

**Explanation of North Carolina's Alternative to the "Daubert Test"**  
**Concerning the Admissibility of Expert Testimony 3-12-10**

As you know, the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), do not apply in North Carolina, as held by the North Carolina Supreme Court in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004). Our Supreme Court reached this decision because it was concerned that trial courts asserting sweeping pre-trial "gatekeeping" authority under *Daubert* might unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence.

Instead, under the test in North Carolina, as set forth in *State v. Morgan*, 359 N.C. 131, 159, 604 S.E.2d 886, 903 (2004), *cert. denied*, 546 U.S. 830, 126 S.Ct. 47, 163 L.Ed.2d 79 (2005), our state courts must conduct a three-step inquiry when considering whether to admit expert testimony under Rule 702 of the Rules of Evidence.

The following analysis is applied in North Carolina, as explained in *State v. Anderson*, 175 N.C.App. 444, 447-450, 624 S.E.2d 393, 397-398 (2006)(emphasis added in bold):

[1] [2] Defendant contends that the trial court erred under Rule 702 of the Rules of Evidence by admitting Powell's ballistics testimony. \*448 Defendant argues that Agent Powell did not comply with "normally accepted scientific methodology" and that "Ms. Powell's results should not have been accepted under *Daubert*." Defendant further objects that "[f]or scientific evidence to be admissible, the expert must point to external sources that validate the methodology," citing *Daubert v. Merrell Dow Pharms.*, 43 F.3d 1311 (9th Cir.), *cert. denied*, 516 U.S. 869, 116 S.Ct. 189, 133 L.Ed.2d 126 (1995), the Ninth Circuit's decision on remand from *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). **Defendant has, however, argued the wrong standard.** As our Supreme Court confirmed in *State v. Morgan*, 359 N.C. 131, 159, 604 S.E.2d 886, 903 (2004) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004)), **"North Carolina is not a *Daubert* state."**

[3] [4] **Instead of evaluating expert witnesses under the standard set out in *Daubert*, courts in this State must conduct a three-step inquiry when considering whether to admit expert testimony pursuant to Rule 702 of the Rules of Evidence: "(1) whether the expert's proffered method of proof is reliable, (2) whether the witness presenting the evidence qualifies as an expert in that area, and (3) whether the evidence is relevant."** *Morgan*, 359 N.C. at 160, 604 S.E.2d at 903-04. **When making determinations about the admissibility of expert testimony, the trial court is given wide latitude and "rulings under Rule 702 will not be reversed on appeal absent an abuse of discretion."** *Id.*, 604 S.E.2d at 904.

[5] Defendant does not argue that Agent Powell was not qualified as an expert or that the evidence was not relevant. Defendant challenges only the reliability of Agent Powell's testimony. Reliability in this State is "a preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony. This assessment does not, however, go so far as to require the expert's testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence." *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687.

**[6] In order to assess reliability, a trial court may look to expert testimony regarding reliability, may take judicial notice, or may use a combination of the two approaches. *Id.* at 459, 597 S.E.2d 674, 597 S.E.2d at 687. The Supreme Court has indicated that the trial court should first review precedent "for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable." *Id.* \*449 "[W]hen specific precedent justifies recognition of an established scientific theory or technique advanced by an expert, the trial court should favor its admissibility, provided the other requirements of admissibility are likewise satisfied." *Id.***

**If no precedent exists, such as when an expert is proposing "novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques," the trial court is required to focus on "indices of reliability" to determine reliability, including the expert's use of established\*\*398 techniques, the expert's professional background in the field, the use of visual aids before the jury, and independent research conducted by the expert. *Id.* at 460, 597 S.E.2d at 687. These indices are not, however, exclusive. *Id.***

Our Supreme Court has previously upheld the admission of similar firearms or ballistics testimony. See *State v. Gainey*, 355 N.C. 73, 88-89, 558 S.E.2d 463, 473-74 (holding that the trial court did not err in admitting testimony of SBI agent regarding rifling characteristics of particular bullets based on his experience and the fact that he had tested the bullets upon which he based his opinion), *cert. denied*, 537 U.S. 896, 123 S.Ct. 182, 154 L.Ed.2d 165 (2002); *State v. Felton*, 330 N.C. 619, 638, 412 S.E.2d 344, 356 (1992) (upholding admissibility of SBI agent's testimony regarding rifling characteristics of particular bullets). Defendant does not address this precedent, but rather argues that the State did not meet its burden because "[t]he State presented no evidence substantiating the scientific validity" of Agent Powell's comparisons of the bullets and the gun.<sup>FN2</sup> As *Howerton* and *Morgan* establish, however, the State was not necessarily required to do so.

FN2. The case cited by defendant, *Sexton v. State*, 93 S.W.3d 96 (Tex.Crim.App.2002), employs a *Daubert* approach not applicable in North Carolina.

In challenging Agent Powell's methodology at trial, defendant did not offer any expert testimony or scientific literature. On appeal, however, defendant relies upon a series of journal articles that he contends establish that Agent Powell improperly failed to use photographs to document her work and that her methodology failed to comply with accepted scientific methods. Those articles were not, however, presented to the trial judge. A defendant cannot establish an abuse of discretion by the trial judge based on scientific literature never provided to that judge. Defendant's literature review thus does not demonstrate that the trial judge abused his discretion in making his preliminary determination that Agent Powell's testimony was sufficiently **\*450** reliable to meet the requirements of Rule 702 of the Rules of Evidence.

[7] [8] [9] **According to our Supreme Court, “once the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility.”** *Howerton*, 358 N.C. at 461, 597 S.E.2d at 688. **Questions of weight are for a jury to determine,** *id.* at 460, 597 S.E.2d at 687, and “**‘[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence,’**” *id.* at 461, 597 S.E.2d at 688 (quoting *Daubert*, 509 U.S. at 596, 113 S.Ct. at 2798, 125 L.Ed.2d at 484).

Defendant's arguments regarding the discoloration of the bullets resulting from the bodily fluids of the victim, the corrosion of the gun, and the subjective nature of Agent Powell's examination go to the weight of Agent Powell's testimony and not its admissibility. See *Felton*, 330 N.C. at 638, 412 S.E.2d at 356 (holding that uncertain length of time the bullets had been in an abandoned water heater and the fact that several types of guns could have produced the rifling characteristics at issue “impact the weight of the evidence, not its admissibility”). Defendant cross-examined Agent Powell about the accuracy of her methods and also questioned the witness about whether ballistic evidence was a scientific certainty. It was for the jury to decide how to weigh Agent Powell's testimony. See *Howerton*, 358 N.C. at 468, 597 S.E.2d at 692 (“[W]e are concerned that trial courts asserting sweeping pre-trial ‘gatekeeping’ authority under *Daubert* may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence.”). We, therefore, hold that the trial court did not abuse its discretion in admitting the expert testimony.

*State v. Anderson*, 175 N.C.App. 444, 447-450, 624 S.E.2d 393, 397-398 (2006).

Submitted by the NCIAAI Chapter Attorney on 3/12/10

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