



### E26 Dr. Cop: The Need to Examine Validation & Reliability Standards for Specialized Law Enforcement Knowledge Testimony

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After attending this presentation, attendees will understand inherent problems in validating the reliability of specialized knowledge.

The presentation will impact the forensic science community by illustrating the unreliability of police officers as expert witnesses.

In 2009, the National Academy of Sciences issued a report criticizing serious deficiencies in the nation's forensic science system and the necessity for major reformation (Report).<sup>1</sup> It discussed a lack of necessary comprehension of science by judges and lawyers, vague standards for evaluation of non-scientific experts, and adversity to change. The Report severely condemned a law enforcement culture that induces wrongful convictions. Although the Report addressed judicial practices and evidentiary standards for expert testimony, its primary focus was improvement within the forensic science community.

The important issue of police officers and federal agents as experts was tangentially addressed. Law enforcement personnel are routinely "qualified" as experts and their opinion testimony is admitted as evidence. Unlike scientific and technical experts, police undergo intense, but very short term training. In three months, brief classes presume to teach them knowledge and competence of scientific evidence, constitutional law, and crime prevention. Their expertise is superficial compared to other experts. There is no prerequisite of scientific training. A junior college associate's degree suffices. Yet, courts are quick to declare them experts.

Expert witness testimony is the most persuasive evidence.<sup>2</sup> Common witnesses can only testify to what they directly observe. Only experts are permitted to state opinions based on observations – and police experts greatly speculate. They are imbued with respect and admiration of courts and society. Their departments then give them prestige titles (for example, "Special Agent," "Inspector," or "Drug Recognition Expert") that do not of themselves ensure truthfulness or reliability. Upon being qualified by a judge, they receive an imprimatur that further enhances their credibility with uninformed jurors, who have a distorted view of the criminal justice system formed by art and not reality. Police are not neutral examiners of evidence. They have a deep bias to convict those they arrest.

Experts in law exist because of Federal Rule of Evidence 702. Three types are recognized: scientific, technical, and "other." Initially interpreted by the Supreme Court in the *Daubert* case,<sup>3</sup> for expert testimony to be admitted requires that it be helpful for the court to understand evidence or the jury to determine a fact at issue. It must also be reliable. In the *Kumho*<sup>4</sup> case the Court decided that these standards apply to all experts alike. They left this up to trial judges, and said the factors that prove reliability are flexible, but police are not exempt from scrutiny just because they are outside the realm of science. Since *Daubert* and *Kumho* these vague standards have resulted in massive confusion. An intergal difficulty of finding applicable factors for "other" experts is the complete lack of comprehension (and often disdain) of science by lawyers and judges. Factors that prove reliability in scientific fields may not precisely apply to police. However, scientific methodology is specifically designed to meet the goal of reliable knowledge. The less scientific police practices are, the less reliable their knowledge or expertise. Ergo, the oxymoron "Dr. Cop."

Courts initially avoided applying *Daubert's* admissibility standards to "other" experts. When *Kumho* confirmed the judicial "gatekeeping" function of protecting jurors from unreliable expert testimony must be applied to all experts, courts bogged on the vagueness of the factors. Many relied on the history of police expert testimony as irrefutable, and took judicial notice of it. The Supreme Court gave great deference to trial judges, and effectively shielded them from any review when it decided in *Joiner*<sup>5</sup> that "abuse of discretion" had to be shown to reverse a trial decision on admissibility.

The pervasive habit of past practices is very difficult to stop. Presumed police expertise is simply not expertise at all. It is based on shallow knowledge and is highly unreliable. It does not demonstrate the basic constructs for reliability. Police are not experts of any kind. Their testimony merits no higher consideration than a lay witness. If police aspire to expert witness status, they should abide by those requirements. Judges and lawyers may not know these standards, but any good theoretical or practical scientist does.

#### References:

1. Strengthening Forensic Science in America: A Path Forward, National Research Council of the National Academies, The National Academies Press, Washington D.C., 2009.
2. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993).



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3. *Daubert*, supra
4. *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999)
5. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997)

**Expert Witness, *Daubert*, Evidential Reliability**