

# II

## Rest for the Wary

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*Deciding Without Experts*

These people who deal in psychology and psychiatry really are doctors of the soul. The way the root of that word comes is from the Greek "suka"; it means soul. And we're going to be looking at people's souls, in particular the plaintiff's soul and her memories in this case as we proceed.

Jim Brown, attorney for the plaintiff, opening statement, *Mateu v. Hagen*, Seattle, June 6, 1993

### **THE FREEING OF GEORGE FRANKLIN**

On April 4, 1996, Judge Lowell Jensen of the United States District Court for the Northern District of California granted George Franklin's petition for a writ of habeas corpus, overturning Franklin's first-degree murder conviction on the grounds that his constitutional rights had been violated by the prosecutors' conduct in portraying George's silence when asked by his daughter if he was guilty as proof of guilt, and by their withholding from the jury the evidence that all the details of Eileen's testimony had been readily available in the popular press.

Franklin remained in prison on \$1 million bail until July 2, 1996, when the prosecutor determined that her only witness, Eileen, was unreliable, and declined to retry the case.

Franklin beamed as deputies escorted him into the Redwood City courtroom. In clipped tones, lead prosecutor Elaine

Tipton told Superior Court Judge Margaret Kemp, "We move to dismiss the charges without prosecution."

"No objection," said [defense attorney Douglas] Horngrad.

"The motion is granted," Kemp said, ending one of the Bay Area's most controversial cases ever.

Speaking outside the courtroom, defense attorneys assailed the use of Eileen Franklin's recovered memory as the basis for Franklin's prosecution. In the future, said [Dennis] Riordan, prosecutors will be more skeptical of witnesses with recovered memories who recall events of 20 years past "better than I remember what I had for breakfast two hours ago."

Ironically, it was a purported recovered memory that finally unraveled the case. After her father was sentenced to life in prison in 1990, Eileen Franklin told investigators that she clearly remembered two more murders her father committed, including the January 7, 1976, slaying of 18-year-old Veronica Cascio of Pacifica, where Eileen said she helped dispose of the body. (Wilderdmuth, *San Francisco Chronicle*, July 4, 1996)

Franklin-Lipsker identified a picture of the teen-ager, whose body was found on a Pacifica golf course. She told prosecutors that she remembered witnessing her godfather, Stan Smith, rape Cascio and seeing her father murder her.

But Franklin's defense attorneys uncovered evidence in May that Franklin was at a union meeting at the time of the murder. DNA tests of semen found on Cascio proved that neither Franklin nor Smith could have raped Cascio.

The final blow to the prosecution came with Janice Franklin's [Eileen's sister] testimony about [both Eileen and Janice] being hypnotized before testifying against [their] father. In California, testimony influenced by hypnotic suggestions is inadmissible. (Mary Curtius, *Los Angeles Times*, July 3, 1996)

George Franklin spent over six years in prison because prosecutors and jurors bought a psychofantasy as science. They believed a storytelling psychoexpert was telling scientific truth. It is sad but true, however, that the science fiction basis of the prosecution's case was

not the grounds for overturning the conviction. The federal appeals court did not touch upon the issue of whether Dr. Lenore Terr's multiple-trauma fictions misrepresented the state of scientific knowledge in the field of psychology.

Did they?

#### **ADMISSIBILITY OF EXPERT TESTIMONY AND CLINICAL REASONING**

Do psychoexperts in our legal system meet the criteria required by law to act as expert witnesses? The answer to this question has a number of ramifications. Just consider this one. In fairness, shouldn't the indigent be supplied with expert psychologists just as they are supplied with attorneys so that they can mount successful psychological defenses? It may be only a short time before all defendants, indigent and not, will demand the same level of psychological defense as they do legal defense, and who can deny them once the courts have determined the indispensability of psychological testimony?

States vary, of course, in their case law and rules of evidence for determining the admissibility of expert testimony, but many states rely on one or some combination of three criteria: the Frye Rule, the 1993 U.S. Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals*, or Rule 702 of the Federal Rules of Evidence.

The Frye Rule holds that scientific evidence is admissible only upon a showing that the scientific principle involved must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

The *Daubert* decision of the Supreme Court demanded more of expert testimony, holding that the scientific validity of the principles and methodology that underlie a proposed submission is an absolutely essential criterion for the admission of testimony that is purportedly expert.

More loosely, Rule 702 of the Federal Rules of Evidence, adopted by many states as their own principle governing expert witnesses, reads, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."