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"A Still-Life Watercolor": *Frye v. United States*

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ABSTRACT: A review is made of documentary material in *Frye v. Unites States,* the case that set the precedent for the Frye test for the admissibility of scientific evidence. The author concludes that the facts of the original case have become seriously distorted with the passage of time.

KEYWORDS: jurisprudence, admissibility, *Frye* case

It's a still-life watercolor
Of a now late afternoon...

—Simon and Garfunkel
The Dangling Conversation

Paradoxes, ironies, myths, and quirks of fate mark the criminal justice system. Not the least of these is the manner by which we memorialize the rules announced in judicial decisions. We have the Miranda Rule [*1*], the M'Naghten Rule [*2*], and the Frye Test [*3*], among a plethora of others. Rules follow cases and cases are marked by the names of the participants. And the participants whom we recall in criminal cases, win or lose though they may, are those accused of crime. Who can name Ernesto Miranda's victim, and how many of us are aware that Daniel M'Naghten was tried for the killing of Sir Robert Peel's secretary, whoever that may have been?[2]

A knowledge of the facts giving rise to a case from which a new rule emerges can do much to illuminate that rule. More, it can avoid the omnipresent tendency to mythologize a decision, to give it a character and a bearing that does not conform to its facts. Such myth-exploding understanding of the root facts seems particularly necessary in the case of the heavily maligned, much pilloried [*4-9*] test for the admission of unique scientific testimony that first appeared in the 1923 opinion of the U.S. Court of Appeals for the District of Columbia, which affirmed the conviction of James Alphonso Frye for murder in the second degree [*3*].

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[2]Edward Drummond was his name. Other societies view the matter differently. In the Republic of Ireland, for example, murders are recalled by the name of the victim, rather than the offender. The famed Colleen Bawn murder in Limerick in 1819 is a classic illustration; see its fictionalization by Gerald Griffin in *The Collegians.*

The facts, as given in Judge Van Orsdel's opinion for the appellate court, portray a landscape denuded of all but the barest factual details. We know Frye was convicted of murder in the second degree. Further, since it was the core of his appeal, it is clear that Frye unsuccessfully attempted to use expert testimony at the trial to introduce the results of a systolic blood pressure test, a precursor of today's polygraph, taken of him prior to trial. More we cannot say about the crime, the trial, or indeed, its aftermath, at least from a simple perusal of the two-page opinion of the appellate court.

Out of this sparse, indeed almost barren, landscape emerged the now well-known and much publicized Frye test for the admission of expert testimony predicated upon new scientific principles or techniques. As the court stated it [*3*]:

> 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.

This standard of admissibility, although first stated in a case involving an abortive attempt to introduce the results of a deception test, has had significant impact beyond the circumstances of its initial appearance. It has been featured and often controlling in cases involving as diverse scientific principles and techniques as ion microprobic analysis of hair samples, multisystem analysis for polymorphic enzymes [*10*] or proteins in blood [*11*], hypnotism [*12,13*], and retesting of Breathalyzer® ampoules [*14*], among numerous others [*15*].

The Frye test, now almost 60 years old, has been anything but an evanescent or fleeting phenomenon. In the 1969 bound volume of Shepherd's *Federal Citations,* covering more than 40 years of Frye in the courts, the entries show one column of cases that have referred to the Frye case. Just eight years later, the 1977 supplemental bound volume of that same Shepherd's series reveals two full columns of case entries; in the pamphlet update in 1980, some three years later, almost two more columns are filled with cases elaborating, in large and small and rarely with vinegar, on the Frye test of admissibility. Evidently the Frye test is here to stay and is gathering momentum. As the Kansas Supreme Court put it in a very recent decision: "The Frye test has been accepted as the standard in practically all of the courts of this country which have considered the question of the admissibility of new scientific evidence" [*9,16*].

This is not to say, however, that the Frye test has met with universal accord. Far from it. Epithets upon epithets have been piled upon it in an intense and concerted effort to drown it in a sea of frothy criticism.[3] "Infamous" [*18*] it has been declared to be, often and with the most vehemence by polygraphists who have felt its sting more than others.

The condemnations of Frye have been of the scattershot variety, hitting anywhere and everywhere, in a frenzied effort to cripple it. There are those (see Ref *7*, p. 1205) who point to its having evolved from an opinion just two pages long, as if a succinct judicial opinion lacks the merit of careful reflection and persuasive argument. Short judicial opinions tend also to be memorable, on the target, and sometimes graced with wit. One of my favorites, marked by pith and wisdom, appeared in the report of the appeal in *Robinson v. Pioche* [*19*] in the Supreme Court of California in 1855:

> The court below erred in giving the third, fourth, and fifth instructions. If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street as a sober one, and much more in need of it. The judgment is reversed and the cause remanded.

[3]Frye has been subjected to misstatement as well as criticism. Although the Frye court unambiguously upheld the trial court's refusal to admit the polygraph's test results, one recent author has described Frye as "one of the first cases in which a ruling of admissibility was granted to an expert witness" [*17*].

Frye has also been attacked for the imprecision, indeed the ambiguity, of the language used by the District of Columbia Appeals Court to phrase the test it propounded [*20–22*]. When is "general acceptance" to be ascertained and by what divining rod? Who bears the burden of proof of "general acceptance" and by what standard of proof? How is "the particular field" to which the scientific principle or discovery belongs to be determined? Is a broad or narrow brush to be used in that quest? And what is meant by "the thing" which must have gained sufficient "general acceptance" to enable expert testimony derived from it to be admissible?

These queries are not to be minimized, for they are necessary preliminaries to a sound application of the Frye test. But if these conundrums are criticisms, they are wide of the mark. It is not that precision of language is to be shunned or mocked, but that the Frye court, like the M'Naghten court, the Miranda court, and so many other courts before them, purposely adumbrated a rule of immense potentialities in words neatly suited to its then ill-defined and even limitless uses. The mark of a formidable, even a percipient, judicial opinion is that it says neither too much nor too little. Frye admirably achieves that objective. It leaves ample room for ingenuity and experimentation in the proper exercise of a trial court's discretion to meet the measure of scientific discoveries and principles yet unborn. It is not strait-jacketed by the facts that gave it being or by the words in which it was formulated. It is adaptable and thereby ageless.

True, the Frye court does not inform us in what way the expert testimony proffered in the trial court was defective. Surely it was unacceptable for lack of general acceptance. But what precisely was not generally accepted? Was it the validity of the principle that deception is reflected in discernible changes in the blood pressure of the prevaricator? Or was it, rather, the validity of the systolic blood pressure test (the sphygmomanometer) to detect such alterations in blood pressure?

The Frye court remarked that "the theory *seems to be* that ... the utterance of a falsehood ... is reflected in the blood pressure" [*3*] (emphasis supplied). Others have refused to hedge this bet. Dean McCormick [*23*], in a more positive vein, wrote in 1927 that "few of us would doubt, or need any evidence other than experience, that conscious lying produces in the ordinary man emotional disturbances." To him the principle was accepted, although the technique to validate it was not—at that time.

This distinction between the validity of a principle and the validity of a technique applying it in concrete circumstances is crucial in determining whether expert testimony should be admitted or not. In the case of the sound spectrograph, it is the difference between the validity of the principle of interspeaker variability and the validity of the sound spectrograph to detect and display that variability. Some courts have apparently blurred this distinction and come to questionable conclusions as a result.

Commonwealth v. Devlin [*24-26*] is illustrative. There the Massachusetts high court upheld the testimony of a radiologist who identified the torso of an unknown deceased person based upon a comparison of the postmortem X-rays of the torso and the antemortem chest X-rays of a known person, since disappeared without a trace. The radiologist's testimony identifying the torso would, under the Frye test, have to satisfy the dual requirements of general acceptance of the principle that no two persons have the same bony structure and the fact that X-rays are an adequate means of detecting this similarity or dissimilarity. The appeals court gave undue prominence to the X-ray as a technique and to its use by Dr. Sosman, the radiologist, and too little to the reliability of the principle of individualization of bone configurations.

The Massachusetts high court disclaimed any concern for a scientific principle and asserted [*24*] instead that:

> Dr. Sosman's medical opinion that no two adults have identical bone structures was not the product of a "scientific theory" but was, rather, the product of years of experience viewing tens of thousands of X-rays.

There is some considerable murkiness in both this language and this thinking. Admittedly the X-ray technique is generally accepted, but its general acceptance for one or more purposes should not be permitted to mask the need to prove its general acceptance for other, dissimilar purposes. Regardless of the means used by scientists to prove the validity of a scientific principle, a strict adherence to the Frye test will keep the imperative to perform that task before the trial court in proper focus.

Frye is said to have another fault, which to a lawyer groomed in the common law system must seem unanswerable. Put simply, the Frye court cited nary a single case or other legal or other authority to buttress its conclusion [*22*]. It violated the hoary axiom of the law review editor that nothing is worth saying that cannot be footnoted, which, of course, is akin to saying nothing is worth saying that has not been said before.

There is merit, however, in standing against the tide. The flotsam and the jetsam of ages past need not beset and misguide you. A *tabula rasa*, uncluttered by historical accretions, gives full rein to creative thought. If, I say in recognition of the heresy in doing so, the world can survive on an English cookbook recipe for rabbit stew without the testimonial of its survivors, a judicial opinion can stand on the force of its argument without the artificial prop of historical relevance.

The attack upon the Frye test has also included various assertions concerning the aftermath of the Frye case. The premise appears to be that if, in truth, Frye was innocent of the crime charged, then the rule in the case is the culprit, for it permitted an innocent man to be convicted when science was ready and able to exonerate him. In the absence of the Frye court's parochial, constraining attitude toward the efficacy of scientific evidence, or so the proponents of this position seem to say, an innocent man would not have been unjustly convicted of murder and punished for it.

But was Frye guilty or was he innocent?

It has become fashionable to affirm, almost as idées fixes, the following as facts about the guilt or innocence of James Alphonso Frye:

1. Frye served only three years in prison of the life sentence imposed upon him.[4]
2. Sometime after Frye's conviction someone else confessed to the commission of the crime for which Frye had been convicted and sentenced [*27*].[5]
3. Frye was pardoned for the crime for which he was convicted.[6]

The most full-blown and current version of the injustice alleged to have been suffered by Frye appears in James Allan Matté's *The Art and Science of the Polygraph Technique* [*29*]. As Matté states the case:

> In 1921, a young Negro named James A. Frye was picked up for questioning about a robbery and was routinely interrogated about the murder of a wealthy Negro physician who had been shot to death in his office in November 1920. Frye denied any knowledge of the murder. However, he later confessed to the crime upon advice from a "friend" who told him that by confessing he would collect half of the one-thousand dollar reward for his own conviction. Frye subsequently learned that he had been duped by his "friend" and repudiated his confession, but his claim of innocence fell on deaf ears. In an attempt to arrive at the truth, Frye's attorneys solicited the aid of Dr. William M. Marston, a scientist and inventor of the systolic blood pressure deception test. This test consisted of intermittent recordings of Frye's systolic blood pressure during questioning, using a standard medical blood pressure cuff and stethoscope, requiring repeated inflation of the

[4]Such an unsupported assertion appears in a pamphlet used in the U.S. Secret Service's training program for its polygraph examiners. The pamphlet gives the name of Norman Ansley as its author and is entitled *Admissibility of Polygraph Evidence in Criminal and Civil Cases.*

[5]This canard has been repeated in a recent and monumental tome in an article by a respected scholar [*28*].

[6]Professor Giannelli cites Wicker [*27*] as support, but Wicker says merely that someone else confessed, not that Frye was thereafter pardoned.

pressure cuff to obtain readings at intervals during the examination. For that reason it was also called the "discontinuous" technique. Obviously this was an early, crude lie-detection technique by comparison with the sophisticated instrumentation and techniques employed today. Nevertheless, with that primitive lie-detector, Marston accurately determined that Frye was truthful when he denied any involvement in the murder of that doctor. The Court rejected Marston's blood pressure deception test as evidence, holding that the lie-detector test had not yet received general acceptance within the scientific community as a valid means of veryifying the truth and detecting deception. However, the jury was sufficiently impressed to reduce Frye's conviction from first to second degree murder, saving his life. Three years later, Frye was freed as a result of further investigation, which revealed that his "friend" who had duped him into making a false confession was the real murderer of the wealthy physician.

Preposterous! Phenomenal balderdash!

Yes, it was in 1921, on 16 August to be exact, that James A. Frye was arrested for a robbery in the District of Columbia and questioned about the murder of a wealthy black physician, Dr. Robert W. Brown, who was murdered in his office at 1737 11 Street, N.W., at 8:45 p.m. on Saturday, 27 Nov. 1920—the same day, it appears, that the Middies defeated the Army football squad at the polo grounds in New York by a mere 7-0 in a nip and tuck battle witnessed by General John Pershing [*30*]. Yes, Frye did confess to the commission of the murder, but not on account of the chicanery of a friend of his, as described by Matté.

No, most emphatically no, Frye was not released from prison after three years. No one, other than Frye, ever confessed to having been the actual murderer of Dr. Brown, nor did any investigation reveal someone other than Frye to be the culprit. And the court, meaning I would suppose the then Supreme Court of the District of Columbia with Chief Justice Walter I. McCoy presiding, did not reject the systolic blood pressure test results for the reasons advanced by Matté.

What then were the facts concerning the culpability of James A. Frye? And how can they be verified?

"Yes, we speak of things that matter with words that must be said [*31*]."

I have personally examined the file in the trial of James Alphonso Frye in the Supreme Court of the District of Columbia as well as the file in the United States Court of Appeals [*32*]. Moreover, I have read the retired files [*33*] of the Office of the Pardon Attorney in the Department of Justice on the various petitions for executive clemency by Frye.[7] My investigative research has included reviews of newspaper accounts of the Frye trial and conversations with persons who could, by reason of personal knowledge, verify and supplement many of the details I have discovered.

The sum of my research indisputably and unequivocally reveals that, as Leslie C. Garnett, then U.S. Attorney for the District of Columbia, wrote to the Attorney General of the United States on 21 July 1934 in connection with Frye's application for executive clemency [*33*]:

About 5:30 p.m. on November 25, 1920 the defendant went to the office of Dr. Robert W. Brown, the deceased. Dr. Julian D. Jackson, who was visiting Dr. Brown, answered the door and told the defendant that Dr. Brown was not in. So defendant went away and returned about 8:45 p.m. Another man named William Robinson arrived at the same time as defendant did, and defendant told Robinson to go in first, as he was in no hurry, and Robinson did so. When Robinson came out of the doctor's office he noticed that the defendant had put on a pair of smoked glasses. Then Robinson went away and defendant entered the office of Dr. Brown. Dr. Jackson had let defendant in the second time and saw that he had something in his hand which looked like money. Dr. Jackson heard defendant ask Dr. Brown what he had decided to do about that stuff, or words to that effect, and then Dr. Brown replied that he had not decided to do anything and asked

[7]Unfortunately the vintage of the Frye case precluded a review of FBI files and the DC police records have been destroyed.

defendant what he was talking about. Then Dr. Jackson went back to the kitchen and shortly thereafter heard a pistol shot. He went into the hallway and saw defendant with a pistol in his hand and saw him shoot a second time at Dr. Brown, who fell on the floor of the hallway. Defendant then stepped over the body and ran out of the house. Dr. Jackson pursued the defendant, but the latter turned and fired at him and escaped.

After the commission of this murder this applicant, on July 21, 1921, committed a robbery in this District. He was convicted of this offense and received a sentence of four years.

Further details, not included in District Attorney Garnett's letter, include the arrest of Frye on 16 August 1921; his confession to Paul W. Jones of the Metropolitan Police of the District of Columbia on 22 August 1921; Frye's indictment for premeditated murder filed on 10 March 1922; and his trial from 17 to 20 July 1922, in which the jury returned a verdict of second degree murder, after deliberating less than an hour.

Frye sought to exonerate himself. At his trial he alleged an alibi as a defense. However, because of the paucity of the available stenographic record of the trial that was preserved for the appeal, it is difficult to evaluate the merits of Frye's claimed alibi. We know that he claimed to have been visiting a Mrs. Essie Watson at 417 Q St., N.W., until midnight on the date of the murder. Further, the records show that the court-appointed defense attorney, Richard V. Mattingly, subpoenaed three witnesses to testify for the defense: Stuart Lewis, William Williams, and Sarah Johnson. Mattingly also unsuccessfully sought a continuance of the trial date, arguing that Mrs. Watson's ill health would prevent her attendance on the scheduled date. Frye himself later asserted in a 1934 application for executive clemency, one of many, that a deathbed deposition taken from Mrs. Watson had been admitted at his trial [*33*]. The file sheds no light on the truth or falsity of this claim.

Frye's confession, which he claimed he gave to Detective Sergeant Jones of the Metropolitan Police Department, must have been formidable evidence against him, along with the testimony of eyewitnesses. Attorney Mattingly sought to have the confession excluded because Frye had not been advised of his right to remain silent (shades of Miranda); the confession was thus, he argued, involuntary. On appeal, Attorney Mattingly asserted as Assignment of Error 2 that the trial court had failed "to require the Government to prove that Government Exhibit #1 was a voluntary statement."

Thus the appeals court was in error when it said, in its opinion, that a "single assignment of error is presented for our consideration" [*3*]. In fact eight errors were charged to the trial court, and only Assignments 4 to 8 related to the exclusion of the systolic blood test evidence. Further, in an effort to tidy up the appellate court's opinion, cocounsel at the trial and on the appeal was not Foster Wood, as appears in the reported decision, but Lester Wood, partner of chief counsel Richard V. Mattingly. More, Frye's middle name was spelled Alphonso, with an *s*, not Alphonzo, with a *z*, as in the report of the case—that is if we are to credit Frye's spelling of his own name in the papers submitted by him imploring executive clemency.

Frye's confession, according to his own self-serving, unsupported, and incredible assertions in his 21 July 1936 application for executive clemency, was occasioned by Detective Sergeant Jones telling him that he would "squash" the robbery charge on which Frye was then being detained if he would plead guilty to the murder of Dr. Brown. What—dismissal of the noncapital robbery charge in exchange for his taking the rap for a capital crime? Some bargain, that! Frye attempted to give his version plausibility by maintaining that Sergeant Jones had told him "there would be nothing to the murder charge after the reward was paid, as he knew I was able to prove a rock-bottom alibi" [*33*]. That version from Frye's own pen, unprovable and implausible though it may be, is less of a fantasy than Matté's assertion that Frye confessed to murder in order to claim half the $1000 (Frye says it was $1500) reward for the conviction of Dr. Brown's murder [*29*].

Matté also reports that three years after his conviction "Frye was freed as a result of further investigation, which revealed that his 'friend' who had duped him into making a false confession was the real murderer of the wealthy physician" [*29*]. This is an unadulterated, unsupportable canard, more of the folklore of the Frye case.

Apparently, it was the New York Judicial Council in its report for 1948 [*34*] that initiated the rumor that three years after Frye's trial someone else confessed to the murder. The author of this report gives no suggestion as to the source of this factual assertion. As Shakespeare has said of all rumors, this rumor was "a pipe blown by surmises, conjectures, and jealousies." As such, the rumor of someone's confession three years after Frye's conviction has been translated into Frye's release after three years imprisonment, which has been transformed into Frye's having ultimately been pardoned.

The truth of the matter [*33*] is that Frye was paroled from the District of Columbia Reformatory at Lorton, VA, on 17 June 1939, just two months short of 18 years after his arrest on 16 Aug. 1921. Not only did Frye serve a combined total of almost 18 years in jail, first at Leavenworth and later at Lorton, but he never received a pardon or any other form of executive clemency. Indeed, in a letter to Frye dated 2 Sept 1943, found in the pardon attorney's files [*33*], Pardon Attorney Daniel M. Lyons writes that "the reports on file leave no doubt as to your guilt of the offense for which you were sentenced."

But what of the friend's supposed confession? The only evidence in any official files I have located that gives even the slightest credence to such a confession is Frye's own puffery in his 21 Sept. 1936 application for executive clemency. These are Frye's words on this issue [*33*]:

> I did not know anything about this crime until about three or four nights after it had been committed. John R. Francis, a dentist and very good friend of Paul Jones (the detective), was talking to me in his office.... This John R. Francis and I had been looked upon as friends.... He and I could have easily have passed for brothers, and very often were taken as such....
>
> Francis had told me that he had shot this Dr. Brown, he also stated that he was worried because some man named Broadwax had saw the man run from Dr. Brown's home directly to his office.
>
> On the night of the crime, there was some form of entertainment at the Browns' residence. Many of the guests had remained in Washington after the Lincoln and Howard football game. Among the guests, I learned, was a man name Dr. Julian Jackson of Norfolk, Virginia. This Dr. Jackson from the beginning I was told was afraid to identify John Francis as the man he saw at Dr. Brown's residence, although this same Julian Jackson came to the District Jail, would not identify me, until after Paul Jones called him aside and had a private talk.
>
> After John Francis had shot Dr. Brown, and ran from Dr. Brown's residence, changed his hat or cap (I can't recall), he returned to Brown's residence in company of a woman name Lois Dunlop watching the actions of the Police Department. John Francis has told me, that he had twice sent Dr. Brown blackmail letters, but the reason the Police could do nothing was because Robert Jones (deceased and dope fiend) was Dr. Brown's nephew, and acted as Dr. Brown's chauffeur at all times.... This Robert Jones was a physician, dope fiend, and had served time for violation of the narcotic laws.

Observe, however, that Frye, unlike Matté, alleges that the true culprit was a Dr. Francis and that the person who induced his confession was a Detective Sergeant Jones, two distinctly different individuals, not one and the same, as Matté would have us believe.

Much of the folklore surrounding the Frye case seems to have its source in *The Lie Detector Test*, a book published in 1938 and written by Dr. William Moulton Marston, the expert left waiting at the altar in the Frye case [*35*]. Dr. Marston's book cites nothing more verifiable than his own participation in the Frye case to substantiate his assertion of its details. However, in fairness to Dr. Marston, his excerpted quotes from the dialog between Chief Justice Walter I. McCoy and Frye's attorney are remarkably close to the actual colloquy that appears in the partial trial transcript filed with the appeal (see Ref *35*, p. 72). Otherwise it is difficult, at this late date, to confirm or to deny other details of the trial proceedings given by him.

Although Frye may have been pleased at not receiving the death penalty (Ref *35*, p. 72), there is no substance to Dr. Marston's claim that "further investigation showed that the negro who had tried to put Jim on the spot by inducing him to make a false confession was the real murderer of Dr. Brown" (Ref *35*, pp. 72–73).

However, there may be some truth in Dr. Marston's contention that "the (deception) test undoubtedly saved his (Frye's) life. No jury could help being influenced by the knowledge that Frye's story had been proved truthful by the Lie Detector" (Ref *35*, pp. 72–73). A similar

claim appeared earlier in an account of the Frye trial in *Family Circle* magazine, which stated that "the fact that there had been a lie detector test which proved Frye innocent got before the jury, and this undoubtedly saved Frye from hanging" [*36*].

By all rights, the trial jury should not have learned of the results of the deception test conducted by Dr. Marston on Frye, since Justice McCoy excluded it at the trial. The purpose of excluding it would have been defeated if the jury gained knowledge of its results by other, less straightforward or permissible means. How then could the jury have come to know of it? The most likely possibilities are either that the argument on the admissibility of the evidence was conducted in the presence of the jury or that Defense Attorney Mattingly managed to bring the matter to the jury's attention, by cunning or stratagem, either in his opening or closing statements to the jury or otherwise. Mattingly tried without success to have Metropolitan Police Officer Johnson take the test while he testified, a shrewd maneuver, the intent of which could not have been lost on the jury [*37*]. Since nothing is known today of Mattingly's peroration to the jury, it cannot be said with safety that he made reference to Dr. Marston's test results in it.

On the other hand, we can legitimately infer that the jury did not learn of Frye's having passed the test during Mattingly's argument on its admissibility. No judge worth his judicial robes would allow such argument in the presence of the jury and then indulge in the charade of finding evidence the jury has already digested inadmissible.

Dr. Marston's brief recapitulation of the Frye trial in his book and the existing transcribed portion of the trial record on the appeal do, however, document one major flaw in the Frye case. No one, expert or otherwise, was permitted by Justice McCoy to tender concrete evidence of the "general acceptance" of Dr. Marston's systolic blood pressure test. It would appear to be a gross deviation from presently accepted trial protocol for the trial court to reject such testimony out of hand. A voir dire or other evidentiary hearing, at which time the case can be made for or against general acceptance, seems to be a minimal requirement for the proper exercise of a trial court's discretion on this issue. Indeed, at least that much seems to be mandated by the opinion of the appellate court in Frye itself.

Defense Attorney Mattingly made it quite clear to Chief Justice McCoy that he wanted to present evidence of the general acceptance of Dr. Marston's deception test. The record also discloses that Mattingly showed much pique over Justice McCoy's frustration of his every effort to do so. As Mattingly put it:

> This offer to attempt to qualify, of course, is for the purpose of showing that this is not merely theory, that it is generally known among experts of this class, that it is not untried, that it has been in practical use, that it is not new, and that it is available [*37*].

But Justice McCoy was not to be convinced that he should hear from Dr. Marston, at least not until the validity of deception test results was as certain as the fact that no two "leaves on a tree" [*38*] are alike. Justice McCoy's view was that deception tests were out of order unless "there is an infallible instrument for ascertaining whether a person is speaking the truth or not [*37*]." The trial judge seemed to be requiring a much greater foundational showing than general acceptance in the particular field in which it belongs. Attorney Mattingly took note of this and argued [*37*]:

> It seems to me that Your Honor is undertaking to say, without learning what we have to say on the subject, whether or not this is a matter of common knowledge.

But Justice McCoy was a man of immutable opinions, or, as he would say, "a conservative judge" [*37*] not "a young one who is willing to take chances."[8]

[8]According to one source, Justice McCoy "presided over the court (the Supreme Court of the District of Columbia) with assuring impartiality and consistent ability" until he retired on 9 Dec. 1929, a day after he reached the age of 70 [*38*].

The frustration of Frye's trial counsel at being thwarted in his every effort to make a case for the acceptability of Dr. Marston's test results broke through when he interjected [*37*]:

> We have proof to offer on this point, that it is a scientifically proven fact that certain results will be accomplished under certain conditions. It seems to me that the very least Your Honor can do is to permit us to attempt to qualify the expert. I think we are entitled to it as a matter of law.

Chief Justice McCoy was not to be moved. "Common knowledge" [*37*] was what he demanded, not scientific acceptance. Since he himself did "not know anything about the test at all," [*37*] it was inadmissible. But he retained an open mind—for the future, that is. He indicated a posttrial vacation might change his mind. As he said [*37*]:

> I had certain pamphlets submitted to me yesterday to look at, of some Dr. Marston—I believe, his thesis when he got his Ph.D. degree. I am going to read them when I come back from vacation.

His mind was not closed. He was willing to admit the possibility that further reflection might alter his view—in later cases.

> Yes, I may try a case next year, after I read those books. I may decide differently next year, but not now.

To what should be the immense relief of the forensic science community, Justice McCoy's rigidly puritanical view of scientific developments did not prevail in the appellate court. Thus matters today could have been worse in the world of forensic science. And for James Alphonso Frye, too, matters could have been worse: he could have been executed for a deliberate homicide.

So Frye was guilty and served 18 years in prison. Does the story end there? What became of him upon his parole in 1939?

Unfortunately, the District of Columbia Parole Board's records on Frye and other inactive files were destroyed or, as the District of Columbia Parole Board put it, "purged," in 1976.[9] But one link to the past still remained. Frye had alleged in his application for executive clemency that he had married since his parole, that he was buying a home in the District of Columbia, and that as a World War I veteran he had joined the James Reese Europe Post 5 of the American Legion. Partly by labor and partly by luck, I happened upon the knowledge that Mrs. James A. Frye still lives. After a number of false starts, I located Mrs. Frye (whose present name is not Frye, but in consideration of a promise to her not to divulge her present identity, I shall continue to call her Mrs. Frye).

On Friday the 13th of February, 1981, I spoke with the 86-year-old Mrs. Frye. She informed me of her marriage to Frye in 1939 and of the unremitting trouble he caused her from that day forward. She denounced Frye as a man who was mean to her, hardly ever resided with her, and abandoned her permanently in February 1948. Not until January 1953 did she hear of Frye again and then only to be informed that he was dead. In deference to their marriage, she visited the undertaker's from which Frye was waked.

Still probing for details, I asked where Frye was buried today. With just a hint of a tremor, she replied, "In Arlington National Cemetery—with all those presidents."

And there we have the final irony. James Alphonso Frye, who was born on 8 April 1895[10] and died on 8 Jan. 1953, the confessed murderer of Dr. Brown, who served 18 years imprisonment for his crime, the man who gave his name to the Frye test for the admissibility of evidence based on new scientific principles or techniques, Private James Alphonso Frye who

[9]Telephone conversation of 13 Feb. 1981 with Mr. John Remakus of the Washington, DC, Jail Records.

[10]Frye's death certificate in the Section of Vital Statistics in the District of Columbia Department of Human Resources gives 5 April 1897 as his date of birth, but his tombstone in the Arlington National Cemetery indicates that 8 April 1895 was his date of birth.

served in the 50th Company, 153 Det. Brig. in World War I, is buried in grave Number 6230, Section 33 of the Arlington National Cemetery, just past McClellen's Gate[11] and on the path leading to and within sight of the eternal flame that exalts the grave of former President John F. Kennedy. May Frye and the myths surrounding the Frye case *requiescat in pace.*[12]

[11]The gate on which is emblazoned Theodore O'Hara's poem "The Bivouac of the Dead," which is hardly the epitaph the facts would have chosen to memorialize James Alphonso Frye. It reads:

Rest on embalmed and sainted dead
Dear as the blood ye gave
No impious footsteps here shall tread
The herbage of your grave.

On fame's eternal camping ground
Their silent tents are spread
And glory guards with solemn round
The bivouac of the dead.

[12]Not only is Frye interred in Arlington National Cemetery, but his burial in that hallowed ground patently violated the then-existing regulations of the Department of the Army as to those eligible for burial there [*39,40*].

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