson, Hypnosis: Its Nature and Therapeutic Uses (1977) pages 58–59; Shor, *The Fundamental Problem in Hypnosis Research as Viewed From Historic Perspectives*, in *Hypnosis Research*, pages 37–39; Hilgard, Hypnotic Susceptibility (1965) page 9; Hull, Hypnosis and Suggestibility (1933) pages 111–115.

49. Diamond, *Inherent Problems*, pages 333–335, 337–338, 340; Orne, *Use and Misuse*, pages 317–318, 320; Spiegel, *Hypnosis and Evidence: Help or Hindrance?* (1980) 347 Annals N.Y.Acad.Sci. 73, 79; Kroger & Douce, *Hypnosis in Criminal Investigation* (1979) 27 Internat.J. Clinical & Experimental Hypnosis 358, 365–367.

hensively.[50] Further enhancement of this effect often occurs when, after he returns to the waking state, the subject remembers the content of his new "memory" but forgets its source, i.e., forgets that he acquired it during the hypnotic session ("posthypnotic source amnesia"); this phenomenon can arise spontaneously from the subject's expectations as to the nature and effects of hypnosis, or can be unwittingly suggested by the hypnotist's instructions. Finally, the effect not only persists, but the witness' conviction of the absolute truth of his hypnotically induced recollection grows stronger each time he is asked to repeat the story; by the time of trial, the resulting "memory" may be so fixed in his mind that traditional legal techniques such as cross-examination may be largely ineffective to expose its unreliability.[51]

IV

The professional literature thus fully supports the testimony of Dr. Schafer and the similar findings of the courts in *Mack*, *Mena*, and *Nazarovitch*. It also demonstrates beyond any doubt that at the present time the use of hypnosis to restore the memory of a potential witness is *not* generally accepted as reliable by the relevant scientific community. Indeed, representative groups within that community are on record as expressly opposing this technique for many of the foregoing reasons, particularly when it is employed by law enforcement hypnotists.[52] In these circumstances it is obvious that the *Frye* test of admissibility has not been satisfied. We therefore hold, in accord with the decisions discussed above (Part II C, *ante*), that the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward. It follows that the trial court erred in denying defendant's motion to exclude Catherine's testimony.[53]

50. Such suggestions are recommended by police hypnosis manuals (e.g., Reiser, Handbook of Investigative Hypnosis (1980) ch. 40), and were given in several of the cases discussed herein (e.g., *Harding*, *Mack*, and *Mena*).

51. Diamond, *Inherent Problems*, pages 339–340; Orne, *Use and Misuse*, pages 320, 327, 332; Cooper, *Hypnotic Amnesia*, in *Hypnosis Research*, pages 223–231; Cooper, *Spontaneous and Suggested Posthypnotic Source Amnesia* (1966) 14 Internat.J. Clinical & Experimental Hypnosis 180; Evans & Thorn, *Two Types of Posthypnotic Amnesia: Recall Amnesia and Source Amnesia* (1966) 14 Internat.J. Clinical & Experimental Hypnosis 162; Hilgard, Hypnotic Susceptibility (1965) pages 166, 182.

52. Thus in October 1978 the Society for Clinical and Experimental Hypnosis adopted a resolution reading in part:

"The Society for Clinical and Experimental Hypnosis views with alarm the tendency for police officers with minimal training in hypnosis and without a broad professional background in the healing arts employing hypnosis to presumably facilitate recall of witnesses or victims privy to the occurrence of some crime. Because we recognize that hypnotically aided recall may produce either accurate memories or at times may facilitate the creation of pseudo memories, or fantasies that are accepted as real by subject and hypnotist alike, we are deeply troubled by the utilization of this technique among the police. It must be emphasized that there is no known way of distinguishing with certainty between actual recall and pseudo memories except by independent verification.

"Police officers typically have had limited technical training and lack the broad understanding of psychology and psychopathology. Their orientation is to obtain the information needed to solve a crime rather than a concern focusing on protecting the health of the subject who was either witness to, or victim of, a crime. Finally, police officers understandably have strong views as to who is likely to be guilty of a crime and may easily inadvertently bias the hypnotized subject's memories even without themselves being aware of their actions." (27 Internat.J. Clinical & Experimental Hypnosis (1979) 452.)

In August 1979 an identical resolution was adopted by the International Society of Hypnosis. (*Id.* at p. 453.)

53. We address the question of retroactivity for the guidance of bench and bar. In *People v. Gainer* (1977) 19 Cal.3d 835, 139 Cal.Rptr. 861, 566 P.2d 997, we held it error to give the "*Allen* instruction" to potentially deadlocked juries; that instruction directed minority jurors to take into account the fact that a majority of their fellow-jurors disagreed with them, and implied that if the jury fails to agree the case will necessarily be retried. Prior to our ruling, a number of published opinions of the Courts of Appeal had expressly approved the giving of

[4] We briefly discuss certain limitations on the rule. First, a previously hypnotized witness is not incompetent in the strict sense of being unable to express himself comprehensibly or understand his duty to tell the truth (Evid.Code, § 701), or of lacking the general capacity both to perceive and remember (Jefferson, Cal. Evidence Benchbook (1972) § 26.2, p. 351). Accordingly, if the prosecution should wish to question such a witness on a topic *wholly unrelated* to the events that were the subject of the hypnotic session, his testimony as to that topic would not be rendered inadmissible by the present rule.

Second, like the court in *Mack* (fn. 28, *ante*) we do not undertake to foreclose the continued use of hypnosis by the police for purely investigative purposes. We recognize that on occasions in the past a subject has apparently been helped by hypnosis to remember a verifiable fact—such as a license plate number—that the police previously did not know and were then able to use as a "lead" for further investigation of the crime. It is neither appropriate nor necessary for us to enter the debate as to the need for this investigative technique,[54] or its reliability.[55] We reiterate, however, that for the reasons stated above any person who has been hypnotized for investigative purposes will not be allowed to testify as a witness to the events of the crime. Like the court in *Mena* (624 P.2d at p. 1280, fn. 1), we do not decide at this time whether procedural devices may be available to alleviate any resulting difficulty of proof.

[5] Third, error in admitting the testimony of a previously hypnotized witness is not reversible per se; its effect must still be judged under the prejudicial error test adopted in *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243. (See *People v. Kelly*, supra, at p. 40 of 17 Cal.3d, 130 Cal.Rptr. 144, 549 P.2d 1240.) The test is to

Allen-type instructions in California. Nevertheless, we concluded that our holding would apply to all cases not yet final as of the date of the *Gainer* decision, explaining that "our disapproval of *Allen*-type charges is not directed at the prophylactic prevention of police misconduct [citations]; rather it is aimed at judicial error which significantly infects the fact-finding process at trial. [Citation.] Given this critical purpose, neither judicial reliance on previous appellate endorsements of the charge in this state nor any effects on the administration of justice require us to deny the benefit of this rule to cases now pending on appeal. [Citations.]" (*Id.* at p. 853, 139 Cal.Rptr. 861, 566 P.2d 997.)

The *Gainer* rule applies a fortiori to the case at bar. No published appellate opinion of this state approved the admission of hypnotically induced evidence until *Diggs* did so on incorrect reasoning in 1980. (See fn. 32, *ante*.) In view of the conclusion of the scientific community that the hypnotic experience renders unreliable the testimony of the witness subjected to it, and the fact that such testimony is frequently a crucial part of the prosecution's case, the present error even more "significantly infects the fact-finding process at trial" than the instruction ruled impermissible in *Gainer*. For these reasons, our holding herein will apply to all cases not yet final as of the date of this decision.

54. Dr. Diamond, for example, believes that "the value of hypnosis for investigative purposes has been greatly overstated by exaggerated claims in irresponsible books and articles. As Freud discovered long ago, whatever can be done by hypnosis can also be done without hypnosis; it merely takes longer and requires greater skill and patience. My own experience convinces me that safe and effective enhancement of recall, with less hazard of suggestion and contamination of future testimony, can be accomplished without gimmicks such as hypnosis and 'truth serum.'" (Diamond, *Inherent Problems*, p. 332, fn. 93.)

55. Experience has shown that even such an apparently objective fact as a license plate number can as easily be confabulated as accurately remembered. (Orne, *Use and Misuse*, p. 318; Putnam, *op. cit. supra* fn. 48, at pp. 444–445.) For this reason, even proponents of the practice warn against relying without verification on any "fact" recalled by the subject as a result of hypnosis: "The most one can legitimately expect from hypnotic interrogation is further data, which may serve as *leads* for more conventional evidence gathering. Data elicited through hypnosis by itself deserve low or no priority until they are supported by other data." (Spiegel, *op. cit. supra* fn. 49, at p. 79.) And Kroger and Douce likewise conclude that "hypnotically related evidence must be validated through careful independent investigation or it is useless! In short, hypnosis is not a modality designed to determine truth from deception." (Kroger & Douce, *op. cit. supra* fn. 49, at p. 371; accord, Schafer & Rubio, *Hypnosis to Aid the Recall of Witnesses* (1978) 26 Internat.J. Clinical & Experimental Hypnosis 81, 83.)

be applied, however, in light of the reasons for our holding herein.

[6] Arguing that the error was harmless, the Attorney General assumes that the inadmissible evidence in this record is limited to those few portions of Catherine's testimony that she asserted were directly affected by her hypnotic experience. (See Part I B, *ante*.) Yet as we have seen, it is the consensus of informed scientific opinion today that in no case can a person previously hypnotized to improve his recollection reliably determine whether any unverified item of his testimony originates in his own memory or is instead a confusion or confabulation induced by the hypnotic experience. It would fly in the face of that consensus to allow a witness to be the judge of which portions of his testimony were actually produced by hypnosis.

The Attorney General suggests that we can at least determine which of Catherine's recollections were potentially the product of hypnosis, by the device of comparing her testimony at trial with the prehypnotic versions of her story given in her interview at the police station and her testimony at the preliminary hearing. But Dr. Schafer's testimony and the professional literature agree that the effects of pretrial hypnosis to restore a witness' recollection go beyond the bare production of pseudomemories during the trance: the experience will tend to clothe the witness' entire testimony in an artificial but impenetrable aura of certainty,[56] and may distort the witness' recall of related events occurring both before and after the hypnotic session.[57] Moreover, it would be impossible in most cases for an appellate court to undertake the kind of comparative analysis proposed by the Attorney General, because such materials as station-house interviews by the police or preliminary hearing testimony are not ordinarily part of the record.[58]

We conclude that proper application of the *Watson* prejudicial error test in the present context requires the appellate court to determine whether it is reasonably probable that a result more favorable to the defendant would have occurred if the testimony of the previously hypnotized witness as to all matters relating to the events of the crime had not been admitted. This was the analysis we followed in *Kelly*. Applying the same analysis to the record before us, we find the error in admitting Catherine's testimony at trial to be prejudicial as it constituted virtually the sole incriminating evidence against defendant. To prevent a miscarriage of justice, a conviction predicated on such tainted evidence cannot be allowed to stand. (Cal.Const., art. VI, § 13.)

V

[7] Of defendant's remaining contentions, we need address only one that bears

56. There is evidence that some law enforcement agencies hypnotize appropriate prospective witnesses not to fill gaps in their memory but merely to bolster their credibility and make them "unshakeable" on the stand. (See, e.g., Orne, *Use and Misuse*, p. 332; *State v. Mack* (Minn.1980) supra, 292 N.W.2d 764, 769 & fn. 10 [reporting testimony by Dr. Orne to the same effect].)

57. For example, Dr. Diamond reports that "the police may tell a witness something just before hypnosis and then hypnotize him. When he awakes, his 'source amnesia' may lead him to believe that the police statement was a product of his own memory. Sometimes communications made to the patient after hypnosis may be retroactively integrated into the hypnotic recall. The subject may recall a fact with no awareness that it was not the product of his own mind. Or he may recall being told the fact but insist that he had prior knowledge of it. This often happens when subjects are shown photographs or line-ups for identification just before or just after hypnotic sessions." (Diamond, *Inherent Problems*, at p. 336.) The author observes that these distortions of memory tend to be strengthened by the passage of time, and concludes that pretrial hypnosis of a witness "appreciably influences *all of his subsequent testimony* in ways that are outside the consciousness of the witness and difficult, if not impossible, to detect." (Italics added; *ibid.*)

58. Indeed, in the case at bar the Attorney General successfully opposed a motion by defendant to augment the record in the Court of Appeal to include the preliminary hearing transcript. Although we ultimately lodged that transcript in this court over the Attorney General's opposition, he successfully objected to our lodging in addition a transcript of Catherine's interview at the police station.

on the question of retrial. At the close of the prosecution's case-in-chief, defendant unsuccessfully moved for a judgment of acquittal on the ground of insufficiency of the evidence. (Pen.Code, § 1118.1.) He now contends the trial court erred in denying that motion, arguing that Catherine was incompetent as a witness because her intoxication had impaired her ability to perceive and remember the events of the evening, and that her testimony was so inconsistent as to be unbelievable. The effect of her intoxication, however, was for the jury to determine; on this record it falls far short of incompetence as a matter of law. And although her testimony was vague and self-contradictory on a number of points, when taken as a whole it was not inherently incredible and would have constituted at least "substantial evidence" to support a verdict of guilt. (See *People v. Blair* (1979) supra, 25 Cal.3d 640, 666, 159 Cal.Rptr. 818, 602 P.2d 738; *People v. Pierce* (1979) 24 Cal.3d 199, 210, 155 Cal.Rptr. 657, 595 P.2d 91.)

[8] It is true that we now hold Catherine's testimony legally inadmissible because of her pretrial hypnotic experience. But in the circumstances of this case the holding does not justify a judgment of acquittal. The purpose of a motion under section 1118.1 is to weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case. (*People v. Belton* (1979) 23 Cal.3d 516, 520–521, 153 Cal.Rptr. 195, 591 P.2d 485.) It therefore speaks to "the evidence then before the court" (§ 1118.1), i.e., to the evidence that the trial court has properly admitted as of the time the motion is determined. As noted above (fn. 33, *ante*), none of the hypnosis cases we now follow had been decided as of the time of the motion herein, and hence the trial court applied the then-prevailing general rule that the fact of Catherine's pretrial hypnotic experience went to "the weight, not the admissibility" of her testimony.

[9, 10] For the same reason, retrial is not prohibited by the federal double jeopardy clause under the rule of *Burks v. United States* (1978) 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1, and *Greene v. Massey* (1978) 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15, followed in this state (*People v. Pierce*, supra, 24 Cal.3d at pp. 209–210, 155 Cal.Rptr. 657, 595 P.2d 91). That rule forbids retrial after a reversal ordered because the evidence introduced at trial was insufficient to support the verdict. (See, e.g., *In re Johnny G.* (1979) 25 Cal.3d 543, 548–549, 159 Cal.Rptr. 180, 601 P.2d 196.) It is inapplicable, however, to the situation here presented. The rule achieves its aim—i.e., of protecting the defendant against the harassment and risks of unnecessary repeated trials on the same charge—by the device of giving the prosecution a powerful incentive to make the best case it can at its first opportunity. (*Burks*, 437 U.S. at p. 11, 98 S.Ct. at p. 2147.) But the incentive serves no purpose when, as here, the prosecution did make such a case under the law as it then stood; having done so, the prosecution had little or no reason to produce other evidence of guilt. To be sure, we now hold it error to admit Catherine's testimony against defendant; but "reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." (*Id.* at p. 15, 98 S.Ct. at p. 2149.) Rather, the matter is governed by the settled rule that the double jeopardy clause does not prohibit retrial after a reversal premised on error of law. (*Ibid.*; accord, *United States v. Tateo* (1964) 377 U.S. 463, 465, 84 S.Ct. 1587, 1588, 12 L.Ed.2d 448, and cases cited.)[59]

It follows that there is no legal bar to retrying defendant on these charges. Of course, for the reasons stated above Catherine cannot be allowed testify in such a trial on any of the events that were the subject

59. We do not decide whether the same result would follow in a case in which the evidence held inadmissible on appeal had also been inadmissible at the time of trial. The United States Supreme Court expressly left this question open in *Greene*. (437 U.S. at p. 26, fn. 9, 98 S.Ct. at p. 2155.)

of her hypnotic experience; her prehypnotic testimony at the preliminary hearing, however, may be admissible in lieu thereof.[60] Whether a retrial is justified in the circumstances of this case is for the prosecutor to determine.

The judgment is reversed.

BIRD, C. J., and NEWMAN, BROUSSARD, TOBRINER *, JJ., concur.

RICHARDSON, Justice, concurring.

I concur in the judgment. Under the circumstances in this case, the prosecutrix' testimony was subject to objection because it was the product of a hypnotic session conducted by a deputy district attorney rather than by a trained professional who was wholly unaffiliated with law enforcement.

I am unable, however, to support an absolute rule rendering inadmissible *all* hypnotically induced testimony without regard to the safeguards under which the hypnosis occurred. Consistent with recent authority and critical commentary, such testimony should be admissible if elicited under adequate safeguards including requiring that, (1) the hypnosis is conducted by a trained, independent psychiatrist or psychologist who in writing is supplied with only sufficient factual background necessary to conduct the session; (2) the hypnosis is videotaped or otherwise recorded for purposes of subsequent review; (3) no persons other than the hypnotist and his subject are present; and (4) the hypnotist obtains a written description of the subject's prior description of the event for comparison purposes. (See *State v. Hurd* (1981) 86 N.J. 525, 432 A.2d 86, 96–97; Note, *The Admissibility of Testimony Influenced by Hypnosis* (1981) 67 Va.L.Rev. 1203, 1230–1232.) If the procedures used are free of suggestion and, in the discretion of the trial court, the probative value of the testimony is not outweighed by its potential for prejudice, I would admit it.

As stated by the New Jersey Supreme Court in *Hurd*, "we believe that a rule of per se inadmissibility is unnecessarily broad and will result in the exclusion of evidence that is as trustworthy as other eyewitness testimony." (432 A.2d p. 94; accord, Note, supra, at p. 1233.) I share that belief.

KAUS, Justice, concurring and dissenting.

I concur in the reversal of the judgment, but feel compelled to dissent from several conclusions of the majority unnecessary to decide this appeal.

On the record before us, this is a relatively simple case. At the outset of the trial, defense counsel objected that a portion of the testimony Catherine was about to give—concerning a period of time during which she had previously testified that she had been asleep—was the result of the improper use of hypnosis, that "it is not in fact refreshing a witness' recollection . . . but that it is . . . *manufactured evidence*." (My emphasis.) The trial court overruled the objection on the basis that the hypnosis only went to the weight of Catherine's testimony.

That ruling was patently wrong, even if there may have been some out-of-state case law to support it. Section 702 of the Evidence Code demands that the testimony of any witness, except an expert, be based on personal knowledge and provides that "[a]gainst the objection of a party, such

60. Because Catherine is now "Disqualified from testifying to the matter" (Evid.Code, § 240, subd. (a)(2)) she is "unavailable as a witness" within the meaning of the former-testimony exception to the hearsay rule (*id.*, § 1291, subd. (a)), and her preliminary hearing testimony was given in a proceeding in which defendant had the "right and opportunity" to cross-examine her with the same "interest and motive" that he now has (*id.*, subd. (a)(2)). Unless defendant can show that Catherine's disqualification as a witness "was brought about by the procurement or wrongdoing of the proponent of [her] statement for the purpose of preventing [her] from attending or testifying" (*id.*, § 240, subd. (b)), her preliminary hearing testimony is therefore admissible under the Evidence Code.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

personal knowledge must be shown before the witness may testify concerning the matter." Defendant clearly objected that the witness was about to testify from other than personal knowledge—that she was about to give "manufactured evidence." This placed the burden of showing that the witness would testify from personal knowledge on the prosecutor, who did nothing except argue that *People v. Colligan* (1979) 91 Cal.App.3d 846, 154 Cal.Rptr. 389 "indicated that hypnosis did not as a matter of law render inadmissible the subsequent identification of a defendant by the witness." Obviously the citation of a case is not a showing that a particular witness is about to testify from personal knowledge, and, in fact, the *Colligan* decision does not purport to relieve a prosecutor of the burden of demonstrating the personal knowledge of a previously hypnotized witness in response to a proper objection.[1]

Thus, on this state of the record, the trial court should not have admitted Catherine's challenged testimony. Given the ambiguities and inconsistencies of Catherine's additional testimony, and the substantial evidence presented by the defense, the error was clearly prejudicial and requires reversal of the judgment. This is all we need to decide in this case.

I recognize, of course, that we have about a dozen additional hypnosis cases pending before us, and that the majority has chosen to use this appeal as a vehicle for deciding the broader issues presented by some of the others. In my view, however, it is a mistake to adopt at this point the sweeping, "per se" rule that the majority proposes—excluding virtually all testimony of a witness who has undergone pretrial hypnosis—without more carefully considering the varied contexts in which hypnosis may take place and the many factors which may affect both the potential danger and the potential utility of hypnosis in a particular instance.

This is the first time we have been called upon to consider the admissibility of a witness' post-hypnosis testimony, and it is by no means clear to me that the facts of this case are typical of hypnosis cases in general. There are obviously a number of factors that render Catherine's post-hypnosis testimony particularly suspect. Because she was at least somewhat intoxicated at the time of the alleged offense, there is a good possibility that she has no clear memory to be refreshed by hypnosis, and instead that she has simply constructed or "confabulated" a "memory" while under hypnosis. (Cf., e.g., *Commonwealth v. Nazarovitch* (1981) —— Pa. ——, 436 A.2d 170, 177–178.) In addition, at the time she was hypnotized she had already given a number of somewhat different accounts of the evening in question, and the academic literature suggests that under such circumstances there is a particularly strong danger that hypnosis will simply serve to fix one particular version—not necessarily the historically accurate one—in the subject's mind and render the witness impervious to cross-examina-

1. In *Colligan*, a witness to a robbery was hypnotized shortly after the crime to help her recall the license plate of a car used in the robbery, and during the hypnosis the witness also gave a description of the robber. At trial, the witness identified the defendant as the robber, apparently without objection, but on appeal the defendant contended that the possibility of suggestion by the hypnotist was so substantial that the in-court identification was necessarily tainted, warranting a reversal of the conviction.

The *Colligan* court rejected the contention, explaining: "In *People v. Johnson* (1974) 38 Cal.App.3d 1 [112 Cal.Rptr. 834] . . . we held that a claim of improper pretrial identification will not be considered on appeal absent an objection in the trial court, because the trial court has no reason to inquire into the independent recollection of the witness if the issue is not before it. (38 Cal.App.3d at p. 6 [112 Cal.Rptr. 834].) In that case, as here, faulty identification was at the heart of the defense and the witness was subjected to vigorous, detailed cross-examination on that issue. Furthermore, defendant does not contend that hypnotic suggestions were actually made to [the witness] which affected her identification; thus no reason to depart from the view expressed in *Johnson* exists. We decline to hold that the use of hypnosis to help a witness remember a license number per se invalidates the identification of a person seen and heard by that witness . . ." (91 Cal.App.3d at p. 850, 154 Cal.Rptr. 389.)

tion. (See Orne, *The Use and Misuse of Hypnosis in Court* (1972) 27 Internat.J. Clinical & Experimental Hypnosis 311, 332–334.) Finally, of course, the hypnosis in this case was not performed by an impartial hypnotist in a setting calculated to minimize potential suggestiveness, but by a deputy district attorney in the presence of the investigating police officers. Given all these facts, I can agree with the majority that, if this case is retried, Catherine should not be permitted to testify.

I think, however, that we should be very wary about establishing a broad, generally applicable exclusionary rule for all post-hypnosis testimony on the basis of the rather egregious facts of this case alone. In other instances, hypnosis may arise in a completely different setting, as, for example, when a victim or a witness to a crime is hypnotized shortly after the offense to aid a police artist compose a sketch of the suspect. In such a case, none of the participants to the hypnosis may have any preconceived bias which would pose a special danger of suggestiveness, and in some cases the witness' post-hypnosis statements may not differ at all from his or her pre-hypnosis statements, or the suspect may be later caught with incriminating evidence corroborating the reliability of at least some of the witness' post-hypnosis memory. If, in such a case, an adequate record of the hypnosis session exists and demonstrates the session's basic fairness, it is not clear to me that the mere fact that the victim or witness has at one time been hypnotized necessarily mandates the total exclusion of the potentially crucial testimony at a later trial.

Contrary to the majority's conclusion, I do not believe that faithful adherence to the *Frye* standard compels the all-encompassing *per se* exclusionary rule adopted in its opinion. Just last year, in *State v. Hurd* (1981) 86 N.J. 525, 432 A.2d 86, the New Jersey Supreme Court, in a thoughtful and scholarly opinion by Justice Pashman, applied the *Frye* standard to post-hypnosis testimony and concluded that "a rule of *per se* inadmissibility is unnecessarily broad and will result in the exclusion of evidence that is as trustworthy as other eyewitness testimony." (432 A.2d at p. 94.) In *Hurd*, a number of preeminent authorities in the field of hypnosis—including Dr. Orne—testified in person at a pretrial evidentiary hearing. On appeal, the New Jersey court, after reviewing both this testimony and much of the same academic literature discussed by the majority in this case, pointed out that while the experts had made it clear that hypnosis is not a tool which can in any way guarantee the accuracy or historical "truth" of a subject's recall, they had at the same time indicated "that *in appropriate cases* and *where properly conducted* the use of hypnosis to refresh memory is comparable in reliability to ordinary recall." (432 A.2d at p. 95; emphasis added.)

Although keenly aware of the potential problems of "confabulation" and possible interference with cross-examination posed by hypnosis, the *Hurd* court recognized that recent psychological research has demonstrated that similar problems inhere in eyewitness testimony in general, particularly when—as is very often the case—a witness has been repeatedly interrogated and has recounted his proposed testimony several times before trial. (*Id.*, 432 A.2d at p. 94.)[2] Indeed, given the majority's own rendering of modern views concerning the nature and fallibility of unhypnotized human memory (see, pp. 266–269 of 181 Cal.Rptr., pp. 798–801 of 641 P.2d, *ante*), it may not be entirely facetious to suggest that if we are to exclude eyewitness testimony unless shown to be scientifically reliable, we may have little choice but to return to trial by combat or ordeal.

2. In this regard, the court cited Marshall et al., *Effects of Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony* (1971) 84 Harv.L.Rev. 1620; Levine & Tapp, *The Psychology of Criminal Identification* (1973) 121 U.Pa.L.Rev. 1079; Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification* (1977) 29 Stan.L.Rev. 969.

Observing that courts have never required "historical accuracy as a condition for admitting eyewitness testimony," the *Hurd* court concluded that, under *Frye*, hypnotically aided testimony should properly be admitted in a criminal trial if the party proffering the evidence demonstrates "by clear and convincing evidence" (*id.*, 432 A.2d at p. 97) "that the use of hypnosis in the particular case was reasonably likely to result in recall comparable in accuracy to normal human memory." (*Id.*, 432 A.2d at p. 95.) The court then went on to discuss in some detail various factors—e.g., the kind of memory loss encountered, the apparent motivations of the hypnotized witness, and the procedural safeguards under which the hypnosis session was conducted—that are likely to affect the reliability of post-hypnosis testimony in a given case. (*Id.*, 432 A.2d at pp. 95–97.)

In my view, if we are to reach the broad question of the general admissibility of post-hypnosis testimony at this time, we should adopt the more cautious approach of the *Hurd* decision, rather than pronounce a general rule excluding virtually all post-hypnosis testimony regardless of the facts of a particular case. Perhaps in the future, as we gain more experience in this area, we will find that post-hypnosis testimony is so often unreliable that "the game is not worth the candle" (see p. 255 of 181 Cal. Rptr., p. 787 of 641 P.2d *ante*) and that a broad, prophylactic exclusionary rule is warranted. At this point, however, I think such a judgment is premature.

Moreover, even if a majority of the court believes that the dangers of hypnosis are so great as to warrant a broad per se exclusionary rule *for the future*, I think the majority opinion errs in applying its sweeping holding retroactively, rendering incompetent virtually all witnesses who have been hypnotized at any time in the past without regard to the circumstances of the hypnosis.

From all accounts, there has in the last few years been a great increase in the use of hypnosis at the investigative stage of the criminal process. The news media frequently report instances in which eyewitnesses to kidnapings or other crimes are hypnotized to help police artists prepare sketches of potential suspects. Until today, we had never indicated that by utilizing this investigative technique, the police would automatically and irrevocably taint a witness and make him or her ineligible to testify about anything related to the hypnosis.

While on a number of occasions we have ruled that extrajudicial statements made under hypnosis may not be introduced as evidence of the truth of the statements made, to my knowledge we have never before even hinted that once a potential witness is hypnotized he or she thereafter becomes ineligible or incompetent to testify about any matter touched upon during hypnosis. For example, in the several cases in which a defendant has been hypnotized by a defense psychiatrist before trial to aid in ascertaining the defendant's mental state at the time of the offense (see, e.g., *People v. Modesto* (1963) 59 Cal.2d 722, 732–733, 31 Cal.Rptr. 225, 382 P.2d 33), we have never suggested that the defendant could not thereafter testify at trial. Similarly, in *People v. Blair* (1979) 25 Cal.3d 640, 664–666, 159 Cal.Rptr. 818, 602 P.2d 738, although we held that the trial court properly excluded a statement made by a prosecution witness while under hypnosis, we did not question the propriety of the witness' post-hypnosis in-court testimony.

The majority relies on *People v. Gainer* (1977) 19 Cal.3d 835, 853, 139 Cal.Rptr. 861, 566 P.2d 997, in concluding that its per se exclusionary rule should be applied retroactively. Unlike *Gainer*, however, retroactive application here will not simply result in the retrial of a number of cases under proper jury instructions, but instead will necessarily demand that a witness who has undergone hypnosis be automatically barred from testifying at any retrial. In many cases, this will mean that the prosecution—or the

defense—will, after-the-fact, be unexpectedly deprived of its main, and perhaps critical, witness.

In view of these potential consequences, we need to be particularly careful in determining how to handle cases in which a hypnosis session was held before our decision in this case was filed. At least with respect to this class of cases, we should refrain from imposing a broad, per se exclusionary rule, and should leave open the possibility that, in light of all the facts of a particular case, it may be found that a previously hypnotized witness' testimony is not irretrievably tainted.

Linda Charlene BROWN, Appellant,

v.

STATE of Florida, Appellee.

No. AE–96.

District Court of Appeal of Florida,
First District.

Feb. 8, 1983.

Defendant was convicted before the Circuit Court, Duval County, Ralph W. Nimmons, J., of forgery, uttering a forged instrument, and grand theft, and he appealed. The District Court of Appeal, Ervin, J., held that: (1) evidence sustained defendant's conviction of forgery, without regard to hypnotically induced recall testimony, and therefore, any error arising out of the admission of that testimony did not require

reversal, and (2) trial court abused its discretion in denying continuance sought by defendant to prepare a defense to prosecution's hypnotically induced recall testimony, since trial was held on Tuesday morning, defense counsel did not learn of the hypnosis session until midday the Friday before trial, and counsel was not furnished opportunity to depose hypnotist until Monday, the day before trial; the error required reversal of defendant's convictions of uttering a forged instrument and grand theft, since the hypnotically induced recall testimony related to those offenses.

Affirmed in part and reversed in part and remanded.

1. Criminal Law ⇐1163(3), 1169.1(1)

A judgment will not be reversed unless error in admitting evidence was prejudicial to the substantial rights of defendant; prejudice will not be presumed. West's F.S.A. § 924.33.

2. Forgery ⇐4

The elements of forgery include the requirements that there be a falsely made or materially altered written instrument; that the writing be of such character that, if genuine, it might apparently be of legal efficacy for injury to another, or the foundation of a legal liability; and that there be an intent to injure or defraud.

3. Criminal Law ⇐1169.1(7)

Evidence sustained defendant's conviction of forgery, without regard to hypnotically induced recall testimony, and therefore, any error arising out of the admission of that testimony did not require reversal.

4. Criminal Law ⇐1151

If trial court denies motion for continuance, its ruling will not be disturbed unless a palpable abuse of discretion is demonstrated to reviewing court.

5. Criminal Law ⇐590(2), 1166(8)

Trial court abused its discretion in denying continuance sought by defendant to prepare a defense to prosecution's hypnotically induced recall testimony, since trial was held on Tuesday morning, defense counsel did not learn of the hypnosis session until midday the Friday before trial, and counsel was not furnished opportunity to depose hypnotist until Monday, the day before trial; the error required reversal of defendant's convictions of uttering a forged instrument and grand theft, since the hypnotically induced recall testimony related to those offenses.

6. Statutes ⇐226

If a state statute is patterned after the language of its federal counterpart, the statute will take the same construction in state courts as its prototype has been given insofar as such construction comports with the spirit and policy of state law relating to the same subject.

7. Witnesses ⇐257.10

The "relevancy approach" is the test to be applied to hypnotically induced recall testimony; the reliability of the technique of memory retrieval is thus a factor to be considered by trial court in determining the question of the evidence's legal relevance. West's F.S.A. §§ 90.401 90.403.

8. Witnesses ⇐257.10

Admissibility of hypnotically induced recall testimony hinges on a case-by-case examination of the techniques used to hypnotize the witness; probative value of hypnosis rests on both reliability of the principal and of the technique or procedure employed, both of which are inseparably intertwined, and court must first weigh the probative value of the evidence in order to decide if its admissibility would be substantially outweighed by dangers of unfair prejudice, confusion of the issues, misguidance of the jury, or needless presentation of the issues. West's F.S.A. § 90.403.

9. Witnesses ⇐257.10

Either upon objection to introduction into evidence of hypnotically induced recall testimony, or upon its proffer, it is burden of party seeking to present such evidence to demonstrate that the hypnosis session and use of that evidence will not cause undue prejudice or mislead the jury.

10. Witnesses ⇐257.10

The following safeguards are recommended to reduce potential prejudice from admission of hypnotically induced recall testimony: neutral hypnotist should be employed; session should be conducted at independent location; only hypnotist and witness should be present; subject should be examined by hypnotist to elicit every possible detail that witness recalls concerning crime; witness should be examined by hypnotist to ascertain whether he suffers from mental or physical disorders that might affect results; some record of session should be preserved; hypnotist should avoid reassuring remarks that might stimulate confabulation; court should carefully consider whether there is independent evidence corroborative of or contradictory to statements made during the trance; and jury should receive instruction warning it of potential influence hypnosis may have on witness.

11. Criminal Law ⇐785(1)

In prosecution for forgery, uttering a forged instrument and grand theft, in which hypnotically induced recall testimony was admitted, trial court erred in denying defendant's request for a cautionary jury instruction concerning the potential influence hypnosis may have on a witness.

Michael E. Allen, Public Defender and P. Douglas Brinkmeyer, Asst. Public Defender, for appellant.

Jim Smith, Atty. Gen., and David P. Gauldin, Asst. Atty. Gen., for appellee.

ERVIN, Judge.

Appellant Brown appeals her convictions for the offenses of forgery, uttering a forged instrument and grand theft. Finding that there is substantial and competent evidence supporting the verdict for the offense of forgery, we affirm it. We reverse, however, the convictions of uttering a forged instrument and commission of grand theft, and remand those offenses to the lower court for further consistent proceedings. In so doing, we reaffirm the continuing vitality of, but reflect upon, principles implicit in our previous opinion in *Clark v. State*, 379 So.2d 372 (Fla. 1st DCA 1979), in which we found hypnotically-induced-recall-testimony to be admissible for consideration by a criminal trial jury.

The convictions in this case stem from a 1979 incident in Jacksonville when the appellant obtained certain company checks in the name of the Abreu Twin Mini-Shops. The Twin Mini-Shops had previously gone out of business, and the owner had closed its bank account, discarding the company checks. At trial, a bank teller at the Atlantic Bank testified that appellant had appeared at the bank with a Twin Mini-Shop check in the amount of $425.01 made out to Kathleen Coleman, a long-time bank customer who testified that she had neither seen nor endorsed the checks. The check, identified by the bank teller as bearing her teller stamp, was negotiated on November 6, 1979. A handwriting expert, after examining the handwriting on the check and the deposit slip, and comparing it with known exemplars of accomplice Ernest Brown and Linda Brown's handwriting, opined that Ernest Brown had written the material on the face of the check and that Linda Brown had done so on the reverse side as well as on the deposit slip. The evidence further revealed that the appellant had previously endorsed the check, using the Coleman name. The teller testified that appellant passed both the check and a deposit slip to her. Appellant's plan to deposit the $425.01 check and receive $300 back in cash was successful. Two days following the check's utterance, a deposit receipt in the name of Kathleen Coleman and in the amount of $125.01 was found in the pocket of a jacket belonging to co-defendant Ernest Brown.

During the two-year period between the check cashing incident and the trial, the teller's recollection of appellant's identity had faded from memory. It was apparent to the prosecution that without the testimony of the teller identifying appellant as the one who had cashed the check, the charges of uttering a forged instrument and grand theft would be difficult, if not impossible, to prove beyond a reasonable doubt. Police

Detective Bryant Mickler was called in to hypnotize the teller in an effort to assist her in refreshing her faded memory as to the day of the crime. It does not appear from the record that Mickler had any connection with the investigation of this case, other than to hypnotize the teller. Experienced in hypnosis, he claimed to have hypnotized over 2,000 people, been trained through many courses, and taught a course in hypnosis at a local junior college, but was admittedly not a medical expert. Mickler's testimony as to hypnosis had been utilized 12 times in court.

Our record review discloses that he knew nothing about the witness before hypnotizing her, that he was alone with her at the time of hypnosis, and that he placed her into "progressive relaxation," taking her back to the day of the crime and asking or perhaps telling her to try to recall the specifics of the incident and the identity of the person from whom she received the forged check. After she was brought out of the hypnotic trance, another detective displayed some photographs to her, and the witness selected a picture of the appellant.

The hypnosis session transpired on Friday morning, May 1, 1981, four days before trial. It was only shortly after the session took place that appellant's counsel was first advised of its occurrence. Upon learning that the teller had made a positive identification of his client, the attorney spent the weekend researching the legal ramifications of using hypnosis in a criminal trial. On Monday, the day before trial, he deposed Mickler. On the following day, just before trial, appellant's counsel sought a continuance, claiming prejudice based on the short notice of the hypnosis session, alleging that he was unable to depose the hypnotist until the day before trial and that he wished to obtain another expert for the purpose of presenting evidence concerning hypnosis in appellant's favor. The motion was denied, and appellant was subsequently convicted of forgery, uttering a forged instrument, and grand theft.

[1] In answer to appellant's arguments assailing the convictions imposed, we respond that a judgment will not be reversed, unless the error of the evidence's admission was prejudicial to the substantial rights of the appellant. Prejudice will not be presumed. Section 924.33, Fla.Stat. (1979); *Palmes v. State,* 397 So.2d 648, 653 (Fla. 1981), *cert. denied,* 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981). This requires us to determine whether, but for the admission of the testimony of the teller and the hypnotist, the result below in regard to each of the three offenses might have been different. *Palmes,* at 654. It seems apparent to us that the admission of Officer Mickler's hypnosis testimony related solely to the charges of uttering a forged instrument and grand theft. Mickler testified as to the procedures used in hypnotizing the teller, while the teller testified concerning the method by which she processed the Twin Mini-Shop check, and her identification of appellant as the individual who passed her a pre-endorsed Abreu Twin Mini-Shops check was the product of her hypnotized state. She did not testify, however, that she had witnessed the actual act of forgery.

[2] Her testimony did not relate to proving any of the elements of forgery, which include the requirements: (1) that there be a falsely made or materially altered written instrument; (2) that the writing be of such a character that, if genuine, it might apparently be of legal efficacy for injury to another, or the foundation of a legal liability; and (3) that there be an intent to injure or defraud. *See* Ch. 831, Fla.Stat.; 16 Fla.Jur.2d *Criminal Law* §§ 1564–1568 (1979).

[3] Although the evidence against Linda Brown was circumstantial as it related to the forgery charge, it was nonetheless sufficient. Independent of the questionable identification of appellant as the person who uttered the forged check, Brown and her accomplice were both shown to be, through the testimony of the expert examining the questioned documents, in possession of a check stolen from the Abreu Twin Mini-Shops. Both the purported maker and purported endorser of the check denied either that they had written anything on the

check or had authorized anyone to do so. Neither of the two Browns offered any explanation as to how they came into possession of the check.

We held in a case which reversed a conviction for uttering a forged instrument that because the only evidence against the defendant was that he had possession of a forged check and caused it to be cashed, yet offered a reasonable explanation for its possession, the evidence was insufficient to convict. *Heath v. State,* 382 So.2d 391 (Fla. 1st DCA 1980). We observed, due to the explanation offered, and the absence of any other evidence of guilty knowledge, such as a handwriting analysis, that possession of the stolen check did not give rise to an inference that the appellant knowingly uttered the forged instrument. Conversely, we consider that such inference could apply to facts such as those in the case before us and is one which the jury could properly weigh in its determination of guilt. The Florida Supreme Court, in sustaining the constitutionality of Section 812.022(2), Florida Statutes (1977),[1] reasoned that "[s]ince there [was] a rational connection between the fact proven (the defendant possessed stolen goods) and the fact presumed (the defendant knew the goods were stolen), the inference created by section 812.022(2) does not violate [the defendant's] due process rights." *Edwards v. State,* 381 So.2d 696, 697 (Fla.1980).

There is a similar rational connection here. In addition to evidence revealing both defendants' possession of the stolen check, without reasonable explanation therefor, the record discloses possession by appellant's accomplice of a deposit receipt containing the difference between that deposited and that received from the forged check. Moreover, the deposit slip was shown through the testimony of the handwriting expert to have been at some point in time in possession of the appellant. As stated, all of this evidence was obtained independently of the questionable method used to retrieve the bank teller's memory relating to the identification of appellant as the person who passed the check. *Cf. Davis v. State,* 364 So.2d 19 (Fla. 1st DCA 1978), *cert. denied,* 373 So.2d 457 (Fla.1979).

We are unable to say, after considering the record as a whole, that any of the allegedly prejudicial evidence, if excluded, might have affected the jury's verdict as to the forgery charge. Consequently, we affirm the conviction of forgery.

[4] Appellant also challenges the lower court's denial of her motion for a continuance. She argues that the untimely scheduled hypnosis session did not give her an adequate opportunity to obtain expert witnesses in opposition to the hypnosis process utilized by the state and the hypnotist who testified for the state. "A motion for a continuance is directed to the sound discretion of the trial judge." *Jordan v. State,* 419 So.2d 363 (Fla. 1st DCA 1982). If the lower court denies the motion for a continuance, the court's ruling will not be disturbed, unless a palpable abuse of discretion is demonstrated to the reviewing court. *Jent v. State,* 408 So.2d 1024, 1028 (Fla. 1981), *cert. denied,* — U.S. —, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982).

[5] A number of cases detail circumstances rising to the level of a palpable abuse of discretion. *Harley v. State,* 407 So.2d 382 (Fla. 1st DCA 1981); *Lightsey v. State,* 364 So.2d 72 (Fla. 2d DCA 1978); and *Sumbry v. State,* 310 So.2d 445 (Fla. 2d DCA 1975). The common thread running through each of these cases is that defense counsel must be afforded an adequate opportunity to investigate and prepare any applicable defenses. This right is inherent in the right to counsel. *Harley,* at 384, citing *Brooks v. State,* 176 So.2d 116 (Fla. 1st DCA 1965), *cert. denied,* 177 So.2d 479 (Fla.1965). Further, it is founded on constitutional principles of due process and cast in the light of notions of a right to a fair trial. *Harley,* at 383-384; *see also Sumbry,* 310 So.2d at 447.

1. Section 812.022(2) states:

> Proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen.

In the case at bar, trial was held on Tuesday morning. Defense counsel did not learn of the hypnosis session until mid-day the Friday before trial. Counsel was not even furnished the opportunity to depose the police hypnotist until Monday, the day before trial. Surely, due process demands that counsel be afforded a fairer means by which to prepare his defense to this critical evidence. In discussing the use of information gained from scientific techniques that has been placed into evidence, Professor Paul C. Giannelli of Case Western Reserve University, notes:

> Effective cross-examination and refutation presuppose adequate notice and discovery of the evidence the opposing party intends to introduce at trial.... Securing the services of experts to examine evidence, to advise counsel, and to rebut the prosecution's case is probably the single most critical factor in defending a case in which novel scientific evidence is introduced.

Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 Colum.L.Rev. 1197, 1240, 1243 (1980) [hereinafter: Giannelli]. We consider that by the court's restricting defense counsel's ability to prepare an adequate defense, the aforementioned safeguard of *liberal* cross-examination was impinged. We therefore find it was a palpable abuse of discretion on the part of the lower court to deny the appellant's motion for a continuance, insofar as the motion related to the offenses of uttering a forged instrument and grand theft.

We reverse the above two convictions and remand for a new trial for the reasons stated. Since conviction on the charges of uttering a forged instrument [2] and grand theft [3] apparently depends upon hypnotically-induced-recall-testimony, we feel it necessary to explore the ramifications of accepting testimony into evidence from a witness whose memory has been refreshed by hypnosis. The use of this type of testimony has been the subject of continuing public attention by the news media,[4] as well as by various legal commentators,[5] and has been utilized in a number of well-known cases.[6]

Our analysis of the use of such testimony involves a discussion of three component parts: First, a recognition of five basic problem areas stemming from the use of hypnosis; second, whether Florida should bar from admission into evidence such testimony on the ground that the principle of hypnosis is unreliable in view of the "gener-

2. § 831.02, Fla.Stat. (1979).

3. § 812.014, Fla.Stat. (1979).

4. *See Crash Memory Hazy: Hypnosis Brings It Out*, 68 A.B.A.J. 900 (1982); Cowen, *Hypnosis Is No Aid to Justice*, Christian Science Monitor, Apr. 14, 1982, at 20, col. 1; *"The Amazing Kreskin" Says Hypnotism Is a Gimmick That Belongs Onstage, Not in Court*, People Weekly, Jan. 25, 1982, at 73–75; and Orne, *The Use and Misuse of Hypnosis In Court*, 27 International Journal of Clinical and Experimental Hypnosis 311 (1979) [hereinafter: Orne].

5. *See, e.g.*, Note, *Safeguards Against Suggestiveness: A Means for Admissibility of Hypno-Induced Testimony*, 38 Wash. & Lee L.Rev. 197 (1981); Note, *The Admissibility of Testimony Influenced by Hypnosis*, 67 Va.L.Rev. 1203 (1981); Comment, *Hypnosis—Its Role and Current Admissibility in the Criminal Law*, 17 Willamette L.Rev. 665 (1981) [hereinafter: *Hypnosis and Criminal Law*]; Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 Calif.L.Rev. 313 (1980) [hereinafter: Diamond]; and Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 Ohio N.U.L.Rev. 1 (1977) [hereinafter: Dilloff]; *see also* Annot., 9 A.L.R. 4th 354 (1981); Annot., 50 A.L.R.Fed. 602 (1980); and Annot., 92 A.L.R.3d 442 (1979).

6. Hypnosis has been used in a number of sensational criminal cases, primarily for investigative purposes. In the 1976 California Chowchilla kidnapping case, a bus driver was able to recall a key license plate number on a getaway van after having been hypnotized. *See* Diamond, *supra* note 5, at 316 n. 7(f); *Admissibility of Testimony Influenced by Hypnosis*, *supra* note 5, at 1203 n. 3. Hypnosis was used in the Boston Strangler case, *see Admissibility of Testimony Influenced by Hypnosis*, *id.*; the recent Los Angeles Hillside strangler murder case; and the abduction of NATO Commander General James Dozier by Red Brigade terrorists in Italy. *People Weekly*, *supra* note 5, at 74. The defense utilized hypnosis to attempt to establish the diminished capacity of Senator Robert Kennedy's killer, Sirhan Sirhan. *See* Diamond, *supra* note 5, at 315 n. 7(c).

al acceptance," or *Frye* rule, and third, if the *Frye* rule is either rejected or considered inapplicable to hypnotically-induced-recall-testimony in Florida, the utilization of certain safeguards to ensure that the probative value of such testimony is not substantially outweighed by certain prejudicial factors.

I.

Our research has revealed five basic problem areas stemming from the use of hypnosis.[7] These areas include:

(1) hypersuggestiveness;

(2) hypercompliance;

(3) confabulation;

(4) jury misunderstanding of the concept of hypnosis, and

(5) unusually strong confidence by the hypnotized subject in his ability to recall events accurately.

The first three of the foregoing problem areas arise from the hypnosis session itself and are inherent in the nature of hypnosis. The fourth and fifth areas deal with problems arising after the hypnotic session, stemming from in-court use of such testimony.

A.

The first of the three problem areas that inhere in the process of hypnosis is hypersuggestiveness, meaning a mental state in which a subject surrenders a great degree of will power and independent judgment to the hypnotist. Comment, *Hypnosis—Its Role and Current Admissibility in the Criminal Law*, 17 Willamette L.Rev. 665, 671–673 (1981) [hereinafter: *Hypnosis and Criminal Law*]. This condition stems in great part from the intense interpersonal relationship between the hypnotist and the subject, as well as from the very nature of hypnosis. 2 Spiegel, *Comprehensive Textbook of Psychiatry* § 30.4 (2nd ed. 1975). In essence, the subject has a heightened sense of awareness in which he is open to even the most minimal of cues from the hypnotist.

The problem of hypersuggestiveness manifests itself in four different ways: First, the "minimal cues" do not necessarily consist of verbal orders or suggestions from the hypnotist. Often, the tone of voice, demeanor of the hypnotist, or "body language" of the hypnotist may be the agent of suggestion. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 Calif.L.Rev. 313, 333 (1980) [hereinafter: Diamond]. The suggestion may be unintended or unperceived by the hypnotist. *See People v. Shirley*, 31 Cal.3d 18, 181 Cal.Rptr. 243, 641 P.2d 775, 802–803 n. 46 (1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 133, 74 L.Ed.2d 114 (1982). Consequently, the hypnotist may ask the witness, "Were there two, three, or four robbers?" In so doing, he may inadvertently cue the witness by lowering his voice to emphasize the word "two." This minimal cue, although inadvertent, suggests to the hypnotized witness that he should remember there were indeed *two* robbers. Even leading questions may cause this result.[8] Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 Ohio N.U.L.Rev. 1, 4 (1977) [hereinafter: Dilloff].

7. It is difficult to formulate a precise definition that accurately conveys what is meant by the term hypnosis. However, hypnosis is generally viewed as "a sleeplike state whereby response to stimuli is more easily achieved than in a waking state . . . Categorized as a state of heightened concentration, hypnosis is achieved by creating a passiveness in the subject, usually by employing eye fatigue. The subject, with increased receptivity to instruction, is guided into a trance-like state through a series of suggestions from the hypnotist." *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170, 173 (1981); *see also State v. Mack*, 292 N.W.2d 764, 765 (Minn.1980); *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274, 1276 (1981).

8. The problems resulting from a leading question were demonstrated in a 1979 study in which William H. Putnam hypnotized a number of individuals, asking them to recall certain events that they had observed on a recently viewed videotape recording. Putnam found that his leading questions elicited more incorrect answers from subjects under hypnosis than from subjects not under hypnosis. *Admissibility of Testimony Influenced by Hypnosis*, *supra* note 5, at 1212.

The second manifestation of hypersuggestiveness results in instances of the hypnotist who is *predisposed* to eliciting a particular response from a witness. Inadvertent, subconscious influences may be exerted upon the subject resulting in a particular response as noted above. Dilloff, *supra* at 4; *see also Hypnosis and Criminal Law, supra,* at 672. Perhaps too, in extreme circumstances, the predisposed, unscrupulous hypnotist might consciously attempt to manipulate the hypnotized subject through "brainwashing." *Dilloff, supra,* at 6. Although a person who has been hypnotized probably cannot be made to do something contrary to his moral standards, it is conceivable that the unscrupulous hypnotist could induce a subject to recall erroneously a false pivotal fact which in reality the witness never did observe. *Hypnosis and Criminal Law, supra,* at 672 n. 47. Obviously an avoidance of this particular manifestation would be promoted by requiring that anyone hypnotizing a witness in preparation for a criminal trial be completely independent and neutral.

A third manifestation inheres in the depth of hypnosis. "The more deeply hypnotized the subject, the more susceptible he may become to suggestions by the hypnotist." Dilloff, *supra,* at 5 (footnote omitted); Note, *Safeguards Against Suggestiveness: A Means for Admissibility of Hypno-Induced Testimony,* 38 Wash & Lee L.Rev. 197, 201 (1981) [hereinafter: *Safeguards*].

Finally, the fourth manner in which hypersuggestiveness manifests itself is due to the way in which hypersuggestiveness interrelates with the other two problem areas of hypnosis: hypercompliance and confabulation.

Hypercompliance results from the fact that a subject under hypnosis is often eager to succeed in being hypnotized and, more important, to please the hypnotist. Diamond, *supra,* at 337; *People v. Shirley,* 641 P.2d at 802–803; *Commonwealth v. Nazarovitch,* 496 Pa. 97, 436 A.2d 170, 174 (1981). Hence, "a subject often will incorporate into his response his notion of what is expected of him." *State v. Hurd,* 86 N.J. 525, 432 A.2d 86, 93 (1981). As noted previously, voice intonations and gestures by the hypnotist can provide unwitting cues concerning the examiner's expectations of the witness.[9] *Id.,* 432 A.2d at 94; *see also Hypnosis and Criminal Law, supra,* at 684 n. 127. The drive or motivation to answer questions and "please" the hypnotist is perhaps much stronger in the criminal trial or investigation setting because of two factors: First, most people truly want to help solve crimes. Second, if the hypnotized witness is also the victim, the motivation to answer may be even more compelling. *People v. Shirley,* 641 P.2d at 801 n. 42; *cf. State ex rel. Collins v. Superior Court,* 132 Ariz. 180, 644 P.2d 1266, 1289 (1982).

The third problem with hypnosis is that of confabulation. Confabulation is the innate tendency of a hypnotized subject to manifest a decrease in critical judgment. Orne, *The Use and Misuse of Hypnosis in Court,* 27 International Journal of Clinical and Experimental Hypnosis 311, 319 (1979) [hereinafter: Orne]. This decrease in critical judgment seems to manifest itself in occasional memory distortions, sheer fantasy, and even willful lies in recalling specific events. *Hurd,* 432 A.2d at 92; *State v. Mena,* 128 Ariz. 226, 624 P.2d 1274, 1277 (1981); Dilloff, *supra* at 4. Although most people are unaware of this fact, the currently accepted view in the scientific community is that no one's conscious or subconscious memory recalls all details in minute detail. No one has a perfect memory. An individual's recall of a specific event may have gaps in it. The mind simply is not a videotape recorder. Orne, *supra,* at 321; Note, *The Admissibility of Testimony Influenced by Hypnosis,* 67 Va.L.Rev. 1203, 1209 (1981). The commentators and experts are

9. Dr. Martin T. Orne, an expert in the field of hypnosis who has testified at numerous trials on the subject, has confirmed this by noting that verbalizations by the hypnotist such as " 'Good,' 'Fine,' 'You are doing well,' and so on" merely exacerbate the problem by reassuring the hypnotized subject that he is pleasing the hypnotist and to continue on. Orne, *supra* note 4, at 326.

united in the view that hypnotized subjects can and occasionally do prevaricate while under hypnosis. *See, e.g.,* Dilloff, *supra,* at 5; *Hypnosis and Criminal Law, supra,* at 670; Orne, *supra,* at 318–319. For reasons that are apparently unknown, a hypnotized subject may attempt to fill in memory gaps with false memories and inaccuracies by confabulation. *Hypnosis and Criminal Law, supra,* at 670 n. 32.

The first legal forecast of this problem came in a 1902 article pointing to the unreliability of hypnosis due to "illusions and hallucinations" that a subject incurs while in a trance. Ladd, *Legal Aspects of Hypnotism,* 11 Yale L.J. 173 (1902). Since that time a number of courts have accepted confabulation as one of the key areas of concern in demonstrating the reliability of recall testimony drawn from a witness' previous hypnosis session. *See, e.g., People v. Shirley,* 641 P.2d at 795, 802-803; *Hurd,* 432 A.2d at 92–94; *State v. Mack,* 292 N.W.2d 764, 771 (Minn.1980); and *Nazarovitch,* 436 A.2d at 174.

The California Supreme Court was particularly concerned by the interplay between the problems of confabulation and hypercompliance.[10] Due to problems with hypercompliance, the witness will refuse to admit that his memory is imperfect and has gaps in it. He will want to try to fill those gaps. *People v. Shirley,* 641 P.2d at 803. This could produce a recall of an event comprised of "(1) relevant actual facts, (2) irrelevant actual facts taken from an unrelated prior experience of the subject, (3) fantasized materials ('confabulations') unconsciously invented to fill gaps in the story, and (4) conscious lies—all formulated in as realistic fashion as" is possible. *Id.* So too, Dr. Martin T. Orne, who is one of the foremost experts on the subject of hypnosis, has observed that the concept of hypersuggestibility is linked to the problem of confabulation. He points out that "[t]he same process which increases suggestibility by permitting the subject to accept counterfactual suggestions as real also makes it possible for the subject to accept approximations of memory as accurate." Orne, *supra,* at 319.[11] Thus

> [t]he risk of confabulation is especially great during post-hypnotic suggestion when the hypnotist suggests that the subject will remember clearly the forgotten event when the subject has no actual memory of the event.... The subject may feel pressured to respond to the hypnotic suggestion as a result of desire to please the hypnotist. In addition, the subject tends to respond literally to hypnotic suggestion.... These factors enhance the potential for the hypnotized person to "remember" events that actually did not occur.

Safeguards, supra, at 200, n. 23.

B.

While there are three areas of concern inherent in the actual process of hypnosis, as above observed, there are also two post-hypnosis problem areas. One problem area inheres in the view held by some members of juries that hypnosis is infallible. The other problem relates to the high level of confidence with which a witness becomes endowed after hypnosis. This level of confidence affects the ability of counsel to succeed in demonstrating problems with a witness' testimony on cross-examination. It also affects the ability of jurors to detect changes in the witness' demeanor and a lack of accuracy of recall.

Turning to the first of the two post-hypnosis session problems, there is a generally accepted view that many people believe that hypnosis acts as a form of foolproof truth serum, preventing a witness who has

10. This interplay has also concerned the Pennsylvania and New Jersey Supreme Courts to some degree. *See Nazarovitch,* 436 A.2d at 174 and *Hurd,* 432 A.2d at 93.

11. One of the most graphic examples of confabulation occurred in *People v. Lopez,* 110 Cal. App.3d 1010, 168 Cal.Rptr. 378 (1980). A witness underwent four pretrial hypnotic sessions, but the hypnotist reported to the court that although the witness had been in a trance, the entire recollection of the witness was a total fabrication. The *Lopez* court accepted this explanation and found that hypnosis had been useless in refreshing the witness' memory.

been hypnotized from lying. As one commentator has indicated: "[M]any laymen believe that the power of hypnosis, clothed in its veil of mystery, prevents willful deception." Dilloff, *supra*, at 5. As noted in the foregoing paragraphs on confabulation, this perception is in error. *Id.*, Orne, *supra*, at 313, 321; *Admissibility of Testimony Influenced by Hypnosis, supra*, at 1208. Recognition of this problem makes it imperative that a party-opponent to the admission of hypnotically-induced-recall-testimony have ample opportunity to educate a jury as to the fact that hypnosis is not a guarantor of truth. It is merely a tool to assist a witness in refreshing a memory that is fallible. So too, the responsibility of enlightening the jury as to the nature of hypnosis is one for the trial court.

The other post-hypnotic session problem stems from the fact that a witness who is uncertain of his recollections before being hypnotized and who has confabulated during hypnosis will become convinced that the post-hypnotic recollections are absolutely accurate. This process is caused by the fact that both before and during hypnosis the witness is told that he will remember everything clearly.[12]

These concepts interrelate with each other and may be manifested strongly on the witness stand through a syndrome known as posthypnotic source amnesia. *See People v. Shirley*, 641 P.2d at 803–804. This syndrome

> occurs when something learned under hypnosis is carried into the wakened state but the fact that the memory or thought was learned under hypnosis is forgotten.... A subject who has lost the memory of the source of his learned information will assume that the memory is spontaneous to his own experience. Such a belief can be unshakeable, last a lifetime, and be immune to all cross-examination. It is especially prone to "freeze" if it is compatible with the subject's prior prejudices, beliefs, or desires.

Diamond, supra, at 336 (footnote cites omitted); *accord*, Orne, *supra*, at 320, 332; *People v. Gonzales*, 108 Mich.App. 145, 310 N.W.2d 306, 310 n. 4, 312 (1981).

As Professor Bernard Diamond notes, most witnesses not previously subjected to hypnosis, when cross-examined as to their recall of events, communicate their uncertainties by hesitancy in answering, expressions of doubt, and body language revealing a lack of self-confidence. These crucial indicators of demeanor are equal to or greater than the bare substance of the testimony in forming the foundation on which a jury determines the weight of the evidence. "Because the [previously hypnotized] witness subjectively believes the veracity of the memory, cross-examination loses effectiveness as a means of attacking credibility and the accuracy of the recall." *Safeguards, supra*, at 203.[13]

II.

Confronting the foregoing problems, many out-of-state jurisdictions called upon to admit hypnotically-induced-recall-testimony into evidence have ruled against admission. However, almost without excep-

12. As noted by the Pennsylvania Supreme Court: "Pre-hypnosis uncertainty becomes molded, in light of additional recall experienced under hypnosis into certitude, with the subject unaware of any suggestions that he acted upon any confabulation in which he engaged." *Nazarovitch*, 436 A.2d at 174; *Mack*, 292 N.W.2d at 769; *see also Hypnosis and Criminal Law, supra* note 5, at 672 n. 43.

13. The degree to which posthypnotic source amnesia can affect a witness is demonstrated by a factor related to the trial of Sirhan Sirhan, the convicted killer of Senator Robert Kennedy. *See People v. Sirhan*, 7 Cal.3d 710, 102 Cal.Rptr. 385, 497 P.2d 1121 (1972), *cert. denied*, 410 U.S. 947, 93 S.Ct. 1382, 35 L.Ed.2d 613 (1973). Professor Bernard Diamond of the University of California, Berkeley, hypnotized Sirhan Sirhan in preparation for trial. The hypnosis session was observed by a number of reliable observers. He was placed into several very deep trances and given certain posthypnotic suggestions which he later acted out. However, to this day Sirhan Sirhan denies having ever been hypnotized. *See* Diamond, *supra*, at 334–335.

tion,[14] the courts that have refused to admit such testimony have relied on the so-called "general acceptance," or "*Frye* rule", originally set forth in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923). In *Frye*, the court declined to admit the results of a lie detector test, known as the "systolic blood pressure deception test," into evidence, because the test had not been generally accepted by the scientific community.

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*

Id. at 1014 (e.s.).

The test obviously applies to any evidence adduced from any new scientific technique or method,[15] and the overwhelming number of jurisdictions that have opposed admission of hypnotically-induced-recall-testimony have generally relied on *Frye*.[16] Therefore, the underlying issue in this case is whether the *Frye* rule is the applicable evidentiary concept in our jurisdiction by which a court may ascertain whether to admit results of a new or controversial scientific technique or test, and of testimony induced by hypnosis. If it is, can the technique used to induce such testimony be considered "scientific"? As was recently explained by the Arizona Supreme Court:

> To a large extent, the decision on the use of hypnotically induced recall turns on the resolution of a single question of policy. The true issue is whether *Frye* should be applied to determine the basic reliability of the new technique as a prerequisite for use in the courtroom, thus leaving only foundational questions for the trial court, or whether the trial court should be left free to decide both basic reliability and foundational questions on a case-by-case basis. The cases proceed along two separate lines, based not so much on how the court views hypnosis (there being a general consensus that it presents a great deal of danger), but primarily on whether the court applies the *Frye* principle in making its determination.

State ex rel. Collins, 644 P.2d at 1282.

It is uncertain from our review of Florida cases whether *Frye* has been accepted in Florida. Certainly no state decision has explicitly applied it. In *Kaminski v. State*, 63 So.2d 339 (Fla.1952), the supreme court cited *Frye* and other cases as authority for the view that the results of lie detector tests were inadmissible, because such tests

14. Our research indicates that almost all courts barring the use of hypnotically-induced-recall-testimony have done so by applying the *Frye* rule. There are a few deviations from this trend. *See, e.g., People v. Diaz*, 644 P.2d 71 (Colo.App.1982) (*Frye* not applied but hypnotically-induced-recall found inadmissible); *Strong v. State*, 435 N.E.2d 969 (Ind.1982) (*Frye* not applied; hypnosis inherently unreliable and therefore not probative); *Hurd*, 432 A.2d 86 (*Frye* inapplicable to hypnotically influenced testimony, but testimony admissible because relevant); and *People v. Beachum*, 97 N.M. 682, 643 P.2d 246 (Ct.App.1981) (follows and quotes *Hurd*).

15. For example the test has been applied to different techniques in *People v. Kelly*, 17 Cal.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240 (1976) (voice-print analysis); *United States v. Distler*, 671 F.2d 954 (6th Cir.1981) (gas chromatograph test for matching oil samples); *People v. Anderson*, 637 P.2d 354 (Colo.1981) (polygraph); *Phillips v. Jackson*, 615 P.2d 1228 (Utah 1980) (H.L.A. paternity test); *People v. Baynes*, 58 Ill.Dec. 819, 88 Ill.2d 225, 430 N.E.2d 1070 (1981) (polygraph); *People v. Alston*, 79 Misc.2d 1077, 362 N.Y.S.2d 356 (1974) (bloodstain cell analysis); *State v. Linn*, 93 Idaho 430, 462 P.2d 729 (1969) (truth serum), and *Brooke v. People*, 139 Colo. 388, 339 P.2d 993 (1959) (paraffin tests).

16. *See, e.g., State ex rel. Collins*, 132 Ariz. 180, 644 P.2d 1266 (1982); *Shirley*, 641 P.2d 775 (Calif.); *Nazarovitch*, 436 A.2d 170 (Pa.); *Mack*, 292 N.W.2d 769 (Minn.); *Collins v. State*, 52 Md.App. 186, 447 A.2d 1272 (1982); *Gonzales*, 310 N.W.2d 306 (Mich.); and *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981); *People v. Hughes*, 88 A.D.2d 17, 452 N.Y.S.2d 929 (1982).

had not then gained sufficient acceptance in the scientific community. However, the court did not adopt *Frye*, since the case presented a more narrow question as to whether testimony concerning the *taking* of a lie detector test, rather than its *results*, should have been admitted. *Id.* at 340.

The only other Florida case we have found which specifically refers to the *Frye* rule is *Coppolino v. State*, 223 So.2d 68 (Fla. 2d DCA 1968), *appeal dismissed*, 234 So.2d 120 (Fla.1969), *cert. denied*, 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1970). The facts there reveal that Coppolino murdered his wife by a lethal injection of succinylcholine chloride. An expert witness for the state was the person who testified as to the cause of death. This witness arrived at his conclusion by utilizing a new test that he had developed. Several other witnesses, including those presented by the state, testified that medical science believed it was impossible to demonstrate the presence of succinylcholine chloride in the body. Nevertheless, the trial court admitted the test results. The Second District Court of Appeal, in affirming, observed that the *Frye* rule was apparently the law based on the Supreme Court's earlier decision in *Kaminski*. The court, however, did not apply *Frye*. Instead it ruled that the trial court had properly admitted the test results, because there was substantial competent evidence to find the tests were reliable. *Coppolino*, 223 So.2d at 70–71.

Although the *Coppolino* court cited *Frye* as the proper rule to apply to determine admissibility, it is clear from the opinion that *Frye* was not applied. If it had been employed, the test results clearly would have been inadmissible. It also appears that the passing reference in *Coppolino* to *Frye* as being the correct approach to utilize is one with which we must respectfully disagree. We do not read *Kaminski* as having adopted *Frye*. Our view is supported by the Supreme Court's recent decision in *Jent v. State*, 408 So.2d at 1029, in which the court considered that a hair analysis which matched Jent's hair with evidence was admissible. The court stated:

> As a general rule, the problem presented to a trial court is whether scientific tests are so *unreliable* and scientifically unacceptable that admission of those test results constitutes error. *Coppolino v. State*, 223 So.2d 68 (Fla. 2d DCA 1968), ... A trial court has wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed.

Id. (e.s.). The foregoing quoted rule clearly is not an adoption of the *Frye* holding, although there is a reference to scientific acceptability. Of greater significance is the fact that neither *Frye* nor *Kaminski* are alluded to in *Jent*, although the court did refer to *Coppolino* as authority for its position.

More recently the Florida Supreme Court cited *Coppolino* as supporting its view that "[a] court should admit evidence of scientific tests and experiments only if the reliability of the results are widely recognized and accepted among scientists." *Stevens v. State*, 419 So.2d 1058, 1063 (Fla.1982). Superficially, it would seem that the above statement embraces the *Frye* rule, yet the court's reliance upon *Coppolino* undercuts that interpretation. Additionally, the statement made in the same paragraph that "[t]he admissibility of a test or experiment lies within the discretion of the trial judge ..." is contrary to *Frye* since a strict adherence to *Frye* would severely curtail trial court discretion. The latter quoted statement is, moreover, consistent with the court's earlier opinion in *Jent*.

The view expressed by certain scholars is that *Coppolino* not only does not accept *Frye*, but in fact utilizes the preferred approach [17] in dealing with the question of

17. The relevancy approach is preferred over the *Frye* rule because of problems inherent in the application of *Frye* and due to policy reasons. *See* Giannelli, *supra*. One of the major criticisms directed against applying the *Frye* rule to a given scientific technique is that it would indiscriminately bar the admissibility of such evidence despite whether it meets the twin tests of logical and legal relevance. For example, as pointed out by Professor Giannelli,

admissibility. This method is known as the "relevancy approach." *See* Giannelli, *supra*, at 1232–1245; *McCormick on Evidence*, § 203 (2nd ed. 1972). Dean McCormick states:

> The practice approved in the last mentioned case [*Coppolino*] is the one which should be followed in respect to expert testimony and scientific evidence generally. "General scientific acceptance" is a proper condition for taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. Particularly, probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, and undue consumption of time. If the courts used this approach, instead of repeating a supposed requirement of "general acceptance" not elsewhere imposed, they would arrive at a practical way of utilizing the results of scientific advances.

McCormick, *supra*, § 203 at 491 (footnotes omitted).

The above view accords fully with the Florida Evidence Code. *See* Ch. 90, Fla. Stat. (1979). The material sections of the code are Sections 90.401, .402 and .403, which we are required to read in pari materia.[18] Section 90.402 provides that "[a]ll relevant evidence is admissible, except as provided by law." There are, of course, two forms of relevancy: *logical* and *legal*. *Atlantic Coast Line R. Co. v. Campbell*, 104 Fla. 274, 139 So. 886, 890 (1932). "The relevancy of a fact to the issue being tried is ordinarily a question of logic rather than one of law." 23 Fla.Jur.2d *Evidence and Witnesses* § 123 (1980). Consequently, whether a fact at issue is logically relevant is controlled by Section 90.401, stating that "[r]elevant evidence is evidence tending to prove or disprove a material fact." Because the bank teller's testimony in the case at bar was the crucial evidence identifying appellant as the individual who committed the offenses of grand theft and uttering a forged instrument, the testimony is obviously material and *logically* relevant.

[6] This evidence may yet be inadmissible if it is not *legally* relevant. *See* McCormick, *supra* § 185 at 440–441; 23 Fla.Jur.2d *Evidence*, *supra*, at § 124; *Cotton v. United States*, 361 F.2d 673, 676 (8th Cir.1966); *Hoag v. Wright*, 34 App.Div. 260, 54 N.Y.S. 658, 662 (1898). Section 90.403 encompasses the test for legal relevance by requiring that "[r]elevant evidence is inadmissible if its *probative value* is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence...."[19] (e.s.) It is in the area of

a rigid application of *Frye* would require a court to await the passage of time until such time as a new test or procedure has been developed to the point that the test or procedure has been developed to the point that the test or procedure has become "generally accepted." This creates a "cultural lag" during the technique's development, requiring that relevant evidence which might be demonstrated to be completely reliable must be excluded from consideration. *See* Giannelli, *supra*, at 1223 nn. 201 & 202; *contrast United States v. Addison*, 498 F.2d 741, 743–744 (D.C.Cir.1974). Plainly, the *Frye* rule engenders an impediment to the admissibility of reliable evidence without considering the cost to society. *Admissibility of Testimony Influenced by Hypnosis*, *supra*, 67 Va.L.Rev. at 1214, n. 77; *see also Hurd*, 432 A.2d at 94.

18. *See Speights v. State*, 414 So.2d 574, 578 (Fla. 1st DCA 1982); *Ivester v. State*, 398 So.2d 926, 930 (Fla. 1st DCA 1981), *rev. denied*, 412 So.2d 470 (Fla.1982).

19. One might well ask, in a jurisdiction that has previously adopted *Frye*, whether the rule survives a subsequent enactment of an evidence code embracing the "relevancy" test. Sections 90.401 .403, Florida Statutes, are patterned after Rules 401, 402 and 403 of the Federal Rules of Evidence, 28 U.S.C. It is well settled that if a state statute is patterned after the language of its federal counterpart, the statute will take the same construction in Florida courts as its prototype has been given insofar as such construction comports with the spirit and policy of the Florida law relating to the same subject. *Pasco County School Board v. Florida Public Employees Relations Commission*, 353 So.2d 108, 116 (Fla. 1st DCA 1977). Unfortunately the answers received from the federal sector are not uniform. Some courts assume that the *Frye* test survived the 1975

legal relevancy that certain undertones of *Frye* become applicable. If *Frye* should not be per se applied to bar evidence obtained from a new or controversial technique solely because the method is not generally accepted by the scientific community, the technique's reliability is a factor to be considered by the trial judge in determining the question of the evidence's legal relevance. As noted by Professor Giannelli, *supra*, at 1235 (footnotes omitted): "The probative value of scientific evidence, . . ., is connected inextricably to its reliability; if the technique is not reliable, evidence derived from the technique is not relevant."

The reliability of the scientific method in question can be established in a number of ways. The party proponent could, for example, introduce evidence of the technique's proven track record and general acceptance by science, or present expert testimony of its reliability. The relevancy approach thus differs from *Frye* in not necessarily precluding the admissibility of evidence which is not generally considered reliable by the scientific community; yet it is similar to *Frye* in recognizing that "novelty and want of general acceptance are *integral parts* of the relevancy analysis which *may* lessen the probative value of a scientific test or technique." Giannelli, *supra*, at 1234 (e.s.); *accord*, McCormick, *supra* at 364.

In Florida, as a matter of law, certain scientific techniques have been found to be so completely devoid of reliability as to fail as probative evidence. *Knight v. State*, 97 So.2d 115 (Fla.1957) (truth serum); *see also Zeigler v. State*, 402 So.2d 365 (Fla.1981), *cert. denied*, 455 U.S. 1035, 102 S.Ct. 1739, 72 L.Ed.2d 153 (1982) (sodium butathol test).[20] Other techniques, however, have been held to have sufficient reliability so as to vest discretion in the trial court to consider Section 90.403's balancing test for legal relevancy. *See, e.g., Jent* (hair comparison analysis); *Carlyon v. Weeks*, 387 So.2d 465, 468 (Fla. 1st DCA 1980) (HLA blood paternity test). In *Clark v. State*, we held as a matter of law the *principle* of hypnosis was sufficiently reliable, and that the testimony of both the hypnotist and hypnotized witness was of sufficient probative value to be presented to the jury. The application of the "relevancy approach" is implicit in *Clark* and the other foregoing cases.

[7] At any event, whether *Frye* is the rule to be applied to a new or controversial scientific technique is not one we are called upon to decide since we conclude that the method by which testimony is hypnotically induced is not one that falls within the ambit of *Frye*. "[T]echnically the test is not directly applicable because it is concerned with the admissibility of *expert opinion* deduced from the results of a scientific technique, such as a lie detector test, and not with the admissibility of *eyewitness testimony*." Note, *The Admissibility of*

adoption of the Federal Rules of Evidence, *see, e.g., United States v. Tranowski*, 659 F.2d 750, 756 (7th Cir.1981); *United States v. Kilgus*, 571 F.2d 508, 510 (9th Cir.1978); *United States v. Brown*, 557 F.2d 541, 556 (6th Cir.1977); *United States v. McDaniel*, 538 F.2d 408, 412 (D.C. Cir.1976). At least one other federal court does not. *United States v. Williams*, 583 F.2d 1194, 1197–1200 (2nd Cir.1978); *cert. denied*, 439 U.S. 1117, 99 S.Ct. 1025, 59 L.Ed.2d 77 (1979). However, apparently no federal court has directly faced nor analyzed the issue. Two state cases have held that state rules of evidence, patterned after the federal rules, displace *Frye*. *State v. Williams*, 388 A.2d 500 (Me.1978); *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975).

20. Hypnosis cannot be equated with polygraph testing and truth serums. As one writer recently explained:

> [I]t [hypnosis] is conceptually different from polygraph testing and narcoanalysis. The last two procedures function as truth elicitors, and properly have nothing to do with memory retrieval. Conversely, hypnosis is a means of memory retrieval and cannot be classified as a truth elicitor. To classify hypnosis with polygraph testing and narcoanalysis erroneously implies that hypnosis can produce truth. This gives rise to the danger that trial courts will label hypnosis as a scientific means of ensuring truth, thereby leading the jury to attribute "uncritical and absolute reliability" to hypnosis without evaluating its flaws.

Hypnosis and Criminal Law, *supra* note 5, at 673 (footnote omitted); *see also People v. Beachum*, 643 P.2d at 251; Orne, *supra* note 4, at 313 n. 5; Dilloff, *supra* note 5, at 22.

Testimony Influenced by Hypnosis, 67 Va.L. Rev. 1203, 1217 (1981) (e.s.); *accord, Commonwealth v. Juvenile*, 381 Mass. 727, 412 N.E.2d 339, 342-343 (1980). Our view is supported by that of the New Jersey Supreme Court in *State v. Hurd*, which observed:

> Unlike the courts in *Mena, supra*, and *Mack, supra*, 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. *See* Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 Ohio St.L.J. 567, 584 (1977) . . . In light of this purpose, hypnosis can be considered reasonably reliable if it is able to yield recollections as accurate as those of an ordinary witness, which likewise are often historically inaccurate.

432 A.2d at 92. *See also State v. Beachum*, 97 N.M. 682, 643 P.2d 246, 252 (Ct.App. 1981).

The appellant perceptively notes that the underpinnings of *Clark* were furnished by *Harding v. State*, 5 Md.App. 230, 246 A.2d 302 (1968), *cert. denied*, 252 Md. 731, *cert. denied*, 395 U.S. 949, 89 S.Ct. 2030, 23 L.Ed.2d 468 (1969), in which the Maryland Court of Appeals explained at length that hypnosis was reliable and admissible. Because the Maryland court has since receded from *Harding* and now bars admission of hypnotically-induced-recall-testimony by virtue of its opinion in *Collins v. State*, 52 Md.App. 186, 447 A.2d 1272 (1982), appellant argues that the foundation of our opinion in *Clark* has now been eroded. We disagree. The *Collins* court relied on the *Frye* rule as the correct basis for barring the admission of hypnotically-induced-recall-testimony and, as we have explained, *Frye* is inapplicable to the technique used to influence the recall of such testimony. We therefore conclude that the "relevancy approach" is the test to be applied to this type of memory retrieval; consequently *Clark* was correctly decided.

III.

[8] Although the principle of hypnosis may itself be reliable and thus probative, our examination of the problems inherent in the process of hypnosis reveals that admissibility of such testimony will hinge on a case-by-case examination of the technique used to hypnotize the witness. The examination of the particular procedure employed in order to determine its reliability interrelates with the second prong of the relevancy test: legal relevancy. Due to the peculiar nature of hypnosis and its inherent potential pitfalls, the admissibility of hypnosis, as a tool for refreshing a witness' memory, is not so much a question of the reliability of the *principle* of hypnosis as it is a question of the reliability of the particular *technique* or *procedure* used in a given case. Hence, the probative value of hypnosis rests on both the reliability of the principle *and* the technique or procedure employed, both of which are inseparably intertwined. The court must first evaluate such evidence pursuant to Section 90.403, Florida Statutes, by weighing its probative value in an effort to decide if its admissibility would be substantially outweighed by dangers of unfair prejudice, confusion of the issues, misguidance of the jury, or needless presentation of the issues.[21]

[9] Thus, either upon objection to introduction into evidence of hypnotically-in-

21. The balancing test of legal relevancy has been advocated by various commentators. *See* Giannelli, *supra*, at 1239; Orne, *supra* note 4; and *Admissibility of Testimony Influenced by Hypnosis, supra* note 5, at 1220. The balancing test was recently severely criticized in *State ex rel. Collins*, 644 P.2d at 1285, because of the "danger of conflicting decisions" as to the admissibility of hypnotically-induced-recall-testimony and due to the "consumption of trial resources." Yet, the *State ex rel. Collins* criticism begs the point because all forms of evidence in all cases are subject to trial court review for legal relevance. The court seems to be opposed to a test for legal relevance by its argument.

duced-recall-testimony, or upon its proffer, it is the burden of the party seeking to present such evidence to demonstrate that the hypnosis session and use of that evidence will not cause undue prejudice or mislead the jury. *Accord, Commonwealth v. Juvenile,* 412 N.E.2d at 344; *Hurd,* 432 A.2d at 96–97; *Beachum,* 643 P.2d at 253 254; and Giannelli, *supra* at 1246. To satisfy this burden, we approve the following language from *Hurd:*

> [T]he party seeking to introduce hypnotically refreshed testimony has the burden of establishing admissibility by clear and convincing evidence. We recognize that this standard places a heavy burden upon the use of hypnosis for criminal trial purposes. This burden is justified by the potential for abuse of hypnosis, the genuine likelihood of suggestiveness and error, and the consequent risk of injustice. The hypnotically refreshed testimony must not be used where it is not reasonably likely to be accurate evidence.

432 A.2d at 97; *accord, Beachum,* 643 P.2d at 254; *cf.* Giannelli, *supra,* at 1246. In meeting the clear and convincing evidence standard, a party advocating the admission of such testimony should attempt to satisfy certain criteria aimed at safeguarding the reliability of the hypnosis process. The nearer the hypnotic session comes to meeting these suggested safeguards, the more reliable and less suggestive the hypnotic session. Use of these extensive safeguards can minimize the gravity of objections to admissibility. *Cf. Safeguards, supra,* at 211; *see generally Beachum,* 643 P.2d at 253; *Hurd,* 432 A.2d at 96; *State v. Glebock,* 616 S.W.2d 897 (Tenn.Ct.Cr.App.1981). We approve some, but not all of the *Hurd* safeguards. *See also Key v. State,* No. AI-480 (Fla. 1st DCA, February 8, 1983).

[10] Returning to the first three problem areas that are inherent in the process of hypnosis: hypersuggestiveness, hypercompliance, and confabulation, we find that commentators generally approve the following safeguards to reduce the potentiality of prejudice.[22] *First,* a neutral and detached hypnotist should be employed. By using such an individual, the appearance of prejudice concomitant with use of a police officer/hypnotist, as in the case at bar, will be substantially abated. Use of a police officer/hypnotist is not per se a compelling reason for a court to suppress automatically as evidence the fruits of a hypnotic session on prejudicial grounds, but the use of such officer in that capacity should be avoided if other professionals are available to conduct the session.

Courts and commentators alike that have adopted or advocated various safeguards are united in requiring that hypnosis be performed by either a trained mental health expert,[23] psychiatrist, or psychologist.[24] We do not go so far as to make this a requirement, but the advantage of using a professional, such as a psychiatrist or psychologist, should be readily apparent. Such professionals should be able to qualify as experts without difficulty and competent to testify about the hypnosis method utilized, as well as the use of hypnosis in general. *Beachum,* 643 P.2d at 253; *Hurd,* 432 A.2d at 96. This is due in part to the fact that the fields of psychiatry and psychology have long embraced hypnosis as a medical tool for therapy. *See* Dilloff, *supra,* at 3. So too, hypnotized "individuals often are able to recall a good deal more while talking to a psychiatrist or psychologist than when they are with an investigator, ..." Orne, *supra,* at 336; *cf. Hurd,* 432 A.2d at 96.

A *second safeguard* involves the location of the hypnosis session. Ideally, the session

22. Many of the safeguards applicable to the process of hypnosis are derived from the position taken by Dr. Martin T. Orne, who is one of the foremost hypnotists. His safeguards are included in his article on the use of hypnosis in court. *See* Orne, *supra* note 4, at 335 336.

23. *People v. Lucas,* 107 Misc.2d 231, 435 N.Y.S.2d 461, 464 (Sup.Ct.1980); *see also People v. Smrekar,* 68 Ill.App.3d 379, 24 Ill.Dec. 707, 385 N.E.2d 848, 855 (1979).

24. *Beachum,* 643 P.2d at 253 254; *Hurd,* 432 A.2d at 96 97; Orne, *supra* note 4, at 335–336.

should be conducted at an independent location, such as a doctor's office, free from a coercive or suggestive atmosphere. Dilloff, *supra*, at 8. *Third*, as was the situation in this case, only the hypnotist and the witness should be present during hypnosis. *Beachum*, 643 P.2d at 254, *Hurd*, 432 A.2d at 97; *People v. Lucas*, 107 Misc.2d 231, 435 N.Y.S.2d 461, 464 (Sup.Ct.1980). "This is important, because it is all too easy for observers to inadvertently communicate to the subject what they expect, what they are startled by, or what they are disappointed by." Orne, *supra*, at 336. This is not to say that the prosecution, defense, police investigators, or other interested parties should not be permitted to observe the hypnosis session. We believe that interested parties should be encouraged to observe the session, since such a procedure will allow a party opponent the opportunity to note any potential problems with the procedure. These problems may be brought to the trial court's attention at a later time. Dilloff, *supra*, at 8. However, as Dr. Orne suggests, parties other than the hypnotist and the hypnotized witness should only be permitted to view the session through a one-way mirror or on a television monitor. Orne, *supra*, at 336.

A recommended *fourth safeguard* proposes that the subject, before the hypnosis session, be examined by the hypnotist in an effort to elicit every possible detail that the witness recalls concerning the crime. This procedure should be recorded in some fashion, as is more fully explained under the sixth safeguard, *infra*.

Fifth, prior to being hypnotized, the witness should be examined by the hypnotist to ascertain whether the witness suffers from any mental or physical disorders that might affect the results of the session. *Lucas*, 435 N.Y.S.2d at 464. Here again, if the hypnotist is a trained expert, such as a psychiatrist, he or she will be more competently able to conduct such an examination.

As a *sixth safeguard*, we consider it highly desirable that some type of record of the actual session be preserved. Several objectives will be accomplished by utilizing this procedure: First, after hypnosis it will be possible to document that a witness has "not been implicitly or explicitly cued pertaining to certain information which might then be reported for apparently the first time by the witness during hypnosis." Orne, *supra*, at 336. Second, should recall testimony be gained by a hypnosis session that is so unreliable as to require exclusion from a court proceeding, a careful record of all pre-hypnosis details recalled by the witness will be documented, preferably by videotape. We see no valid reason for barring a witness' pre-hypnosis recollections from evidence, merely because the witness has been later hypnotized. Additionally, not even jurisdictions which have barred the admission of testimony from a witness who has been hypnotized have gone so far as to exclude per se, pre-hypnotic recollections. *See State ex rel. Collins*, 644 P.2d at 1295 1297; *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648, 655 (1981); *State v. Wallach*, 110 Mich.App. 37, 312 N.W.2d 387 (1981); and *State v. Koehler*, 312 N.W.2d 108 (Minn.1981).

By having such a record available, a party opponent might also be able to muster expert witnesses for the purpose of developing any possible flaws in the manner in which the hypnosis was performed. The court, moreover, would be able to scrutinize the session. Although we do not go so far as to require that the session and pre-session examination be videotaped, as did the New York court in *Lucas*, 435 N.Y.S.2d at 464, we strongly suggest that a videotape system be utilized.[25] After all, the video-

25. Videotaping has come into vogue in the last few years, and numerous articles have been written about the advantages and disadvantages of the technique. *See, e.g.*, Raburn, *Videotapes in Criminal Courts: Prosecutors on Camera*, 17 Crim.L.Bull. 405 (1981); Armstrong, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 Ore.L.Rev. 567 (1976); Doret, *Trial by Videotape—Can Justice be Seen to be Done?*, 47 Temple L.Q. 228 (1974); Note, *Videotape as a Tool in the Florida Legal Process*, 5 Nova L.J. 243 (1981). It should be noted that videotapes are not only probative, but admissible in Florida criminal

tape system is the only method by which visual cues can be documented. Orne, *supra*, at 336; Diamond, *supra*, at 339. Absent use of a videotape, an audio tape recording or a written transcript of the proceedings is an alternative. *Accord Beachum*, 643 P.2d at 253-254; *Hurd*, 432 A.2d at 97. Finally, in determining the admissibility of hypnotically-induced-recall-testimony, if videotaping of the hypnosis session is not employed, the manner in which the session was conducted becomes less demonstrably reliable and more inherently suspect.

A *seventh safeguard* relates to the means by which the interview is conducted. The hypnotist should avoid reassuring remarks that might assist in stimulating the process of confabulation. The hypnotist should merely relate details generally to the hypnotized subject, leaving the witness free to present a narrative that will fill in the details of previous observations of the crime. Dilloff, *supra*, at 8. Free narrative recall under hypnosis will produce a higher degree of accurate information. *State ex rel. Collins*, 644 P.2d at 1291.

Eighth, in weighing the reliability of the session and its results, the court should carefully consider whether there is independent "evidence corroborative of or contradictory to statements made during the trance...." *Lucas*, 435 N.Y.S.2d at 464. An example of this type of situation exists in the case at bar. We find the bank teller's hypnotically-induced-recall-testimony by which she identified the appellant as the individual who passed the check and received cash for it jibes with other factors in this case. For example, a handwriting expert implicitly corroborated such testimony by determining that appellant forged the check which was later passed to the teller. Additionally, a deposit receipt from the transaction was found in a jacket belonging to appellant's accomplice. Circumstantially, this evidence strongly suggests that the bank teller's identification of the appellant was reliable and not the product of confabulation.

Dependent upon the degree to which the eight foregoing safeguards can be satisfied, the trial judge can weigh the probative value of the testimony to see if it is substantially outweighed by dangers of unfair prejudice, or by the fact that it may mislead the jury. § 90.403, Fla.Stat. Assuming that the trial judge permits the testimony to be introduced into evidence, there are two mandatory safeguards that we find to be necessary. Because the witness who has been hypnotized may have an almost unshakeable belief in the correctness of details recalled during the hypnotic trance, the court should give great leeway to a party opponent in cross-examining the witness. "As a practical matter, counsel challenging testimony elicited through pretrial hypnosis ... should apply techniques similar to those used to attack present recollection refreshed. The most advantageous approaches are to discredit the accuracy of testimony or to question the hypnotic procedure itself through the cross-examination of experts." *Hypnosis and Criminal Law*, *supra*, at 678; *cf. Chapman v. State*, 638 P.2d 1280, 1284 (Wyo.1982).

[11] An additional required safeguard should be implemented in the form of a cautionary jury instruction warning the jury of the potential influence hypnosis may have on a witness. *Hypnosis and Criminal Law*, *supra*, at 678; *see also Admissibility of Testimony Influenced by Hypnosis*, *supra*, 67 Va.L.Rev. at 1215 n. 79; *cf.* Giannelli, *supra*, at 1238 n. 310. The instruction should be given by the court prior to the time that hypnotically-induced-recall-testimony is presented and again at the time that the jury is charged. At the minimum, the instruction should carefully advise the jury not to place unduly great weight on the witness' recall testimony, and that the process of hypnosis merely assists a witness in recalling an event. It does not act as a magic truth serum, nor does it guarantee an accurate recall of the details

proceedings on much the same basis as still photographs. *Paramore v. State*, 229 So.2d 855, 859 (Fla.1969), *vacated as to death sentence only*, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972). *See also*, 3 Scott, *Photographic Evidence* §§ 1294, 1333 (2nd ed. 1969).

of the crime. We find that it was error for the lower court to deny the appellant's request for a cautionary jury instruction, although the particular instruction as requested was only a partially complete statement of the law.[26]

Appellant's convictions on the charges of uttering a forged instrument and grand theft are reversed and remanded for further consistent proceedings. Appellant's conviction on the charge of forgery is affirmed.[27]

McCORD, GUYTE P., Jr. and SHAW, LEANDER J., Jr., Associate Judges, concur.

26. The appellant requested the following jury instruction:

> The court allowed into evidence testimony that was recalled or induced through the aid or use of hypnosis, the court instructs you to consider that testimony and give it the weight and credibility you feel it deserves since the court cannot vouch for its reliability. The court, however, admitted the testimony into evidence because it was relevant to the issue at hand.

27. Not raised in this appeal nor addressed in this opinion is the issue of an unduly suggestive identification violative of principles of due process. *See Hurd*, 432 A.2d at 97–98.

THE COURT: Return the jury, please.

(Thereupon, at 6:28 o'clock p.m., the jury entered the courtroom, after which the following proceedings were had before the Court, counsel for the respective parties and the jury.)

THE COURT: Ladies and gentlemen of the jury, it's 6:28. Ordinarily, this is supper time and I would not want you to continue deliberating -- the purpose of it to interfere with your ability to concentrate on what you're doing.

I would like to -- extend to

you at this time the opportunity to recess for supper and reconvene in about an hour to continue deliberations or, if you wish, to continue deliberations at this time. It's kind of up to you what you'd like to do.

The Court had received a request to at least get some cigarettes, but I take the opportunity to give you the opportunity to indicate whether you'd like to recess at this time or not. Who is your foreman?

MR. PASCUAL: (Indicating)

THE COURT: Yes, Mr. Pascual. Do you know what the jury would like to do, Mr. Pascual?

MR. PASCUAL: No, sir, may I discuss it with them for a moment?

THE COURT: Surely.

MR. PASCUAL: I believe we'll stay, Your Honor.

THE COURT: Okay. All right. We'll suggest, perhaps, the Court will make a further inquiry of you in about a half an hour. If you haven't reached a verdict at that time, we'll reconsider perhaps recessing for supper.

MR. PASCUAL: Thank you.

THE COURT: Does counsel have any objection to this proceeding?

MR. KIRKLAND: No, Your Honor.

MR. VAN HOOK: State does not, Your Honor.

THE COURT: Okay, thank you. If you would, resume your deliberations then.

(Whereupon, at 6:30 o'clock p.m., court was recessed pending rendition of the verdict by the jury.)

* * * * * * *

THE COURT: Counsel approach the Bench, please.

(Whereupon, counsel for the respective parties approached the Bench and conferred with the Court out of the hearing of the court reporter.)

THE COURT: Return the jury, please.

(Whereupon, at 8:27 o'clock p.m., the jury entered the courtroom, after which the following proceedings were had before the Court, counsel for the respective parties and the jury.)

THE COURT: Ladies and gentlemen, I realize the hour is late and, of course, the Court has made inquiry of you from time to time as to whether you wanted to go to supper. It's 8:29. The Court has received indication from you that you're having trouble reaching a unanimous verdict.

What I'd like to suggest is that perhaps we do recess for supper and come back after supper and continue deliberations.

The Court has another instruction that it would give you concerning the situation that you find yourselves in at this time. I think it's just to the point where to ask you to continue any further would be, you know, against human endurance to go without food.

The Court will ask the Bailiffs to take you to a restaurant nearby and see that you get fed and see that you return within the hour and continue deliberations or whatever time it takes you to be fed. The expense of feeding is upon the State. The meals will be paid for, of course.

MR. PASCUAL: Your Honor, some members of the jury have expressed an interest in contacting

their families. Perhaps some provision could be made, sir, to make a call.

MR. KIRKLAND: No objection.

THE COURT: The telephone is in the Judges' office. By dialing a particular combination of numbers, you can get to the south part of the county.

MR. MC CLUNG: My wife is sitting in the back row -- my wife is sitting in the back of the courtroom, may I speak with her?

THE COURT: Yes, but---

MR. KIRKLAND: We have no objection to that, Your Honor.

THE COURT: It's important that you not talk about the case.

MR. MC CLUNG: I don't want to talk about the case.

THE COURT: You mean to give her instructions about the case, I see your children are [illegible] like that?

MR. MC CLUNG: No children, just herself and the [illegible].

THE COURT: All right. Any objection, Mr. Van Hook?

MR. VAN HOOK: No, Your Honor.

THE COURT: Okay. All right, Mrs. Galloway, if you'll give them a chance to use the telephone. We'll be in recess for supper.

(Whereupon, at 8:31 o'clock p.m., court was recessed for supper, at which time the Court, counsel for the respective parties and the jury left the courtroom.)

* * * * * * *

THE COURT: Return the jury, please.

(Whereupon, at 9:56 o'clock p.m., the Defendant was seated in the courtroom.)

(Whereupon, at 9:57 o'clock p.m., the jury entered the courtroom, after which the following proceedings were had before the Court, counsel for the respective parties and the jury.)

THE COURT: Mr. Pascual, as foreman, the Court would inquire of you if you think that if given more time, there is a reasonable probability that the jury could agree upon a verdict, it being the jury's function to do so?

MR. PASCUAL: Your Honor, I don't know if I can say that there will be reasonable

probability, but I think I can speak for the entire jury that I believe we would like to spend some more time. We don't feel, I don't believe, that we're at the point where we are at an impasse that cannot be overcome.

THE COURT: In view of that, does counsel have any objection---

MR. KIRTLAND: I think in view of that, Your Honor, it would not be necessary for further instruction.

MR. VAN HOOK: The State has no objection to further instruction.

THE COURT: I think it's only a point that they feel there may be an impasse, a further instruction wouldn't be indicated. All right.

Ladies and gentlemen, if you would, continue deliberations and see if a verdict can be reached. Thank you.

(Thereupon, at 9:58 o'clock p.m., the jury was sent from the courtroom to continue deliberations.)

THE COURT: We will be in session until we hear if we have a jury.

(Whereupon, at 9:59 o'clock p.m., court was recessed within, pending the receipt of a

verdict by the jury.)

* * * * * * *

THE COURT: Return the jury, please.

(Whereupon, at 10:26 o'clock p.m., the Defendant was brought into the courtroom, the jury entered the courtroom, after which the following proceedings were had before the Court, counsel for the respective parties and the jury.)

THE COURT: Mr. Pascual, let me inquire of you as foreman whether or not you think the jury would be able to reach a verdict?

MR. PASCUAL: At this point, Your Honor, I don't believe so.

THE COURT: Let me provide you with one more instruction here. After hearing this instruction, I'd ask that you try for one more time.

Ladies and gentlemen, it is your duty to agree upon a verdict if you can do so without violating conscientiously-held convictions that are based on the evidence or lack of evidence. No juror, from mere pride or opinion hastily formed or expressed, should refuse to agree. Yet, no juror,

simply for the purpose of terminating a case, should acquiesce in a conclusion that is contrary to his own conscientiously held view of the evidence. You should listen to each other's views, talk over your differences of opinion in a spirit of fairness and candor and, if possible, resolve your differences and come to a common conclusion, so that a verdict may be reached and that this case may be disposed of.

With that thought in mind, I would ask that you again retire and continue your deliberations.

Does counsel have any objections to these additional instructions?

MR. VAN HOOK: No, Your Honor.

THE COURT: You may proceed.

(Whereupon, at 10:29 o'clock p.m., the jury retired from the courtroom to continue deliberations.)

MR. KIRKLAND: Your Honor, we object to the giving of the additional charge. The jury has indicated they have reached a mistrial status or hung jury.

THE COURT: Objection will be overruled.

MR. KIRKLAND: I suppose for the record I

should move at this time for a mistrial. Merely objecting to it I don't think would be sufficient. I would ask for a mistrial on the basis that there was an announcement of the jury that they are unable to arrive at a verdict.

THE COURT: Motion for mistrial will be denied. We'll be in recess for not longer than a half hour.

(Whereupon, at 10:30 o'clock p.m., court was recessed pending rendition of a verdict by the jury.)

* * * * * * *

(Whereupon, at 11:01 o'clock p.m., the following proceedings were had before the Court and counsel for the respective parties.)

THE COURT: Counsel approach the Bench.

(Whereupon, counsel for the respective parties approached the Bench and conferred with the Court out of the hearing of the court reporter.)

THE COURT: Return the jury.

(Whereupon, at 11:03 o'clock p.m.,

counsel for the respective parties approached the Bench and conferred with the Court.)

MR. KIRKLAND: They want more time?

THE COURT: Five minutes.

MR. KIRKLAND: That's not unreasonable.

* * * * * * *

THE COURT: Return the jury, please.

(Whereupon, at 11:07 o'clock p.m., the jury entered the courtroom, after which the following proceedings were had before the Court, counsel for the respective parties and the jury.)

THE COURT: Ladies and gentlemen, let me caution everyone, whatever verdict this jury returns, the Court will not tolerate any outbursts from anyone. I'd ask that everyone be careful about that.

Ladies and gentlemen of the jury, has an agreement been reached upon the verdict?

MR. PASCUAL: Yes, Your Honor.

THE COURT: Mr. Foreman, if you would, please, hand your verdict to the Clerk.

(Whereupon, the verdict was given