Daubert in the States

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In 1993, the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* overruled the general acceptance standard set forth in *Frye v. United States,* a 1923 decision by the D.C. Circuit. In its place, the Court substituted a reliability test for determining the admissibility of scientific evidence. The *Frye* standard had been the majority rule in both federal and state courts until *Daubert.* This article discusses the reactions of state courts to the *Daubert* decision.

*Daubert* rests on an interpretation of the Federal Rules of Evidence, and therefore as a statutory, rather than a constitutional, case, it is not binding on the states. This is true even in the forty jurisdictions that have adopted evidence rules based on the Federal Rules. For example, the Arizona Supreme Court has declined to follow *Daubert,* noting that it was “not bound by the United States Supreme Court’s non-constitutional construction of the Federal Rules of Evidence when we construe the Arizona Rules of Evidence.” Similarly, the Nebraska Supreme Court has commented: “[N]otwithstanding that our rule parallels the federal rule 702, *Daubert* does not apply to state court decisions. The increasing prevalence of expert evidence cautions against the admission of scientific evidence which is still the subject of dispute and controversy in the relevant scientific communities. . . . We thus adhere to the *Frye* standard. . . .”

### Pre-Daubert Approaches

An understanding of the post-*Daubert* developments requires

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3 509 U.S. at 587 (“We interpret the legislatively-enacted Federal Rules of Evidence as we would any statute.”).


6 Id.

some appreciation of the pre-Daubert case law. At the time Daubert came before the Supreme Court, there were four approaches to the admissibility of scientific evidence in this country. First, a majority of jurisdictions followed the Frye general acceptance test, including most federal circuit courts. Second, a number of courts had rejected Frye, adopting a relevancy test. Under this view, if the expert was qualified, the underlying technique used by that expert was also qualified. In practice, this approach often left the reliability issue to the jury.

In the 1980s, a third position began to develop, one that rejected Frye but required a judicial determination of reliability. This reliability approach was more stringent than the relevancy approach. Under this approach, the trial court was required to go beyond the expert’s qualifications and scrutinize the reliability of the underlying scientific technique. This approach was the precursor of the Supreme Court’s decision in Daubert.

Finally, an approach labelled “Frye plus” surfaced in some DNA cases. This approach is not an alternative that replaces Frye, but rather it adds a further element to the Frye test. Moreover, it is not necessarily tied to the Frye rule. Indeed, some recent decisions may be described as “Daubert plus.”

**Frye v. United States**

Numerous state courts continue to apply the Frye test post-Daubert. Since 1993, Frye has been applied to a wide range of scientific techniques in criminal cases, including Human Leukocyte Antigen (HLA) testing,8 battered women syndrome,9 and intoxication testing10 (including the horizontal gaze nystagmus test).11 Frye has also been applied to various aspects of DNA evidence: RFLP,12 PCR,13 binning,14 band-

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12 E.g., State v. Cauthron, 846 P.2d 502, 512 (Wash. 1993) (General scientific theory underlying DNA identifications and the RFLP test generally accepted in the relevant scientific communities).
13 E.g., State v. Carter, 524 N.W.2d 763, 783 (Neb. 1994) (DNA-PCR DQ alpha statistical probability calculations not generally accepted); State v. Russell, 882 P.2d 747, 768 (Wash. 1994) (PCR-DQ alpha generally accepted; the Cetus kit is only one means of PCR testing and need not be shown to be generally accepted), cert. denied, 514 U.S. 1129 (1995).
14 E.g., People v. Venegas, 36 Cal. Rptr. 2d 856, 864-66 (Cal. App. 1995) (prosecution failed to establish that FBI “binning” method and statistical calculations satisfy Frye; reliability of Cell-
shifting, statistical calculations, and the ceiling principle. Many important jurisdictions still adhere to the Frye rule: Alaska, California, Colorado, Florida, Illinois, Kansas, Maryland, Nebraska, New York, and Washington. Some Frye jurisdictions, however, have not definitively rejected Daubert, but have merely postponed consideration of the issue. In other cases, intermediate appellate courts have felt bound to apply Frye until their respective state supreme courts speak on the issue.

23 State v. Hill, 895 P.2d 1238, 1245 (Kan. 1995) ("Kansas has repeatedly applied Frye.").


25 State v. Carter, 524 N.W.2d 763, 783, 779 (Neb. 1994) ("We decline to adopt the less demanding Daubert standard and reaffirm Frye as the standard for determining the admissibility of DNA evidence.").


27 State v. Riker, 869 P.2d 43, 48 n.1 (Wash. 1994) (en banc) (Court will "continue to adhere to the view that the Frye analysis is a threshold inquiry to be considered in determining the admissibility of evidence under ER 702"; however, "many of the "general observations" made in Daubert may be of use to trial judges in making the threshold Frye determination.").

28 Commonwealth v. Crews, 640 k2 d 395, 400 n.2 (Pa. 1994) ("Daubert relaxes, somewhat, the impediments to admission of novel scientific evidence. . . Whether or not the rationale of Daubert will supersede or modify the Frye test in Pennsylvania is left to another day.").

29 State v. Cissne, 865 P.2d 564, 569 (Wash. App. 1994) ("[U]ntil such time as our Supreme Court abandons Frye and interprets ER 702 in the same manner as Daubert Fed. R. Evid. 702, we are bound by . . . previous decision.").
In defending its decision to adhere to Frye, the Washington Supreme Court made the following comment:

The State maintains that this court should abandon Frye and adopt Daubert. The State argues that Frye is difficult to apply. While Frye may be difficult to apply in some contexts, this is a result of the complexity of the particular science at issue, the extent to which the scientific community has made its view known, and the extent of any dispute in the scientific community. The same, or similar problems, arise under Daubert, including questions of testability, the extent to which the scientific technique or method is accepted by the scientific community, and drawing the line between legitimate science and “junk” science, along with other questions. Questions of admissibility of complex, controversial scientific techniques or methods, like those involving DNA evidence, are going to be difficult under either standard.30

Relevancy Approach

In his 1954 evidence text, Professor Charles McCormick criticized the Frye test. In his view:

“General scientific acceptance” is a proper condition upon the court’s taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. Particularly, its probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, unfair surprise and undue consumption of time.31

The balancing of probative value against other factors such as misleading the jury, of which McCormick spoke, is comparable to present Federal Rule 403. In practice, however, this approach might be quite different. Since most trial judges do not possess the scientific background to determine relevance/reliability, the judge “will generally be forced to accept the probative value of the evidence as what a qualified expert testifies it to be.”32 In effect, qualifying the expert presumptively qualifies the technique. This is too lax a standard for criminal cases. Moreover, “[t]he major flaw in the relevancy analysis . . . is its failure to recognize the distinctive problems of scientific evidence.”33

Daubert implicitly rejects this approach. The United States Supreme Court emphasized: “That the Frye test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of sci-

scientifc evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.34

Despite Daubert, some courts still follow this approach. For example, in State v. Peters35 the Wisconsin Court of Appeals, in upholding the admissibility of DNA evidence, stated that Wisconsin followed neither Frye nor Daubert: “Once the relevancy of the evidence is established and the witness is qualified as an expert, the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-examination or by other means of impeachment.”36

In State v. Donner,37 an intoxication case, the same court wrote:

[B]efore Daubert, the Frye test was not the law in Wisconsin. To that extent, Wisconsin law and Daubert coincide. Beyond that, Wisconsin law holds that “any relevant conclusions which are supported by a qualified witness should be received unless there are other reasons for exclusion.”38

Stated otherwise, expert testimony is admissible in Wisconsin if relevant and will be excluded only if the testimony is superfluous or a waste of time.

Assuming that Daubert in its application represents something beyond Walstad, we observe that we... are bound to follow our supreme court case law.38

In sum, Daubert not only rejects Frye but the relevancy test as well.

Reliability Approach

A number of jurisdictions have explicitly rejected Frye in favor of the Daubert approach—for example, Connecticut,39 Indiana,40 Kentucky,41 Massachusetts,42 New

34 509 U.S. at 589.
35 State v. Peters, 534 N.W.2d 867 (Wis. App. 1995) (DNA admissible notwithstanding the absence of Native Americans from the database used to project the likelihood of a coincidental DNA match), rev. denied, 537 N.W.2d 572 (Wis. 1995).
36 Id. at 873.
38 Id. at 374 (quoting State v. Walstad, 351 N.W.2d 469, 487 (Wis. 1984)).
40 Steward v. State, 652 N.E.2d 490, 498 (Ind. 1995) (“The concerns driving Daubert coincide with the express requirement of Indiana Rule of Evidence 702(b) that the trial court be satisfied of the reliability of the scientific principles involved. Thus, although not binding upon the determination of state evidentiary law issues, the federal evidence law of Daubert and its progeny is helpful to the bench and bar in applying Indiana Rule of Evidence 702(b).”); McGrew v. State, 673 N.E.2d 787, 800 (Ind. App. 1996) (“[T]he State failed to present any evidence to satisfy the first three prongs of Daubert.”).
41 Cecil v. Commonwealth, 888 S.W.2d 669, 675 (Ky. 1994) (clinical psychologist testimony on mens rea properly admitted under Daubert).
42 Commonwealth v. Lanigan, 641 N.E.2d 1342, 1349 (Mass. 1994) (“We accept the basic reasoning of the Daubert opinion.”).
Even before *Daubert*, however, courts in non-*Frye* jurisdictions had adopted a type of "reliability" approach. For example, in 1984 the Oregon Supreme Court rejected the *Frye* test, but then went on to exclude polygraph evidence under the Oregon Rules of Evidence. Louisiana applied a comparable analysis in polygraph and voice stress analysis cases. Similarly, courts excluded truth-serum evidence on this basis.

Post-*Daubert* cases falling into this category include: Arkansas, Delaware, Georgia, Iowa, Louisiana, Montana, North Carolina, and West Virginia. Court of Appeals of the State of Arkansas, 915 S.W.2d 284, 294 (Ark. 1996) (DNA evidence no longer novel; *Daubert* adopted a reliability approach to Rule 702, comparable to the relevancy approach of *Prater* in which reliability is the critical element).


51 Moore v. State, 915 S.W.2d 284, 294 (Ark. 1996) (DNA evidence no longer novel; *Daubert* adopted a reliability approach to Rule 702, comparable to the relevancy approach of *Prater* in which reliability is the critical element.).

52 Nelson v. State, 628 A.2d 69, 73–75 (Del. 1993) ("Our decisions [in prior cases] are consistent with the Supreme Court’s decision in *Daubert*.")

53 Carr v. State, 482 S.E.2d 314 (Ga. 1997) ("[O]ur decisions [in prior cases] are consistent with the Supreme Court’s decision in *Daubert*.")


55 State v. Foret, 628 So. 2d 1116, 1123–27 (La. 1993) ("Past decisions of this court have espoused similar sentiments [as *Daubert*].")

56 State v. Moore, 885 P.2d 457, 471 (Mont. 1994) ("[T]he guidelines set forth in *Daubert* are consistent with our previous holding. . . . concerning the admission of expert testimony of novel scientific evidence, and we, therefore, adopt the *Daubert* standard.")

57 State v. Goode, 461 S.E.2d 631 (N.C. 1995) (bloodstain pattern interpretation admissible under North Caro-
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Oregon, 58 Utah, 59 Vermont, 60 and Wyoming. 61 Consequently, Daubert did not have much of an effect in these jurisdictions, except to the extent that it moved a state from the less stringent relevancy approach to the reliability approach. In contrast, in State v. Cosby 62 the Utah Supreme Court indicated that its reliability approach was more stringent than the one required by Daubert. The Court wrote:

If there is a noteworthy difference between the two opinions, it is perhaps that our opinion in Rimmasch provides a detailed and rigorous outline for trial courts to follow when making determinations concerning the admissibility of scientific evidence. . . . "[T]he trial court should carefully explore each logical link in the chain that leads to expert testimony given in court and determine its reliability." The Supreme Court in Daubert, on the other hand, emphasized a more flexible approach. . . .

Frye "Plus" & Daubert "Plus"

Before Daubert was decided, several courts had applied a Frye-plus test. 64 For example, in People v. Castro, 65 the court set forth a three-pronged analysis for the admissibility of scientific evidence. The proponent must show that (1) the underlying theory has been generally accepted, (2) the procedures implementing the theory have been generally accepted, and (3) the testing laboratory has followed these procedures. Because of the "complexity" of DNA analysis and its "powerful impact" on a jury, the court held that "passing muster under Frye alone is insufficient." In the court's view, the prosecution satisfied the first two prongs but not the third. Daubert, Frye, and the relevancy approach all relate only to the first two prongs.

Note, however, that this requirement predated the DNA cases. In a 1971 case involving chromatographic ink analysis, the court stated: "It is widely recognized that the party offering the results of laboratory tests must . . . vouch for its correct administration in the particular case." 66 Moreover, this founda-

58 State v. O'Key, 899 P.2d 663, 680 (Or. 1995) (en banc) ("Both Daubert and Brown allow Frye's 'general acceptance' standard to be considered as one factor in the trial court's decision about admissibility. . . . Faced with a proffer of expert scientific testimony, an Oregon trial court . . . should find Daubert instructive"); HGN intoxication test is scientifically valid.


63 Id. at 642 (quoting State v. Rimmasch, 775 P.2d 388, 403 (Utah 1989)).


tional requirement is applied daily in intoxication and radar cases.\(^{67}\)

While the Alabama and Nebraska Supreme Courts adopted the three-prong test,\(^{68}\) the federal courts split on the issue. In *United States v. Two Bulls*,\(^{69}\) the Eighth Circuit adopted the *Castro* approach. In contrast, the Second Circuit, which had earlier rejected *Frye*, also rejected this “el-

67 See I Giannelli & Imwinkelried, *Scientific Evidence* 36 (2d ed. 1993) (listing cases involving polygraph and voiceprint as well as other types of scientific evidence that adopt this position).

68 See also Ex parte Perry, 586 So. 2d 242, 249–50 (Ala. 1991) (adopting the three-pronged test) (“In this particular case, did the testing laboratory perform generally accepted scientific techniques without error in the performance or interpretation of the tests?”); Ex parte Hutcherson, 677 So. 2d 1205, 1209 (Ala. 1996) (“[T]he testimony from forensic scientist Elaine Scott failed to satisfy the third prong of the *Perry* test because she did not testify as to the quality controls used by the Mobile laboratory [for DNA]. Additionally, testimony from Roger Morrison failed to sufficiently meet the third prong, because he explained only one type of quality control procedure used and did not testify as to other quality control procedures used. . . . ”); State v. Houser, 490 N.W.2d 168, 181 (Neb. 1992) (“[T]he trial court, in determining admissibility of DNA evidence, must first be satisfied, and find, as to the general acceptance of relevant DNA theories in the scientific community and must be satisfied as to the acceptance and validity of the methodology of testing DNA used. The trial court then determines if specific procedures were properly followed in the case before the court.”).

69 United States v. Two Bulls, 918 F.2d 56 (8th Cir. 1990) (adopting *Castro* approach), vacated en banc, dismissed as moot after defendant’s death, 925 F.2d 1127 (8th Cir. 1991).

The post-*Daubert* developments are difficult to categorize. Several *Frye* jurisdictions have addressed this issue. In *People v. Wesley*,\(^{71}\) the New York Court of Appeals affirmed *Frye* but held that case-specific errors generally go to the weight of the evidence, to its admissibility. As the highest court in New York, *Wesley* overrules *Castro*. In rejecting the three-pronged test, the Maryland Court of Appeals adopted an intermediate approach: “Although these particularized challenges ordinarily will go to the weight of the evidence rather than its admissibility, the trial judge retains discretion to exclude evidence if it is so unreliable that it would not be helpful to the factfinder.”\(^{72}\)

Even after *Daubert*, the Eighth Circuit in *United States v. Martinez*\(^{73}\) continued to impose this “plus” requirement:

We believe that the reliability inquiry set forth in *Daubert* mandates that there be a preliminary showing that the expert properly performed a reliable methodology in arriving at his opinion. . . . In order to determine whether scientific testimony is reliable, the court must conclude that the testimony was derived from the application


73 United States v. Martinez, 3 F.3d 1191, 1197–98 (8th Cir. 1993).
of a reliable methodology or principle in the particular case.

Thus, we conclude that the court should make an initial inquiry into the particular expert’s application of the scientific principle or methodology in question. The court should require the testifying expert to provide affidavits attesting that he properly performed the protocols involved in DNA profiling.74

In United States v. Galbreth,75 a federal district court also discussed the Daubert “plus” issue in a polygraph case: “It is not entirely clear whether Daubert requires as a prerequisite to admissibility that the proponent establish the validity of the specific application of a scientific technique.”76 The court further remarked: “[A]fter reviewing the case law addressing this issue in the context of other forensic laboratory techniques and after careful consideration of the testimony presented at the hearing regarding the polygraph technique, the Court holds that in the context of polygraph evidence, such scrutiny is imperative to a faithful application of Daubert.”77 Accordingly, the court went on to rule “that in addition to establishing the scientific validity of the polygraph technique in the abstract, the proponent of the proposed testimony must also prove that the specific examination was conducted properly by a competent examiner.”78

Texas has also followed this approach: “To be considered reliable, evidence of a scientific theory must satisfy the following three criteria: (a) the underlying theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question.”79 In addition, Texas has required the proponent of novel scientific evidence to establish its reliability by clear and convincing evidence.80

Daubert’s “Relaxed” Standard

A related issue concerns the extent to which Daubert lowers the barriers to admissibility. At the time Daubert was decided in 1993, many commentators interpreted the Court’s opinion as replacing the

74 The Eighth Circuit later withdrew the first opinion and substituted a new opinion. The court’s position on this issue, however, does not appear to have changed. The court wrote:

We believe that the reliability inquiry set forth in Daubert mandates that there be a preliminary showing that the expert properly performed a reliable methodology in arriving at his opinion. ... [Daubert] suggests that the inquiry extends beyond simply the reliability of the principles or methodologies in the abstract. In order to determine whether scientific testimony is reliable, the court must conclude that the testimony was derived from the application of a reliable methodology or principle in the particular case.


76 Id. at 880–81.

77 Id. at 881.

78 Id. at 882.


80 Id.
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Frye general acceptance standard with a more liberal standard of admissibility. Passages in the opinion support this view. For example, the Court commented:

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.81

Some later cases embraced this position. For example, in United States v. Bonds,82 the Sixth Circuit ruled: "We find that the DNA testimony easily meets the more liberal test set out by the Supreme Court in Daubert."83 Similarly, the Second Circuit has written: "[B]y loosening the strictures on scientific evidence set by Frye, Daubert reinforces the idea that there should be a presumption of admissibility."84 The polygraph cases illustrate this development. The Fifth Circuit has observed that "the rationale underlying this circuit's per se rule against admitting polygraph evidence did not survive Daubert."85 The court went on to state:

[W]e do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact. We merely remove the obstacle of the per se rule against admissibility, which was based on antiquated concepts about the technical ability of the polygraph and legal precepts [the Frye rule] that have been expressly overruled by the Supreme Court.86

There is, however, an alternative interpretation of Daubert. Admittedly, Daubert overruled Frye and adopted a different standard of admissibility—but not necessarily a less stringent one. Daubert required the trial judge to make an independent assessment of reliability. The Court wrote:

[I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.87

In addition, the trial court's admissibility determination "entails a preliminary assessment of whether

81 509 U.S. at 589.
83 Id. at 568. See also United States v. Kwong, 69 F.3d 663, 668–69 (2d Cir. 1995) ("The Federal Rules of Evidence, although conceded more liberal than the Frye test, still require a determination that the proffered scientific evidence is both relevant and reliable.").
85 United States v. Posado, 57 F.3d 428, 429 (5th Cir. 1995).
86 Id. at 434.
87 Daubert 509 U.S. at 590.
the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.\textsuperscript{88}

\textit{General Electric Co. v. Joiner,}\textsuperscript{89} the United States Supreme Court's only decision interpreting \textit{Daubert,} provides some further elaboration. Joiner alleged that exposure to PCBs had caused his cancer, but the trial court had excluded the plaintiff's expert testimony on causation as unsupported speculation. The Supreme Court was asked to determine the standard of appellate review. The Court adopted an abuse-of-discretion standard for reviewing a trial court's admissibility decision under \textit{Daubert.} In one passage, the Court wrote: "While the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under \textit{Frye,} they leave in place the 'gatekeeper' role of the trial judge in screening such evidence."\textsuperscript{90} Again, the ambiguity of \textit{Daubert} is repeated; a "broader range" of testimony is admissible, but the trial court's gatekeeping function is also emphasized. Moreover, the trial court in \textit{Joiner} had excluded the plaintiff's expert testimony, i.e., applying a rather demanding admissibility standard.

In addition, the Supreme Court elaborated on a sentence in \textit{Daubert} that had proved troublesome. In \textit{Daubert} the Court had written that the "focus, or course, must be solely on principles and methodology, not on the conclusions that they generate."\textsuperscript{91} The plaintiff argued that the district court had erred because it had disagreed with the conclusions (not the methods) that the experts had drawn from the scientific studies. The Court responded to this argument by noting that:

[C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either \textit{Daubert} or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the \textit{ipse dixit} of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.\textsuperscript{92}

Here, again, the district court had not applied a lax standard; it had scrutinized the underlying scientific basis (i.e., animal and epidemiological studies) of the experts' opinions. As the Supreme Court noted, the animal studies were "dissimilar" to the facts presented in this litigation and the epidemiological studies "were not a sufficient basis for the experts' opinions."\textsuperscript{93} In sum, \textit{Joiner} does not seem to resolve the "relaxed" standard issue.

The view that \textit{Daubert} does not adopt a lax standard finds support in recent cases dealing with questioned document and hair comparisons.

\textbf{Questioned Documents}

In \textit{United States v. Starzecpyzel}\textsuperscript{94} a federal district court concluded

\begin{itemize}
  \item \textsuperscript{88} Id. at 592–93.
  \item \textsuperscript{89} \textit{General Electric Co. v. Joiner,} 118 S. Ct. 512 (1997).
  \item \textsuperscript{90} Id. at 517.
  \item \textsuperscript{91} \textit{Daubert,} 509 U.S. at 595.
  \item \textsuperscript{92} \textit{Joiner,} 118 S. Ct. at 519.
  \item \textsuperscript{93} Id. at 518.
  \item \textsuperscript{94} \textit{United States v. Starzecpyzel,} 880 F. Supp. 1027, 1038 (S.D.N.Y. 1995).
\end{itemize}

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that "the testimony at the Daubert hearing firmly established that forensic document examination, despite the existence of a certification program, professional journals and other trappings of science, cannot, after Daubert, be regarded as 'scientific...knowledge.'" In addition, "while scientific principles may relate to aspects of handwriting analysis, they have little or nothing to do with the day-to-day tasks performed by [Forensic Document Examiners]...[T]his attenuated relationship does not transform the FDE into a scientist."95

The court ruled that Daubert applied only to expert testimony that is "scientific" within the meaning of Federal Rule 702. But Rule 702 also permits the admission of expert testimony based on "technical" or "other specialized knowledge," and in the court's view, Daubert did not apply to nonscientific experts falling within these categories. The court went on to hold, however, that the Rule 702 requirements limiting expert testimony to that which assists the trier of fact and is proffered by a qualified expert must nevertheless be satisfied: "[T]his court concludes that adequate guidance can be found within Rule 702 to conduct a meaningful inquiry into the reliability of the expertise claimed by FDEs."96 After the court found the testimony to be sufficiently reliable, it considered the risk of unfair prejudice. Because of FDE's use of terms such as "laboratory" and references to authorities with titles that may contain the words "science" or "scientific," there was a risk that jurors may bestow upon FDE's the aura of the infallibility of scientists. Moreover, use of a nine-level scale of probability to express an opinion regarding genuineness appeared, in the court's view, to be misleadingly precise. Such overly fine distinctions are inappropriate in forensic document examination where it is conceded that conclusions are drawn, in large part, on subjective criteria.97

These problems do not preclude admission because several procedures can attenuate these risks. The first is a jury instruction stating that "FDEs offer practical rather than scientific expertise."98 Second, the court may restrict testimony relating to the existence of the nine-level scale. Finally, the defense is entitled "to attack the reliability of forensic document examination...to attack the expertise of each testifying FDE,[and] to introduce the testimony of their own FDE."99

Later cases affirmed this view. In United States v. Velasquez,100 the Third Circuit ruled that the trial court "erred as a matter of law in denying the defense the opportunity to criticize the standards employed in that field of expertise." The expert would

95 Id. at 1041.
96 Id. at 1043.
97 Id. at 1048.
98 Id. at 1049. The court attached a draft jury instruction to the end of the opinion. Id. at 1050–51.
99 Id. at 1050.
have testified that "handwriting analysis is not a valid field of scientific expertise because it lacks standards to guide experts in weighing the match or non-match of particular handwriting characteristics." 101

In United States v. Jones, 102 the Sixth Circuit wrote: "In short, expert handwriting analysis is a field of expertise under the Federal Rules of Evidence. This decision, however, does not guarantee the reliability or admissibility of this type of testimony in a particular case."

**Hair Comparisons**

In Williamson v. Reynolds, 103 a federal habeas corpus case, an expert testified that hair samples were "microscopically consistent." However, the "expert did not explain which of the 'approximately' 25 characteristics were consistent, any standards for determining whether the samples were consistent, how many persons could be expected to share this same combination of characteristics, or how he arrived at his conclusions." Moreover, "[t]his court has been unsuccessful in its attempts to locate any indication that expert hair comparison testimony meets any of the requirements of Daubert." 104 The court further observed: "Although the hair expert may have followed procedures accepted in the community of hair experts, the human hair comparison results in this case were, nonetheless, scientifically unreliable." 105 Finally, the prosecutor exacerbated the problem by stating in the closing argument, "[T]here's a match." The state court also misinterpreted the evidence, writing that the "hair evidence placed [Petitioner] at the decedent's apartment." The "prosecutor's mischaracterization of the hair evidence misled the jury...." 106

The Tenth Circuit reversed on the ground that due process, not Daubert, was the standard in habeas cases. 107

Subsequently, an Indiana appellate court wrote: "[T]he State mistakenly believed that a Daubert foundation was only required for novel scientific techniques, and thus did not attempt to lay the requisite foundation of evidentiary reliability [for hair comparison evidence]." 108

**Conclusion**

In sum, it is too early to predict the long-range impact of Daubert. As Daubert moves into its fifth year, the courts are still struggling to define its scope. Moreover, the state courts are in the process of deciding whether the Daubert standard should replace Frye.

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101 64 F.3d at 846.
102 United States v. Jones, 107 F.3d 1147, 1160 (6th Cir. 1997).
104 Id. at 1557.
105 Id. at 1558.
107 Williamson v. Ward, 110 F.3d 1508, (10th Cir. 1997).