

# The Validity of Eyewitness Accounts: What you see is what you think!

Posted At : June 23, 2014 10:10 AM | Posted By : [Tim Brunson, PhD](#)

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Eyewitness testimony is far from being full-proof. Despite the assumption that witnesses under oath are honest, sincere, and credible and that they claim that their memories are clear and accurate, there may be sufficient discrepancies. Witnesses may remember accurately, but misremember what they originally perceived.

Any two witnesses to the same event will undoubtedly and unfailingly observe it differently. What is subjectively true to a witness may be objectively false due to faulty or defective perception. Perception is not a fixed or static ability that all people have to the same degree. It is highly variable and fluid.

As a forensic hypnotist, one of the first things that I must ask a witness or victim is the condition of their vision (i.e., farsightedness, nearsightedness, colorblindness) or whether that are taking medication. I must also ask them about visual conditions such as light and darkness, fog or smoke, etc.

Another set of factors involve the fact that witnesses often do not see what they thought that they see. This issue of visual attentiveness is a factor that magicians use to create illusions due to misdirected attention. Witnesses are not immune to this problem.

Speaking of illusions, witnesses generally tend to judge the physical dimensions of objects in relation to surroundings. For instance, the designers of Walt Disney World in Orlando, used this concept to give the castle the appearance of being taller than it is. (The City of Orlando requires all buildings over 250 feet to have flashing red lights. To Disney designers, this was unacceptable. So they built the castle just shy of the limit and used comparative illusions to make it appear to be taller.)

Witnesses also misjudge the speed of a moving object based upon the distance from the observer.

All of these factors call into question the accuracy of a witness's perception. This means that perception must be considered before discussing the factor of memory.

It is very disconcerting to trial lawyers that memories will change over time. The statement made to investigators (to include a forensic hypnosis interview) near the time of an incident, normally has substantial changes by the time that a deposition or trial occurs. This is especially true when the witness is confronted with their original signed statement.

That there are sometimes drastic changes in witness statements cannot be denied. For instance, in 1974, a man in California was erroneously convicted on the basis of a testimony of seven eye witnesses who identified him as a bank robber. In another case in 1973, seventeen witnesses identified a man who has erroneously charged with shooting a police officer. It turned out that the man was no where in the vicinity of the shooting at that time.)

Experimental studies have also demonstrated the fallibility of the eyewitness. A simulated

purse-snatching was staged before sixty-four witnesses. Forty-eight of the witnesses attempted to identify the suspect from two videotaped lineups, one with and one without the suspect. Only 13.5 percent made a positive identification while the remainder either chose the wrong man, made no identification, or impeached themselves by picking two men.

It is obvious that something drastic happens to memories after the original event, unless of course, it was originally misperceived. It can be inferred that memory may change as a result of psychodynamic defense mechanisms within one's own personality, faulty reconstruction, or interference and mis-associations. Two additional factors are imagination and suggestion.

Retention and recall decreases in direct proportion to time interval. The greater the time interval, the greater the possibility there is of influence from the imagination. Also, a person may be influenced by what they thought they saw. Then, explicit or implicit suggestion may lead the witness to think they witnessed something that was not seen. And, there is a distinct possibility that a person can have a false memory of an event. This hallucinated memory is called a confabulation.

Until several years ago courts struggled with the concept of suggestibility as a key factor in questioning the validity of hypnotically refreshed memories. Many psychologists (such as Drs. Diamond and Ohrne) have testified as expert witnesses disputing the validity of forensic hypnosis. Indeed, even today there are several respected clinical psychologists who have added their voices to the skeptics. Unfortunately, some of my classmates have seen some of these articles and come to the unfounded opinion that hypnotically refreshed memories are inaccurate (as compared to other memories) and therefore inadmissible in the courts. Unfortunately, this is far from being true.

After the 1950's there was a trend for courts to reject hypnotically refreshed memories. Basically they first misunderstood hypnosis. Until the late 1950's when the American Medical Association and the American Psychological Association, hypnosis was the domain of stage operators and fringe medical and psychology practitioners. When legitimate psychologists began performing forensic hypnosis interviews, courts around the nation found it convenient to throw hypnotically enhanced testimony citing the Frye Test, which is used to prevent the admissibility of polygraph test results. The Frye test was used to lump hypnosis as "new and unproven technologies." The question of confabulations was not directly ruled upon.

Another factor was that the clinical psychologists were ruining hypnotic interviews because they had a difficulty differentiating between therapy and a forensic interrogation. There were several cases in a row in Alabama, for instance, where such testimonies were thrown out because the psychologist used techniques that led the courts to feel like they were too suggestible. Therefore, once experienced police investigators began being trained as forensic hypnotists, the trend towards accepting such testimony changed drastically. (The rivalry between clinical psychologists and forensic hypnotists still exists. One charge the psychologists make is that forensic hypnotists are usually ill-equipped to handle abreactions. To the contrary, the truth is that most of the hypnotists are police officers who routinely handle more abreactions in a year than most psychologists do in a whole career. Nevertheless, I attribute much of psychologists pseudo-opinions against forensic hypnotist as due more to this professional rivalry than to scientifically derived opinions.)

Note that even in Alabama while rejecting hypnotically enhanced memories for years, courts recognized the use of hypnosis as an investigative tool.

Still until 1987 there was no consistency among state courts nationwide. Courts normally used the Frye Test to avoid accepting such testimony. That year the U.S. Supreme Court ruled in the Rock case that the Arkansas Supreme Court was wrong for excluding hypnotically refreshed testimony as their action "infringed on criminal defendant's right to testify on her own behalf." Specifically, they cited that such testimony has the support of the Fourteenth Amendment, the Sixth Amendment, and

the Fifth Amendment. In the majority opinion, Justice Blackmon stated the Arkansas per se ruling against such testimony was not valid. Furthermore, he stated that the interview was conducted without undue suggestibility and that the testimony had been corroborated by other evidence. Generally, the Rock ruling and subsequent case law states that hypnosis interviews do not necessarily create a greater risk of confabulations than other types of interviews and interrogation.

Currently every state in the U.S. accepts hypnotically refreshed memories provided that the interview is conducted by a trained investigator, who is careful to avoid any techniques which may create a condition of suggestibility. Such interviews must be video recorded, "head to foot" and "hello to good bye." Rules are clearly laid out in post Rock case law and even in a Texas statute. Generally, the role of the psychologist has been relegated to being the "expert witness" on the opposing side. This "expert" must go up against corroborating evidence to the contrary. According to Dr. Martin Reiser of the LAPD Behavior Science Services unit, a study hypnotically refreshed memories showed that 80% of the cases in which this technique was used provided new information which led to either a conviction or opened up substantially new avenues for investigation.

Of course, I take great exception to David Myers psychology textbook, which states that forensic hypnosis is out of favor. Based upon the information that I've presented here (and extensive research that I have conducted) Myers is totally incorrect in his statements. Last week I had breakfast with Marx Howell while I was at a conference in Newport Beach, CA. A retired Texas Ranger, a student of Dr. Reiser, and the head investigator handling the Branch Davidian massacre in Waco, he is the leading authority in this field. He regularly conducts hypnosis interviews in the U.S., Asia, and Europe. I told him about Myers' statements. Based upon the numerous convictions as a result of his work in forensic hypnosis (and that of his students – which includes FBI agents), we both share the opinion about the text's inaccuracy. However, neither one of us were surprised. As I stated above, there are several psychologists that dispute the validity of forensic hypnosis. Their only reasoning is based upon the same concept that calls into question any and all eye witness testimony. (Memories enhanced by hypnosis is subject to all of the problems which I listed in the beginning of this reply. Hypnosis merely aids in recall without enhancing the accuracy.) Simply their unfounded opinions stand in the face of case law (including the U.S. Supreme Court rulings), the Texas statute, and a solid record of convictions. There is no valid research conducted by psychologists that specifically dispute forensic hypnosis. (By the way, I was trained by Investigator Howell and Dr. Jerome Beacham of the Detroit Police Department.)

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