



## Criminalistics Section – 2004

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### **B119 *Daubert* Factors Applied to the Examination of Footwear Evidence**

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The purpose of this presentation is to acquaint the footwear examiner with the *Daubert/Kumho* criteria and to offer suggestions for answering these criteria as they relate to footwear evidence.

This presentation will provide answers to these criteria that the author has used in a previous *Daubert* hearing along with suggestions that can be used to demonstrate the way that comparisons are done and the reliability of the methods used.

In *Daubert*, the United States Supreme Court has created a gatekeeping role for trial judges as to the admissibility of scientific expert testimony. The Supreme Court has envisioned that trial courts would conduct a factor-based analysis when determining whether the testimony is reliable. The issues to be considered by the trial judge are:

1. whether the theory or technique can be and has been tested.
2. the existence and maintenance of standards controlling the technique's operation;
3. whether the theory or technique has been subjected to peer review and publication;
4. the known or potential rate of error; and
5. general acceptance

The opinion noted that the factors did not comprise a definitive checklist or test.

Initially, *Daubert* was applied only to "scientific" expert testimony. In *Kumho* tire, the courts acknowledged that trial judges also have to apply the *Daubert* analysis in the context of experience-based expert testimony. This means whether your discipline is considered to be "scientific" or "technical," *Daubert* still applies.

This presentation will provide answers to these criteria that the author has used in a previous *Daubert* hearing along with suggestions that can be used to demonstrate the way that comparisons are done and the reliability of the methods used.

The prosecutor or judge may suggest that the jury be allowed to make the comparison between the footwear impression and the shoes in question. The author will recommend examples that you can use which should convince the court that this is not a good idea.

Avenues for further research and previous *Daubert* decisions will also be discussed.

***Daubert*, Footwear, Evidence**