

Admissibility of Post-Hypnotic Testimony

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PART VI

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 demon-

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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 by law or are not permitted at all.

strate 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

Footnotes

³³*Id.* at 1014.

³⁴See, e.g., *United States v. Tranowski*, 659 F.2d 750 (7th Cir. 1981) (photograph dating by mathematical and astronomical calculations); *United States v. Kilgus*, 571 F.2d 508 (9th Cir. 1978) (forward looking infrared system); *United States v. Brown*, 557 F.2d 541 (6th Cir. 1977) (ion micro-probe analysis of human hair) *United States v. McDaniel*, 538 F.2d 408 (D.C. Cir. 1976) (spectrographic voice identification); *State v. Canaday*, 585 P.2d 1185 (Wash. 1978) (breathalyzer); *State v. Clawson*, 270 S.E.2d 659 (W. Va. 1980) (hair analysis)

³⁵See, e.g., Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 Cal. L. Rev. 313 (1980); Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 Ohio N.L. Rev. 1 (1977); Sanders and Simmons, "Use of Hypnosis to Enhance Eyewitness Accuracy: Does it Work?" *Journal of Applied Psychology*, vol. 68, February 1983, p. 70; Smith, "Hypnotic Memory Enhancement of Witnesses: Does it Work?" *Psychological Bulletin*, vol. 94, November 1983, p. 387; Timm, "The Factors Theoretically Affecting the Impact of Forensic Hypnosis Techniques on Eyewitness Recall," *Journal of Police Science and Administration*, vol. 11, December 1983, p. 442.

³⁶644 P.2d 1266.

³⁷*Id.* at 1295.

ADMISSIBILITY OF POST-HYPNOTIC TESTIMONY

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

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 extreme 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.

Footnotes

³⁸In *State ex rel Collins*, *supra* note 36, the Supreme Court of Arizona stated that a "review of the literature and the position of law enforcement experts, lead us to conclude that hypnosis is generally accepted as a reliable investigative tool by the relevant scientific community."

³⁹See, e.g., *People v. Shirley*, 641 P. 2d 775 (Calif. 1982); *State v. Conley*, 627 P. 2d 1174 (Kan. App. 1981) (unless both parties stipulate to admissibility); *People v. Gonzales*, 329 N.W. 2d 743 (Mich. 1982) subsequently modified by *People v. Nixon*, 364 N.W. 2d 593 (Mich. 1985); *State v. Pierce*, 207 S.E. 2d 414 (S.C. 1974).

⁴⁰*Pointer v. Texas*, 380 U.S. 400 (1965).

⁴¹*Supra* note 36, at 1274.

⁴²The decision in *State ex rel Collins*, *supra* note 36, which held post-hypnotic testimony to be inadmissible per se, was modified in a supplemental opinion filed in that case. The supplemental opinion of the court declared inadmissible only hypnotically induced recall testimony.

⁴³See, e.g., Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 Cal. L. Rev. 313 (1980); Sanders and Simmons, "Use of Hypnosis to Enhance Eyewitness Accuracy: Does it Work?," *Journal of Applied Psychology*, vol. 68, February 1983, p. 70.

⁴⁴See, e.g., *State ex rel Collins v. Sup. Ct. for the County of Maricopa*, 644 P. 2d 1266 (Ariz. 1982) modifying *State v. Mena*, 624 P. 2d 1274 (Ariz. 1981); *State v. Collins*, 464 A. 2d 1028 (Md. 1983) modifying *State v. Harding*, 246 A. 2d 302 (Md. 1968); *People v. Nixon*, 346 N.W. 2d 593 (Mich. 1985) modifying *People v. Gonzales*, 329 N.W. 2d 743 (Mich. 1982); *State v. Peoples*, 319 S.E. 2d 177 (N.C. 1984) modifying *State v. McQueen*, 244 S.E. 2d 414 (N.C. 1978).

⁴⁵See *State ex rel Collins*, *supra* note 36, at 1295. See also, Orne, Soskis, Dinges, Orne and Torney, *Hypnotically Refreshed Testimony: Enhanced Memory or Tampering With Evidence?* National Institute of Justice, Issues and Practice, January 1985, pp. 2 and 40.