

6.02 Competency of a Previously Hypnotized Witness

(1) Given that statements made under hypnosis are inherently unreliable:

(a) a witness's testimony as to events the witness recalls as a result of hypnosis is inadmissible;

(b) a witness's statement made under hypnosis is, as a general rule, inadmissible for the purposes of impeachment; and

(c) a party's admission induced by hypnosis is inadmissible.

(2) A witness's testimony as to events the witness recalls prior to hypnosis is admissible when, at a pretrial hearing, the proponent of the witness establishes by clear and convincing proof that the testimony of the witness as to his or her prehypnotic recollection will be reliable and that there has been no substantial impairment of the defendant's right of cross-examination. In particular, the trial court must determine the extent of the witness's prehypnotic recollection (which would establish the boundaries of admissible testimony) and whether the hypnosis was so impermissibly suggestive as to require exclusion of in-court testimony with respect to such prehypnotic recollection. Evidence, testimonial and documentary, which is material to the pretrial determination should be received at the hearing, without rigid application of the hearsay rule.

(3) If the witness is held to be competent to testify, the party affected by the testimony may introduce proof with respect to the hypnotic procedures followed as well as expert testimony concerning the potential effect of the hypnosis on the witness's recollections.

Note

Subdivision (1) is derived from Court of Appeals decisions.

Subdivision (1) (a) sets forth the holding of *People v Hughes* (59 NY2d 523, 545 [1983] [“the defendant is entitled to a new trial because the trial court should not have permitted the victim to testify to events recalled after the hypnotic sessions”]).

Subdivision (1) (b) sets forth the holding of *People v Hults* (76 NY2d 190, 192 [1990] [“hypnotic statements are, as a general rule, also inadmissible for purposes of impeachment”]). Thus far, there has been no exception made to the “general rule.”

Subdivision (1) (c) sets forth the holding of *People v Schreiner* (77 NY2d 733, 734 [1991] [a defendant’s statement which had been “hypnotically induced” during a psychiatric examination “in which he confessed to the murder . . . was improperly received in evidence against him”]).

Subdivision (2) is derived from *Hughes*, which held that the “pretrial use of hypnosis does not necessarily render the witness incompetent to testify to events recalled prior to being hypnotized” (*Hughes* at 545).

A pretrial hearing, however, is required to determine “the extent of the witness’s prehypnotic recollection (which would establish the boundaries of admissible testimony) and whether the hypnosis was so impermissibly suggestive as to require exclusion of in-court testimony with respect to such prehypnotic recollection” (*Hughes* at 546).

At that hearing, “evidence, testimonial and documentary, which is material to the determination thereof should be received . . . without rigid application of the hearsay rule” (*Hughes* at 547). The burden of proof rests upon the People to demonstrate by “clear and convincing proof that the testimony of the witness as to his or her prehypnotic recollection will be reliable and that there has been no substantial impairment of the defendant’s right of cross-examination” (*Hughes* at 547; see *People v Tunstall*, 63 NY2d 1, 8 [1984] [the defendant was entitled to a hearing on his claim that “the victim’s confidence in her prehypnotic recollections, such as her identification of defendant, may have been artificially enhanced by the hypnotic process, thereby impairing defense counsel’s ability to conduct a meaningful cross-examination of her”]).

On the remand of *Hughes* from the Court of Appeals, a hearing was conducted; the hearing was, however, ultimately found to be deficient for failure to adequately explore the propriety of admitting the prehypnotic testimony of the witness. The court “heard no expert testimony whatsoever on the suggestiveness of the hypnotic procedures that had been used . . . Moreover, although the court viewed that portion of a videotape showing the victim’s interview, prior to hypnosis, about

her prehypnotic recollection, the court did not view that portion covering the hypnotic session itself” (*People v Hughes*, 72 NY2d 1035, 1037-1038 [1988]).

Subdivision (3) is based on the following holding of *Hughes*:

“If the witness is held to be competent to testify, the defendant, of course, has the option at trial of introducing proof with respect to the hypnotic procedures followed as well as expert testimony concerning the potential effect of the hypnosis on the witness’s recollections. And since there is general agreement in the scientific community that a witness who has been hypnotized usually acquires some measure of confidence in events recalled under hypnosis, the court should charge the jury to that effect if the defendant requests it” (*People v Hughes*, 59 NY2d 523, 547-548 [1983]; *see* CJI2d[NY] General Applicability, Witness Underwent Hypnosis).