

# Admissibility of Post-Hypnotic Testimony

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

**PART IV**

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

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.”<sup>21</sup>

## 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.<sup>22</sup> 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

*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.*

witness to observe the events which he purports to recall under hypnosis.<sup>23</sup> Other jurisdictions apply a balancing test<sup>24</sup> 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.”<sup>25</sup>

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,<sup>26</sup> an expert in hypnosis, and are, therefore, fundamentally quite similar.

Dr. Orne's suggestions were first introduced in the 1981 New Jersey Supreme Court case of *State v. Hurd*.<sup>27</sup> 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.

## Footnotes

- <sup>21</sup>*State v. Hurd*, 432 A. 2d 86, 91 (N.J. 1981).  
<sup>22</sup>See, 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).  
<sup>23</sup>See 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).  
<sup>24</sup>See, 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).  
<sup>25</sup>Plotkin, *supra* note 4, at 185.  
<sup>26</sup>For a resume of Dr. Orne's qualifications, see *supra* note 10, at 1288, n. 6.  
<sup>27</sup>432 A. 2d 86 (N.J. 1981).