

Rock Vs. Arkansas

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Appellant : Rock

Respondent : Arkansas

Judgement :

Rock v. Arkansas - 483 U.S. 44 (1987)

U.S. Supreme Court Rock v. Arkansas, 483 U.S. 44 (1987)

Rock v. Arkansas

No. 86-130

Argued March 23, 1987

Decided June 22, 1987

483 U.S. 44

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

SYLLABUS

Petitioner was charged with manslaughter for shooting her husband. In order to refresh her memory as to the precise details of the shooting, she twice underwent hypnosis by a trained neuropsychologist. These sessions were tape-recorded. After the hypnosis, she remembered details indicating that her gun was defective and had misfired, which was corroborated by an expert witness' testimony. However, the trial court ruled that no hypnotically refreshed testimony would be admitted, and limited petitioner's testimony to a reiteration of her statements to the doctor prior to hypnosis, as reported in the doctor's notes. The Arkansas Supreme Court affirmed her conviction, ruling that the limitations on her testimony did not violate her constitutional right to testify, and that criminal defendants' hypnotically refreshed testimony is inadmissible *per se* because it is unreliable.

HELD

1. Criminal defendants have a right to testify in their own behalf under the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment's privilege against self-incrimination. Pp. [483 U. S. 49](#) -53.

2. Although the right to present relevant testimony is not without limitation, restrictions placed on a defendant's constitutional right to testify by a State's evidentiary rules may not be arbitrary or disproportionate to the purposes they are designed to serve. Pp. [483 U. S. 53](#) -56.

3. Arkansas' *per se* rule excluding all hypnotically refreshed testimony infringes impermissibly on a criminal defendant's right to testify on his or her own behalf. Despite any unreliability that hypnosis may introduce into testimony, the procedure has been credited as instrumental in obtaining particular types of information. Moreover, hypnotically refreshed testimony is subject to verification by corroborating evidence and other traditional means of assessing accuracy, and inaccuracies can be reduced by procedural safeguards such as the use of tape or video recording. The State's legitimate interest in barring unreliable evidence does not justify a *per se* exclusion, because the evidence may be reliable in an individual case. Here, the expert's corroboration of petitioner's hypnotically

enhanced memories and the trial judge's conclusion that the tape recordings indicated that the doctor did not suggest responses with

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leading questions are circumstances that the trial court should have considered in determining admissibility. Pp. [483 U. S. 56](#) -62.

288 Ark. 566, 708 S.W.2d 78, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. REHNQUIST, C.J., filed a dissenting opinion, in which WHITE, O'CONNOR, and SCALIA, JJ., joined, *post* p. [483 U. S. 62](#) .

JUSTICE BLACKMUN delivered the opinion of the Court.

The issue presented in this case is whether Arkansas' evidentiary rule prohibiting the admission of hypnotically refreshed testimony violated petitioner's constitutional right to testify on her own behalf as a defendant in a criminal case.

I

Petitioner Vickie Lorene Rock was charged with manslaughter in the death of her husband, Frank Rock, on July 2, 1983. A dispute had been simmering about Frank's wish to move from the couple's small apartment adjacent to Vickie's beauty parlor to a trailer she owned outside town. That night a fight erupted when Frank refused to let petitioner eat some pizza and prevented her from leaving the apartment to get something else to eat. App. 98, 103-104. When police arrived on the scene, they found Frank on the floor with a bullet wound in his chest. Petitioner urged the officers to help

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her husband, Tr. 230, and cried to a sergeant who took her in charge, "please save him" and "don't let him die." *Id.* at 268. The police removed her from the

building because she was upset and because she interfered with their investigation by her repeated attempts to use the telephone to call her husband's parents. *Id.* at 263-264, 267-268. According to the testimony of one of the investigating officers, petitioner told him that

"she stood up to leave the room and [her husband] grabbed her by the throat and choked her and threw her against the wall and . . . at that time she walked over and picked up the weapon and pointed it toward the floor and he hit her again and she shot him."

Id. at 281. [[Footnote 1](#)]

Because petitioner could not remember the precise details of the shooting, her attorney suggested that she submit to hypnosis in order to refresh her memory. Petitioner was hypnotized twice by Doctor Bettye Back, a licensed neuropsychologist with training in the field of hypnosis. *Id.* at 901-903. Doctor Back interviewed petitioner for an hour prior to the first hypnosis session, taking notes on petitioner's general history and her recollections of the shooting. App. 46-47. [[Footnote 2](#)] Both hypnosis sessions were recorded on

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tape. *Id.* at 53. Petitioner did not relate any new information during either of the sessions, *id.* at 78, 83, but, after the hypnosis, she was able to remember that, at the time of the incident, she had her thumb on the hammer of the gun, but had not held her finger on the trigger. She also recalled that the gun had discharged when her husband grabbed her arm during the scuffle. *Id.* at 29, 38. As a result of the details that petitioner was able to remember about the shooting, her counsel arranged for a gun expert to examine the handgun, a single-action Hawes .22 Deputy Marshal. That inspection revealed that the gun was defective and prone to fire, when hit or dropped, without the trigger's being pulled. Tr. 662-663, 711.

When the prosecutor learned of the hypnosis sessions, he filed a motion to exclude petitioner's testimony. The trial judge held a pretrial hearing on the motion and concluded that no hypnotically refreshed testimony would be admitted. The

court issued an order limiting petitioner's testimony to "matters remembered and stated to the examiner prior to being placed under hypnosis." App. to Pet. for Cert. xvii. [[Footnote 3](#)] At trial, petitioner introduced testimony by the gun expert, Tr. 647-712, but the court limited petitioner's own description of the events on the day of the shooting to a reiteration of the sketchy information in Doctor Back's notes. See App. 96-104. [[Footnote 4](#)] The jury convicted petitioner on the manslaughter charge, and she was sentenced to 10 years' imprisonment and a \$10,000 fine.

On appeal, the Supreme Court of Arkansas rejected petitioner's claim that the limitations on her testimony violated her right to present her defense. The court concluded that "the dangers of admitting this kind of testimony outweigh whatever probative value it may have," and decided to follow

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the approach of States that have held hypnotically refreshed testimony of witnesses inadmissible *per se*. 288 Ark. 566, 573, 708 S.W.2d 78, 81 (1986). Although the court acknowledged that "a defendant's right to testify is fundamental," *id.* at 578, 708 S.W.2d at 84, it ruled that the exclusion of petitioner's testimony did not violate her constitutional rights. Any "prejudice or deprivation" she suffered "was minimal and resulted from her own actions and not by any erroneous ruling of the court." *Id.* at 580, 708 S.W.2d at 86. We granted certiorari, 479 U.S. 947 (1986), to consider the constitutionality of Arkansas' *per se* rule excluding a criminal defendant's hypnotically refreshed testimony.

II

Petitioner's claim that her testimony was impermissibly excluded is bottomed on her constitutional right to testify in her own defense. At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense. This, of course, is a change from the historic common law view, which was that all parties to litigation, including criminal defendants, were disqualified

from testifying because of their interest in the outcome of the trial. See *generally* 2 J. Wigmore, Evidence 576, 579 (J. Chadbourn rev.1979). The principal rationale for this rule was the possible untrustworthiness of a party's testimony. Under the common law, the practice did develop of permitting criminal defendants to tell their side of the story, but they were limited to making an unsworn statement that could not be elicited through direct examination by counsel and was not subject to cross-examination. *Id.* at 579, p. 827.

This Court in *Ferguson v. Georgia*, [365 U. S. 570](#) , [365 U. S. 573](#) -582 (1961), detailed the history of the transition from a rule of a defendant's incompetency to a rule of competency. As the

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Court there recounted, it came to be recognized that permitting a defendant to testify advances both the " *detection of guilt*" and "*the protection of innocence*," *id.* at [365 U. S. 581](#) , quoting 1 Am.L.Rev. 396 (1867), and, by the end of the second half of the 19th century, [[Footnote 5](#)] all States except Georgia had enacted statutes that declared criminal defendants competent to testify. See 365 U.S. at [365 U. S. 577](#) and n. 6, [365 U. S. 596](#) -598. [[Footnote 6](#)] Congress enacted a general competency statute in the Act of Mar. 16, 1878, 20 Stat. 30, as amended, 18 U.S.C. 3481, and similar developments followed in other common law countries. Thus, more than 25 years ago this Court was able to state:

"In sum, decades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who, above all others may be in a position to meet the prosecution's case."

Ferguson v. Georgia, 365 U.S. at [365 U. S. 582](#) . [[Footnote 7](#)]

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The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that "are essential to due

process of law in a fair adversary process." *Faretta v. California*, [422 U. S. 806](#) , [422 U. S. 819](#) , n. 15 (1975). The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony:

"A person's right to reasonable notice of a charge against him, and *an opportunity to be heard in his defense* -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

(Emphasis added.) *In re Oliver*, [333 U. S. 257](#) , [333 U. S. 273](#) (1948). [[Footnote 8](#)] See also *Ferguson v. Georgia*, 365 U.S. at [365 U. S. 602](#) (Clark, J., concurring) (Fourteenth Amendment secures "right of a criminal defendant to choose between silence and testifying in his own behalf"). [[Footnote 9](#)]

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The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor," a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. *Washington v. Texas*, [388 U. S. 14](#) , [388 U. S. 17](#) -19 (1967). Logically included in the accused's right to call witnesses whose testimony is "material and favorable to his defense," *United States v. Valenzuela-Bernal*, [458 U. S. 858](#) , [458 U. S. 867](#) (1982), is a right to testify himself, should he decide it is in his favor to do so. In fact, the most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony. Like the truthfulness of other witnesses, the defendant's veracity, which was the concern behind the original common law rule, can be tested adequately by cross-examination. See generally Westen, *The Compulsory Process Clause*, 73 *Mich.L.Rev.* 71, 119-120 (1974).

Moreover, in *Faretta v. California*, 422 U.S. at [422 U. S. 819](#) , the Court recognized that the Sixth Amendment

"grants to the accused *personally* the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'"

(Emphasis added.) Even more fundamental to a personal defense than the right of self-representation, which was found to be "necessarily implied by the structure of the Amendment," *ibid.*, is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness.

The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. In *Harris v. New York*, [401 U. S. 222](#) , [401 U. S. 230](#) (1971),

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the Court stated: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Id.* at [401 U. S. 225](#) . Three of the dissenting Justices in that case agreed that the Fifth Amendment encompasses this right:

"[The Fifth Amendment's privilege against self-incrimination] is fulfilled only when an accused is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will. . . .' The choice of whether to testify in one's own defense . . . is an exercise of the constitutional privilege."

Id. at [401 U. S. 230](#) , quoting *Malloy v. Hogan*, [378 U. S. 1](#) , [378 U. S. 8](#) (1964). (Emphasis removed.) [[Footnote 10](#)]

III

The question now before the Court is whether a criminal defendant's right to testify may be restricted by a state rule that excludes her posthypnosis testimony. This is not the first time this Court has faced a constitutional challenge to a state rule, designed to ensure trustworthy evidence, that interfered with the ability of a defendant to offer testimony. In *Washington v. Texas*, [388 U. S. 14](#) (1967), the

Court was confronted with a state statute that prevented persons charged as principals, accomplices, or accessories in the same crime from being introduced as witnesses for one another. The statute, like the original common law prohibition on testimony by the accused, was grounded in a concern for the reliability of evidence presented by an interested party:

"It was thought that, if two persons charged with the same crime were allowed to testify on behalf of each

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other, 'each would try to swear the other out of the charge.' This rule, as well as the other disqualifications for interest, rested on the unstated premises that the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue."

(Footnote omitted.) *Id.* at [388 U. S. 21](#) , quoting *Benson v. United States*, [146 U. S. 325](#) , [146 U. S. 335](#) (1892). As the Court recognized, the incompetency of a codefendant to testify had been rejected on nonconstitutional grounds in 1918, when the Court, refusing to be bound by "the dead hand of the common law rule of 1789," stated:

"[T]he conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court. . . ."

388 U.S. at [388 U. S. 22](#) , quoting *Rosen v. United States*, [245 U. S. 467](#) , [245 U. S. 471](#) (1918). The Court concluded that this reasoning was compelled by the Sixth Amendment's protections for the accused. In particular, the Court reasoned that the Sixth Amendment was designed in part "to make the testimony of a defendant's witnesses admissible on his behalf in court." 388 U.S. at [388 U. S. 22](#)

With the rationale for the common law incompetency rule thus rejected on constitutional grounds, the Court found that the mere presence of the witness in the courtroom was not enough to satisfy the Constitution's Compulsory Process Clause. By preventing the defendant from having the benefit of his accomplice's testimony,

"the State *arbitrarily* denied him the right to put on the stand a witness who was

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physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."

(Emphasis added.) *Id.* at [388 U. S. 23](#) .

Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony. In *Chambers v. Mississippi*, [410 U. S. 284](#) (1973), the Court invalidated a State's hearsay rule on the ground that it abridged the defendant's right to "present witnesses in his own defense." *Id.* at [410 U. S. 302](#) . Chambers was tried for a murder to which another person repeatedly had confessed in the presence of acquaintances. The State's hearsay rule, coupled with a "voucher" rule that did not allow the defendant to cross-examine the confessed murderer directly, prevented Chambers from introducing testimony concerning these confessions, which were critical to his defense. This Court reversed the judgment of conviction, holding that, when a state rule of evidence conflicts with the right to present witnesses, the rule may "not be applied mechanistically to defeat the ends of justice," but must meet the fundamental standards of due process. *Ibid.* In the Court's view, the State in *Chambers* did not demonstrate that the hearsay testimony in that case, which bore "assurances of trustworthiness" including corroboration by other evidence, would be unreliable, and thus the defendant should have been able to introduce the exculpatory

testimony. *Ibid.*

Of course, the right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.* at [410 U. S. 295](#) . [[Footnote 11](#)] But restrictions of a

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defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.

IV

The Arkansas rule enunciated by the state courts does not allow a trial court to consider whether post-hypnosis testimony may be admissible in a particular case; it is a *per se* rule prohibiting the admission at trial of any defendant's hypnotically refreshed testimony on the ground that such testimony is always unreliable. [[Footnote 12](#)] Thus, in Arkansas, an accused's testimony is limited to matters that he or she can prove were remembered *before* hypnosis. This rule operates to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced. [[Footnote 13](#)]

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In this case, the application of that rule had a significant adverse effect on petitioner's ability to testify. It virtually prevented her from describing any of the events that occurred on the day of the shooting, despite corroboration of many of those events by other witnesses. Even more importantly, under the court's rule, petitioner was not permitted to describe the actual shooting except in the words contained in Doctor Back's notes. The expert's description of the gun's tendency to misfire would have taken on greater significance if the jury had heard petitioner testify that she did not have her finger on the trigger, and that the gun went off

when her husband hit her arm.

In establishing its *per se* rule, the Arkansas Supreme Court simply followed the approach taken by a number of States that have decided that hypnotically enhanced testimony should be excluded at trial on the ground that it tends to be unreliable. [[Footnote 14](#)] Other States that have adopted an exclusionary rule, however, have done so for the testimony of *witnesses*, not for the testimony of a *defendant*. The Arkansas

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Supreme Court failed to perform the constitutional analysis that is necessary when a defendant's right to testify is at stake. [[Footnote 15](#)]

Although the Arkansas court concluded that any testimony that cannot be proved to be the product of prehypnosis memory is unreliable, many courts have eschewed a *per se* rule, and permit the admission of hypnotically refreshed testimony. [[Footnote 16](#)] Hypnosis by trained physicians or psychologists has

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been recognized as a valid therapeutic technique since 1958, although there is no generally accepted theory to explain the phenomenon, or even a consensus on a single definition of hypnosis. See Council on Scientific Affairs, Scientific Status of Refreshing Recollection by the Use of Hypnosis, 253 J.A.M.A.1918, 1918-1919 (1985) (Council Report). [[Footnote 17](#)] The use of hypnosis in criminal investigations, however, is controversial, and the current medical and legal view of its appropriate role is unsettled.

Responses of individuals to hypnosis vary greatly. The popular belief that hypnosis guarantees the accuracy of recall is, as yet, without established foundation, and, in fact, hypnosis often has no effect at all on memory. The most common response to hypnosis, however, appears to be an increase in both correct and incorrect recollections. [[Footnote 18](#)] Three general characteristics of hypnosis may lead to the introduction of inaccurate memories: the subject becomes "suggestible,"

and may try to please the hypnotist with answers the subject

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thinks will be met with approval; the subject is likely to "confabulate," that is, to fill in details from the imagination in order to make an answer more coherent and complete; and, the subject experiences "memory hardening," which gives him great confidence in both true and false memories, making effective cross-examination more difficult. See generally M. Orne *et al.*, Hypnotically Induced Testimony, in *Eyewitness Testimony: Psychological Perspectives* 171 (G. Wells & E. Loftus, eds., 1984); Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 *Calif.L.Rev.* 313, 333-342 (1980). Despite the unreliability that hypnosis concededly may introduce, however, the procedure has been credited as instrumental in obtaining investigative leads or identifications that were later confirmed by independent evidence. See, e.g., *People v. Hughes*, 59 N.Y.2d 523, 533, 453 N.E.2d 484, 488 (1983); see generally R. Udolf, *Forensic Hypnosis* 11-16 (1983).

The inaccuracies the process introduces can be reduced, although perhaps not eliminated, by the use of procedural safeguards. One set of suggested guidelines calls for hypnosis to be performed only by a psychologist or psychiatrist with special training in its use and who is independent of the investigation. See Orne, *The Use and Misuse of Hypnosis in Court*, 27 *Int'l J.Clinical and Experimental Hypnosis* 311, 335-336 (1979). These procedures reduce the possibility that biases will be communicated to the hypersuggestive subject by the hypnotist. Suggestion will be less likely also if the hypnosis is conducted in a neutral setting, with no one present but the hypnotist and the subject. Tape or video recording of all interrogations, before, during, and after hypnosis, can help reveal if leading questions were asked. *Id.* at 336. [[Footnote 19](#)] Such guidelines do not guarantee the accuracy of the testimony, because they cannot control the subject's own

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motivations or any tendency to confabulate, but they do provide a means of controlling overt suggestions.

The more traditional means of assessing accuracy of testimony also remain applicable in the case of a previously hypnotized defendant. Certain information recalled as a result of hypnosis may be verified as highly accurate by corroborating evidence. Cross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies. Moreover, a jury can be educated to the risks of hypnosis through expert testimony and cautionary instructions. Indeed, it is probably to a defendant's advantage to establish carefully the extent of his memory prior to hypnosis, in order to minimize the decrease in credibility the procedure might introduce.

We are not now prepared to endorse without qualifications the use of hypnosis as an investigative tool; scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy. Arkansas, however, has not justified the exclusion of *all* of a defendant's testimony that the defendant is unable to prove to be the product of prehypnosis memory. A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case. Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections. The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified. But it has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial.

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In this case, the defective condition of the gun corroborated the details petitioner remembered about the shooting. The tape recordings provided some means to

evaluate the hypnosis, and the trial judge concluded that Doctor Back did not suggest responses with leading questions. See [n](#) 3, *supra*. Those circumstances present an argument for admissibility of petitioner's testimony in this particular case, an argument that must be considered by the trial court. Arkansas' *per se* rule excluding all posthypnosis testimony infringes impermissibly on the right of a defendant to testify on his own behalf. [[Footnote 20](#)]

The judgment of the Supreme Court of Arkansas is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

[[Footnote 1](#)]

Another officer reported a slightly different version of the events:

"She stated that she had told her husband that she was going to go outside. He refused to let her leave and grabbed her by the throat and began choking her. They struggled for a moment and she grabbed a gun. She told him to leave her alone and he hit her, at which time the gun went off. She stated that it was an accident and she didn't mean to shoot him. She said she had to get to the hospital and talk to him."

Tr. 388. See also *id.* at 301-304, 337-338; App. 3-10.

[[Footnote 2](#)]

Doctor Back's handwritten notes regarding petitioner's memory of the day of the shooting read as follows:

"Pt states she & husb. were discussing moving out to a trailer she had prev. owned. He was 'set on' moving out to the trailer -- she felt they should discuss. She bec[ame] upset & went to another room to lay down. Bro. came & left. She came out to eat some of the pizza, he wouldn't allow her to have any. She said she would go out and get [something] to eat; he wouldn't allow her -- He pushed

her against a wall an end table in the corner [with] a gun on it. They were the night watchmen for business that sets behind them. She picked gun up stated she didn't want him hitting her anymore. He wouldn't let her out door, slammed door & 'gun went off & he fell & he died' [pt looked misty eyed here -- near tears]"

(additions by Doctor Back). App. 40.

[[Footnote 3](#)]

The full pretrial order reads as follows:

"NOW on this 26th day of November, 1984, comes on the captioned matter for pretrial hearing, and the Court finds:"

"1. On September 27 and 28, 1984, Defendant was placed under hypnotic trance by Dr. Bettye Back, Ph.D, Fayetteville, Arkansas, for the express purpose of enhancing her memory of the events of July 2, 1983, involving the death of Frank Rock."

"2. Dr. Back was professionally qualified to administer hypnosis. She was objective in the application of the technique and did not suggest by leading questions the responses expected to be made by Defendant. She was employed on an independent, professional basis. She made written notes of facts related to her by Defendant during the prehypnotic interview. She did employ post-hypnotic suggestion with Defendant. No one else was present during any phase of the hypnosis sessions except Dr. Back and Defendant."

"3. Defendant cannot be prevented by the Court from testifying at her trial on criminal charges under the Arkansas Constitution, but testimony of matters recalled by Defendant due to hypnosis will be excluded because of inherent unreliability and the effect of hypnosis in eliminating any meaningful cross-examination on those matters. Defendant may testify to matters remembered and stated to the examiner prior to being placed under hypnosis. Testimony resulting from post-hypnotic suggestion will be excluded."

App. to Pet. for Cert. xvii.

[[Footnote 4](#)]

When petitioner began to testify, she was repeatedly interrupted by the prosecutor, who objected that her statements fell outside the scope of the pretrial order. Each time she attempted to describe an event on the day of the shooting, she was unable to proceed for more than a few words before her testimony was ruled inadmissible. For example, she was unable to testify without objection about her husband's activities on the morning of the shooting, App. 11, about their discussion and disagreement concerning the move to her trailer, *id.* at 12, 14, about her husband's and his brother's replacing the shock absorbers on a van, *id.* at 16, and about her brother-in-law's return to eat pizza, *id.* at 19-20. She then made a proffer, outside the hearing of the jury, of testimony about the fight in an attempt to show that she could adhere to the court's order. The prosecution objected to every detail not expressly described in Doctor Back's notes or in the testimony the doctor gave at the pretrial hearing. *Id.* at 32-35. The court agreed with the prosecutor's statement that "ninety-nine percent of everything [petitioner] testified to in the proffer" was inadmissible. *Id.* at 35.

[[Footnote 5](#)]

The removal of the disqualifications for accused persons occurred later than the establishment of the competence to testify of civil parties. 2 J. Wigmore, Evidence 579, p. 826 (J. Chadbourn rev.1979). This was not due to concern that criminal defendants were more likely to be unreliable than other witnesses, but to a concern for the accused:

"If, being competent, he failed to testify, that (it was believed) would damage his cause more seriously than if he were able to claim that his silence were enforced by law. Moreover, if he did testify, that (it was believed) would injure more than assist his cause, since by undergoing the ordeal of cross-examination, he would appear at a disadvantage dangerous even to an innocent man."

Id. at 828.

[[Footnote 6](#)]

The Arkansas Constitution guarantees an accused the right "to be heard by himself and his counsel." Art. 2, 10. Rule 601 of the Arkansas Rules of Evidence provides a general rule of competency: "Every person is competent to be a witness except as otherwise provided in these rules."

[[Footnote 7](#)]

Ferguson v. Georgia struck down as unconstitutional under the Fourteenth Amendment a Georgia statute that limited a defendant's presentation at trial to an unsworn statement, insofar as it denied the accused "the right to have his counsel question him to elicit his statement." 365 U.S. at [365 U. S. 596](#) . The Court declined to reach the question of a defendant's constitutional right to testify, because the case did not involve a challenge to the particular Georgia statute that rendered a defendant incompetent to testify. *Id.* at [365 U. S. 572](#) , n. 1. Two Justices, however, urged that such a right be recognized explicitly. *Id.* at [365 U. S. 600](#) -601, [365 U. S. 602](#) (concurring opinions) .

[[Footnote 8](#)]

Before *Ferguson v. Georgia*, it might have been argued that a defendant's ability to present an unsworn statement would satisfy this right. Once that procedure was eliminated, however, there was no longer any doubt that the right to be heard, which is so essential to due process in an adversary system of adjudication, could be vindicated only by affording a defendant an opportunity to testify before the factfinder.

[[Footnote 9](#)]

This right reaches beyond the criminal trial: the procedural due process constitutionally required in some extrajudicial proceedings includes the right of the affected person to testify. See, e.g., *Gagnon v. Scarpelli*, [411 U. S. 778](#) , [411 U. S. 782](#) , [411 U. S. 786](#) (1973) (probation revocation); *Morrissey v. Brewer*, [408 U. S. 471](#) , [408 U. S. 489](#) (1972) (parole revocation); *Goldberg v. Kelly*, [397 U. S. 254](#) , [397 U. S. 269](#) (1970) (termination of welfare benefits).

[[Footnote 10](#)]

On numerous occasions, the Court has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right. See, e.g., *Nix v. Whiteside*, [475 U. S. 157](#) , [475 U. S. 164](#) (1986); *id.* at [475 U. S. 186](#) , n. 5 (BLACKMUN, J., concurring in judgment); *Jones v. Barnes*, [463 U. S. 745](#) , [463 U. S. 751](#) (1983) (defendant has the "ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . testify in his or her own behalf"), *Brooks v. Tennessee*, [406 U. S. 605](#) , [406 U. S. 612](#) (1972) ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right").

[[Footnote 11](#)]

Numerous state procedural and evidentiary rules control the presentation of evidence, and do not offend the defendant's right to testify. See, e.g., *Chambers v. Mississippi*, 410 U.S. at [410 U. S. 302](#) ("In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence"); *Washington v. Texas*, [388 U. S. 14](#) , [388 U. S. 23](#) , n. 21 (1967) (opinion should not be construed as disapproving testimonial privileges or nonarbitrary rules that disqualify those incapable of observing events due to mental infirmity or infancy from being witnesses).

[[Footnote 12](#)]

The rule leaves a trial judge no discretion to admit this testimony, even if the judge is persuaded of its reliability by testimony at a pretrial hearing. Tr. of Oral Arg. 36 (statement of the Attorney General of Arkansas).

[[Footnote 13](#)]

The Arkansas Supreme Court took the position that petitioner was fully responsible for any prejudice that resulted from the restriction on her testimony, because it was she who chose to resort to the technique of hypnosis. 288 Ark.

566, 580, 708 S.W.2d 78, 86 (1986). The prosecution and the trial court each expressed a similar view, and the theme was renewed repeatedly at trial as a justification for limiting petitioner's testimony. See App. 15, 20, 21-22, 24, 36. It should be noted, however, that Arkansas had given no previous indication that it looked with disfavor on the use of hypnosis to assist in the preparation for trial and there were no previous state court rulings on the issue.

[[Footnote 14](#)]

See, e.g., *Contreras v. State*, 718 P.2d 129 (Alaska 1986); *State ex rel. Collins v. Superior Court, County of Maricopa*, 132 Ariz. 180, 207-208, 644 P.2d 1266, 1293-1294 (1982); *People v. Quintanar*, 659 P.2d 710, 711 (Colo.App.1982); *State v. Davis*, 490 A.2d 601 (Del.Super.1985); *Bundy v. State*, 471 So.2d 9, 18-19 (Fla.1985), *cert. denied*, [479 U. S. 894](#) (1986); *State v. Moreno*, 68 Haw. 233, 709 P.2d 103 (1985); *State v. Haislip*, 237 Kan. 461, 482, 701 P.2d 909, 925-926, *cert. denied*, 474 U.S. 1022 (1985); *State v. Collins*, 296 Md. 670, 464 A.2d 1028 (1983); *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E.2d 1190 (1983); *People v. Gonzales*, 415 Mich. 615, 329 N.W.2d 743 (1982), *opinion added to*, 417 Mich. 1129, 336 N.W.2d 751 (1983); *Alsback v. Bader*, 700 S.W.2d 823 (Mo.1985); *State v. Palmer*, 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981); *People v. Hughes*, 59 N.Y.2d 523, 453 N.E.2d 484 (1983); *Robison v. State*, 677 P.2d 1080, 1085 (Okla.Crim.App.), *cert. denied*, 467 U.S. 1246 (1984); *Commonwealth v. Nazarovitch*, 496 Pa. 97, 110, 436 A.2d 170, 177 (1981); *State v. Martin*, 101 Wash.2d 713, 684 P.2d 651 (1984). See *State v. Ture*, 353 N.W.2d 502, 513-514 (Minn.1984).

[[Footnote 15](#)]

The Arkansas court relied on a California case, *People v. Shirley*, 31 Cal.3d 18, 723 P.2d 1354, *cert. denied*, 459 U.S. 860 (1982), for much of its reasoning as to the unreliability of hypnosis. 288 Ark. at 575-578, 708 S.W.2d at 83-84. But while the California court adopted a far stricter general rule -- barring entirely testimony by any witness who has been hypnotized -- it explicitly excepted testimony by an accused:

"[W]hen it is the defendant himself -- not merely a defense witness -- who submits to pretrial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. In that case, the rule we adopt herein is subject to a necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf."

31 Cal.3d at 67, 723 P.2d at 1384.

This case does not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants, and we express no opinion on that issue.

[[Footnote 16](#)]

Some jurisdictions have adopted a rule that hypnosis affects the credibility, but not the admissibility, of testimony. See, e.g., *Beck v. Norris*, 801 F.2d 242, 244-245 (CA6 1986); *United States v. Awkard*, 597 F.2d 667, 669 (CA9), cert. denied, 444 U.S. 885 (1979); *State v. Wren*, 425 So.2d 756 (La.1983); *State v. Brown*, 337 N.W.2d 138, 151 (N.D.1983); *State v. Glebock*, 616 S.W.2d 897, 903-904 (Tenn.Crim.App.1981); *Chapman v. State*, 638 P.2d 1280, 1282 (Wyo.1982).

Other courts conduct an individualized inquiry in each case. See, e.g., *McQueen v. Garrison*, 814 F.2d 951, 958 (CA4 1987) (reliability evaluation); *Wicker v. McCotter*, 783 F.2d 487, 492-493 (CA5) (probative value of the testimony weighed against its prejudicial effect), cert. denied, 478 U.S. 1010 (1986); *State v. Iwakiri*, 106 Idaho 618, 625, 682 P.2d 571, 578 (1984) (weigh "totality of circumstances").

In some jurisdictions, courts have established procedural prerequisites for admissibility in order to reduce the risks associated with hypnosis. Perhaps the leading case in this line is *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981). See also *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1122-1123 (CA8 1985), cert. denied, 475 U.S. 1046 (1986); *United States v. Harrington*, 18 M.J. 797, 803 (A.C.M.R.1984); *House v. State*, 445 So.2d 815, 826-827 (Miss.1984); *State v. Beachum*, 97 N.M. 682, 689-690, 643 P.2d 246, 253-254 (App.1981),

writ quashed, 98 N.M. 51, 644 P.2d 1040 (1982); *State v. Weston*, 16 Ohio App.3d 279, 287, 475 N.E.2d 805, 813 (1984); *State v. Arrmstrong*, 110 Wis.2d 555, 329 N.W.2d 386, *cert. denied*, 461 U.S. 946 (1983).

[[Footnote 17](#)]

Hypnosis has been described as

"involv[ing] the focusing of attention; increased responsiveness to suggestions; suspension of disbelief with a lowering of critical judgment; potential for altering perception, motor control, or memory in response to suggestions; and the subjective experience of responding involuntarily."

Council Report, 253 J.A.M.A. at 1919.

[[Footnote 18](#)]

"[W]hen hypnosis is used to refresh recollection, one of the following outcomes occurs: (1) hypnosis produces recollections that are not substantially different from nonhypnotic recollections; (2) it yields recollections that are more inaccurate than nonhypnotic memory; or, most frequently, (3) it results in more information being reported, but these recollections contain both accurate and inaccurate details. . . . There are no data to support a fourth alternative, namely, that hypnosis increases remembering of only accurate information."

Id. at 1921.

[[Footnote 19](#)]

Courts have adopted varying versions of these safeguards. See n. [16](#) *supra*. Oregon, by statute, has a requirement for procedural safeguards for hypnosis. Ore.Rev.Stat. 136.675 (1985).

[[Footnote 20](#)]

This disposition makes it unnecessary to consider petitioner's claims that the trial court's order restricting her testimony was unconstitutionally broad, and that the

trial court's application of the order resulted in a denial of due process of law. We also need not reach petitioner's argument that Arkansas' restriction on her testimony interferes with her Sixth Amendment right to counsel. Petitioner concedes that there is a "substantial question" whether she raised this federal question on appeal to the Arkansas Supreme Court. Reply Brief for Petitioner 2.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

In deciding that petitioner Rock's testimony was properly limited at her trial, the Arkansas Supreme Court cited several factors that undermine the reliability of hypnotically induced testimony. Like the Court today, the Arkansas Supreme Court observed that a hypnotized individual becomes subject to suggestion, is likely to confabulate, and experiences artificially increased confidence in both true and false memories following hypnosis. No known set of procedures, both courts agree, can insure against the inherently unreliable nature of such testimony. Having acceded to the

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factual premises of the Arkansas Supreme Court, the Court nevertheless concludes that a state trial court must attempt to make its own scientific assessment of reliability in each case it is confronted with a request for the admission of hypnotically induced testimony. I find no justification in the Constitution for such a ruling.

In the Court's words, the decision today is "bottomed" on recognition of Rock's "constitutional right to testify in her own defense." *Ante* at [483 U. S. 49](#) . While it is true that this Court, in dictum, has recognized the existence of such a right, see, e.g., *Faretta v. California*, [422 U. S. 806](#) , [422 U. S. 819](#) , n. 15 (1975), the principles identified by the Court as underlying this right provide little support for invalidating the evidentiary rule applied by the Arkansas Supreme Court.

As a general matter, the Court first recites, a defendant's right to testify facilitates the truth-seeking function of a criminal trial by advancing both the " *detection of*

guilt" and "the protection of innocence." Ante at [483 U. S. 50](#) , quoting *Ferguson v. Georgia*, [365 U. S. 570](#) , [365 U. S. 581](#) (1961). Such reasoning is hardly controlling here, where advancement of the truthseeking function of Rock's trial was the sole motivation behind limiting her testimony. The Court also posits, however, that "a rule that denies an accused the opportunity to offer his own testimony" cannot be upheld because, "[l]ike the truthfulness of other witnesses, the defendant's veracity . . . can be tested adequately by cross-examination." Ante at [483 U. S. 52](#) . But the Court candidly admits that the increased confidence inspired by hypnotism makes "cross-examination more difficult," ante at [483 U. S. 60](#) , thereby diminishing an adverse party's ability to test the truthfulness of defendants such as Rock. Nevertheless, we are told, the exclusion of a defendant's testimony cannot be sanctioned, because the defendant, "above all others, may be in a position to meet the prosecution's case." Ante at [483 U. S. 50](#) , quoting *Ferguson v. Georgia, supra*, at [365 U. S. 582](#) . In relying on such reasoning, the Court apparently forgets that the issue before us arises only by virtue

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of Rock's memory loss, which rendered her less able "to meet the prosecution's case." 365 U.S. at [365 U. S. 582](#) .

In conjunction with its reliance on broad principles that have little relevance here, the Court barely concerns itself with the recognition, present throughout our decisions, that an individual's right to present evidence is subject always to reasonable restrictions. Indeed, the due process decisions relied on by the Court all envision that an individual's right to present evidence on his behalf is not absolute, and must oftentimes give way to countervailing considerations. See, e.g., *In re Oliver*, [333 U. S. 257](#) , [333 U. S. 273](#) , [333 U. S. 275](#) (1948); *Morrissey v. Brewer*, [408 U. S. 471](#) , [408 U. S. 481](#) -482 (1972); *Goldberg v. Kelly*, [397 U. S. 254](#) , [397 U. S. 263](#) (1970). Similarly, our Compulsory Process Clause decisions make clear that the right to present relevant testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, [410 U. S. 284](#) , [410 U. S. 295](#) (1973);

see *Washington v. Texas*, [388 U. S. 14](#) , [388 U. S. 22](#) (1967). The Constitution does not in any way relieve a defendant from compliance with "rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, *supra*, at [410 U. S. 302](#) . Surely a rule designed to exclude testimony whose trustworthiness is inherently suspect cannot be said to fall outside this description. *

This Court has traditionally accorded the States "respect . . . in the establishment and implementation of their own criminal trial rules and procedures." 410 U.S. at [410 U. S. 302](#) -303; see, e.g., *Marshall v. Lonberger*, [459 U. S. 422](#) , [459 U. S. 438](#) , n. 6 (1983) ("[T]he Due Process Clause does not permit the federal

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courts to engage in a finely tuned review of the wisdom of state evidentiary rules"); *Patterson v. New York*, [432 U. S. 197](#) , [432 U. S. 201](#) (1977) ("[W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States"). One would think that this deference would be at its highest in an area such as this, where, as the Court concedes, "scientific understanding . . . is still in its infancy." *Ante* at [483 U. S. 61](#) . Turning a blind eye to this concession, the Court chooses instead to restrict the ability of both state and federal courts to respond to changes in the understanding of hypnosis.

The Supreme Court of Arkansas' decision was an entirely permissible response to a novel and difficult question. See National Institute of Justice, Issues and Practices, M. Orne *et al.*, *Hypnotically Refreshed Testimony: Enhanced Memory or Tampering with Evidence?* 51 (1985). As an original proposition, the solution this Court imposes upon Arkansas may be equally sensible, though requiring the matter to be considered *res nova* by every single trial judge in every single case might seem to some to pose serious administrative difficulties. But until there is much more of a consensus on the use of hypnosis than there is now, the Constitution does not warrant this Court's mandating its own view of how to deal with the issue.

* The Court recognizes, as it must, that rules governing

"testimonial privileges [and] nonarbitrary rules that disqualify those incapable of observing events due to mental infirmity or infancy from being witnesses"

do not "offend the defendant's right to testify." *Ante* at [483 U. S. 55](#) -56. n. 11. I fail to discern any meaningful constitutional difference between such rules and the one at issue here.

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