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Hypnotically enhanced testimony in the criminal trial

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The criminal practitioner faced with a witness who has had his testimony influenced in one way or another by a pre-trial hypnosis session should be aware that this is a rapidly changing area of the criminal law. This article is intended to acquaint the reader with some of the basic principles of hypnosis, and then to set out how the writer views the various categories of treatment by the courts in the last several years. Finally, there will be some suggestions with regard to how to attack the use of hypnotically enhanced testimony against an accused person in the context of the criminal trial.

Basic principles of hypnosis

There is general consensus that hypnosis is a heightened state of mental suggestibility. Its uses include psychotherapy, treatment of psychosomatic illnesses, anesthesia, and memory recall. In recent years it has been used by law enforcement agencies throughout the country as an investigative tool. It is the latter use that is the subject of the newly emerging trend of appellate case law relating to the criminal justice system. Because the scientific community views hypnosis as a heightened state of mental suggestibility, there exists

the possibility or the risk that the person undergoing hypnosis will fill in gaps in his or her memory with fantasy. This phenomenon is known as confabulation. Confabulations are aggravated by a tendency of the subject of the hypnosis to respond in a manner which will please the hypnotist. The problem wrestled with by the appellate courts in the criminal law context is that it is difficult to identify and segregate actual recall from this suggestion acceptance. A danger, of course, is that after hypnosis the subject of the hypnosis goes through what is known as a "memory cementing process" which can create a memory of perceptions that did not previously exist. Because of this characteristic, it has been stated by scientists and experts in the field, as well as appellate court opinions, that a person is no longer subject to cross-examination because he believes sincerely after hypnosis that the confabulation is in fact the truth. Therefore the danger is that the unreliability of hypnotically enhanced testimony imposes an unfair burden on the right to confront witnesses against the criminally accused.

Because subjects of hypnosis are often very enthusiastic to help the authorities, and humans are subject to a natural desire to please others, hypnosis as a means to enhance trial testimony is also suspect because of the danger of hypersuggestibility. Persons in laboratory tests were induced with false guilt, but so believed themselves guilty that they were unable to successfully complete a polygraph examination later. The polygraph registered their strongly held belief in their guilt as nondeceptive, although in fact it was untrue. Another factor not often recognized is that a person can and often will purposely lie under hypnosis.

Categories of treatment by the courts

Those jurisdictions which have ruled on the admissibility of hypnotically enhanced testimony on behalf of the prosecution can be classified in the following categories. The first is the most restrictive, that is, those jurisdictions which hold that hypnotically enhanced testimony per se is inadmissible under any circumstances. The second category is that which states that pre-hypnosis recall is admissible, but post-hypnosis testimony is inadmissible. The third category involves those jurisdictions which state that safeguards must be imposed not to insure credibility or reliability but to insure admissibility or competency of the testimony in the first place. The fourth category reflects the theory that there should be safeguards to insure the credibility or the reliability of the hypnotically enhanced testimony, but leaves to the jury the credibility decision once that threshold is passed. Last are those jurisdictions that place no restrictions on the qualification of the hypnotically enhanced testimony; that is they leave it as a pure jury question.

I. Those jurisdictions which have held that in effect hypnotizing a prosecution witness makes that witness completely unavailable for testimony about that subject matter at trial include the following: California,[1] Michigan,[2] Minnesota,[3] and Oklahoma.[4] These states basically have adopted the position that once a witness has been hypnotized it is tantamount to destruction of evidence, and even the most careful cross-examiner would not be able to demonstrate the difference between confabulation and actual recall of truthful matters.

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II. Those jurisdictions which have held that pre-hypnosis recall is admissible but post-hypnosis recall is inadmissible include the following: Arizona,[5] Colorado,[6] Maryland,[7] Massachusetts,[8] Nebraska,[9] New York,[10] Pennsylvania,[11] and the United States Court of Appeals for the Fifth Circuit.[12] The reason that the pre-hypnosis recall is permitted is that it is information that was not influenced by the hypnosis, and can be independently verified. They hold the post-hypnosis testimony inadmissible for all the reasons listed above, which can be summarized as making the testimony immune from proper cross-examination.

III. Those jurisdictions which permit its use under strict procedural safeguards with regard to admissibility or competency are the following: New Jersey,[13] New Mexico,[14] and Washington.[15] The reasons these jurisdictions permit its use but require the safeguards are (a) that the purpose of using hypnosis is not to obtain the truth as is a polygraph test, but to overcome amnesia, therefore restoring memory; (b) the court should not demand general acceptance of the scientific theory as a means of reviewing truthful or historically accurate recall; (c) if the material is subject to independent verification, then its utility is considerable and the risk attached to the procedure is minimal; (d) the potential for suggestiveness during the trance would be alleviated by the exercise of critical judgment afterwards; and (e) The rule of per se inadmissibility is unnecessarily broad and could result in exclusion of evidence that is otherwise trustworthy in the nature of other eyewitness testimony. The leading safeguards case in this regard is the New Jersey case of *State v. Hurd*. The first question under *Hurd* is to determine whether the case is of a kind likely to yield recall comparable to the reliability of normal recall if the hypnosis is in fact properly administered. If the answer to that question is in the affirmative, then it is necessary to determine if the procedures followed in the particular case were reliable. In reaching this determination the following factors have been set out for consideration by the court: (1) the hypnosis must be conducted by a psychiatrist or a psychologist. (2) The professional should not regularly be employed by the prosecution, the investigator, or the defense counsel. (3) Any information given to the hypnotist prior to the session by law enforcement personnel or by the defense must be recorded. (4) Before inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them. The hypnotist should carefully avoid influencing the description by asking structured questions or adding new details. (5) All contacts between the hypnotist and the subject must be recorded. (6) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and the post-hypnotic interview.

IV. These jurisdictions which hold that there should be safeguards to insure

the credibility or reliability of the witness, after which credibility becomes a jury question are the following: Florida,[16] Illinois,[17] Indiana,[18] Missouri,[19] North Dakota,[20] Tennessee,[21] the United States Court of Appeals for the Ninth Circuit,[22] and Wisconsin.[23]

V. Those jurisdictions which hold that it is a pure jury question of weight, subject to cross-examination as in any other type of witness situation, are the following: Georgia,[24] Iowa,[25] Louisiana,[26] North Carolina,[27] Oregon,[28] Texas,[29] and Wyoming.[30]

There are three states which have not reached the issue of admissibility or inadmissibility of hypnotically enhanced testimony, but have held that hypnosis evidence is scientifically unreliable. Those states are the following: Kansas,[31] South Carolina,[32] and Virginia.[33]

Suggestions on how to attack hypnotically-enhanced testimony

The criminal defense practitioner who is faced with a prosecution witness who has been hypnotized must first learn that that is the situation. Therefore, the initial step in the defense of such a case is to file a discovery motion to determine whether or not a witness has been hypnotized. If in fact that happened, then the next step would be to request to see the video tape and/or the sound recordings of the hypnotic sessions. When and if that is done, then the defense lawyer must be careful to compare the procedures used in that particular case with the recognized *Hurd* safeguards to determine whether or not to make an attack on the admissibility of the testimony in the first place, or to attack the credibility if the jurisdiction in which the case is being tried does not permit an attack on its admissibility. The vehicle of course would be a motion to suppress, which this writer recommends should be filed in every case involving hypnotically-enhanced testimony of a prosecution witness.

An actual case in which the writer participated was an allegation of rape by a young woman who claimed that four men had raped her.[34] She appeared disheveled and upset early one morning when she appeared in front of a stranger's apartment door and asked to use the telephone to call a friend to pick her up. This was done, and then her husband was eventually called. She was taken to the hospital, at which time one of the doctors suggested that she may have been raped. In her report to the police she was unable to recall any of the details at all that caused her to have to call her friend early in the morning from a stranger's apartment. Sometime later she made her initial report, in which she indicated that she had no recall. Before any subsequent report, she and her husband returned to the apartments and drove around the parking lot. At that time, she saw two young men standing by a black pickup truck outside an apartment near the one from which she called her friend. She did not recognize them nor speak to them. A few days later she was asked to come to the district attorney's office, where she was hypnotized by the chief of the district attorney's detective section. The session was videotaped and recorded. During the session, she related being raped by four men, and described the incident in some detail, including the fact that she had scratched and seriously cut the face of one of the alleged rapists. During that time, she also described a black pickup truck and gave a license number. After the session, she gave a written statement. Based on this information, a check was run on the license plate and it was determined that the vehicle was owned by a person with a certain name. That name was then processed by the driver's license bureau, and it turned out that there were two persons with similar names. Photographs were obtained from the driver's license bureau and shown to the alleged victim. She then picked out one of those persons, and a line-up was held. Based on her identification of the photograph, she then identified at a live line-up, the person who came to be our client. When retained, we discovered at an examining trial that the witness had been hypnotized. An examining trial in Texas is similar to the preliminary hearing in a federal court, and it is ostensibly for the purpose of determining probable cause prior to grand jury action. At the examining trial, the alleged victim's testimony differed substantially from her written statement after hypnosis. After the examining trial the motion to suppress was filed based on the hypnosis. The hypnotically enhanced testimony resulting from the session was attacked as a denial of the right to confront and cross-examine witnesses under both the state and federal constitutional provisions. The videotape was viewed in the presence of the district attorney, the investigator who conducted the hypnosis, the defense lawyer, and the trial judge. A hearing was then held on the motion to suppress, at which time the alleged victim testified in a manner substantially different from her examining trial testimony and her statement following the hypnosis session. At this point, the story had changed to three alleged rapists instead of four, and the person who had been severely cut across the face who had previous to this time allegedly been our client), was no longer the man who was our client. Through the testimony it turned out that the alleged victim had claimed to have gone to the corner liquor store to obtain some drinks and had instead gone into a bar because the liquor store had closed. Her story became more suspect when she stated that at the bar she was placed on the shoulders of a stranger and carried out the door, thrown in the back of a pickup truck, and taken to an unfamiliar apartment complex. Her story was that at the apartment complex she was injected with drugs and then forcibly raped by these men who, after having violated her in several different ways, placed her outside in the bed of the truck. She awoke early the next morning from her stupor and then ran up to an apartment and called her friend.

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Argument was made to the court that, first of all, the Texas courts had never before accepted the scientific principle of hypnosis and therefore its use as a scientific aid was not generally accepted in the scientific community. Then each of the *Hurd* requirements was set out, showing that all but one safeguard had been violated. It was demonstrated that the hypnosis was conducted by an investigator and not a psychiatrist or psychologist. The person who conducted the hypnosis was in fact employed on a full-time basis by the prosecution. There was no recording of the information given to the hypnotist prior to the session. Prior to inducing the hypnosis in this case, the hypnotist was unable to obtain a detailed description of the facts because the subject claimed not to recall them. There was another person present during the interview, a psychologist from

the Houston Police Department. The only safeguard dictated by the *Hurd* case which was followed in this particular instance was that the hypnotically induced session was videotaped and recorded. Based on these objections, the trial court at that time in May, 1982, granted the defense motion to suppress and suppressed the testimony of the alleged victim in this case. Based on that ruling the case was dismissed for lack of evidence.

The writer's recommendation then is to attack the use of such testimony because it is founded on a scientific principle not accepted in the scientific community, and by showing lack of compliance with safeguards which would either determine admissibility or reliability, depending on the jurisdiction in which the case is tried. If a pretrial motion to suppress is not entertained or is denied, then the same types of attacks can be made at trial before the jury. Surely in the case described above, any jury would have had difficulty with the credibility of that witness because of the stories she had told, in addition to the suspicion caused by the fact that she had been hypnotized and the conditions under which she had been hypnotized. Therefore, if the motion to suppress had been denied and these issues would have had to have been resolved by a trial jury, the denial would not necessarily have been fatal to the cause of the defendant.

Finally, a word of caution to those practitioners who may encounter this in their practice. The law is changing rapidly. States have issued per se inadmissibility rules only to modify the rules in later cases. If you have a case, you need to determine what the law is in your jurisdiction, and if quoting out-of-state jurisdictions, you must shepardize the out-of-state cases listed in the footnotes to this article to insure that those jurisdictions have not modified or altered the rule listed in this article. Without question, the rules set out in the categories listed above are going to change. Many cases are before the courts of last resort in jurisdictions both listed above and not appearing on the above list. At the time of this writing in February of 1984, the information is correct and current. Without question by the time the reader may read this article, the law may have changed. This word of advice is no different than that given to any criminal defense lawyer in all areas of the law, that is that we must be ever vigilant and constantly aware of changes in the law in pursuit of the goal of a vigorous defense of those persons who are falsely accused of crime.

Footnotes

1. *People v. Shirley*, 31 Cal.3d 18, 181 Cal. Rptr. 243, 641 P.2d 775 (1982).
2. *People v. Gonzales*, 415 Mich. 615, 329 N.W.2d 743 (1982).
3. *State v. Blanchard*, 315 N.W.2d 427 (Minn. 1982); *State v. Mack*, 292 N.W.2d 764 (Minn. 1980).
4. *Robison v. State*, 34 CRIM. L. REP. 2337 (Okl. Crim. App. Jan. 13, 1984).
5. State ex. rel. Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982), (supplemental opinion on rehearing); *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981). The *Collins* opinion should be studied—it is extremely well organized and reasoned. Note that prehypnosis recall cannot be admitted unless safeguards are followed.
6. *People v. Quintanar*, 659 P.2d 710 (Colo. App. 1982).
7. *Collins v. State*, 52 Md. App. 186, 447 A.2d 1272 (1982) *aff'd* 34 CRIM. L. REP. 2045 (Md. Sept. 9, 1983). This case modified *Polk v. State*, 48 Md. App. 382, 427 A.2d 1041 (1981), which left the discretion with the trial court to determine whether hypnosis is generally accepted in the scientific community and that the test was conducted under proper conditions if rendered acceptable. *Collins* invoked a per se inadmissible rule for all recollection resulting from hypnosis.
8. *Commonwealth v. Kater*, 447 N.E.2d 1190 (Mass. 1983). The right to a jury instruction, upon request, is clearly established.
9. *State v. Patterson*, 213 Neb. 686, 331 N.W.2d 500 (1983); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981).
10. *People v. Hughes*, 88 A.D.2d 17, 452 N.Y.S.2d 929 (1982).
11. *Commonwealth v. Taylor*, 294 Pa. Super 171, 439 A.2d 805 (1982); *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981).
12. *United States v. Valdez*, 34 CRIM. L. REP. 2330 (5th Cir. Jan. 3, 1984). This is the latest case in print as of this writing. It was a case where there was no pre-hypnosis recall.
13. *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981).
14. *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (1982).
15. *State v. Martin*, 33 Wash. App. 486, 656, P.2d 526 (1982); *State v. Long*, 32 Wash. App. 732, 649 P.2d 845 (1982).
16. *Key v. State*, 430 So.2d 909 (Fla. Dist. Ct. App. 1983); *Brown v. State*, 426 So.2d 76 (Fla. Dist. Ct. App. 1983).
17. *People v. Smrekar*, 68 Ill. App. 3d 379, 24 Ill. Dec. 707, 385 N.E.2d 848 (1979).
18. *Morgan v. State*, 445 N.E.2d 585 (Ind. App. 1983); *Pearson v. State*, 441 N.E.2d 468 (Ind. 1982).
19. *State v. Greer*, 609 S.W.2d 423 (Mo. Ct. App. 1980), *vacated on other grounds*, 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981), *but see State v. Little*, 34 CRIM. L. REP. 2337 (Mo. Ct. App. Jan 3, 1984).
20. *State v. Brown*, 337 N.W.2d 138 (N.D. 1983).
21. *State v. Glebock*, 616 S.W.2d 897 (Tenn. Crim. App. 1981).
22. *United States v. Adams*, 581 F.2d 193 (9th Cir. 1978); *United States v. Awkard*, 597 F.2d 667 (9th Cir.) *cert. denied* 444 U.S. 885, 100 S.Ct. 179, 62 L.Ed.2d 116 (1979). Note that in *Adams*, the defense called the witness, after its Motion to Suppress had been denied.
23. *State v. Armstrong*, 329 N.W.2d 386 (Wis. 1983).
24. *Creamer v. State*, 232 Ga. 136, 205 S.E.2d 240 (1974).
25. State v. Seager, 34 CRIM. L. REP. 2337 (Iowa Jan. 18, 1984).
26. *State v. Wren*, 425 So.2d 756 (La. 1983). This case did not directly reach hypnotically-*induced* testimony, because the hypnosis produced no *additional* evidence.
27. *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978).
28. *State v. Brom*, 8 Or. App. 598, 494 P.2d 434 (1972); *State v. Jorgensen*, 8 Or. App. 1, 492 P.2d 312 (1971).
29. *Vester v. State*, No. 07-81-0206, slip op. at 1 (Tex. App.—Amarillo 1983, pet. granted). This is a case of first impression, decided by an intermediate court. No objection had been made at trial on the basis of lack of confrontation. The highest court has yet to issue an opinion.
30. *Chapman v. State*, 638 P.2d 1280 (Wyo. 1982). Note that the strong dissent says that, because of the failure to observe any safeguards, "This case should be placed in a museum as an object of interest, but of no value as a precedent." at p. 1292.
31. *State v. Conley*, 627 P.2d 1174 (Kan. App. 1981).
32. *State v. Pierce*, 263 S.C. 23, 207 S.E.2d 414 (1974).
33. *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974).
34. *State v. Pendarvis*, No. 353367 (184th Dist. Ct. of Harris County, Texas—May 20, 1982).

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to Estes Mandate?" 10 Sw.U.L. Rev. 2001-2067 (1978); Netteburg, "Does Research Support the *Estes* Ban on Cameras in the Courtroom?" 63 Judicature 467-475 (1980); Baker, *Report to the Supreme Court of Florida RE: Conduct of Audio-Visual Trial Coverage* (1978); *Washington-Bench-Bar Press Committee, Subcommittee on Canon 35, Report* (April 5, 1975).

4. In *Re Photography, Broadcasting and Televising Proceedings in the Courts of Illinois*, 2634 (Nov. 29, 1983) (Ill.Sup.Ct.Order)
5. 695 F.2d 1278 (1983).
6. *Ibid*, at 1280.