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On Shaky Ground: the need for the reexamination of the admissibility of field sobriety testing

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ABSTRACT

Federal and state rules of evidence permit judges to take judicial notice of specific categories of facts, which allows these facts into evidence if the truth of these facts is so notorious or well known that they cannot be refuted. Frequently, judicial notice is used for the most basic, or common sense, facts without being formally introduced by a witness or other rule of evidence. At times, however, a request is made for a court to judicially notice something more complex than which day of the week corresponds to a particular calendar date. While judicial notice can contribute to a more efficient judiciary, courts must remain conscious of what facts are being judicially noticed, particularly those facts arising from ever-changing developments within scientific fields. More importantly, courts must remain cautious when the decision by one court to take judicial notices is based on nothing more than the judicial notice taken by another jurisdiction, without independent analysis or verification by the former. Blindly accepting the reasoning and resolution of another jurisdiction as to a factual issue based in science can result in courts allowing facts into evidence that would otherwise be deemed inadmissible for failure to meet either evidentiary standards for scientific evidence set forth in *Frye* or *Daubert*.

I. INTRODUCTION

During a routine traffic stop, a police officer pulls over an individual for swerving and failing to stay in his lane. Upon approaching the vehicle, the officer observes that the driver has slow and slurred speech, as well as difficulty locating and handing his license and registration to
the officer. The driver also appears disoriented and sluggish. In other words, the drive is presenting classic symptoms of alcohol intoxication. At this point in any traffic stop, an officer would initiate a standardized field sobriety test (“SFST”) to determine whether the individual was intoxicated.\(^1\) Based on these symptoms, the driver would probably fail the test. After failing the SFST, the officer would take driver into custody and arrest him for driving under the influence (“DUI”).

At trial, the arresting officer would testify regarding his traffic stop and the subsequent SFST administered to the defendant.\(^2\) The prosecutor would ask the officer about his observations of the defendant at the time of the stop, as well as during the SFST. Most likely, the court would allow the officer to state his assumption regarding the defendant’s state of mind and level on intoxication based on defendants SFST performance. Ultimately, this defendant could be convicted of a DUI, and unbeknownst to the officer, the judge, or the jury, was stone-cold sober at the time of the traffic stop.

Unfortunately for the driver, the symptoms of hypoglycemia are not as well-known as those of alcohol intoxication. A diabetic suffering from hypoglycemia will demonstrate almost identical symptoms to those of someone who is intoxicated, including slow and slurred speech, poor balance, impaired motor control, staggering, drowsiness, flushed face, and disorientation.\(^3\) Even if this individual informed the officer he was diabetic at the onset of the traffic stop, the officer must rely on the results of the field sobriety test to guide his assessment of the situation, and not take the word of the driver he suspects is intoxicated. However, scientific testimony, including the science that informs an officer’s testimony regarding his assessment of the results

\(^1\) See “Part III” of this comment for a comprehensive discussion of the tests that comprise a the standard battery for field sobriety tests.

\(^2\) See Part V of the comment for a detailed description of the various limitations imposed on officer testimony.

of a SFST, remains an essential weapon wielded by courts when addressing society’s ills, including driving under the influence of alcohol.\textsuperscript{4}

In May of 2001, the District of Columbia Court of Appeals decided \textit{Karamychev v. District of Columbia}, a case in which the Court took judicial notice\textsuperscript{5} of the reliability of SFSTs, and in particular, the Horizontal Gaze Nystagmus (“HGN”) test.\textsuperscript{6} By taking judicial notice, the Court of Appeals avoided handing down a holding as to the admissibility of SFSTs, and the HGN test in particular, based on the rules of evidence governing courts in the District of Columbia.\textsuperscript{7} Despite several other courts in \textit{Frye} jurisdictions handing down holdings based on the rules of evidence set forth in \textit{Frye}, the evidentiary reliability of SFSTs remains an unresolved issue in the District.\textsuperscript{8}

In January 2002, the United States District Court for the District of Maryland provided some guidance as to how courts in the District of Columbia should address the reliability of SFSTs when it decided \textit{United States v. Horn}.\textsuperscript{9} In \textit{Horn}, the court applied the Federal Rules of

\textsuperscript{4} For a more comprehensive discussion of the development of expert testimony in Anglo American jurisprudence, see 15 \textsc{Harv. Rev.} 40 (May 1901).
\textsuperscript{5} Though the District of Columbia has no specific rule authorizing judicial notice, Maryland Rule 5-201(b), which governs what courts may take judicial notice of, reads, “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Md. R. 5-201(b). Maryland’s rule is identical to the Federal Rule, which permits judges to take judicial notice of two categories of facts: (1) those that are “generally known within the territorial jurisdiction of the trial court,” or (2) those that are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” \textsc{Fed R. Evid.} 201. The use of the phrase “judicial notice” throughout this comment is intended to mirror the Federal Rule as well.
\textsuperscript{6} \textit{Karamychev v. District of Columbia}, 772 A.2d 806, 812 n.8 (D.C. 2001). This comment is primarily interested in judicial treatment of the HGN test. However, since the HGN test is one of three tests that comprise the SFST battery, most judicial analysis of the HGN test is conflated with generally discussions of the reliability of SFST. As such, this comment will engage in analysis of the SFST battery with a keen eye towards the HGN test in particular.
\textsuperscript{7} The rules of evidence utilized by courts in the District of Columbia were established by the holding in \textit{Frye v. United States}, 293 F. 1013 (D.C. Cir. 1923).
\textsuperscript{8} See “Part IV” of this comment for discussion of the evidentiary treatment of SFSTs in other \textit{Frye} jurisdictions. In light of courts in other \textit{Frye} jurisdictions taking the time to apply the rules of evidence established in \textit{Frye} to the reliability and admissibility of SFST results, the position taken in this comment is that judicial notice does not stand on equal footing with those jurisdictions and is not considered to be a definitive determination as to the reliability and admissibility of SFST results informed by the rules of evidence established in \textit{Frye}.
Evidence (“Rules”) to Maryland's drunk driving law.\textsuperscript{10} Specifically, the Court in \textit{Horn} addressed the admissibility of SFST results at trial.\textsuperscript{11} Although the Court’s thorough application of the Rules to the use of SFSTs in \textit{Horn} is informative for the purposes of this comment, of even greater relevance is Chief Magistrate Grimm’s comprehensive analysis of the application of \textit{Frye}’s evidentiary rules to SFSTs.\textsuperscript{12} As a result of the holding in \textit{Horn}, the D.C. Court of Appeals now has a clear roadmap to follow when next confronted with the issues of SFST reliability and admissibility. Instead of continuing to take judicial notice, the D.C. Court of Appeals, as well as all other \textit{Frye} jurisdictions, should apply the same level of scrutiny to the reliability and admissibility of SFST results as was demonstrated by the holding of Chief Magistrate Grimm in \textit{Horn}.

In order to better understand the significance of the \textit{Horn} holding and its future applications towards the admissibility of SFST results, it is essential to examine the historical development of the admissibility of scientific, technical, or other specialized knowledge given in the form of expert testimony. Part II of this comment will examine the common law rules for admitting expert testimony that have culminated in two competing approaches governing the reliability of scientific techniques and their admissibility as evidence. Part III will discuss the three tests that comprise the SFST battery. Part IV of this comment will analyze judicial treatment of SFST in other \textit{Frye} jurisdictions. Part V will address the judicial treatment of SFST by District of Columbia and federal courts under the applicable evidentiary standard. Finally, Parts VI and VII will show how the District of Columbia’s current judicial treatment of SFST is flawed, while asserting that courts, including courts in the District of Columbia, should

\begin{itemize}
\item \textsuperscript{10} Id.
\item \textsuperscript{11} Id.
\item \textsuperscript{12} Id. at 546.
\end{itemize}
reconsider taking judicial notice of the reliability of the SFST results in light of the analysis in *Horn*.

II. **HISTORICAL BACKGROUND**

A. **Common law rule for admitting evidence prior to *Frye***

Courts have allowed the opinion evidence of experts for centuries, but a judicially developed theoretical basis for doing so is a new phenomenon. As recent as the early 1900s, there was no uniform standard for courts to follow when deciding whether expert evidence was relevant or admissible. Courts throughout the United States utilized a variety of admissibility standards when it came to expert testimony, but most trended towards a “market place” approach. Under this approach, the court made a determination as to an individual’s qualifications as an expert by looking to see if he or she had obtained a level of skill and proficiency in a particular trade or profession to be able to make a living at that undertaking. The threshold for deciding what constituted “a living” was not defined.

On its face, the admissibility standard under this “market place” approach appears to be met easily. However, serious restrictions were placed on the scope of an individual’s testimony. Once a court qualified an individual as an expert, he or she had to limit the basis of his or her testimony to “admissible, admitted evidence presented in open court.” Furthermore, all questions posed to the expert had to be presented as a hypothetical. Finally, an expert had to

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13 See note 5 supra.
14 ANDRE A. MOENSSENS ET AL., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 9-10 (5th ed. 2007).
15 Id. at 9.
16 Id.
17 Id. See also Marcy v. Barnes, 82 Mass. 161 (1860) (stating that a photographer was qualified to give an expert opinion about the genuineness of a disputed signature based on his level of familiarity in examining handwriting during the normal course of his business.).
18 ANDRE A. MOENSSENS ET AL., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 10 (5th ed. 2007).
19 Id.
20 Id.
21 Id.
come to a “reasonable degree of professional probability”\textsuperscript{22} when stating a conclusion based on the proffered hypothetical.

\textbf{B. District of Columbia Law and the Frye/Dyas Standard}

In 1923, the D.C. Court of Appeals faced a case of first impression regarding the admissibility of the testimony of an expert witness as to the results of a novel scientific procedure known as the systolic blood pressure deception test.\textsuperscript{23} The trial court had found the testimony inadmissible, and in affirming the trial court's ruling the Court of Appeals instituted a common law doctrine governing the admissibility of expert testimony regarding scientific principles.\textsuperscript{24} In \textit{Frye}, the court held:

\begin{quotation}
\noindent 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.\textsuperscript{25}
\end{quotation}

In other words, the Court established a rule that expert testimony regarding scientific information would only be admissible if the method used to deduce the information was established and generally accepted within the particular scientific field in question. Specifically, the Court found that the "[systolic blood pressure] test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert

\textsuperscript{22} Id.

\textsuperscript{23} Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). The systolic blood pressure deception test was the precursor to the polygraph examination, or lie detector test. The test was based on the notion that "conscious deception or falsehood, concealment of facts, or guilt of crime, accompanied by fear of detection when the person is under examination" would result in a rise in the test subject's blood pressure. Id. at 1013.

\textsuperscript{24} Id. at 1014.

\textsuperscript{25} Id.
testimony.”26 It is important to note that although evidence may rest on scientific principles, *Frye* only applies to scientific evidence that is "new or novel."27

In 1977, the D.C. Court of Appeals was presented with an opportunity to tailor the ruling in *Frye* more narrowly by determining who could qualify as an expert witness.28 In order to testify as an expert under *Dyas v. United States*, an individual must: (1) address a subject matter that is “so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman”; (2) “have sufficient skill, knowledge or experience in the field or calling as to make it appear that his opinion or interference will probably aid the trier of fact in his search for the truth” and (3) have a legitimate basis for his testimony, that is “the state of the pertinent art or scientific knowledge” must “permit a reasonable opinion to be asserted.”29

Both *Frye* and *Dyas* remain good law in the District of Columbia. Moreover, the even-handed application of the *Dyas* standard for the admission of expert testimony is compelled by constitutional protections of due process and equal protection embodied in the Fifth Amendment to the United States Constitution.30

C. Federal Law and Rule 702/ *Daubert/Kumho Tire* Standard

Prior to the 1993 Supreme Court decision in *Daubert v. Merrell Dow Pharmaceutical, Inc.*,31 the standard governing the admissibility of expert testimony deduced from the application

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26 Id.
29 Id. at 832. The test in *Dyas* was developed in response to an effort by a defendant to call an expert regarding the factors that affect the reliability of eyewitness identifications, but the Court limited exclusion of that expert based only on “the particular proffer made and in the concrete setting of that case.” *Green v. United States*, 718 A.2d 1042, 1051 (D.C. 1998). The holding in *Dyas* did not purport to “exclude expert testimony about the reliability of eyewitness identification for all purposes and under all circumstances.” Id.
30 U.S. Const. amend V. The equal protection clause under the 14th Amendment is not applicable to D.C. residents, but they receive the same constitutional protection under the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Smith v. United States*, 460 A.2d 576, 578 n.3. (D.C. 1983).
31 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585 (1993). Before articulating the new federal standard, the Court wrote that "in the 70 years since its formulation in the Frye case, the 'general acceptance' test has been the dominant standard for determining the admissibility of novel scientific evidence at trial.” Id.
of scientific techniques in federal courts was the "general acceptance" test articulated in *Frye*. In *Daubert*, the Supreme Court was presented with the opportunity to juxtapose the *Frye* “general acceptance” standard with the recently adopted Federal Rules of Evidence (“the Rules”).

Because the Court in *Daubert* held that the Rules superseded *Frye*, any analysis of the Court's holding must begin with an examination of the applicable rule.

Federal Rule of Evidence 702 reads in full:

> 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Because Rule 702 directly addressed the issue decided in *Frye*, the *Daubert* Court reasoned:

> Given the Rules’ permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention “general acceptance,” the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.

As a result of the Court’s holding in *Daubert*, the “general acceptance” standard set forth in *Frye* no longer applied in federal cases.

> After announcing that *Daubert* would supersede the evidentiary standard in *Frye*, the Court proceeded to establish a new series of requirements for scientific evidence to be reliable in

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32 The Federal Rules of Evidence were adopted by order of the Supreme Court on Nov. 20, 1972, transmitted to Congress by the Chief Justice on Feb. 5, 1973, and became effective on July 1, 1973. Pub. L. 93-12, Mar. 30, 1973. Although the Rules have been amended several times since becoming effective in 1973, any discussion of these amendments are beyond the scope of this comment. The most current manifestation of the Rules will be utilized for the purposes of this comment.

33 See *Daubert*, 509 U.S. at 587.

34 FED. R. EVID. 702.

35 *Daubert*, 509 U.S. at 589. The Court’s imputation of a’ "permissive backdrop" referred to the liberal standard of relevance established by the Rules. Id. at 587.
accordance with Rule 702. The initial hurdle any evidence must clear to comport with Daubert is that the subject matter must be “scientific.” According to the Court, subject matter is “scientific” when an inference or assertion can only be realized through the utilization of a scientific method. The second prong in the Daubert test is whether the proposed testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue."

In determining whether these two considerations are met, the Daubert Court provided a "checklist" of observations a trial judge may use for his or her benefit when making determinations as to the admissibility of scientific evidence. First, a trial judge should determine whether the technique or method at issue “can be (as has been) “tested.” Second, a trial judge should consider “whether the theory or technique has been subjected to peer review and publication.” The Court acknowledged that publication, although an element of peer review, does not necessarily result in reliability, while at the same time, recognizing that some “well-grounded but innovative theories will not have been published.” Third, a trial judge should look to the known or potential error rate of the method when determining admissibility. Finally, a trial judge may also consider the general acceptance of the method in his or her

36 Id. at 589-95.
37 Id. at 589-90. It is also worth noting that the Court acknowledged that the Rule recognized, "technical, or other specialized knowledge," but that section of the holding was limited to a scientific context. Id. at 590 n.8.
38 Id. at 590.
39Id. at 591. This relevancy requirement is also plainly stated in Rule 702. FED. R. EVID. 702. See also U.S. v. Downing, 753 F.2d 1224, 1242 (3d. Cir. 1985) (stating that "an additional consideration under Rule 702 - and another aspect of relevancy - is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute").
40 Daubert, 509 U.S. at 592-94. The Court noted that this "checklist" is not definitive. Id. at 593.
41 Id. The Court went on to state, “[s]cientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.” Id.
42 Id.
43 Id. The Court went on to state that the “submission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.” Id.
44 Id. at 594.
determination.\textsuperscript{45} In light of these factors, the 	extit{Daubert} Court acknowledged that a Rule 702 inquiry must be flexible, and that a trial judge’s focus should be on the principles and methodologies employed by the expert, not on the conclusions that he or she reaches.\textsuperscript{46}

No analysis of the Rules is complete without a discussion of \textit{Kumho Tire Co. v. Carmichael}.\textsuperscript{47} \textit{Kumho Tire} afforded the Supreme Court the opportunity to extend \textit{Daubert}’s application to only “testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialise’ knowledge.”\textsuperscript{48} Although this holding seems to expand the applicability of \textit{Daubert} to all expert testimony, the Court later clarified the list of factors enunciated in \textit{Daubert}, noting that they may not apply "to all experts or in every case."\textsuperscript{49} Similar to the discretion afforded trial judges in \textit{Daubert}, the \textit{Kumho Tire} holding granted judges “broad latitude” in what factors to weigh when determining reliability.\textsuperscript{50} The Supreme Court realized that trial courts must have the same kind of latitude in deciding how to test an expert's reliability, as they enjoy when they decide if that expert's testimony is reliable.\textsuperscript{51}

In order to understand how these competing approaches are applied in drunk driving cases, one must first become familiar with the SFST battery to which the previously discussed evidentiary standards are applied.

\textsuperscript{45} Id.
\textsuperscript{46} Id. at 594-95.
\textsuperscript{47} Kumho Tire Co. v. Carmichael 526 U.S. 137 (1999). The evidence at issue in \textit{Kumho} pertained to testimony by an expert in tire failure analysis. Id. at 142. Because the expert was not a scientist, there was an issue as to whether \textit{Daubert} applied. Id. at 141.
\textsuperscript{48} Id. at 141.
\textsuperscript{49} Id. at 141-42.
\textsuperscript{50} Id. at 142.
\textsuperscript{51} Id. at 152.
III. THE STANDARDIZED FIELD SOBRIETY TEST BATTERY

SFSTs are a battery of three tests administered and evaluated in a standardized manner to obtain validated indicators of impairment and establish probable cause for arrest. These tests were developed as a result of research sponsored by the National Highway Traffic Safety Administration (“NHTSA”) and conducted by the Southern California Research Institute. A formal program of training was developed and is available through NHTSA to assist law enforcement officers become more skillful at detecting DWI suspects, describing the behavior of these suspects, and presenting effective testimony in court.

The first test in the SFST battery is the Horizontal Gaze Nystagmus (“HGN”) test. Nystagmus describes an involuntary eye motion that can be exhibited in two ways. There is "pendular nystagmus,” where the eye “oscillates equally in two directions.” The second is "jerk nystagmus,” including HGN, which occurs “[when] the eye moves slowly away from a fixed point and then is rapidly corrected.” According to the American Optometric Association, nystagmus results from the instability or impairment of the part of the central nervous system responsible for controlling eye movements. As a central nervous system depressant, alcohol consumption can have a direct impact on one’s ability, or inability, to control eye movement.

53 Id.
54 Id.
55 Id.
57 Id. Pendular nystagmus is beyond the scope and not relevant for the purposes of this comment.
58 Id. The study compares a normal eye to one with jerk nystagmus: "An eye normally moves smoothly like a marble rolling over a glass plane, whereas an eye with jerk nystagmus moves like a marble rolling across sandpaper." Id.
60 Id.
As an individual becomes more intoxicated he or she begins to lose the ability to control the “smooth and accurate” control of his or her eye movement, thus demonstrating nystagmus.  

According to the NHTSA, the HGN test serves two purposes: (1) to “identify drivers with [blood alcohol content] in the .08-.12 range that make up the bulk of the impaired drivers who do not necessarily exhibit exaggerated characteristics of impairment; and (2) [to] detect impairment in alcohol-tolerant drivers who may not display any gross coordination and balance problems.”  

The HGN test is based on the administering officer’s observation of three different physical manifestations that purportedly occur when a person is under the influence of alcohol. These manifestations are: “(1) the inability of a person to follow, visually, in a smooth way, an object that is moved laterally in front of the person's eyes; (2) the inability to retain focus and the likelihood of jerking of the eyeball when a person has moved his or her eye to the extreme range of peripheral vision; and (3) the reported observation that this ‘jerking’ of the eyeball begins before the eye has moved forty-five degrees from forward gaze.”  

When administering the HGN test, the officer instructs the individual to keep his or her head facing straight for the entire test. The officer then instructs the individual to follow an object, such as a pen, penlight, or the officer’s finger, with his or her eyes. The administering officer must hold the stimulus approximately twelve to fifteen inches from the individual’s face, while keeping the object slightly above eye-level. As the officer moves the stimulus slowly towards the suspect's ear and out of the suspect's field of vision, the officer observes the suspect's

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63 ANDRE A. MOENSENS ET AL., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 224 (5th ed. 2007).
64 Id.
66 Id.
eyeballs for any indication of the three previously discussed “signs” of intoxication: an angle of onset of nystagmus (measured from the suspect's nose) of forty-five degrees or less;\textsuperscript{67} distinct or pronounced nystagmus at the eye's maximum horizontal deviation;\textsuperscript{68} and the inability of the eyes to smoothly pursue the stimulus.\textsuperscript{69} The officer scores one point for each sign of intoxication per eye, the maximum score being six points.\textsuperscript{70} If at least four clues are present, it is likely that the subject has a blood alcohol content (“BAC”) of at least .10.\textsuperscript{71}

B. Walk-and-Turn and One-Leg-Stand Tests

The remaining two tests in the SFST batter are the walk-and-turn (“WAT”) test and one-leg-stand (“OLS”) test.\textsuperscript{72} The NHTSA classifies the WAT and OLS tests as "divided attention" tests.\textsuperscript{73} The rationale for these tests is that an intoxicated individual would have difficulty dividing his or her attention between simple physical and mental tasks.\textsuperscript{74}

During the WAT test, the officer instructs the subject to take nine steps along a straight line.\textsuperscript{75} These nine steps must be made in a heel-to-toe fashion.\textsuperscript{76} After completing the initial nine steps, the suspect must then pivot 180 degrees on one foot and repeat the process for nine more steps.\textsuperscript{77} The officer scores the subject based on eight indicators of intoxication, which include: (1) failing to maintain balance while listening to instructions; (2) beginning the test

\textsuperscript{67} The officer slowly moves the object from the center of the subject's face towards the left ear, watching to see if the left eye will follow smoothly or exhibit nystagmus. The process is then repeated with the right eye. Id.
\textsuperscript{68} The officer again moves the object toward the left ear, this time pausing at the point that the eye has gone as far to the side as possible. The officer will hold the object here for about four seconds, looking to see if there is a "distinct and sustained nystagmus." Again, the process is repeated with the right eye. Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} ANDRE A. MOENSSSENS ET AL., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 225 (5th ed. 2007).
\textsuperscript{72} U.S. Dep’t. of Transp., DWI (Driving While Intoxicated) Detection & Standardized Field Sobriety Testing Student Manual (February, 2006 Edition).
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
before the instructions are completed; (3) stopping during walking to maintain or regain balance;
(4) failing to walk in a heel-to-toe manner; (5) stepping off of the line; (6) using arms for
balance; (7) making an improper turn; (8) taking an improper number of steps.\textsuperscript{78}

In the OLS test, the officer directs the subject to lift one foot off of the ground
approximately six inches and count, out loud, by thousands while maintaining that position for
thirty seconds.\textsuperscript{79} The officer grades the subject based on four indicators of intoxication, which
are: "swaying while balancing, using arms to balance, hopping to maintain balance, and putting
[one’s] foot down" on the ground.\textsuperscript{80} According to the NHTSA, an individual exhibiting at least
two of these indicators will have a BAC of .08 or higher eighty-three percent of the time.\textsuperscript{81}

According to the NHTSA, when the results of all three SFSTs are combined, officers
conclude a subject is intoxicated ninety-one percent of the time.\textsuperscript{82} However, NHTSA
conclusions alone are not enough to make the tests admissible in impaired driving trials. As the
following sections will demonstrate, courts around the country address the admissibility of the
SFST results differently, while coming to different conclusions as to their reliability.

\section*{IV. JUDICIAL TREATMENT OF SFST AND HGN IN OTHER FRYE JURISDICTIONS}

Courts in jurisdictions using the \textit{Frye} test have found the SFST unreliable and, therefore,
inadmissible. For example, in \textit{Young v. City of Brookhaven}, the Supreme Court of Mississippi
held that the HGN test failed the Frye analysis, as it had not gained acceptance in the scientific

\begin{footnotesize}
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\item[78] Id. The Department of Transportation research indicates that seventy-nine percent of those exhibiting two or
more of the above indicators will have a BAC of .08 or greater. Jack Stuster & Marcelline Burns, \textit{Validation of the
Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent} (August 1998), http://www.nhtsa.dot.gov/people/injury/ alcohol/Archive/Limit.08/!SFSTREP.PDF).
\item[79] U.S. Dep't. of Transp., Development of a Standardized Field Sobriety Test (SFST) Training Management System,
\item[80] Id.
\item[81] Jack Stuster & Marcelline Burns, \textit{Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent} (August 1998), http://www.nhtsa.gov/people/injury/ alcohol/Archive/Limit.08/!SFSTREP.PDF).
\item[82] Id.
\end{footnotelist}
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community. Specifically, the *Young* court determined that "the HGN test can...be used to prove probable cause to arrest and administer the intoxilyzer or blood test. [But] [t]his is the only allowable use for the test results."  

In addition, the Superior Court of Pennsylvania ruled in *Commonwealth v. Apollo* that the results of an HGN test are precluded from admission into evidence. In that trial, the State presented one expert who testified as to the reliability of HGN testing as an indicator of intoxication. The court held that this testimony did not meet the general acceptance requirement of *Frye* because it was based in part upon the expert's personal observations and views, and the trial court had been confronted with evidence that indicated that the tests were not reliable.

Faced with the same issue, the Supreme Court of Nebraska reached a conclusion similar to that in *Horn*. In *State v. Baue*, the Court ruled that the *Frye* test was satisfied, but limited the purpose for which the results of HGN testing could be admitted into evidence to establishing that the defendant *may* have been intoxicated. In its decision, the Court found:

> [T]he HGN field sobriety test meets the Frye standard for acceptance in the relevant scientific communities, and when the test is given in conjunction with other field sobriety tests, the results are admissible for the limited purpose of establishing that a person has an impairment which *may* be caused by alcohol.

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83 Young v. City of Brookhaven, 693 So. 2d 1355 (Miss. 1997).
84 Id. at 1361.
86 Id. at 1027. The expert was a behavioral optometrist who evaluated eye health and visual performance. *Id.*
87 *Frye* was adopted as the applicable standard by Pennsylvania state courts in Commonwealth v. Topa, 369 A.2d 1277 (Pa. 1977). *Id.* at 1026.
88 Id. at 1028. The court concluded: "Under these circumstances, we cannot say that the lower court abused its discretion when it precluded the admission at trial of any evidence concerning the administration to appellant of the HGN test or of the results of that test." *Id.*
90 Id. at 204.
91 Id. (emphasis added).
The Court went on to state that while the results of HGN testing are relevant, the results of the test are not enough to prove that a defendant is guilty of driving under the influence of alcohol.\textsuperscript{92}

In \textit{State v. Chastain},\textsuperscript{93} the Supreme Court of Kansas considered expert testimony, and still concluded that HGN testing did not satisfy the Frye standard.\textsuperscript{94} The Court found that it was "not satisfied that such testing has achieved general acceptance within the relevant scientific community."\textsuperscript{95}

In light of the jurisdictions that apply the \textit{Frye} standard and have either concluded that HGN testing does not meet the standard, or have limited the purposes for which the test could be used, the issue should be reexamined by any \textit{Frye} jurisdiction having taken judicial notice of its reliability, including Maryland and the District of Columbia. As discussed below, the holding in \textit{Horn} revealed a plethora of evidence casting doubt upon the reliability of SFSTs in general, and the HGN test specifically.\textsuperscript{96}

\textbf{V. EVIDENTIARY TREATMENT OF SFST UNDER DC AND FEDERAL STANDARDS}

\textbf{A. The Lack of a DC Standard}

There is no recorded case of a judge in the District of Columbia handing down a holding that contained a step-by-step application of the admissibility standard established in \textit{Frye} to SFSTs. More specifically, the HGN test has never been the subject of any judicial decision determining whether its results are admissible in D.C. pursuant to the standard in \textit{Frye}.

In \textit{Karamychev v. District of Columbia}, the Court of Appeals acknowledged that “the majority of jurisdictions around the country have declared HGN testing to be reliable,”\textsuperscript{97} when it

\begin{footnotes}
\item[92] Id.
\item[93] State v. Chastain, 960 P.2d 756 (Kan. 1998).
\item[94] Id. at 761.
\item[95] Id.
\item[96] See “Part V” for a discussion of the doubt cast upon the reliability of SFSTs in \textit{Horn}.
\end{footnotes}
decided on the HGN test’s admissibility in the District. However, at the time the court in *Karamychev* took judicial notice of the HGN test’s reliability, it based its decision on a holding from the Maryland Court of Special Appeals that had been handed down six years earlier. In *Schultz v. State*, the court ruled that a *Frye* foundation was required for the HGN test to be admissible.98 The court stated that "the HGN test…does not test a suspect's coordination or ability to recollect. It is based upon a scientific principle that the extent and manner in which one's eye quivers can be a reliable measure of the amount of alcohol one has consumed."99 After determining that the HGN test was scientific in nature, and thus subject to the admissibility standards in *Frye*, the court then stated that the test would be admissible without subjecting it to the scrutiny of a *Frye* analysis.100

As previously discussed, under Maryland law, a court is empowered to take judicial notice of a fact if it is "not subject to reasonable dispute" and either "generally known within the territorial jurisdiction of the trial court," or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."101 The *Schultz* court used cases from other jurisdictions in taking judicial notice of the fact that the SFST, and the HGN test in particular, were reliable.102 The court's judicial notice was somewhat qualified, however, as the State would still be required to show that the test was properly conducted and given by a qualified officer.103

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99 Id. at 65.
100 Id. at 69. The court stated that “[w]e shall further hold, however, that the results of HGN tests are, nevertheless, admissible in the trial courts of this State without further reference to the Frye/Reed standard. We take judicial notice of the reliability and acceptance of the HGN test.” Id.
101 Md. R. 5-201(b). See also note 8 supra.
102 *Schultz*, 664 A.2d at 71.
103 Id. at 74. In 1999, the Court of Special Appeals of Maryland further limited its judicial notice of SFST reliability by holding that HGN tests could be used as proof of a specific BAC. *Wilson v. State*, 723 A.2d 494, 499-500 (1999).
The case the *Schultz* court relied upon was *State v. Superior Court*,\(^{104}\) decided by the Supreme Court of Arizona in 1986.\(^{105}\) In that case, the court wrote, "[a]lthough the publications [establishing HGN testing reliability] are not voluminous, they have been before the relevant communities a considerable period of time for any opposing views to have surfaced."\(^{106}\) As such, the *Karamychev* court, writing in 2001, based its decision regarding HGN reliability on the *Schultz* court, writing in 1995. The *Schultz* court, in turn, had based it acceptance of HGN testing reliability upon research conducted prior to 1986. Therefore, the D.C. Court of Appeals and Maryland Special Court of Appeals operate under the assumption that no opposing views have surfaced challenging the reliability of SFSTs since 1986.

**B. The Federal Standard**

One of the most comprehensive articulations of the federal standard governing the admissibility of the SFSTs was provided by Chief Magistrate Paul Grimm in *United States v. Horn*.\(^{107}\) Chief Magistrate Grimm began his analysis of the admissibility of SFST results as direct evidence of intoxication, and held that using the results of a SFST was not enough to prove BAC levels.\(^{108}\) The court’s analysis then turned to the issue of whether the SFST battery could be used as circumstantial evidence of intoxication.\(^{109}\) On that issue, Chief Magistrate Grimm found that the results of a SFST could be used as circumstantial evidence of intoxication if a judicial determination was made that SFSTs met the reliability requirements of Rule 702 as interpreted in *Daubert* and *Kumho Tire*.\(^{110}\) Following this acknowledgement, Chief Magistrate Grimm then held that "the Standardized Field Sobriety Test evidence in this case does not, at this

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\(^{105}\) Id.
\(^{106}\) Id. at 181.
\(^{108}\) Id. at 556.
\(^{109}\) Id. at 557.
\(^{110}\) Id. at 557-58.
time, meet the requirements of Daubert/Kumho Tire and Rule 702 as to be admissible as direct
evidence of intoxication or impairment.”¹¹¹ Based on the holding in Horn, SFSTs cannot be
used as direct evidence of a particular BAC, intoxication, or impairment in federal court.

When discussing the OLS and WAT tests, Chief Magistrate Grimm concluded that they
were merely "standardized procedures" used by officers to make objective observations of
coordination, speech, balance, concentration, and ability to follow directions.¹¹² Specifically,
Chief Magistrate Grimm declared that "if [SFSTs are] offered as circumstantial evidence of
alcohol intoxication or impairment, the probative value of the SFSTs derives from their basic
nature as observations of human behavior, which is not scientific, technical or specialized
knowledge."¹¹³ In further limiting the applicability of SFST results in federal court, Chief
Magistrate Grimm concluded that the administering officer was precluded from using terms such
as “test,” “standardized clues,” “pass,” or “fail” when testifying because SFSTs did not satisfy
the reliability requirements of Rule 702 as interpreted in the Daubert and Kumho Tire.¹¹⁴

When attacking the reliability of SFST results, the defense presented substantial
persuasive evidence that SFSTs did not meet the federal standard under Daubert and Kumho
Tire. Specifically, the defense raised significant concerns regarding the methods used to develop
the tests and the error rates of the tests.¹¹⁵

The evidence challenging the integrity of the tests’ development was provided by
industrial psychologist Joel P. Wiesen, Ph.D.¹¹⁶ Dr. Wiesen, whose special expertise was in

¹¹¹ Id. at 557.
¹¹² Id. at 558.
¹¹³ Id. at 559.
¹¹⁴ Id. at 557-58. See note 100 supra and accompanying text.
¹¹⁵ Id. at 556.
¹¹⁶ Id. at 542. At the time of his testimony, Dr. Wiesen had ten years or experience working for the Commonwealth
of Massachusetts, including experience developing civil service examinations. Dr. Wiesen also possessed and
additional ten years of experience as an independent consultant who specialized in the development of tests of
human abilities. Id. Dr. Wiesen’s testimony is summarized in a table. Id. at 542-43.
experimental psychology, psychometrics and statistics,\textsuperscript{117} based his review of the SFST battery on his examination of five reports discussing the sobriety exams, which form the cornerstone for NHTSA’s endorsement of the HGN, WAT, and OLS tests as the uniform SFST battery administered by police officers across the country.\textsuperscript{118} These reports consisted of a June 1977 report prepared for the NHTSA titled "Psychophysical Tests for DWI Arrests" ("1977 Report");\textsuperscript{119} a March 1981 report titled "Development and Field Test of Psychophysical Tests for DWI Arrest" ("1981 Report");\textsuperscript{120} a September 1983 field study titled "Field Evaluation of a Behavioral Test Battery for DWI," ("1983 Report");\textsuperscript{121} a November 1995 study of the SFST battery titled "A Colorado Validation Study of the Standardized Field Sobriety Test (SFST) Battery," (the "1995 Report");\textsuperscript{122} and an undated study titled "A Florida Validation Study of the Standardized Field Sobriety Test (SFST) Battery" ("Florida Report").\textsuperscript{123}

Throughout his analysis, Dr. Wiesen was "highly critical" of these five studies.\textsuperscript{124} In the 1977 report, Dr. Wiesen identified six specific problems with the reports’ findings.\textsuperscript{125} Dr. Wiesen also identified eight concerns with the 1981 Report.\textsuperscript{126} Dr. Wiesen identified an

\textsuperscript{117} Id. at 542.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 535-36. The report was prepared by Marcelline Burns, Ph.D., a frequent expert for the prosecution DWI/DUI cases, and Herbert Moskowitz, Ph.D. Id. at 535-36 & n. 14. Both Drs. Burns and Moskowitz were members of the Southern California Research Institute ("SCRI"). Id.
\textsuperscript{120} Id. at 536. This report was prepared for the NHTSA by Dr. Burns and SCRI. Id.
\textsuperscript{121} Id. This study was conducted by Theodore E. Anderson, Robert M. Schweitz and Monroe B. Snyder. Id.
\textsuperscript{122} Id. The report was also prepared by Dr. Burns, as well as the Pitkin County (Colorado) Sheriff’s Office, who received funding from the NHTSA. Id.
\textsuperscript{123} Id. Dr. Burns and the Pinellas County (Florida) Sheriff’s Office prepared this report. Id.
\textsuperscript{124} Id. at 542. A table summarizing Dr. Wiesen’s concerns with these studies was included in the decision. Id.
\textsuperscript{125} Id. Specifically, Dr. Wiesen cited that: 1) a chin rest was used in the lab tests, which was not done in the field; 2) a single set of data was used, which artificially inflated scores; 3) the tests were not age and gender neutral; 4) the lab tests were monitored to ensure they were correctly performed, which was not done in the field; 5) scoring was not adjusted to reflect differences in results based on the time of day the HGN test was conducted; and 6) the fact that "the study was not peer reviewed, and would not have been accepted if offered." Id.
\textsuperscript{126} Id. Dr. Wiesen’s concerns with the study were as follows: 1) very high error rates; 2) no adjustment to reflect effects of time of day on HGN testing; 3) low test/retest reliability rates; 4) testing officers not basing decisions on SFST results; 5) possible bias; 6) fifty percent of suspects arrested had a BAC below legal limit; 7) officers used in study were not representative of all officers; and 8) reports that in the field some officers entirely forgot or ignored standardized procedures. Id.
additional seven problems with the 1983 Report. Dr. Wiesen raised five points of contention with the 1995 Report, as well as three more with the Florida Report. Dr. Wiesen concluded his evaluation of the SFST reports with the following observation:

[T]he studies give only a general indication of the level of potential validity of the tests as described in the NHTSA manual.... Rather than the five studies supporting each other, they evaluate somewhat different combinations of test content and test scoring. The differences are large enough to change the validity and accuracy of the tests. The older studies are probably less germane, due to the changes in test content and scoring over time. The reports for the newer studies are grossly inadequate. Given this, and in light of the specific critiques above (which are not exhaustive), I can only conclude that the field sobriety tests do not meet reasonable professional and scientific standards.

Dr. Wiesen's affidavit raised serious doubts regarding the methods used to develop the SFST battery.

The defense offered testimony and submitted an affidavit of another expert, Dr. Harold P. Brull, to attack the SFSTs’ error rates. Dr. Brull, a licensed psychologist, analyzed the same five studies as Dr. Wiesen, and came to the conclusion that there was a "complete absence of evidence 'which would allow one to predict a known error rate in the field.'" Dr. Brull also concluded that if the rate of error of the SFSTs could be determined, they “likely would have been unacceptable in real world situations,” thus precluding them from being admitted as scientific evidence.

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127 Id. In Dr. Wiesen’s expert opinion, the report had the following flaws: 1) the professional standards of the testing community were not met; 2) a failure to monitor data collection; 3) arrests made due to results of breath tests made it impossible to tell what the arresting decision was based upon; 4) a failure to report twenty-five percent of the data; 5) no statistical tests were performed on the data; 6) the tests were not administered in standard fashion; and 7) the accuracy of the data was suspect. Id.
128 Id. They were as follows: 1) the report was too incomplete to draw conclusions on the test's validity; 2) sections of the report were missing; 3) possible bias; 4) no monitoring of data collection; and 5) unclear results based on two different arrest standards. Id.
129 Id. They were as follows: 1) the report was incomplete; 2) the methodology was not described in the report; and 3) the data was incompletely described. Id.
130 Id. at 543.
131 Id.
132 Id. at 543-44.
133 Id. at 544.
Dr. Wiesen’s expert testimony on the methods used to develop the field sobriety test battery, as well as Dr. Brull’s testimony regarding the tests’ unknown and unpredictable error rates culminated in Chief Magistrate Grimm’s conclusion that the SFSTs were unreliable for providing a specific BAC under a Daubert/Kumho Tire analysis.134

VI. DC’S FLAWED APPROACH TO SFST

A. Critique of Frye Standard in Horn

As previously discussed, under the Frye standard, a method must have gained general acceptance in the relevant scientific community to be considered reliable.135 However, based on expert testimony in Horn, particularly that of Professor Emeritus of Psychology at Clemson University, Spurgeon Cole, Ph.D.,136 SFSTs probably do not meet this standard.137 Dr. Cole’s testimony first challenged the validity of the tests, which is a component of general acceptance.138

Looking at the reasons for SFST failure under the federal standard can be instructive in showing why the general acceptance standard is also not satisfied. When evaluating whether the tests have been subjected to peer review, which is one of the Daubert factors,139 Dr. Cole stated, "It is difficult to see how the NHTSA could claim that the [S]FST is accepted in the scientific community, when results of studies on the validation of the [S]FST have never appeared in a

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134 Id. at 556. It is also worth noting that Chief Magistrate Grimm reached this conclusion without considering peer review of the tests or acceptance in an unbiased, relevant technical or scientific community. Id. However, he did acknowledge that even if these two factors were considered, the tests would still fail. Id. at 556-57.

135 See “Part II, Section B” for a discussion of Frye.

136 Horn, 185 F. Supp. 2d at 540. Cole is the author of several articles on SFSTs. Id. at 539-40. See also http://www.clemson.edu/psych/faculty.html.

137 Not meeting the Frye/Dyas standard would not render the tests and their results inadmissible, but it would subject them to Horn-like limitations.

138 Horn, 185 F. Supp. 2d at 540. Dr. Cole stated in the Defendant's Memorandum that the SFSTs "must be held to the same standards the scientific community would expect of any valid test of behavior." Id.

139 See “Part II, Section C” supra for discussion of Daubert factors.
scientific peer reviewed journal, which is a basic requirement for acceptance by the scientific community. “

Dr. Cole concluded his testimony by stating:

Because of its widespread use, the FST battery has been assumed to be a reliable and valid predictor of driving impairment. NHTSA has done little to dispel that assumption. ... The FST battery to be valid must discriminate accurately between the impaired and non-impaired driver. NHTSA’s own research on that issue ... has not been subjected to peer review by the scientific community. In addition, a careful reading of the reports themselves provides support for the inadequacy of the FST battery.

Because SFST reliability has not been subjected to peer review, it can be reasoned that the concept has not gained the general acceptance of the scientific community. If the concept has not gained general acceptance of the scientific community, it makes it unreliable even under a Frye analysis.

In addition, three other experts offered testimony for the defendant in Horn. The testimonial thrust of all three experts was the doubt as to the reliability of the HGN tests, thus showing a lack of general acceptance of the test’s reliability.

B. SFSTs do not Meet Frye/Dyas General Acceptance Standard

An examination of Magistrate Grimm’s rationale in Horn shows not only that the SFST failed to satisfy the federal evidentiary standard, but also that the Frye standard is likely not met. The D.C. Court of Appeals, as well as the Maryland Court of Special Appeals, therefore, erred by taking judicial notice of the reliability of the SFST.

As discussed in more detail below, judicial notice relieves the prosecution of its burden of proving the reliability and admissibility of SFST results, even if evidence indicating the

140 Horn, 185 F. Supp. 2d at 541.
141 Id. at 541-42.
142 See “Part II, Section B” for discussion of Frye’s general acceptance standard.
143 Horn, 185 F. Supp. 2d at 539. They are: Yale Caplan, Ph.D., the former chief toxicologist for the State of Maryland and former scientific director of the Maryland Alcohol Testing Program; Harold P. Brull, a licensed psychologist; and Joel Wiesen, Ph.D., an industrial psychologist and "independent consultant in the field of development and validation of human performance tests." Id.
144 See “Part VI, Section A” for discussion of the critique of Frye in Horn.
unreliability of the test is available. Perhaps in 1995, when the Court of Special Appeals of Maryland decided *Schultz*, the existing research led to the conclusion that the field sobriety tests were reliable. This in turn led the D.C. Court of Appeals to also take judicial notice in *Karamychev*.145 However, testimonial evidence from *Horn* refutes the reliability of the SFST to such an extent that reliability no longer deserves judicial notice.146 The fact remains that neither the *Schultz* nor *Karamychev* courts considered, or even cited to, any of the scientific studies regarding the tests and their reliability.147

C. Error Committed by DC Court of Appeals in *Karamychev* by Taking Judicial Notice of SFST

Taking judicial notice of the reliability of SFSTs is not warranted, particularly in a *Frye* jurisdiction such as the District of Columbia, where the science supporting the reliability of the HGN test has never been scrutinized under the lens of the *Frye* standard. Specifically, judicial notice relieves the Government of its burden of establishing the reliability of the test at trial.148 This comment maintains that a *Frye* hearing is always necessary when the issue of a particular theory or method has not been litigated adequately to ensure the theory or method meets the *Frye* standard.

As previously discussed, the cornerstone of evidentiary reliability under *Frye* is the notion that a specific method or theory is “established and generally accepted within the particular scientific field in question.”149 From the previous discussion, it is clear that the reliability of the HGN test is not a settled proposition in the scientific community; not even

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146 See “Part V, Section B” supra for discussion of expert testimony in *Horn* refuting need for judicial notice of SFST reliability.
147 See “Part VI” for a discussion regarding the presumption of reliability in *Schultz* and *Karamychev*.
149 See note 20 supra.
among the numerous Frye jurisdictions. Without first being subjected to an analysis under Frye, the probative value of any testimony or direct evidence based on the results of an HGN test would be far outweighed by the prejudicial effect any such evidence might have.

Considering the testimony in Horn, as well as holdings in other Frye jurisdictions, it seems impossible for courts, such as the court in Karamychev, to continue to take judicial notice of the reliability of the SFST and its results. By ignoring the existing research and taking judicial notice of the SFST, the Karamychev court relieved the State of its burden of proving the reliability of questionable science. Instead of engaging in independent research and coming to its own conclusions the court relied on a six-year-old case from a non-controlling jurisdiction to decide that other courts had accepted HGN tests as reliable.

The case the Schultz court relied upon was State v. Superior Court, an Arizona Supreme Court decision, where the Court held, "[a]lthough the publications [indicating the reliability of HGN testing] are not voluminous, they have been before the relevant communities a considerable period of time for any opposing views to have surfaced." Clearly, this passage indicates that the Arizona Supreme Court encountered few or no opposing views. Since 1986, multitudes of opposing views on HGN tests have appeared, including the conflicting views on

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150 See “Section IV” supra.
151 Oh v. Nat’l Capital Revitalization Corp., 7 A.3d 997 (D.C. 2010) (citing Plummer v. United States, 813 A.2d 182, 189 (D.C. 2002)) (“weighing of probative value versus prejudice must always be part of the trial judge’s consideration, and the trial judge has the discretion to exclude evidence if its probative values is substantially outweighed by the danger of unfair prejudice”). See also Johnson v. United States, 960 A.2d 281,300 n.18 (D.C. 2008) (“[a] trial court must always consider the extent to which a party may be prejudiced by the admission of any evidence”).
152 Karamychev relied on Schultz v. State, 106 Md. App. 145, 664 A.2d 60 (1995), (stating that "the admissibility of the results of HGN testing has been challenged in some foreign jurisdictions for failing to satisfy the Frye standard (or the standard adopted by that jurisdiction for determining the admissibility of scientific evidence)"). The court noted State v. Superior Court, 149 Ariz. 269, 718 P.2d 171 (1986), as an early case in which the test was unsuccessfully challenged. Id.
155 Id. at 181. The sources the Supreme Court of Arizona utilized in its decision can be found in appendices to the opinion. Id. 182-84.
the test’s development and margin of error. As such, the D.C. Court of Appeals was wrong to take judicial notice of SFST reliability in Karamychev, and remains in error by continuing to operate under the ill-informed and foundationally shaky opinion of a twenty-five year old holding from Arizona.

VII. HOW DC COURT SHOULD TREAT SFST RESULTS WHEN ADMINISTERED INTO EVIDENCE

As the previously discussed analysis of SFSTs in Horn demonstrates, it is not difficult for one to reach the conclusion that a standard employing similar limitations on the testimony regarding a defendant's performance on a field sobriety test is the correct one. Unfortunately for DUI defendants, Horn is not binding precedent in the District of Columbia, or any other Frye jurisdiction. Moreover, judges in the District of Columbia courts remain free to follow the judicial notice precedent set forth in Karamychev. As such, it remains a strong possibility that the next time a defendant challenges the evidentiary reliability of SFSTs as part of his or her defense against a DUI, the presiding judge will look no further than Karamychev when ruling on the admissibility of the tests’ results.

However, one element of a of common law rule, such as the judicial notice of SFST reliability in Karamychev, is that the next judge to preside over a DUI case is not bound to follow it in the same way he or she would be bound to follow a statute governing evidentiary admissibility. A well-crafted motion challenging the evidentiary reliability of SFST results could persuade a Frye-jurisdiction judge to grant a hearing on the issue. This would provide a long overdue opportunity to re-examine SFST reliability, and re-litigate the tests’ results in light of the serious concerns raised by Chief Magistrate Grimm in Horn.

Assuming such a well-crafted motion presents itself in the District of Columbia, the court would be ignoring the spirit of the Frye holding by not allowing a hearing regarding the
reliability and admissibility of SFST results. Should such a hearing take place, it is difficult to envision a D.C. judge disagreeing with the thorough analysis of Frye in Horn. Based on the record in Horn, a Frye jurisdiction should admit a SFST conducted properly for use in determining if probable cause existed to charge a driver with DWI or DUI, but cannot be used to prove a specific BAC. A Frye jurisdiction court may still take judicial notice of the connection between HGN and intoxication, but the defense must be given the opportunity to present evidence that this relationship is by no means exclusive. Finally, an arresting officer in a Frye jurisdiction must be limited to offering lay opinion testimony of first hand observations of the defendant, admissible as circumstantial evidence of intoxication, but may not use decisive language such as "fail" or "standardized clues" during his or her testimony.

The only way to ensure that the jury affords proper weight to evidence of intoxication at trial is through a judge’s instructions. These guidelines given by the judge about the law the jury must apply to the facts it finds to be true help ensure the jury arrives at a verdict that follows the law of that jurisdiction. Based on the analysis in Horn, a jury instruction for a Frye jurisdiction must be clear about the limited weight a jury should afford an officer’s testimony regarding SFSTs. For example, the jury instruction could state:

You have heard the testimony of a law enforcement officer(s). The fact that a witness is employed as a law enforcement officer does not mean that (his)(her) testimony deserves more or less consideration, or greater or lesser weight than that of any other witness. At the same time, it is quite legitimate for defense counsel to try to attack the believability of a law enforcement witness on the ground that (his)(her) testimony may be colored by a personal or professional interest in the outcome of the case. You must decide, after reviewing all the evidence, whether you believe the testimony of the law enforcement witness and how much weight, if any, it deserves.

157 Id.
158 Id.
Generally, witnesses are not permitted to state their personal opinions about important questions in a trial. However, a witness may be allowed to testify to his or her opinion if it is rationally based on the witness’ perception and is helpful to a clear understanding of the witness' testimony or to the determination of a fact in issue.

In this case, I permitted Officer (name) to offer (his)(her) opinion based on (his)(her) perceptions. The opinion of this witness should receive whatever weight you think appropriate, given all the other evidence in the case and the other factors discussed in these instructions for weighing and considering whether to believe the testimony of witnesses.

Such an instruction provides litigants with a platform from which to craft a more favorable instruction for the judge’s consideration based on the specific facts at trial.

Such an instruction also guides juries back to considering the evidence as circumstantial, while minimizing the potential for it to be more favorably weighed as “scientific.”

**VII. CONCLUSION**

Police officers administering SFSTs are not optometrists, ophthalmologists, scientists, or trained laboratory technicians. As such, they must be precluded from testifying as experts as to whether the SFSTs, and HGN tests in particular, measure one’s level of intoxication reliably. Because of the shaky footing upon which judicial notice was taken in *Karamychev* and other *Frye* jurisdictions, these courts’ conclusions that SFST reliability has reached "general acceptance" within the scientific community is suspect. Any jurisdiction operating under this misinformed presumption should adopt an approach similar to that in *United States v. Horn*. Only when similar limitations are placed upon the admissibility of SFST results will defendants accused of DWI or DUI be ensured the fair trial to which they are entitled.