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Admissibility of Post-Hypnotic Testimony

"... an investigator should use hypnosis only in situations where the potential gains outweigh the risk of prejudice that may result and only after more traditional methods have failed."

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

In Chowchilla, CA, a busload of 26 school children and their driver were kidnaped by 3 masked gunmen who forced the victims into an abandoned trailer truck buried 6 feet underground. Sixteen hours after their abduction, the captives managed to free themselves and were soon rescued. Much to the investigators' dismay, however, neither the children nor the bus driver were able to provide any clues as to the identities of their kidnapers. In desperation, a hypnotist was called to assist in the investigation. During his first session with the hypnotist, the bus driver was able to recall all but one digit of the license plate on the kidnapers' white van. This information helped investigators to identify and locate three individuals who were eventually arrested, tried, and convicted on kidnaping charges.¹

In Arizona, the mother of two young children stood helplessly by while her husband died of gunshot wounds inflicted during an exchange of fire with an intruder in their home. Highly traumatized as a result of the incident, the witness could not give a clear description of the intruder until she was placed under hypnosis. Once under hypnosis, the woman not only assisted in the construction of a composite drawing of a suspect but also

recalled that the intruder had been shot during the altercation. The suspect who was ultimately identified on the basis of the composite drawing had, at the time of his arrest, a fresh gunshot wound in the same location described by the witness under hypnosis.²

These and countless other similar successes have made hypnosis a very popular and widely used investigative tool over the past 2 decades. So common has the use of hypnosis become in the investigation of crimes that many police departments and law enforcement agencies have established specially trained units that exist primarily for hypno-investigative purposes. These so called "Svengali Squads" came into existence in the early 1970's³ and have been credited with hundreds of convictions since that time. Unfortunately, hypnosis is not an exact science, and for every success story attributable to the "Svengali Squads," there is an equally striking example of how hypnosis has failed to produce accurate results. Consequently, some courts are less than totally enamored with hypnosis as a forensic tool and have significantly curtailed the usefulness of hypnosis in many jurisdictions. These courts question the reliability of recall enhanced by hypnosis, whether the hypnotic process affects the accuracy of pre-hypnotic recall, and ultimately what, if



Special Agent Kingston

any, post-hypnotic testimony should be legally admissible against a criminal defendant.

This article will identify the problems inherent in using hypnosis to enhance witness recall, discuss rules that State and Federal courts have adopted to determine the admissibility of post-hypnotic testimony, and suggest procedural safeguards to be implemented when using hypnosis as an investigative tool.

PROBLEMS WITH RELIABILITY

As courts which have confronted this issue point out, experts in the "science" of hypnosis themselves are unable to agree on a theory that adequately explains the phenomenon of hypnotic recall. One school of thought maintains that memories are "recorded" in the human mind much like movies are recorded on film. Under hypnosis, these memories can be "played back" in precise detail, and as a result, the subject's memory is accurately refreshed.⁴ While this particular theory enjoyed considerable acceptance in the past, its popularity in recent years has been usurped by a more realistic approach. Today, a majority of experts in the scientific community adhere to the proposition that the human mind perceives an event, receives the information, and retains only portions of the memory for later recall. Hypnosis can aid in that recall by relaxing the subject and removing exterior distractions. However, because hypnotic retrieval of memory entails a reconstruction of events rather than an errorless "play back," recollections induced in this manner may be fraught with inaccuracies.⁵

The inaccuracies associated with hypnotic recall cannot, necessarily, be blamed on the individuals involved in the process. Rather, the inaccuracies are more often attributable to problems inherent in the hypnotic process itself, problems such as hypersuggestibility, hypercompliance, and confabulation.

Hypersuggestibility

Hypnosis is a state of altered consciousness "marked by heightened suggestibility"⁶ or hypersuggestibility. Thus, an individual in a hypnotic state is very open and responsive to suggestions made by the hypnotist. While this particular characteristic is what makes hypnosis a successful technique in both the medical and entertainment fields, hypersuggestibility presents a very serious problem when using hypnosis for investigative purposes. When using hypnosis to refresh the memory of a potential witness, there exists a very real danger that the subject will respond to suggestions made by the hypnotist, no matter how subtle or unwitting those suggestions may be. The unfortunate result is an inaccurately refreshed recollection based on a commingling of the subject's original observations and the suggestions received from the hypnotist.⁷

Hypercompliance

Very closely related to hypersuggestibility is a characteristic of hypnosis known as hypercompliance—the hypnotized subject's overwhelming desire to please either the hypnotist or others who have urged him to undergo hypnosis.⁸ Motivated by hypercompliance, it is not uncommon for a subject being questioned under hypnosis to suppress an appropriate response and respond, instead, in a manner that he believes is expected of him.⁹ When the subject under hyp-

“... the admissibility of post-hypnotic testimony is contingent upon a showing that the hypnotically refreshed recall is reliable.”

nosis is a potential witness attempting to refresh his memory, and the individual he is seeking to please is a prosecutor or an investigator, it is not difficult to imagine the havoc hypercompliance could wreak on the subject's accurate recall.

Confabulation

In a hypnotic state, a subject, already prone to hypersuggestibility and hypercompliance, will unconsciously invent facts in order to answer questions posed by the hypnotist, if the subject lacks adequate knowledge or memory to respond honestly to the inquiry. This process of artificially enhancing memory or “filling in the gaps” is called confabulation.¹⁰

Although hypersuggestibility, hypercompliance, and confabulation present serious problems when attempting to refresh the recollections of a witness through hypnosis, these problems are, by no means, unique to hypnosis. It is not uncommon for an individual who is overly anxious to assist in an investigation to engage in activities closely resembling hypersuggestibility, hypercompliance, and confabulation without the aid of hypnosis. However, many experts in the field of hypnosis contend that an additional feature of hypnosis puts the previously hypnotized witness in a class by himself. This distinguishing feature is the fact that a witness who admits to being uncertain of the accuracy of his recollections prior to hypnosis often becomes firmly convinced of the accuracy of his recollections after hypnosis, despite the fact that his recollections may include false memories induced by hypersuggestibility, hypercompliance, and confabulation.¹¹

These problems inherent in the use of hypnosis were powerfully demonstrated in a laboratory test which involved instilling false guilt in experimental subjects through hypnosis. The subjects were so strongly convinced of their own guilt that they were unable to pass a subsequently administered lie detector test. Although completely innocent, the subjects' admissions of guilt registered as truths on the polygraph.¹²

JUDICIAL ANALYSIS

Overwhelming as the problems inherent in the hypnotic process appear to be, some experts still believe the harmful effects of hypnosis can be minimized and are of the opinion that if proper precautions are taken, previously hypnotized witnesses can provide accurate courtroom testimony.¹³ Nevertheless, many appellate courts have opted to curtail drastically the use of previously hypnotized witnesses in criminal proceedings.¹⁴ The courts that have limited the use of post-hypnotic testimony have done so on the ground that prior hypnosis renders a witness intrinsically unreliable. However, like their counterparts in the scientific community, appellate court judges are unable to agree on what constraints should be placed on the use of post-hypnotic testimony. As a result, a wide discrepancy exists among the courts with regards to the admissibility of testimony of a previously hypnotized witness. This discrepancy, in turn, has created a dilemma for the investigator deciding when to use hypnosis to enhance witness recall and for the prosecutor determining how to present his best evidence to support a criminal conviction.

A review of the Federal and State appellate court decisions which ad-

dress the issue of admissibility of post-hypnotic testimony indicates that the variance in treatment by these courts can be analyzed by grouping their decisions into four categories: (1) Those that find prior hypnosis to be an issue affecting credibility, not admissibility; (2) those that make admissibility of post-hypnotic testimony contingent upon a showing of reliability; (3) those that declare inadmissible any testimony based on hypnotic recall while permitting testimony relating to events recalled prior to hypnosis; and (4) those that hold prior hypnosis to be an absolute bar to admissibility. The cases in each category, although factually different, are decided on similar rationale. Each category is discussed below in terms of factors considered by courts in deciding the legal admissibility of such testimony.

Credibility Not Admissibility

This first category was created in the 1968 case of *Harding v. State*.¹⁵ In that case, the Maryland Court of Special Appeals became the first appellate court to address specifically the issue of the admissibility of post-hypnotic testimony. The trial court in *Harding* had heard the testimony of Mildred Coley, the victim of an apparent attempted rape and murder, and had admitted her testimony over defense objections, despite the fact that the evidence clearly demonstrated the victim had little or no accurate recall of the assault prior to hypnosis. The trial judge allowed the case to go to the jury in its entirety with the following precautionary statement:

“You have heard, during this trial, that a portion of the testimony of the prosecuting witness, Mrs. Coley,

was recalled by her as a result of her being placed under hypnosis. The phenomenon commonly known as hypnosis has been explained to you during this trial. I advise you to weigh this testimony carefully. Do not place any greater weight on this portion of Mrs. Coley's testimony than on any other testimony that you have heard during this trial. Remember, you are the judges of the weight and the believability of all the evidence in this case."¹⁶

On appeal, the Maryland Court of Special Appeals upheld the defendant's conviction and found that the post-hypnotic testimony of the prosecuting witness was sufficient to support that verdict. Essentially, the court held that prior hypnosis, in and of itself, does not render a witness incompetent to testify and that any ill effects the hypnotic process may have on accurate recall create issues of credibility, not admissibility. In so holding, the court considered neither the potential dangers of hypersuggestibility, hypercompliance, or confabulation nor the viewpoints of the scientific community on the reliability of hypnotically induced recall. Rather, the court simply emphasized the witness' own statement that she was testifying from her own refreshed recollection of the events as they occurred, the opinion of the hypnotist that there was "no reason to doubt the accuracy of the witness' recollections,"¹⁷ and the trial court's cautionary instruction to the jury. Based on the foregoing observations, the appellate court believed it was justified in drawing the following conclusion:

"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 she was doing so from her own recollection. The fact that she has 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."¹⁸

Although the rather simplistic approach adopted by the court in *Harding* drew considerable criticism from legal commentators and the Maryland court's position was subsequently reversed in the 1982 case of *Collins v. State*,¹⁹ the case won immediate acceptance among many State and Federal courts faced with like issues, and the opinion has managed to retain considerable vitality.²⁰

Today, several courts still hold to the proposition that the possible effects of hypersuggestion, hypercompliance, and confabulation impact on the weight, not the admissibility, of the testimony of previously hypnotized witnesses. These courts assume that "skillful cross-examination will enable the jury to evaluate the effects of hypnosis on the witness and the credibility of his testimony."²¹

Admissibility Contingent Upon Reliability

Several State appellate courts since *Harding* have created a second category of cases on this issue by rejecting *Harding's* per se admissible standard, and instead, adopting a rule of limited admissibility.²² Court decisions that fall into this category are more concerned with the problems inherent in the hypnotic process and hold that the admissibility of post-hypnotic testimony is contingent upon a showing that the hypnotically refreshed recall is reliable. While these

courts agree that the key to admissibility of post-hypnotic testimony is reliability, the methods prescribed for demonstrating such reliability vary greatly by jurisdiction.

Some jurisdictions have embraced a very elementary test of reliability that requires the party proposing the testimony of a previously hypnotized witness to show that the testimony is based on the witness' independent recall and is not merely the product of the hypnotic process. Conceivably, this burden could be met by demonstrating a consonance between the witness' pre- and post-hypnotic statements, corroboration of the witness' statements made under hypnosis, or merely by establishing the opportunity of the witness to observe the events which he purports to recall under hypnosis.²³ Other jurisdictions apply a balancing test²⁴ which measures the probative value of the post-hypnotic testimony and weighs it against the "danger of unfair prejudice, confusion of issues, or misleading the finder of fact."²⁵

However, a majority of courts that subscribe to the limited admissibility rule have shifted their attention away from the proffered post-hypnotic testimony and focus, instead, on the hypnotic process itself. Typically, these courts attempt to insure the reliability of post-hypnotic recall by imposing procedural safeguards which must be strictly adhered to during the hypnotic session. Although differing slightly from jurisdiction to jurisdiction, a majority of these safeguards have been adapted from suggestions made by Dr. Martin Orne,²⁶ an expert in hypnosis, and are, therefore, fundamentally quite similar.

“... law enforcement officers should be selective in their use of hypnosis and should follow procedures that grant them the greatest likelihood of admissibility.”

Dr. Orne's suggestions were first introduced in the 1981 New Jersey Supreme Court case of *State v. Hurd*.²⁷ In this case, defendant Hurd was arrested and charged with assault with intent to kill when the victim of the assault identified Hurd as her assailant. The victim, Hurd's ex-wife, informed investigators that on the evening of the attack, she was asleep in the bedroom of her ground floor apartment when someone reached through the window and stabbed her numerous times. Although she was unable to identify her attacker immediately after the incident, the victim asked the police to "check out" her former husband. Later, the victim was informed that her current husband, David Sell, and her former husband, Paul Hurd, were the primary suspects in the case.

The victim then agreed to undergo hypnosis in an attempt to refresh her memory. While under hypnosis, the victim began to relive the incident and became hysterical. When asked whether the assailant was her ex-husband, the victim responded affirmatively.

After she was brought out of the hypnotic trance, the victim expressed mistrust about her identification of Hurd. However, investigators encouraged her to vindicate her current husband by making a formal identification of Hurd. Consequently, the victim gave a statement to police identifying Paul Hurd as her assailant.

Prior to trial, the defendant moved to suppress the victim's proposed in-court identification on the ground that the original identification procedure was tainted by the suggestive hypnotic process, and therefore, was inherently

unreliable. After hearing expert testimony regarding the reliability of hypnotically refreshed recall in general and reviewing the circumstances of the particular hypnotic process in question, the trial court granted the defendant's motion to suppress. On appeal, the New Jersey Supreme Court upheld the trial court's decision to suppress the in-court identification and imposed the following procedural safeguards to insure the reliability of post-hypnotic testimony:

- 1) The hypnotic session should be conducted by a licensed psychiatrist or psychologist trained in the use of hypnosis.
- 2) The qualified professional conducting the hypnotic session should be independent of and not responsible to the prosecutor, investigator, or the defense.
- 3) Any information given to the hypnotist by law enforcement personnel prior to the hypnotic session must be in written form so that subsequently the extent of the information the subject received from the hypnotist may be determined.
- 4) Before induction of hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them, carefully avoiding adding any new elements to the witness' description of the events.
- 5) All contacts between the hypnotist and the subject should be recorded so that a permanent record is available for comparison and study to establish that the witness has not received information or suggestion which might later be reported as having been first described by the subject during hypnosis. Videotape

should be employed if possible, but should not be mandatory.

- 6) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and post-hypnotic interview.²⁸

Clearly, these safeguards, when made a condition precedent to admission of post-hypnotic testimony, are designed to limit the effects of hypersuggestion, hypercompliance, and confabulation while, at the same time, providing the court with adequate grounds on which to judge the reliability of post-hypnotic recall.²⁹

No matter what test in this category is used to determine the admissibility of post-hypnotic testimony—the elementary test of reliability, balancing, compliance with procedural safeguards, or a combination of all three—the result is the same: The party attempting to use a previously hypnotized witness must first persuade the court that the post-hypnotic recall of the witness is reliable and not simply the product of the hypnotic process. Once the initial burden is met, the testimony will be admitted, "leaving the jury free to hear and weigh all evidence the opponent of the testimony may offer regarding possibilities of pseudomemory resulting from suggestion, confabulation, or deliberate untruthfulness."³⁰

Hypnotically Induced Recall Inadmissible

In a third category of cases involving hypnosis, a growing number of appellate courts are retreating from the case-by-case analysis of admissibility of post-hypnotic testimony, contingent upon its reliability. These courts are

holding, as a matter of law, that the probative value of hypnotically induced recall is outweighed by the danger of prejudice in every instance.³¹ In their analysis, the courts that subscribe to this view unanimously rely on the test for the admissibility of scientific evidence announced in the 1923 case of *Frye v. United States*³² to support their decisions.

In discussing the admissibility of evidence obtained through scientific means, the court in *Frye* rejected expert testimony based on a lie detector test, despite the fact that the proper foundation had been laid. The court held that regardless of the expertise of the operator, the lie detector test itself was too unreliable to warrant acceptance as a measure of truth. In so holding, the *Frye* court looked to the scientific community and formulated the following rule:

"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."³³

Accordingly, the court in *Frye* determined that the lie detector test had not gained sufficient recognition among physiologists or psychologists to permit the admissibility of evidence derived from the administration of the test.

Since *Frye*, many jurisdictions have adopted the *Frye* test and applied it in a variety of situations,³⁴ each with the same result. If the scientific principle, theory, or discovery in question has not gained sufficient general acceptance in the scientific community from which it stems, the evidence arising from the use of such principle, theory, or discovery will not be admissible in a court of law.

Courts that apply the *Frye* test to determine the admissibility of post-hypnotic testimony thus require the party offering the testimony to demonstrate the general acceptance of hypnosis among members of the scientific community. Regardless of the efforts displayed by proponents of hypnosis, courts which apply the *Frye* test to the admissibility of hypnotically induced testimony inevitably conclude that hypnosis, although to a large extent accepted as a viable therapeutic tool, is not generally regarded as a reliable forensic tool by hypnosis experts. This conclusion is not surprising, considering that one need only peruse legal and scientific journals to find a number of articles written by hypnosis experts that warn against the dangers of hypersuggestibility, hypercompliance, and confabulation—dangers that militate against the acceptance of hypnosis as a forensic tool.³⁵

Most courts which apply the *Frye* test, however, have been reluctant to declare all post-hypnotic testimony inadmissible. Rather, they have attempted to protect against the dangers inherent in the hypnotic process while, at the same time, preventing the total disqualification of a previously hypnotized witness by excluding only the testimony that is based on hypnotically induced recall. More specifically, these courts permit a witness to testify regarding events known prior to hypnosis but prohibit testimony based on

events recalled only under hypnosis. Unquestionably, this position is a compromise designed to preserve the use of hypnosis as an investigative technique under limited circumstances. This compromise is explained by the Arizona Supreme Court in the case of *State ex rel Collins v. Superior Court for the County of Maricopa*.³⁶

"As a practical matter, if we are to maintain the rule of incompetence, the police will seldom dare to use hypnosis as an investigatory tool because they will thereby risk making the witness incompetent if it is later determined that the testimony of that witness is essential. Thus, applying the *Frye* test of general acceptance and weighing the benefit against the risk, we . . . hold that a witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case. That witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis."³⁷

It is noteworthy that the Arizona Supreme Court in *State ex rel Collins*, like all other courts that have adopted a similar position, requires the prosecution to obtain and record information known to the witness prior to hypnosis. Only that pre-hypnosis recollection is admissible when the witness testifies. Other information obtained from the witness in the hypnotic session is useful for investigative purposes but not as testimony.³⁸

“Under current judicial analysis, hypnosis remains a useful investigative technique, and in many jurisdictions, post-hypnotic testimony has evidentiary value.”

Inadmissible Per Se

Court decisions in the fourth category of cases concerning the admissibility of post-hypnotic testimony hold that prior hypnosis of a witness is an absolute bar to admissibility of that witness' testimony.³⁹ Some courts have reached this result by combining the application of the *Frye* test with an analysis of the sixth amendment confrontation clause, concluding that the inherent dangers of the hypnotic process render a previously hypnotized witness completely incompetent to testify. These courts apply the *Frye* test in the same manner as those courts which exclude post-hypnotic recall as testimony. Their analysis, however, also includes an application of the sixth amendment guarantee that all defendants have the right to confront witnesses against them. The right to confrontation embodies the right of defendants to effectively and meaningfully cross-examine witnesses against them.⁴⁰ The concern some courts have is that the hypnotic process may irrevocably alter the witness' recall and demeanor so as to deny the defendant the opportunity to confront and cross-examine the witness against him. Particularly troublesome to these courts is the fact that witnesses often become firmly convinced of their recollections made under hypnosis and thereby immunize themselves from the rigors of cross-examination. In *State ex rel Collins*, the court stated the problem as follows:

“The concern in the area of posthypnotic testimony is that posthypnotic memory may be different than prehypnotic memory.

This memory alteration may result from purposeful or unwitting cues given by the hypnotist, the phenomenon of confabulation, and the need for the subject to achieve some sense of certainty within his or her own mind. The basic problem is that if a witness sincerely believes that what he or she is relating is the truth, they become resistant to cross examination and immune to effective impeachment to ascertain the truth.”⁴¹

Thus, the court in *State ex rel Collins*⁴² and others with similar reasoning have concluded that because the impervious nature of previously hypnotized witnesses works to deny a defendant his fundamental right to effective cross-examination all posthypnotic testimony is per se inadmissible in a criminal trial.

Although the per se inadmissible rule won fairly wide support from hypnosis experts and legal commentators,⁴³ most courts have not adopted this extreme approach.

PROCEDURAL SAFEGUARDS

As the analysis of court decisions concerning the admissibility of post-hypnotic testimony indicates, there is continued inconsistency among jurisdictions, and no uniform treatment appears forthcoming. Several State appellate courts which have ruled on the admissibility of post-hypnotic testimony have subsequently modified their own position on this issue.⁴⁴ This variance in the way courts look at hypnosis has resulted in confusion on the part of law enforcement. Officers do not have a clear and structured view of when this investigative technique may be judicially accepted in criminal prosecutions.

Most courts that have addressed the issue, even those that hold the ex-

treme position that post-hypnotic testimony is per se inadmissible, have concluded that hypnosis is an acceptable, reliable investigative technique.⁴⁵ This conclusion suggests that hypnotically induced recall may be used in furtherance of investigation and to establish probable cause. However, investigators who wish to use hypnosis as an investigative tool are placed in the unenviable position of having to guess whether the testimony of a witness who has undergone hypnosis will be admissible in court. The investigator who chooses to proceed with the use of hypnosis in his investigation risks losing a potentially valuable witness and possibly his whole case, if the court in his jurisdiction takes an adverse position on the issue of admissibility. Therefore, law enforcement officers should be selective in their use of hypnosis and should follow procedures that grant them the greatest likelihood of admissibility. In this regard, the following procedural safeguards, which have evolved in judicial analysis of hypnosis, merit consideration.

First, if an investigator is unsure of a particular court's position on the issue of post-hypnotic testimony, he should use hypnosis only in situations where the potential gains outweigh the risk of prejudice that may result and only after more traditional methods of investigation have failed. To insure further the admissibility of a witness' post-hypnotic testimony, hypnosis should only be used to further a legitimate investigative need and should not be used simply to bolster a witness' confidence.

Second, the investigator who chooses to use investigative hypnosis and desires to have the testimony of hypnotized witnesses admissible in court should consider following the procedural safeguards that were announced in the *Hurd* case.⁴⁶ These safeguards require use of a licensed psychologist or psychiatrist trained in the use of hypnosis, who is independent of both prosecution and defense and whose contacts with the witness are both restricted and recorded.

By following these safeguards, the investigator insures the admissibility of the witness' post-hypnotic testimony, if the court in his jurisdiction adopts either the *Harding*⁴⁷ per se admissible rule or the limited admissibility rule advanced by the court in *Hurd*. Under both rules, following the safeguards establishes the reliability of the post-hypnotic testimony. Compliance would enhance the witness' credibility in the jury's eyes under *Harding* and establish reliability of the process itself before the court under the *Hurd* rule. Moreover, because the safeguards specifically require the recording of a subject's pre-hypnotic recall, adherence to the safeguards will document, and thereby save, the pre-hypnotic portion of the witness' testimony in the event the court rules that only post-hypnotic recall is inadmissible. As the Arizona Supreme Court required in *State ex rel Collins*, the investigator should always obtain and record information known to the witness prior to hypnosis.

Finally, the reliability of the hypnosis process itself can be improved if both the subject and the hypnosis expert conducting the session are not made aware of the identities of potential suspects or the investigator's theories regarding the case. These precautions will reduce the possibility that the subject's post-hypnotic recall is the

product of hypersuggestibility, hypercompliance, or confabulation and further enhance the chances of admissibility.⁴⁸

CONCLUSION

Under current judicial analysis,⁴⁹ hypnosis remains a useful investigative technique, and in many jurisdictions, post-hypnotic testimony has evidentiary value. However, investigators who use this technique should take every precaution to insure the reliability of both the hypnotic process itself and the witness' post-hypnotic recall. While most experts believe that the effects of hypersuggestibility, hypercompliance, and confabulation can never be totally eliminated when using hypnosis to enhance recall, strict adherence to procedural safeguards can minimize their effects and provide the best opportunity for admissibility of post-hypnotic testimony.

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Footnotes

¹*People v. Schoenfeld*, 111 Cal. App. 3d 671, 168 Cal. Rptr. 762 (1980).

²Reiser, "Investigative Hypnosis: A Controversial Technique," *The Police Chief*, August 1984, p. 65. The individual arrested in this case never went to trial because the Arizona trial court disqualified the witness from testifying on the ground that the hypnotic process rendered the witness' testimony inherently unreliable.

³The Los Angeles Police Department pioneered the use of "Svengali Squads" in 1970. During the first 5 years of its existence, the Los Angeles hypnosis squad was involved in approximately 70 cases. See generally, "The Svengali Squad," *Time*, September 13, 1976, p. 56.

⁴Plotkin, *The Previously Hypnotized Witness: Is His Testimony Admissible?* 106 *Military L. Rev.* 163, 173 (1984).

⁵*Id.*
⁶*People v. Gonzales*, 329 N.W. 2d 743, 746 (Mich. 1980).

⁷*Id.* See also, *State ex rel Collins v. Sup. Ct. for the County of Maricopa*, 644 P. 2d 1266, 1269 (Ariz. 1982).

⁸*Id.*
⁹*Id.*
¹⁰See *State ex rel Collins v. Sup. Ct. from the County of Maricopa*, 644 P. 2d 1266, 1270-71 (Ariz. 1982).

¹¹*Supra* note 5, at 746. See also, *Commonwealth v. Kater*, 447 N.E. 2d 1190, 1197 (Mass. 1983).

¹²*Supra* note 10, at 1269, citing Margolin, "Hypnosis-enhanced Testimony: Valid Evidence or Prosecutor's Tool?" *Trial*, *The National Legal News Magazine*, October 1981, pp. 43-44. Although not all experts would concur with the results of this experiment, the court in *State ex rel Collins* relied on its validity, *supra* note 10.

¹³See generally, Reiser, *supra*.

¹⁴The admissibility of testimony given while under hypnosis and evidence of what was said under hypnosis is well-settled. All courts which have considered the question are in agreement that such testimony is inadmissible. See, e.g., *Pearson v. State*, 441 N.E. 2d 468 (Ind. 1982); *State v. Pusch*, 46 N.W. 2d 508 (N.D. 1950); *Jones v. State*, 542 P. 2d 1316 (Okla. Crim. 1975).

¹⁵246 A.2d 302 (Md. 1968).

¹⁶*Id.* at 310.

¹⁷*Id.* at 311.

¹⁸*Id.* at 306.

¹⁹447 A. 2d 1272 (Md. App. 1982), *aff'd*, 464 A.2d 1028 (Md. 1983). In *Collins*, a differently constituted Maryland court of appeals abandoned the position stated in *Harding* and held that testimony developed through hypnosis was inadmissible.

²⁰See, e.g., *Clay v. Vose*, 771 F. 2d 1 (1st Cir. 1985); *United States v. Awkard*, 597 F. 2d 667 (9th Cir. 1979); *United States v. Adams*, 581 F. 2d 193 (9th Cir. 1978); *Crum v. State*, 433 So. 2d 1384 (Fla. App. 1983); *Key v. State*, 430 So. 2d 909 (Fla. App. 1983); *State v. Little*, 674 S.W. 2d 541 (Mo. 1984); *State v. Brown*, 337 N.W. 138 (N.D. 1983); *State v. Glebock*, 616 S.W. 2d 897 (Tenn. Cr. App. 1981); *Chapman v. State*, 638 P. 2d 1280 (Wyo. 1982).

²¹*State v. Hurd*, 432 A. 2d 86, 91 (N.J. 1981).

²²See, e.g., *State v. Contreras*, 674 P. 2d 792 (Alaska App. 1983); *State v. Iwakiri*, 682 P. 2d 571 (Idaho 1984); *People v. Cohoon*, 457 N.W. 2d 998 (Ill. App. 1984); *Gentry v. State*, 471 N.E. 2d 263 (Ind. 1984); *Strong v. State*, 435 N.E. 2d 969 (Ind. 1982); *State v. Luther*, 663 P. 2d 1261 (Or. App. 1983); *State v. Jorgensen*, 492 P. 2d 312 (Or. App. 1971); *Walters v. State*, 680 S.W. 2d 60 (Tex. App. 1984); *Zani v. State*, 679 S.W. 2d 144 (Tex. App. 1984); *Hopkins v. Com.*, 337 S.E. 2d 264 (Va. 1985).

²³See generally, Plotkin, *supra* note 4, 184-85. See also, *State v. Contreras*, 674 P. 2d 792 (Alaska App. 1983); *People v. Cohoon*, 457 N.E. 2d 998 (Ill. App. 1984); *Gentry v. State*, 471 N.E. 2d 263 (Ind. 1984); *Strong v. State*, 435 N.E. 2d 969 (Ind. 1984); *Walters v. State*, 680 S.W. 2d 60 (Tex. App. 1984); *Hopkins v. Com.*, 337 S.E. 2d 264 (Va. 1985).

²⁴See, e.g., *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984); *United States v. Valdez*, 722 F. 2d 1196 (5th Cir. 1984); *State v. Iwakiri*, 682 P. 2d 571 (Idaho 1984).

²⁵Plotkin, *supra* note 4, at 185.

²⁶For a resume of Dr. Orne's qualifications, see *supra* note 10, at 1288, n. 6.

²⁷432 A. 2d 86 (N.J. 1981).

²⁸*Id.* at 89-90.

²⁹Oregon has adopted similar safeguards by statute. See, *Or. Rev. Stat.*, §136.675.

³⁰*Supra* note 10, at 1290.

³¹See, e.g., *Prowitt v. State*, 460 So. 2d 296 (Ala. Cr. App. 1984); *People v. Quintana*, 659 P. 2d 710 (Colo. App. 1982); *State v. Atwood*, 479 A. 2d 258 (Conn. Super. 1984); *Felker v. State*, 314 S.E. 2d 621 (Ga. 1984); *State v. Moreno*, 709 P. 2d 103 (Hawaii 1985); *State v. Seager*, 341 N.W. 2d 420 (Iowa 1983); *State v. Goutro*, 444 So. 2d 615 (La. 1984); *Commonwealth v. Kater*, 447 N.E. 2d 1190 (Mass. 1983); *State v. Ture*, 353 N.W. 2d 502 (Minn. App. 1984); *State v. Patterson*, 331 N.W. 2d 500 (Neb. 1983); *People v. Hughes*, 453 N.E. 484 (N.Y. 1983); *State v. Payne*, 325 S.E. 2d 205 (N.C. 1985); *State v. Maurer*, 473 N.E. 2d 768 (Ohio 1984); *Robinson v. State*, 677 P. 2d 1080 (Okla. Cr. 1984); *Com. v. Smoyer*, 476 A. 2d 1304 (Pa. 1984); *State v. Coe*, 684 P. 2d 668 (Wash. 1984).