

Daubert Comes to North Carolina

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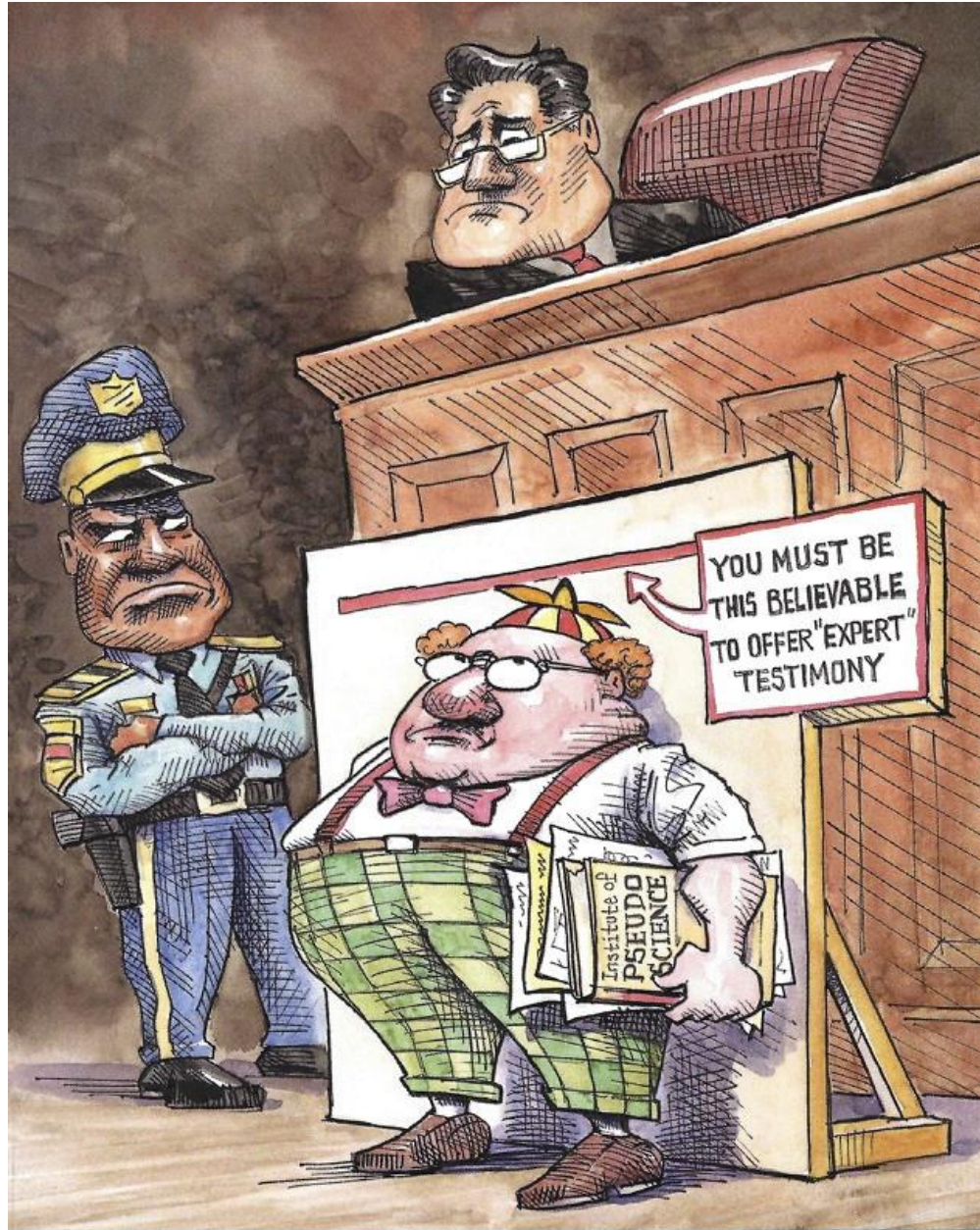
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Rule 702 – Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

<https://www.youtube.com/watch?v=3nGQLQF1b6I>

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - (b) the testimony is based on sufficient facts or data;
 - (c) the testimony is the product of reliable principles and methods.
- (3) the witness has reliably applied the principles and methods to the facts of the case.

- Garrett, Brandon L. and Fabricant, M. Chris, The Myth of the Reliability Test (March 8, 2018). FORDHAM LAW REVIEW, Vol. 86, 2018. Available at SSRN: <https://ssrn.com/abstract=3136632>



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The Myth of the Reliability Test

Fordham Law Review, Vol. 86, 2018

43 Pages • Posted: 12 Mar 2018

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Date Written: March 8, 2018

Abstract

The U.S. Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and subsequent revisions to Federal Rule of Evidence 702, was supposed to usher a reliability revolution. This modern test for admissibility of expert evidence is sometimes described as a reliability test. Critics, however, have pointed out that judges continue to routinely admit unreliable evidence, particularly in criminal cases, including flawed forensic techniques that have contributed to convictions of innocent people later exonerated by DNA testing. This Article examines whether Rule 702 is in fact functioning as a reliability test, focusing on forensic evidence used in criminal cases and detailing the use of that test in states that have adopted the language of the 2000 revisions to Rule 702. Surveying hundreds of state court cases, we find that courts have largely neglected the critical language concerning reliability in the Rule. Rule 702 states that an expert may testify if that testimony is "the product of reliable principles and methods," which are "reliably applied" to the facts of a case. Or as the Advisory Committee puts it simply, judges are charged to "exclude unreliable expert testimony." Judges have not done so in state or federal courts, and in this study, we detail how that has occurred, focusing on criminal cases.

We assembled a collection of 229 state criminal cases that quote and in some minimal fashion discuss the reliability requirement. This archive will hopefully be of use to litigators and evidence scholars. We find,

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NC	State v. Daughtridge, 789 S.E.2d 667 (N.C. Ct. App. 2016)	Exclude	Causation	Π
NC	State v. Frye, No. COA16-362, 2016 WL 6440555 (N.C. Ct. App. Nov. 1, 2016)	Admit	Drugs	Π
NC	State v. Greene, No. COA16-1309, 2017 WL 4127730 (N.C. Ct. App. Sept. 19, 2017)	Admit	Horizontal gaze nystagmus	Π
NC	State v. Hunt, 790 S.E.2d 874 (N.C. Ct. App. 2016)	Admit	Drugs	Π
NC	State v. McDonald, 716 S.E.2d 250 (N.C. Ct. App. 2011)	Admit	Drugs	Π
NC	State v. McGrady, 753 S.E.2d 361 (N.C. Ct. App. 2014)	Exclude	Use of force	Δ
NC	State v. McGrady, 787 S.E.2d 1 (N.C. 2016)	Exclude	Reaction times	Δ
NC	State v. Perry, 750 S.E.2d 521 (N.C. Ct. App. 2013)	Admit	Child abuse	Π

The *Daubert* Trilogy

(1) *Daubert* (1993): Evidence must be reliable; *Frye* is dead

The *Daubert* factors:

1. Can theory or technique be or has it been tested?
2. Has theory or technique been subjected to peer review and publication?
3. What is “known or potential error rate” of theory or technique?
4. Are there standards controlling technique’s operation?
5. Has theory or technique achieved “general acceptance?”

The *Daubert* Trilogy, Cont'd

- (2) *General Electric v. Joiner* (1997): May exclude if linkage to data is only by *ipse dixit* of expert; Appellate review for abuse of discretion
- (3) *Kumho Tire v. Carmichael* (1999): extends *Daubert* to all expert testimony, not just novel scientific techniques; reinforces abuse of discretion standard of review

The Daubert trilogy established “exacting standards of reliability” for the admission of expert testimony. *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000).

Additional Reliability Factors (derived from the Advisory Committee Note to Rule 702)

6. Is expert testifying about matters growing naturally out of research that is independent of the litigation?
7. Has expert “unjustifiably extrapolated” from accepted premise to unfounded conclusion?
8. Has expert “adequately accounted for alternative explanations?”
9. Was expert as careful in his consulting work as in his regular professional work?
10. Is expert’s field of expertise known to reach reliable results for type of opinion being given?

Practical Advice for Litigating *Daubert* Hearings

- A. Take advantage of the opportunity provided by Rule 702 and the *Daubert* standard to challenge expert testimony even if similar testimony has regularly been admitted in the past.

State v. Babich, 797 S.E.2d 359 (2017):

- “[W]here, as here, the expert concedes that her opinion is based entirely on a speculative assumption about the defendant—one not based on any actual facts—that testimony does not satisfy the *Daubert* ‘fit’ test because the expert’s otherwise reliable analysis is not properly tied to the facts of the case. *Daubert*, 509 U.S. at 593. Accordingly, we hold that the trial court abused its discretion by admitting the challenged expert testimony in this case.”

State v. McPhaul, 808 S.E.2d 294 (2017):

“Wood previously testified that during an examination, she compares the pattern type and minutia points of the latent print and known impressions until she is satisfied that there are “sufficient characteristics and sequence of the similarities” to conclude that the prints match. However, Wood provided no such detail in testifying how she arrived at her actual conclusions *in this case*. Without further explanation for her conclusions, Wood implicitly asked the jury to accept her expert opinion that the prints matched. Since Wood failed to demonstrate that she ‘applied the principles and methods reliably to the facts of the case,’ as required by Rule 702(a)(3), we hold that the trial court abused its discretion by admitting this testimony.”

McPhaul Amicus Motion and Brief:

- https://www.ncappellatecourts.org/show-file.php?document_id=230138
- https://www.ncappellatecourts.org/show-file.php?document_id=230139

- B. Even if you cannot exclude a government expert's testimony under Rule 702, try to limit the expert's testimony. In other words, do not let their experts overstate their conclusions.



The judge didn't disqualify the expert witness for his marginal credentials, but did mandate mouse ears.

- C. Spend time with your expert. Meet with the government's experts.
- <https://www.youtube.com/watch?v=CFdJza0AbeA>

- D. Make a Record!

Resources

PCAST Report:

<https://obamawhitehouse.archives.gov/administration/eop/ostp/pcast/docsreports>

NAS Report:

<https://www.nap.edu/catalog/12589/strengthening-forensic-science-in-the-united-states-a-path-forward>

NC Forensic Resource Counsel:

- <http://www.ncids.com/forensic/>
- <https://ncforensics.wordpress.com/2016/11/21/using-the-pcast-report-in-the-courtroom/>

702 Case Law

- [NC Superior Court Judges' Benchbook](#)
- NC 702 Opinions (See Jessie Smith's [Criminal Case Compendium>Evidence>Opinions>Expert Opinions](#)) (105 cases as of Sept. 14, 2018)

- Judicial Notice
- Relevancy
- Rule 403
- Rule 404(b): Evidence of Other Crimes, Wrongs, or Acts
- Character Evidence
- Habit Evidence
- Impeachment
- Rule 609: Impeachment by Evidence of Conviction of a Crime
- Privileged Communications
- Expert Testimony
- Pleas and Plea Discussions
- Refreshed Recollection
- Sexual Assault Cases
- Criminal Cases Involving Child Victims and Child Witnesses
- Hearsay Rules
- Confrontation Clause
- Routine Limiting Instructions in Criminal Cases



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Most sections are posted as PDFs. However, if the section contains items such as sample orders, a Word version also is posted so that you can download and use the form order.

The benchbook is designed primarily for online use. However, you can print out sections & keep them in a trial notebook. Either way, sign up [here](#) to receive emails about new or

School of Government, The University of North Carolina at Chapel Hill, Jessica Smith (Ed.)

Evidence >> Expert Testimony

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This section discusses the admissibility of expert testimony in criminal cases under Evidence Rule 702.

Rule 702	Daubert
expert testimony	reliability
forensic evidence	DNA
bite mark	fingerprint
tool mark	blood alcohol
blood spatter	fiber analysis

UNC School of Government

NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK

CRIMINAL EVIDENCE: EXPERT TESTIMONY

Jessica Smith, UNC School of Government (August 2017)

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Opinions

Expert Opinions

- Issues Re: of Amendments to Ballistics
- Dog Bite
- Sexual Assault Cases
- Computer Experts
- Criminal Practice Experts

Drug Cases

- Chemical Analysis/Visual Identification
- Testing Only a Portion of the Substance
- Combining Substances for Testing
- NarTest Cases
- Lab Licensing/Accrediting Issues
- Miscellaneous Cases

- Fingerprint Experts
- Fire Investigation
- Impaired Driving, HGN & DRE
- Invading Province of Jury
- Medical Examiners & Pathologists
- Mental Health Experts
- Procedure
- Prosecutor's Fallacy—DNA Expertise
- Repressed Memory
- Use of Force & Related Expert Testimony
- Qualifying Witness as Expert

Lay Opinions

- On Credibility
- On Defendant's Guilt
- On Legal Issue

Smith's Criminal Case Compendium

About

This compendium includes significant criminal cases by the U.S. Supreme Court & N.C. appellate courts, Nov. 2008 – Present. Selected 4th Circuit cases also are included.

Instructions

Navigate using the table of contents to the left or by using the search box below. Use quotations for an exact phrase search. A search for multiple terms without quotations functions as an "or" search. Not sure where to start? The 5 minute video tutorial offers a guided tour of main features – [Launch Tutorial \(opens in new tab\)](#).

Displaying 1 - 105 of 105

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State v. McGrady, 368 N.C. 880 (June 10, 2016)

Affirming the decision below, the court held that the trial court did not abuse its discretion by ruling that the defendant's proffered expert testimony did not meet the standard for admissibility under Rule 702(a). The defendant offered its expert to testify on three principal topics: that, based on the "pre-attack cues" and "use of force variables" present in the interaction between the defendant and the victim, the defendant's use of force was a reasonable response to an imminent, deadly assault that the defendant perceived; that the defendant's actions and testimony are consistent with those of someone experiencing the sympathetic nervous system's "fight or flight" response; and that reaction times can explain why some of the defendant's defensive shots hit the victim in the back. Holding (for reasons discussed in detail in the court's opinion) that the trial court did not abuse its discretion by excluding this testimony, the court determined that the 2011 amendment to Rule 702(a) adopts the federal standard for the admission of expert witness articulated in

Reference Manual on Scientific Evidence

- Available at http://www.nap.edu/catalog.php?record_id=13163

US DOJ, Uniform Language for Testimony and Reports

- <https://www.justice.gov/olp/uniform-language-testimony-and-reports>

- E. Be creative with the *Daubert* (or other) factors for measuring reliability

- F. Go Narrow to Exclude expert testimony / Go Broad to Admit expert testimony

- G. Consider HOW to litigate the *Daubert* issues in your case.
 - Motion *in Limine*
 - Objection/*Voir Dire* during trial
 - RENEW YOUR OBJECTIONS!

- H. Constitutionalize Your Objections

Thank you!

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