

Admissibility of Post-Hypnotic Testimony

By **KIMBERLEY A. KINGSTON**
Special Agent • FBI Academy • Legal Counsel Division
Federal Bureau of Investigation • Quantico, VA

PART I

“... and 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.”

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 com-

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 by law or are not permitted at all.

mon 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 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.

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

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.*