



E3 Judicial Bias and Scientific Evidence in Criminal Cases

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After attending this presentation, attendees will have a better understanding of the possible predisposition of trial and appellate judges to routinely admit scientific evidence offered by the prosecution in criminal cases.

This presentation will impact the forensic science community by assisting attorneys and forensic scientists in understanding the basic psychological principles that affect judicial admissibility decisions.

What accounts for the current overwhelming court rejection of *Daubert* challenges? Judicial decisions often do not indicate that the judges weighed the scientific validity of proffered evidence meaningfully. Most of the decisions rationalize admissibility based on prior admissions of such evidence. Judges use what has been characterized as “judicial gymnastics,” including refusing to hold a hearing, taking “judicial notice” of admissibility, ignoring the *Kumho* case, reversing the burden of proof, or abdicating the “gatekeeper” duty by deferring to jurors to “weigh” scientific issues.

Why? One significant factor may be a systemic pro-prosecution bias on the part of judges that is reflected in admissibility decisions, regardless of the standards of *Frye* or *Daubert*. As Groscup, found, “as a general proposition, judges disfavor civil plaintiffs and criminal defendants and are more likely to rule against them than against their opposites even when presenting equivalent evidence or arguments.”¹

Systemic pro-prosecution bias by judges is a function of elementary psychological concepts. Guthrie described it as a reflection of an “attitudinal blinder,” relying on significant empirical studies of judicial attitudes and actions: Whether elected or appointed, judges come to the bench with political views. This is not to say that they have pre-committed to positions in particular cases, but—judges do have opinions, and these opinions or attitudes can predispose them to rule in ways that are consistent with those opinions or attitudes.

To establish the presence of attitudinal blinders among judges, political scientists have developed, and provided empirical evidence to support, the so-called attitudinal theory or model—the evidence suggests that attitudinal blinders are an issue not only at the highest court in the land but also in these lower courts.²

These “attitudinal blinders” are especially prevalent in criminal cases and especially in the state courts where most criminal cases are tried. As Professor Rodney Uphoff put it, “In the end, state court judges are, for the most part, rational actors whose attitudinal biases reflect their self-interest and their backgrounds. Most are answerable to a tough-on-crime electorate and are often reluctant, therefore, to make risky political decisions upholding the constitutional rights of criminal defendants.”³ Specifically, Uphoff comments on how this attitudinal bias manifests itself in criminal cases:

Most judges, especially those with prosecutorial experience, presume that most defendants are, in fact, guilty, even though some are, in fact, innocent. This presumption of guilt, pro-prosecution perspective not only affects the manner in which many judges rule on motions, evaluate witnesses, and exercise their discretion, but it also adversely affects the willingness of many judges to police law enforcement agents and prosecutors.⁴

The current legal state of forensic science evidence in criminal cases is somewhat schizophrenic. While many scientists and scholars, and even a congressionally mandated national study, seriously question whether there is validity to non-DNA forensic evidence, trial judges simply continue to admit such evidence and appellate judges continue to affirm them.

References:

1. *Modern Scientific Evidence: The Law and Science of Expert Testimony*, (eds. David L. Faigman, Michael J. Saks, Joseph Sanders, and Edward K. Cheng), 2009-2010 edition, at §1:35, p. 112.
2. Guthrie, Chris, *Misjudging*, 7 Nev. L. J. 420 (2007) at 438-440, citing *The Hearing of Samuel A. Alito, Jr.’s Nomination to the Supreme Court*, Hearing Before the S. Judiciary Comm., 109th Cong. 56 (2006).
3. Uphoff, Rodney J., *On Misjudging and its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 Nev. L. J. 521 (2007), at 532; and see Fredric N. Tulsy, *How Judges Favor the Prosecution*, Mercury News.com (February 12, 2007), available online at http://www.mercurynews.com/search/ci_5128172?IADID=Search-www.mercurynews.com-www.mercurynews.com (last visited December 14, 2011) (claiming that “in a fourth of all jury cases, a review finds, members of the bench apply their tremendous powers in ways that hurt defendants”).
4. *Id.*

Judicial Bias, Judges, Admissibility