

SYLLABUS

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State v. Clarence M. Moore (A-38-2003)

**Argued March 15, 2004 – Remanded April 27, 2004
Reargued October 24, 2005 - Decided August 10, 2006**

PORITZ, C.J., writing for the Court.

This case returns to this Court after remand for a plenary hearing in respect of the continued viability of State v. Hurd, 86 N.J. 525 (1981), wherein the Court established guidelines for the admissibility of hypnotically refreshed testimony proffered by a witness in a criminal trial.

At approximately 2:30 a.m. on the morning of January 14, 1986, twenty-five-year-old M.A. was sleeping in the bedroom of her Somers Point cottage when a man woke her by grabbing her neck and demanding money. The man repeatedly sexually assaulted and threatened her, telling her not to look at him. At one point, M.A. opened her eyes and looked up at the man, and the man immediately told her to close her eyes, which she did. After the assault, M.A. remained in her bed for four hours, fearing the man was still in the house. At daylight, M.A. sought the assistance of a neighbor, who contacted police.

According to the police report, M.A. stated to police upon their arrival that she thought her attacker might be an African-American man of medium build. Later that day, M.A. described her assailant as black in his late twenties to mid-thirties, with short hair and a short beard. She also indicated that she saw him only once and that he was wearing jeans. Because she was unable to provide sufficient information to develop a composite sketch, M.A. suggested hypnosis.

On January 30, 1986, M.A. visited the office of Dr. Samuel Babcock, a licensed clinical psychologist, to undergo hypnosis. In a pre-hypnosis interview, M.A. explained that there was not much light in the bedroom at the time of the assault – only enough to see shadows and outlines of things, but nothing in detail. She also stated that she did not remember anything distinctive about her attacker, though she thought he had a light beard and a round face. Prior to being hypnotized, M.A. removed her contact lenses. Dr. Babcock asked M.A. how well she could see without the lenses, and she explained that if an object is “a couple feet away,” all she saw was a “blur,” but her assailant had been “close enough to see but not in detail.” When hypnotized, M.A. stated for the first time that she thought her assailant wore a suede jacket and was a medium-skinned black male. Dr. Babcock advised her that after she came out of hypnosis, M.A. would remember the face of her assailant “very clearly.”

A few days later, M.A. chose defendant Clarence Moore, who did not have a beard, from a photo array. Subsequently, she identified Moore from two more photo arrays – one of which was actually a photograph of a lineup. Moore was the only person common to all three arrays. A grand jury indicted Moore on charges of burglary, robbery, and three counts of aggravated sexual assault. After pre-trial hearings, the trial court ruled that M.A.’s hypnosis complied with Hurd, and permitted M.A.’s testimony as refreshed recollection. The court further ruled that M.A.’s out-of-court and in-court identifications of Moore were sufficiently reliable to be admitted at trial.

At trial, Dr. Babcock and several police investigators testified for the State. The State played a portion of the tape of Dr. Babcock’s hypnosis session with M.A. The State offered no corroborating evidence of M.A.’s identification of Moore. On the witness stand, M.A. made an in-court identification of Moore as the person who assaulted her. M.A. acknowledged that her recollection of her assailant had been altered by her hypnotic experience. She explained that hypnosis made her assailant’s face much clearer with the features more detailed.

The jury convicted Moore on all counts and the trial court denied his motion for a new trial. The Appellate Division upheld Moore’s conviction, although the matter was remanded for resentencing. This Court denied

Moore's petition for certification in 1991. Moore sought relief in the federal courts. In 2001, the Third Circuit overturned the conviction based primarily on prosecutorial misconduct.

When the State sought to retry Moore, he made certain pretrial motions, including a motion to dismiss the indictment; and a motion holding hypnotically assisted testimony inadmissible or, alternatively, to suppress M.A.'s hypnotically assisted testimony. The trial court dismissed the indictment because the State had failed to inform the grand jury that M.A.'s memory had been hypnotically refreshed. The trial court denied Moore's other motions.

The State appealed the dismissal of the indictment and Moore cross-appealed the denial of his other motions. The Appellate division held there was no prejudicial prosecutorial error in the grand jury presentation, and also ordered the trial court to conduct a hearing on the admissibility of the hypnotically refreshed eyewitness testimony. In August 2003, Moore petitioned this Court for certification. He asked the Court to decide, among other things, whether Hurd remained viable law. The Court granted the petition without limitation. After oral argument, the Court determined that the record was inadequate for consideration of the continued validity of Hurd. The matter was remanded to the trial court for a plenary hearing.

On remand, the trial court heard testimony from three experts. The court concluded that hypnotically refreshed testimony should be precluded; that, at the very least, the Hurd guidelines should be supplemented; and that, regardless of the decision on those two issues, M.A.'s testimony should be barred because Dr. Babcock did not comply with the Hurd guidelines.

HELD: Hypnotically refreshed testimony of a witness in a criminal trial is generally inadmissible and Hurd should no longer be followed in New Jersey.

1. Twenty-five years ago, in Hurd, this Court held that a witness who has been hypnotized in an attempt to improve his or her recollection may testify at trial subject to strict safeguards to ensure reliability of the hypnotic procedure. The safeguards were suggested by defense expert Dr. Martin Orne. Under the safeguards, a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session; that person should be independent of and not regularly employed by the prosecutor or defense; any information given to the hypnotist by law enforcement personnel or the defense prior to the session must be recorded; the hypnotist must elicit a detailed description of the facts from the subject before hypnosis; all contacts between the hypnotist and the subject must be recorded; and only the hypnotist and the subject should be present during the hypnotic session. (pp. 12-18)

2. Other courts had considered the issue of the admissibility of hypnotically refreshed testimony prior to the Hurd decision. In early cases, courts refused to admit any such evidence. It was not until 1968 that any court concluded otherwise. Harding v. State, 246 A.2d 302 (Md. Ct. Spec. App. 1968). After Harding, a number of courts followed its lead in holding that a witness's testimony having been refreshed by hypnosis goes only to credibility and not admissibility. Other courts began to question the reliability of hypnotically refreshed testimony. Still other courts, applying the prevailing rule governing the admissibility of scientific evidence set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), decided that the use of hypnosis to refresh memory had not been accepted as reliable within the scientific community. In 1982, the California Supreme Court issued a decision citing problems associated with hypnosis, including suggestiveness that may be unintended or unperceived by the hypnotist; confabulation (gaps in memories unconsciously filled with imagined material); the inability of expert and lay observers to distinguish between true memories and pseudomemories; and increased confidence in recall by the hypnotized individual that renders cross-examination largely ineffective. Later, the California Supreme Court took note of Dr. Orne's repudiation of the guidelines approach. Dr. Orne, the expert relied on by this Court in Hurd, explained in an article published in 1984, that the guidelines, while helpful, "do not prevent (nor is there any reliable way to prevent) subjects from confounding distorted hypnotic memories with prior and subsequent nonhypnotic recall or from placing undue confidence in these distorted recollections." (pp. 18-25)

3. The issue came to this Court a second time ten years ago in State v. Fertig, 143 N.J. 115 (1996). Because defendant had not raised the Hurd challenge below, and a record had not been developed, the Court declined to address it. Justice Pollock, writing for a unanimous Court, concluded that despite the problems posed by hypnotically refreshed testimony, the Court would not abandon Hurd in the absence of a more complete record. When this case first came to the Court in August 2003, we were concerned about the record as we had been in

Fertig. The Court therefore remanded the matter to the trial court for a plenary hearing and retained jurisdiction. (pp. 25-29)

4. At the plenary hearing, the State's expert acknowledged problems with forensic hypnosis, such as confabulation and memory hardening. Nonetheless, he concluded that those problems do not significantly differ from problems related to memory generally. The defense presented two experts, one of whom testified that hypnotically induced testimony is not reliable and that hypnosis, in fact, has an adverse effect on accuracy. He also concluded that the Hurd guidelines do not reduce the effects of hypnosis in respect of false confidence, confabulation, uncued errors, recall problems, and response to pseudomemory. The other defense expert opined that there should be a per se ban on hypnotically enhanced testimony because such testimony was likely to produce invalid memories. Based on the expert testimony and the scientific research submitted by the parties, the trial court decided that hypnotically refreshed testimony should be per se inadmissible. In so concluding, the court used a cost-benefit analysis, and concluded that the costs outweighed the benefits. The writings of Dr. Orne disavowing the efficacy of the Hurd guidelines also were important to the court in reaching its conclusion. (pp. 29-33)

5. Since the time Hurd was decided, there has been a shift in expert opinion suggesting that the problems associated with the use of hypnotically refreshed testimony are less amenable to correction through controls on the hypnotic process. The testifying experts and the scientific literature are consistent in their description of the effects of hypnosis – suggestibility, confabulation or “gap filling,” pseudomemory or “false memory,” memory hardening or “false confidence” in one's recollections, source amnesia, and loss of critical judgment. In contrast, there is a lack of empirical evidence supporting the popular notion that hypnosis improves recall. Yet, the general public believes that hypnosis is a powerful tool to recover accurate memories. This confidence affects the individuals undergoing hypnosis who are convinced that they will remember precisely what happened to them after they are hypnotized, and affects jurors, who are likely to reach a favorable verdict when a witness has been hypnotized. The cases from the twenty-six states that limit the admissibility of post-hypnotic testimony represent a persuasive body of law, based on expert opinion, holding that hypnotically refreshed testimony is not generally accepted science. This Court now agrees with that view. Because the Court is no longer confident that procedural safeguards can guard effectively against the risks associated with hypnotically refreshed testimony, the Court rejects the Hurd approach and holds that M.A.'s testimony is inadmissible. (pp. 33-43).

The conclusion of the Law Division that hypnotically refreshed testimony should be inadmissible is **AFFIRMED**, and the matter is **REMANDED** to that court for any further proceedings consistent with this opinion.

JUSTICE RIVERA-SOTO has filed a separate, **CONCURRING** and **DISSENTING** opinion, agreeing with the majority's conclusion that the procedures followed in respect of the hypnosis of M.A. violated the Hurd guidelines, but disagreeing with the majority's rejection of all hypnotically refreshed testimony save for that of a defendant.

JUSTICES LONG, LaVECCHIA, ZAZZALI, ALBIN and WALLACE join in **CHIEF JUSTICE PORITZ's** opinion. **JUSTICE RIVERA-SOTO** has filed a separate, concurring and dissenting opinion.