

Admissibility of Post-Hypnotic Testimony

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

END OF SERIES

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

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 hypnotic 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 theo-

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.

ries 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.

Footnotes

⁴⁶Supra note 21.

⁴⁷Supra note 15.

⁴⁸See generally, Orne, Soskis, Dinges, Orne and Tonny, supra note 45.

⁴⁹The U.S. Supreme Court has not ruled on the admissibility of post-hypnotic testimony. If that Court should conclude that the use of post-hypnotic testimony violates a defendant's 6th amendment right to confrontation, then the admissibility question would be resolved in all the States because the States are bound by the proscriptions of the 6th amendment through the Due Process Clause of the 14th amendment.

APPELL

Il-Korp tal-Pulizija ta' Malta qieghed jippjana u jahdem fuq progett sabiex jigi mwaqqaf

MUŻEW TA' OĠĠETTI U STORJA TAL-KORP TAL-PULIZIJA

fejn jigu esibiti materjal, ta' liema natura jkun, li għandu x'jaqsam ma' l-istess Korp.

Għalhekk, nistiednu iil dawk kollha li jgħandhom xi oġġetti, bħal Ritratti Qodma, Dokumenti, Midalji, Badges, Ilbies eċċ., li jistghu jirregalawhom, jew jisilfuhomna halli niehduhom ritratti, sabiex jagħmlu dan, biex il-Mużew jigi attrezzat kif inhu xieraq.

Min ighin f'dan ir-rigward, ismu jitnizzel f'Album ta' Tifkira fis-Sala ta' l-Esibiti.

Nirringrazzjawkom minn issa.