

# Alaska v Coon

**Supreme Court opinion dealing with the admissibility of spectrographic voice identification and the qualifications required of an expert witness under the Daubert ruling. (3/5/99, 974 P 2d 386)**

## **Admissibility Considerations: Voice Identification Evidence**

The attached Supreme Court opinion rendered by the State of Alaska (Alaska vs. Coon, 974 P 2d 386) was one of the more recent high court decision dealing with the admissibility of spectrographic voice identification and the qualifications required of an expert witness under the Daubert ruling. In making its findings on remand, the trial court found that the technique of spectrographic voice identification had been successful empirically tested on numerous occasions by many scientists during the past 20 years. It was also found that when properly employed by certified experts that the known error rate was less than one percent and this agrees with empirical studies also conducted by the Federal Bureau of Investigation Crime Laboratory. Lastly, the trial court found that both the reasoning and methodology underlying the expert's testimony were scientifically valid and that the expert had properly performed the forensic analysis. The trial court therefore concluded that the expert's testimony was sufficiently relevant and reliable to be admitted under Daubert. (Alaska vs. Coon, 974 P 2d 386) (Alaska, 1999)

\*It should be noted that the expert opinion rendered in this recent Supreme Court decision is Steve Cain, President of AFTI. The specifics of his testimony in the reasoning process leading to the conclusions in this case are fully elaborated in the attached Supreme Court decision.

Alaska v. Coon (3/5/99), 974 P 2d 386

Notice: This opinion is subject to correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878. THE SUPREME COURT OF THE STATE OF ALASKA STATE OF ALASKA,) Supreme Court No. S-6893) Petitioner, ) Court of Appeals No. A-4764 ) v.) Superior Court No. ) 3PA-S92-071 Cr. GEORGE L. COON,)) 0 P I N I O N Respondent.) \_\_\_\_\_)[No. 5091 - March 5, 1999] Petition for Hearing from the Court of Appeals of the State of Alaska, on appeal from the Superior Court of the State of Alaska, Third Judicial District, Palmer, Beverly W. Cutler, Judge. Appearances: Nancy R. Simel, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Boteiho, Attorney General, Juneau, for Petitioner. George Coon, pro se, Anchorage. Mauri Long, Dillon & Findley, P.C., Anchorage, for Amicus Curiae Alaska Academy of Trial Lawyers. G. Blair McCune, Deputy

Public Defender, and Barbara K. Brink, Public Defender, Anchorage, for Amicus Curiae Alaska Public Defender Agency. Gary A. Zipkin and Nelleene A. Boothby, Guess & Rudd, Anchorage, for Amicus Curiae Defense Counsel of Alaska, Inc. Jonathan Hoffman, Martin, Bischoff, Templeton, Langslet & Hoffman, Anchorage, Hugh F. Young, Jr., Product Liability Advisory Council, Inc., Reston, Virginia, and Mary A. Wells, Suanne M. Dell, Gregory E. Sopkm, Wells, Anderson & Race L.L.C., Denver, Colorado, for Amicus Curiae Product Liability Advisory Council. Rex Lamont Butler and Linda S. Thomas, Rex Lamont Butler and Associates, Anchorage, for Amicus Curiae Rex Lamont Butler and Associates. Before: Matthews, Chief Justice, Compton, Eastaugh, and Fabe, Justices. [Bryner, Justice, not participating.] EASTAUGH, Justice. FABE, Justice, concurring in part, and dissenting in part. I.

INTRODUCTION A jury found George Coon guilty of making three terroristic telephone calls. We must decide whether the superior court erred in admitting opinion evidence, based on a voice spectrographic analysis, that Coon made those calls. Applying the Alaska Rules of Evidence and the standard for admitting novel scientific opinion evidence, articulated by the United States

Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), we hold that it was not error to admit that evidence, and affirm Coon's conviction. 2. FACTS ANJ) PROCEEDINGS Three messages threatening David Rudolph's life were left on Deborah Rudolph's telephone answering machine. Deborah, Coon's former daughter-in-law, recognized the recorded voice as Coon's. The State charged Coon under former AS I 1.56.810(a)(2) with terroristic threatening. The State retained a voice analysis expert, Steve Cain, who compared the voice on the answering machine with verbatim voice exemplars provided by Coon. At Coon's 1992 trial, the superior court held a hearing outside the jury's presence to determine whether Cain's testimony would be admissible under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The superior court found that Cain's testimony was relevant and would assist the jury. It therefore held that the evidence was admissible under Alaska Evidence Rule 702. The court also concluded that spectrographic analysis of voices satisfied the *Frye* test for admitting novel scientific evidence, and that the identification of voices by analyzing spectrograms had been generally accepted by courts and was a reliable technique. The jury then heard Cain express his opinions that Coon made the first telephone call, and that there was a high probability Coon also made the second and third calls. Cain described for the jury the scientific foundation for his opinions. The jury found Coon guilty of terroristic threatening. On appeal, the Alaska Court of Appeals held that the appellate record did not support admitting Cain's testimony at trial. 1 It reasoned that the State had not presented evidence concerning the relevant scientific community and whether that community generally accepted voice spectrographic analysis. It noted that the superior court had made no findings on those topics, contrary to the requirements of *Frye*. It remanded, reasoning that the State might be able to establish that voice spectrographic analysis met the *Frye* standard for

admissibility. Citing *Contreras v. State*, 718 P.2d 129 (Alaska 1986), where we adhered to the Frye standard, the court of appeals declined to address the State's argument that the Frye standard was no longer viable in Alaska following adoption of the Alaska Rules of Evidence and announcement of the Daubert opinion. Petitioning for hearing, the State asked us to consider the same arguments. It also argued that the trial court's ruling satisfied Daubert. We granted the State's petition. Following briefing and oral argument, we remanded with directions that the superior court enter findings of fact and conclusions of law about whether Cain's testimony was admissible under Evidence Rule 703. The order also required findings of fact and conclusions of law about the admissibility of the proffered testimony under the Frye and Daubert standards. We retained jurisdiction. Entering separate findings and conclusions for each standard, the superior court ruled on remand that the evidence was admissible under both tests. We then asked the parties and possible amici curiae to file briefs discussing whether to retain Frye or to adopt the test articulated in Daubert to determine the admissibility of scientific evidence. Five amici curiae -- the Alaska Academy of Trial Lawyers (AATL), the Alaska Public Defender Agency (APDA), the Defense Counsel of Alaska (DCA), the Product Liability Advisory Counsel (PLAC), and Rex Lamont Butler and Associates (Butler)

-- submitted briefs thoroughly discussing the issues presented. We thank them for their valuable assistance.

3. DISCUSSION

1. Frye, Daubert, and the Rules of Evidence

The State asks us to abandon the scientific evidence test discussed in Frye and adopt the "more flexible" standard announced in Daubert. Whether to adopt a new standard for admitting evidence involves the interpretation of the Alaska Rules of Evidence and is therefore a legal question to which this court applies its independent judgment, adopting the rule most persuasive "in light of reason, precedent and policy."

2 Before Daubert was issued, Frye was the dominant standard for the admissibility of scientific evidence in federal and many state courts.

3 We adopted the Frye standard in *Pulakis v. State*, 476 P.2d 474,478-79 (Alaska 1970). The Frye court held the results of a crude lie detector test, based on the examinee's blood pressure, to be inadmissible to show a criminal defendant's innocence.

4 The court's entire analysis consisted of one paragraph and cited no supporting authority: Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from well recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. [5] The court concluded that the systolic blood pressure deception test had "not yet gained such standing and scientific recognition among physiological and psychological authorities" as to be admissible into evidence.

6 Seventy years later in Daubert, the United States Supreme Court ruled that the Federal Rules of Evidence, adopted in 1975, had superseded the Frye "general acceptance" test for admitting scientific evidence.

7 The plaintiffs in Daubert were minor children

with serious birth defects. 8 They alleged that the birth defects resulted from their mothers' ingestion of Bendectin, a prescription anti-nausea drug, during pregnancy. They sought to introduce expert testimony that Bendectin was a teratogen, a substance capable of causing malformations in fetuses. 9 The trial court refused to admit the testimony and entered a defense judgment. 10 The Ninth Circuit affirmed, but the Supreme Court vacated the judgment and remanded. 11 So ruling, the Court stated that "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal [Evidence] Rules and their 'general approach of relaxing the traditional barriers to 'opinion' testimony.'" 12 The Court concluded that the "austere" Frye "general acceptance" standard, "absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials." 13 The Court delineated a standard that requires the trial judge to "determine at the outset, pursuant to [Federal Rule of Evidence] 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. 14 This two-step inquiry requires a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." 15 The Court also provided a non-exhaustive list of factors courts may use in making this inquiry. These included (1) whether the proffered scientific theory or technique can be (and has been) empirically tested (i.e., whether the scientific method is falsifiable and refutable); (2) whether the theory or technique has been subject to peer review and publication (although publication "is not a sine qua non of admissibility"); (3) whether the known or potential error rate of the theory or technique is acceptable, and whether the existence and maintenance of standards controls the technique's operation; and, echoing Frye, (4) whether the theory or technique has attained general acceptance. 16 The Court offered "general observations" concerning publication, peer review, and other factors, and how they pertain to scientific validity. The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity -- and thus the evidentiary relevance and reliability -- of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.[17] Daubert thus requires trial courts to ensure that scientific evidence is both relevant and reliable. The opinion is widely regarded as imposing a more rigorous "gatekeeper" function on trial courts than Frye did. 18 In 1986, before the Supreme Court announced Daubert, but after we adopted rules of evidence in 1979 modeled after the Federal Rules of Evidence, we rejected an argument by the State in *Contreras* that the Federal Rules of Evidence had replaced Frye. 19 Recognizing that the federal rules did not mention the Frye test, we said that "[w]e believe it unlikely that this silence was meant to overturn long-established rules of admissibility based on Frye. . . ." 20 Although we did not expressly say so, we implicitly held that the Frye standard was not inconsistent with the Alaska Rules of Evidence. We also noted that "we have held other pre-existing rules to survive adoption of the rules of evidence." 21 Noting that we had adopted Frye in *Pulakis*, we declined to question Frye. 22 We have not revisited the question

since deciding *Contreras*. We noted the existence of *Daubert* in *Mattox v. State, Department of Revenue*, 875 P.2d 763, 764 n.2 (Alaska 1994), but declined to consider the issue. The Alaska Court of Appeals has commented on the conflict between *Frye* and *Daubert*, but in conformity with *Contreras*, it has continued to apply the *Frye* standard. 23 In its Memorandum Opinion and Judgment in this case, the court of appeals stated that, given our adherence in *Contreras* to the *Frye* standard, “we believe that. . . the proper course of action is for us to follow the existing standard.” 24 We now reconsider the standard in light of *Daubert*’s holding that *Frye* is inconsistent with the Federal Rules of Evidence. Because the trial court found Cain’s opinion evidence to be admissible under both tests, and assuming that it applied each test correctly, it can be argued that there is no reason for us to resolve a legal issue that is not dispositive of the outcome of this petition. We nonetheless choose to reach the *Frye*/*Daubert* issue because the parties and the amici have thoroughly and skillfully discussed the reasons why we should or should not adopt *Daubert* in place of *Frye*. Postponing a decision for another day would be unlikely to give us the benefit of better advocacy. Further, to the extent that this issue relates to our rules of evidence, it implicates our rule-making responsibility. Although we are not bound by the Supreme Court’s conclusion, its analysis of the corresponding federal rules is helpful and, moreover, has triggered a wealth of useful critical comment. 25

2. Ex Post Facto Prohibition Before deciding whether *Frye* remains ascendant, we consider, and reject, Coon’s argument that the federal and state constitutional prohibitions on ex post facto legislation apply to judicial decisions thus barring the application of the 1993 *Daubert* decision to his 1992 trial. 26 We reach this conclusion because there is no support for Coon’s proposition in federal or state law. On its face, the federal ex post facto prohibition applies only to legislative acts, not judicial decisions. 27 We construe our state prohibition no differently than the federal prohibition. 28 Unforeseeable judicial enlargements of criminal statutes have been struck down as violative of due process when applied retroactively. 29 But that is not the case here. Even if we were to apply the prohibition on ex post facto laws to judicial decisions, changes to rules governing the admissibility of evidence do not violate it. In *Thompson v. Missouri*, 171 U.S. 380, 387 (1898), the United States Supreme Court stated that [W]e cannot perceive any ground upon which to hold a statute to be ex post facto which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offense was committed.[30] The prohibition on ex post facto laws has been construed as applicable only to penal legislation.3 1 Coon also asserts that retrospective application of *Daubert* to his case would deny him substantive and procedural due process of law and violate his right to equal protection. His cursory discussion of these issues is inadequate to preserve them. We consider them waived. 32

3. The Alaska Rules of Evidence The State argues that we should abandon the *Frye* standard. It asserts that *Frye* has become outdated and inadequate for modern litigation, where many cases involve sophisticated scientific data and knowledge. It argues that *Frye* uses social, rather than scientific, criteria for determining reliability and validity when reviewing a novel

scientific technique. This causes trial courts simply to “count hands” to determine whether scientists in the relevant scientific community accept the technique as reliable, and “abdicates” judicial responsibility for determining admissibility to scientists uneducated in the law. The State also argues that a few dissenters within a scientific community may prevent a finding of general acceptance, leading to over-representation of the dissenters’ views. In addition, the State contends that Frye’s conservative nature causes a “gross time lag” between the development of a new scientific technique and its judicial admissibility. This can cause certain cutting edge science to become obsolete before it is admissible under Frye. Our new evidence rules became effective in 1979, nine years after we decided *Pulakis*.<sup>33</sup> We there approvingly quoted the Frye standard in holding that polygraph test results had been properly excluded.<sup>34</sup> Several of our evidence rules bear on the admissibility of scientific evidence. Evidence Rule 104(a) assigns to the trial court the duty to determine preliminary questions concerning the qualification of a person to be a witness and the admissibility of evidence. Evidence Rule 401 defines what evidence is relevant. Evidence Rule 403 allows exclusion of relevant evidence for such reasons as prejudice, confusion, and waste of time. Evidence Rule 702 allows experts to offer helpful opinion testimony.<sup>35</sup> Evidence Rule 703 allows experts to base opinions on facts or data of a type reasonably relied upon by experts in the field.<sup>36</sup> Thus, expert opinion evidence is admissible if the trial court (exercising its authority under Rule 104(a)) determines that (1) the evidence is relevant (Rule 401); (2) the witness is qualified as an expert (Rule 702(a)); (3) the trier of fact will be assisted (Rule 702(a)); (4) the facts or data on which the opinion is based are of a type reasonably relied upon by experts in the particular field in forming opinions upon the subject (Rule 703); and (5) the probative value of the evidence is not outweighed by its prejudicial effect (Rule 403).<sup>37</sup> Nothing in our evidence rules requires or implies that any single criterion, let alone Frye’s general acceptance standard, controls admission of scientific opinion evidence. The commentary, which predated *Daubert*, observed that Evidence Rule 703 “attempts to chart a path between the rigid approach of [Frye] and the minimal relevance approach of Rule 401.”<sup>38</sup> It also mentioned several *Daubert*-like factors and noted: Even though Rule 403 might be deemed sufficient protection against the dangers of relatively untested evidence, Rule 703 is drafted so as to remind trial judges that innovative attempts to offer expert evidence may involve evidence that is superficially attractive, but which is problematic for one or more of the following reasons:... 3) while the expert evidence is plainly relevant, the rate of error associated with the technique that produced the evidence is unknown and the trier of fact is therefore unable to properly evaluate the evidence; 4) the expert evidence is the subject of great controversy among the nation’s experts and it would be inappropriate for a court or jury to resolve the controversy in any particular case. See, e.g., *People v. Kelly*, 549 P.2d 1240 (Cal. 1976) (rejecting voiceprint evidence).<sup>[39]</sup> Although the United States Supreme Court stated in *Daubert* that Federal Evidence Rule 702 is the “locus” for determining the admissibility of scientific evidence,<sup>40</sup> the commentary to the Alaska Rules of Evidence provides support for the State’s view that Alaska Rule of Evidence 703

is also a source for an approach broader than the Frye standard. Our evidence rules give trial courts both the authority and the responsibility to determine the admissibility of such evidence without being limited to the general acceptance standard. They preclude this inquiry from focusing exclusively on general acceptance or any other single factor. Our evidence rules contemplate a broader inquiry, allowing a proponent to establish admissibility even if general acceptance is absent, and allowing an opponent to challenge admissibility even if general acceptance is present. Frye is potentially capricious because it excludes scientifically reliable evidence which is not yet generally accepted, and admits scientifically unreliable evidence which although generally accepted, cannot meet rigorous scientific scrutiny. Because the Frye test potentially excludes evidence that should be admitted under our rules, and also potentially admits evidence that should be excluded under our rules, we conclude that it is both unduly restrictive and unduly permissive. Just as the Supreme Court concluded in *Daubert* that the Frye test is inconsistent with the federal evidence rules,<sup>41</sup> we conclude that it is inconsistent with the Alaska Rules of Evidence. We reach this conclusion despite our prior approval of the Frye standard. “[T]he judicial doctrine of *stare decisis* accords the prior holdings of the highest courts of this State precedential value while still permitting the reconsideration of legal issues when conditions warrant.”<sup>42</sup> We have stated that we will overrule a prior decision only when we are “clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent.”<sup>43</sup> It is our view that these requirements are met with respect to our decision in *Contreras*. First, we are clearly convinced that we erroneously decided *Contreras* for the following reasons. *Contreras* assumes that the Federal Rules of Evidence did not change the Frye test. *Daubert* has subsequently shown that assumption to be incorrect. Further, our decision in *Contreras* ignored Alaska Evidence Rule 703, which employs a “reasonably relied upon by experts” standard in contrast to Frye’s “general acceptance” standard. This oversight in *Contreras* is all the more surprising because the commentary to the Rule 703 makes clear an intent to promulgate a rule different from Frye: “The rule attempts to chart a path between the rigid approach of [Frye] and the minimal relevance approach of Rule 401.” Second, we conclude that the “more good than harm” requirement is also met. As noted above, Frye may exclude scientifically reliable evidence while admitting unreliable evidence. It is desirable to replace Frye with a rule not suffering from these deficiencies. Any harm as may be done by overruling *Contreras* is short term and limited. It concerns only cases in which the Frye/*Daubert* controversy has been raised that are pending in the trial courts or on direct review at the time of this decision.<sup>44</sup> In those cases, if reliance on Frye is found to be other than harmless error, a new trial may be required. But a new trial may not be necessary, because on remand the trial court may determine that the questioned evidence meets the standard set out in this opinion. The limitations of the general acceptance standard have been extensively catalogued.<sup>45</sup> Assuming that some of the strictures of Frye were ameliorated in some courts pre-*Daubert*,<sup>46</sup> we nonetheless conclude that it is better to resolve admissibility disputes by referring to our modern evidentiary

foundation, the Alaska Rules of Evidence, than by trying to salvage or remold a “rigid” standard that is fundamentally inconsistent with our rules. How should Alaska trial courts assess the reliability and relevance of proffered scientific evidence? The factors identified in Daubert provide a useful approach: (1) whether the proffered scientific theory or technique can be (and has been) empirically tested (i.e., whether the scientific method is falsifiable and refutable); (2) whether the theory or technique has been subject to peer review and publication; (3) whether the known or potential error rate of the theory or technique is acceptable, and whether the existence and maintenance of standards controls the technique’s operation; and (4) whether the theory or technique has attained general acceptance. 47 Other factors may apply in a given case. After the Supreme Court issued its decision in Daubert, the Ninth Circuit suggested two ways to satisfy Daubert’s requirement that the testimony be “derived by the scientific method [or] ... based on scientifically valid principles.” 48 As described by Kesan, “either (a) the expert’s proffered testimony must grow out of prelitigation research, or (b) the expert’s research must be subjected to peer review.” 49 Kesan, giving the example of “independent” research funded by tobacco companies, appropriately notes the danger of a hidden litigation motive. 50 Nonetheless, publication is at least more likely to provoke scrutiny and response, and reveal methodological deficiencies. Alaska Evidence Rule 702 is similar to New Mexico’s equivalent rule. 51 In 1993 the New Mexico Supreme Court adopted the Daubert standard in *State v. Alberico*, 861 P.2d 192, 203-04 (N.M. 1993). Other state supreme courts with similar evidence rules have also adopted the Daubert standard. 52 But other states, whose evidence rules also mirror the federal rules, have rejected Daubert and retained Frye. 53 California and New York courts have also retained a Frye-type standard; they have no rule similar to Alaska Evidence Rule 702. 54 Those decisions do not convince us that we should retain Frye. In invoking our evidence rules, adopting Daubert, and limiting Frye, we reject arguments and dire predictions supporting the status quo. Burden on trial judges. We first reject concerns that Daubert will make the trial courts’ gatekeeping role unduly burdensome. This concern is founded on a perception that Daubert requires judges to determine the reliability of the expert’s scientific methods, whereas the general acceptance standard allows courts to defer to the judgment of scientists. 55 The notion that scientists are better suited than judges for assessing scientific reliability may appear initially persuasive, given that trial judges are rarely trained in science and given concerns that they are already overburdened. Closer consideration reveals that the notion is misleading and irrelevant. First, scientific reliability is not necessarily congruent with judicial reliability. This is illustrated by Frye itself. The “general acceptance” standard does not define scientific reliability; it is simply a judicial construction. And for reasons noted above, it is a flawed judicial construction. Second, the rules of evidence must be applied by trial judges, subject to review for abuse of discretion. It is for the trial court to determine whether the expert is qualified to testify and the proffered evidence is admissible. 56 Determining reliability for judicial purposes is unavoidably the responsibility of trial courts, and should not be delegated to an expert’s peers.



The burden, especially when considering novel scientific evidence, may well be substantial. We nonetheless conclude that it is one the trial courts (and appellate courts on review) must bear. But we are not convinced that the burden will be as onerous as some predict. We suspect that most difficult disputes will be limited to evidence that is rationally disputable; we expect that relatively little effort will be required to determine the admissibility of most scientific evidence, because most will be either patently reliable or unreliable. As for the difficult disputes, the courts may reduce the judicial burden and increase the accuracy of their admissibility decisions by selecting independent expert witnesses. 57 They can also appoint expert advisors. 58 Such advisors can provide valuable guidance to courts determining reliability of proffered scientific evidence. Commentators have identified various concerns about using technical advisors. 59 Their suggestions - how to select an advisor, how to define the expert's duties, and how the expert should act -- are worthy of consideration. 60 "Junk science." Several amici argue that juror susceptibility to the persuasive power of scientific evidence mandates a conservative reliability standard, such as Frye's general acceptance test, to prevent admission of "junk science." 61 In *State v. Carter*, 524 N.W.2d 763, 777-78 (Neb. 1994), the Nebraska Supreme Court stated that the Frye rule was intended to ensure the reliability of scientific evidence because: (1) lay jurors can be overly impressed by science; (2) lay jurors lack the capacity to evaluate scientific evidence critically; and (3) lay jurors are likely to give "junk science" more weight than it deserves. The court, citing New Mexico and Arizona decisions, recognized "the complex nature of DNA evidence and the need to protect against unproven and potentially erroneous and misleading evidence," and declined to adopt the Daubert standard for the admissibility of DNA evidence. 62 The Frye test is arguably a safeguard against evidence based upon specious scientific techniques, especially in criminal trials where the defendant's right to a fair trial is crucial. 63 Nevertheless, the Frye standard has also been criticized for being easily manipulated by courts when deciding whether or not to admit certain evidence. "The lack of a definitional framework for 'field' and 'general acceptance' allowed courts seeking to admit scientific evidence to confine the 'field' of pertinent inquiry narrowly to a specialty within a broader scientific discipline in order to demonstrate 'general acceptance.'" 64 For example, in *Commonwealth v. Lykus*, 327 N.E.2d 671, 675-78 (Mass. 1975), the record contained evidence of a dispute about the acceptance of voice spectrography in the scientific community; the court resolved the dispute by limiting the applicable scientific community to "those who would be expected to be familiar with its use." 65 We are not convinced that "junk science" is more likely to be admitted under Daubert than under Frye. Post-Daubert reported decisions suggest that courts are acting with restraint, and are giving rigorous consideration to the reliability of scientific evidence. 66 Furthermore, Frye also potentially permits admission of unreliable scientific evidence, because a methodology that has been generally accepted might nonetheless have been discredited during a Daubert inquiry. We also suspect that junk science poses less risk to fair trials than a more common aspect of admitting scientific evidence. Even when they apply identical methodologies that satisfy both Daubert and

Frye, dueling experts can reach conflicting, irreconcilable conclusions. Indeed, Daubert has been criticized because it assumes that reliability should be determined by examining the methodology, without regard to the truth of the scientific conclusions. 67 Even when they apply the same methodology, experts for opposing parties may reach different results. Likewise, well-qualified experts may make rational conflicting choices in deciding which reliable methodology to apply. Juries, relatively ill-trained to resolve such conflicts on subtle or complex scientific grounds, may resort to credibility assessments which are unduly simplistic. Opinions of a practiced forensic expert may prevail over those of a true academic who makes a less impressive appearance on the witness stand. Assuming proper execution of the judicial gatekeeping function, we think the risk to fair trials posed by junk science is lower than the risk posed by jurors' difficulty in critically assessing scientific evidence that is based on reliable methodologies. Relitigation of evidence admissible under Frye. Butler's amicus brief asserts that since the Daubert standard applies to all scientific knowledge, and is not limited to "novel" scientific evidence, evidence deemed admissible under Frye may now be found inadmissible under Daubert. Butler argues that this will lead to increased litigation over the admissibility of scientific evidence, and to a case-by-case determination of admissibility, with the possibility of inconsistent or unpredictable decisions. Butler suggests that Daubert may affect forensic sciences, such as fingerprint, handwriting, and hair comparison analyses, that are now admissible under Frye. While Butler frames this as a negative result of adopting Daubert, the New Mexico Supreme Court noted: Contrary to the assertion..., that the Frye test places the responsibility of determining scientific validity upon scientists, in practice too many courts reference reported case law to determine what is generally accepted in the scientific community. It is improper to look for scientific acceptance only from reported case law because that amounts to finding a consensus in the legal community based on scientific evidence that is sometimes many years old.[68] Further, as the State notes, when an area of expertise is well-known and has been fully considered by the courts, a trial court may take judicial notice of its admissibility. The Supreme Court advocated this approach. 69 Moreover, general acceptance remains a factor under Daubert. 70 It also seems unlikely that methodologies that were admitted under Frye and that remain generally accepted in the appropriate community will be excluded, absent affirmative evidence of unreliability. 4. The Admissibility of Voice Spectrograph Evidence under Daubert On remand, the trial court found that Cain's testimony regarding the applied forensic technique of using spectrography to analyze and identify voices was admissible under both Frye and Daubert. Coon and the APDA contend that the trial court erred in finding Cain's testimony regarding voice spectrography admissible under either test. Given our adoption of Daubert in Part III.C, there is no reason to review admissibility under Frye. 1. Standard of review We review a trial court's ruling on the admissibility of expert testimony for abuse of discretion. 71 Although the parties agree on this standard of review, two amici curiae, Butler and the APDA, argue that we should review de novo a trial court's decision to admit or exclude scientific evidence. So arguing, APDA relies on a passage from Pulakis, where

we stated that “[o]n the basis of our study of the judicial authority and academic literature in this area, we conclude that the results of polygraph examinations should not be received in evidence over objection.” 72 In addition, both Butler and APDA cite *Contreras*, in which the court of appeals stated that it was “free to exercise [its] independent judgment” when reviewing the trial court’s decision to admit evidence recovered from an eyewitness during hypnosis because the findings regarding memory and the effects of interrogative techniques on eyewitness testimony and hypnosis in general are legislative facts, rather than adjudicative facts. 73 *Kesan* and the dissenting opinion propose adopting a hybrid standard of review, reviewing *de novo* a trial court’s findings on the scientific knowledge prong of the *Daubert* test and retaining an abuse of discretion standard for the second prong relating to relevance or “fit” of the facts of the particular case to the scientific technique employed. 74 They assert that implementing *de novo* review of scientific validity allows for more uniform adjudication at the trial and appellate levels, and for development of distinct validation criteria for expert testimony relating to different scientific or technical disciplines. 75 We see no present reason to adopt a new or hybrid standard for reviewing rulings on the admissibility of scientific evidence. Abuse of discretion is the standard applicable to other evidentiary rulings. 76 Such rulings are best left to the discretion of the trial court. A determination of reliability under *Daubert* is no different. The dissent reaches a different conclusion because it begins with the premise that the scientific validity of a technique is a legal issue which does not turn on case-sensitive facts. 77 This premise does not adequately take account of the reality of the judicial process and the variable state of science. The New Mexico Supreme Court rejected the same argument advanced here by the dissent. In rejecting the *de novo* standard of review that court noted: This reasoning assumes, however, that the record on appeal contains all of the relevant, most recent data concerning the scientific method, and that assumes too much. It also assumes that there is always a reservoir of scientific literature that an appellate court might independently reference in a *de novo* review. The abstract validity of a scientific technique should not vary from court to court, but how the proof of such validity is communicated will often vary from presentation to presentation. Some experts are more skillful and more well-informed than others just as some lawyers are more skillful and more well-prepared than others. In addition, the state of science is not constant; it progresses daily. For example, what might have been true about [post traumatic stress disorder] in the early 1980s when it was first addressed in published opinions might not have been true in 1992. . . .[78] We recognize that different trial judges, in exercising their discretion, may reach different conclusions about scientific reliability. But we disagree with the dissent’s suggestion that the inconsistency will be of such magnitude as to “compromise the integrity of the judiciary in the eyes of the public.” 79 Despite such predictions in the academic literature, the majority of the federal circuits have chosen to apply the abuse of discretion standard when reviewing district court decisions under *Daubert*. 80 In addition, the Supreme Court recently approved the abuse of discr

the Daubert standard is to give the courts greater flexibility in determining the admissibility of expert testimony, so as to keep pace with science as it evolves. We think the abuse of discretion standard of review best comports with these aims, and we choose to apply it here.

## 2. Admissibility of Cain's voice spectrographic analysis under Daubert

In making its findings on remand, the trial court discussed each factor the Supreme Court articulated in Daubert. The trial court found that the technique of spectrographic voice identification had been empirically tested "on numerous occasions by many scientists during approximately the past twenty years." The court determined that voice spectrography had been subjected to peer review and publication, but noted that the technique's reliability was debated in the scientific literature. It also found that when properly performed under the "stringent standards" of the International Association for Identification by a qualified, trained scientist or technician, voice spectrography has a known error rate of less than one percent. The trial court found that because voice spectrography has been subjected to empirical testing, it is both falsifiable and refutable, and that testing has not refuted the technique or shown that it is falsified. The court determined that when voice spectrography is properly performed by a qualified person, it has attained widespread acceptance within the relevant scientific community -- amongst forensic scientists and scientists in acoustics and speech-related fields with experience using the technique. The trial court also found that the reasoning and methodology underlying Cain's testimony were scientifically valid, and that Cain had properly performed the voice spectrographic analysis in this case. The trial court stated that Cain's testimony was relevant in that it assisted the jury in determining a key issue at trial, namely the identification of the person who left the threatening messages on Deborah Rudolph's answering machine. The trial court therefore concluded that Cain's testimony was sufficiently relevant and reliable to be admitted under Daubert. The trial court made these findings on remand after reviewing the record, including Cain's testimony. Because this is our first review of a trial court's application of Daubert, we discuss Cain's evidence at some length. Cain testified at the 1992 hearing about his qualifications as a voice spectrograph expert. He has a bachelor of science degree in engineering and two master's degrees in forensic science; he had completed two years of work toward a doctoral degree in criminology. He had continued his post-graduate education by attending seminars at the state and national levels dealing with tape examination and other aspects of forensic evidence analysis. He had given talks and seminars throughout the United States on voice identification and tape analysis and had published "a number of articles" concerning the legal aspects and results of research studies on the reliability of voice spectrograph analysis. He owned and operated Applied Forensic Technologies International, Inc., a forensic laboratory that analyzes physical evidence. Before opening his private laboratory, Cain worked for ten years as a document and voice print examiner for the Secret Service in its Washington, D.C., crime laboratory, and for three years for the Internal Revenue Service as a supervisor at its Illinois Crime Lab, where he started a voice identification program. He was certified by the International Association for Identification (IAI) as a voice identification specialist and he

served on the certification board of that organization. Based on this testimony offered outside the jury's presence, the trial court found that Cain was qualified as an expert under Alaska Evidence Rule 702 in the field of "applied forensic techniques of voice prints." Cain then explained that in performing a voice analysis, he conducts both an aural and a spectrographic analysis of a voice. Cain discussed factors which might affect the results of voice analysis, the potential error rate of voice analysis, and the reliability of the technique. He described the standards adopted by the IAI in 1992, and stated that he adhered to these standards, and that he sends his work to another examiner for an independent review of the accuracy of his findings. Cain estimated that approximately thirty-one to thirty-four states have accepted voice spectrograms, commonly known as voiceprints, as a positive means of forensic identification. Cain testified that voice spectrographic analysis has been subjected to empirical testing from the time of its inception over twenty years prior. Cain testified about various scientific studies that concluded that voice spectrographic analysis was a valid and reliable forensic identification technique. The scientific literature submitted to us by amicus APDA would also support a finding that spectrographic analysis has been empirically tested. We conclude that the trial court did not err in finding on remand that this technique has been subjected to empirical testing. Cain conceded that several studies question the validity and reliability of the technique. Although many of the studies questioned the reliability of the technique, the trial court did not err in finding on remand that the technique had been subjected to peer review and publication, since a general consensus is not a mandatory requirement under Daubert. Cain also testified that research studies have calculated the known error rate for voice spectrographic analysis to be less than one percent when the technique is performed properly by a scientist skilled in the technique. 81 Cain stated that in order to make the sample as accurate as possible by eliminating "intraspeak variation" (the internal factors that affect a person's voice, such as the time of day, the amount a person has eaten, or the person's mood), the scientist conducting the analysis should take numerous exemplars and attempt to duplicate the conditions of the original recording. The trial court did not err in finding on remand that the known error rate for voice spectrographic analysis performed properly by a skilled scientist in the field was sufficiently low to make this evidence reliable. General acceptance remains a factor under Daubert. The trial court on remand found that "[t]he technique of voice identification using spectrography when properly performed by a qualified person has attained widespread acceptance within a relevant scientific community --forensic scientists and scientists in acoustics and speech related fields who had experience using the technique." In determining the admissibility of voice spectrograph evidence under the general acceptance test, several courts have defined the composition of the "relevant scientific community." In *State v. Gortarez*, 686 P.2d 1224, 1233 (Ariz. 1984), the Arizona Supreme Court defined the relevant scientific community as "disinterested and impartial experts in many fields, possibly including acoustical engineering, acoustics, communications electronics, linguistics, phonetics, physics, and speech communications." The Gortarez court noted that this list was merely

suggestive and not all-inclusive. 82 Neither party questions the trial court's determination of the relevant scientific community in this case. Based upon the findings of other courts as to the relevant scientific community for the technique of forensic voice identification using spectrography, we conclude that the trial court did not abuse its discretion in determining the relevant scientific community. Coon and the APDA argue that voice spectrograph analysis is not generally accepted within the relevant scientific community, and has been ruled inadmissible by numerous courts applying Frye. The APDA has submitted several articles questioning the reliability of voice spectrograph analysis when used as anything other than an investigative tool. The APDA also included a copy of an Alaska superior court decision in *State v. Gomez*, No. 3AN-S88- 5190 Cr. (March 23, 1990), in which Superior Court Judge Joan M. Katz found that voice spectrographic identification evidence was inadmissible because it was not generally accepted within the relevant scientific community. In determining whether evidence is generally accepted within the scientific community, courts have generally looked to three sources for guidance: (a) judicial opinions; (b) scientific literature; and (c) expert testimony presented at an evidentiary hearing. 83 Under Frye many courts have determined that voice spectrographic evidence is not admissible. 84 But other courts have allowed voice spectrographic evidence under standards other than Frye. 85 And several courts purporting to apply Frye have also allowed such evidence. 86 Overall, it is inconclusive whether there is a judicial consensus that voice spectrographic evidence is generally accepted within the relevant scientific community. The scientific literature cited by the APDA permits a conclusion that there is significant disagreement among experts in the field of voice spectrographic analysis regarding the reliability of the technique. As the State notes, no scientific literature was submitted to the trial court for review, but Cain testified about several articles and studies addressing voice spectrographic analysis, and conceded that the reliability of the technique was disputed among members of the relevant scientific community. Cain cited, among others, a study conducted in 1986 by Bruce E. Koenig of the Federal Bureau of Investigation. Koenig there noted that in a survey of 2,000 voice identification comparisons made by FBI examiners under actual forensic conditions, meaningful decisions were made only 34.8% of the time, with a known error rate of 0.3 1% for false identifications and 0.53% for false eliminations, with an overall error rate of 0.43%. 87 In a 1993 article, Koenig noted that problems still persist in the spectrographic voice identification field, such as "separate sets of certified examiners making high confidence decisions for both identification and elimination in the same case." 88 Koenig also stated that even with the establishment of new standards by the IAI in 1992, the use of spectrographic voice technique is on the decline, and "[t]he most important legal difference is the FBI's policy not to provide testimony on spectrographic comparisons due to the inconclusive nature of the examination and the unknown error rate under specific investigative conditions." 89 Although it is not clear that voice spectrographic analysis has attained general acceptance within the relevant scientific community, we do not find that the trial court clearly erred in making its general acceptance finding, or abused its discretion in ruling

that the evidence satisfied Daubert. Consequently, we conclude that the trial court did not err in finding the voice spectrographic evidence admissible under Daubert. It therefore did not abuse its discretion in admitting this evidence at Coon's trial. 4. CONCLUSION For these reasons, we overrule Contreras, and hold that the Alaska Rules of Evidence supersede the Frye test. We adopt the Daubert standard for determining the admissibility of scientific evidence. We hold that the voice spectrograph analysis evidence was admissible under Daubert and the Alaska Rules of Evidence in this case. We therefore AFFIRM Coon's judgment and conviction. Footnotes 1 See Coon v. State, Mem. Op. & J. No. 3070 (Alaska App., January 25, 1995). 2 M.R.S. v. State, 897 P.2d 63,66 (Alaska 1995); see also Hernandez-Robaina v. State, 849 P.2d 783, 785 n.2 (Alaska 1993); Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979). 3 See Jay P. Kesan, An Autopsy of Scientific Evidence in a PostDaubert World, 84 Geo. L.J. 1985, 1990 (1996) [hereinafter Kesan, Autopsy]; Joseph R. Meaney, From Frye to Daubert: Is a Pattern Unfolding?, 35 Jurimetrics J. 191, 191, 194-99 (Winter 1995) (hereinafter Meaney, Pattern Unfolding?). 4 See Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). 5 Id. (emphasis added). 6 Id. 7 See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993). 8 See id. at 582. 9 See id. at 582-83. 10 See id. at 583-84. 11 See id. at 584, 598. 12 Daubert, 509 U.S. at 588 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)). 13 Id. at 589. 14 Id. at 592 (footnotes omitted). 15 Id. at 592-93. 16 Id. at 593-94. 17 Daubert, 509 U.S. at 594-95. 18 See generally John M. Conley & David W. Peterson, Essay, The Science of Gatekeeping: The Federal Judicial Center's New Reference Manual on Scientific Evidence, 74 N.C. L. Rev. 1183, 1186(1996) (hereinafter Conley & Peterson, Science of Gatekeeping). 19 See Contreras v. State, 718 P.2d 129, 136 (Alaska 1986). 20 Id. 21 Id. 22 See id. at 134, 136. 23 See, e.g., Harmon v. State, 908 P.2d 434, 439 & n.5 (Alaska App. 1995); Williams v. State, 884 P.2d 167, 172 (Alaska App. 1994); McGlaufflin v. State, 857 P.2d 366, 371 & n.3 (Alaska App. 1993). 24 Coon v. State, Mem. Op. & J. No. 3070 at 7 (Alaska App., January 25, 1995). 25 See, e.g., Conley & Peterson, Science of Gatekeeping, supra note 18; Paul C. Giannelli, The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later, 80 Colum. L. Rev. 1197, 1207 (1980) [hereinafter Giannelli, Novel Scientific Evidence]; Kesan, Autopsy, supra note 3; Meaney, Pattern Unfolding?, supra note 3; Adina Schwartz, A "Dogma of Empiricism" Revisited: Daubert v. Merrell Dow Pharmaceuticals, Inc. and the Need to Resurrect the Philosophical Insight of Frye v. United States, 10 Harv. J.L. & Tech. 149, 156 (Winter 1997) [hereinafter Schwartz, Dogma of Empiricism]; Note, Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence, 110 Harv. L. Rev. 941, 953 (Feb. 1997) (hereinafter Improving Judicial Gatekeeping). 26 See U.S. Const. art. I, §§ 9 and 10; Alaska Const. art. I, § 15. 27 See Frank v. Magnum, 237 U.S. 309, 344(1915); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); and Laurence H. Tribe, American Constitutional Law § 10-2, at 632 (2d ed. 1988). 28 See State v. Creekpaum, 753 P.2d 1139, 1143 (Alaska 1988). 29 See, e.g., Marks v. United States, 430 U.S. 188, 191-97 (1977); Bouie v. Columbia, 378 U.S. 347, 353-54 (1964); and Tribe, supra note 27. 30 See also Hopt v. Utah,

110 U.S. 574, 588-90 (1884) (upholding retroactive application of statute making felons competent to testify); *Allen v. State*, 945 P.2d 1233, 1236 (Alaska App. 1997) (holding that because it does not alter the definition of crimes or increase the punishment for criminal acts, the amendment of Evidence Rule 404(a)(2) may be applied “retrospectively” without violating the prohibition on ex post facto laws). 31 See *Landgraf v. USI Film Products*, 511 U.S. 244, 266 n.19 (1994); *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (“It is settled. . . that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission; or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.”). 32 See *Adamson v. University of Alaska*, 819 P.2d 886, 889 n.3 (Alaska 1991) (stating that “where a point is given only a cursory statement in the argument portion of a brief, the point will not be considered on appeal”). 33 See Alaska Supreme Court Order No. 364 (August 1, 1979). 34 See *Pulakis v. State*, 476 P.2d 474, 478 (Alaska 1970). 35 Alaska Rule of Evidence 702(a) provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion [or] otherwise. 36 Alaska Rule of Evidence 703 provides: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Facts or data need not be admissible in evidence, but must be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. 37 See also *State v. Alberico*, 861 P.2d 192, 202-04 (N.M. 1993). 38 Alaska R Evid. 703, commentary. 39 *Id.* 40 509 U.S. at 589. 41 See *id.* 42 *State v. United Cook Inlet Drift Ass’n*, 895 P.2d 947, 953 (Alaska 1995); see also *Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d

1173, 1175-76 (Alaska 1993). 43 *State v. Fremgen*, 914 P.2d 1244, 1348 (Alaska 1996). 44 See *Yerrington v. Anchorage*, 675 P.2d 649 (Alaska App. 1983). 45 See *Kesan, Autopsy*, supra note 3, at 1191-92; *Giannelli, Novel Scientific Evidence*, supra note 25, at 1208-3 1; see also *Daubert*, 509 U.S. at 586 n.4 (listing articles debating the merits of Frye). 46 For example, in California one must satisfy the Frye! Kelly test to introduce expert testimony by showing: (1) that the technique or method is sufficiently established to have gained general acceptance in its field; (2) that the expert is properly qualified; and (3) that correct scientific procedures have been used in the particular case. See *People v. Leahy*, 882 P.2d 321, 324-25 (Cal. 1994) (referring to test announced in *People v. Kelly*, 549 P.2d 1240 (Cal. 1976)). Also, even before the Court announced *Daubert*, some federal appellate courts had rejected the Frye test and adopted multifactor reliability tests. See, e.g., *United States v. Downing*, 753 F.2d 1224, 123 8-39 (3d Cir. 1985); *United States v. Williams*, 583 F.2d 1194, 1198-99 (2d Cir. 1978). 47 See 509 U.S. at



593-94. 48 *Daubert v. Merrell Dow Pharm., Inc.*, (Daubert IV), 43 F.3d 1311, 1316(9th Cir. 1995). 49 *Kesan, Autopsy*, supra note 3, at 2003 (citing Daubert IV, 43 F.3d at 1318). 50 See *id.* at 2002. 51 See Alaska R. Evid. 702, commentary. 52 See *Cecil v. Commonwealth*, 888 S.W.2d 669, 674-75 (Ky. 1994); *State v. Foret*, 628 So. 2d 1116, 1121, 1123 (La. 1993); *Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1348-49 (Mass. 1994); *State v. Brooks*, 643 A.2d 226, 229 (Vt. 1993); *Mayhorn v. Logan Med. Found.*, 454 S.E.2d 87, 90-93 (W. Va. 1994). 53 See *Flanagan v. State*, 625 So. 2d 827, 828-29 & n.2 (Fla. 1993); *State v. Carter*, 524 N.W.2d 763, 778-79 (Neb. 1994), overruled on other grounds by *State v. Freeman*, 571 N.W.2d 276, 293 (Neb. 1997); *State v. Riker*, 869 P.2d 43, 47-48 & n.1 (Wash. 1994). 54 See *People v. Leahy*, 882 P.2d 321, 325 (Cal. 1994); *People v. Wesley*, 633 N.E.2d 451, 454 & n.2 (N.Y. 1994). 55 See *Kesan, Autopsy*, supra note 3, at 2000; Daubert IV, 43 F.3d at 1316 (“As we read the Supreme Court’s teaching in Daubert, ... though we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts’ proposed testimony amounts to ‘scientific knowledge,’ constitutes ‘good science,’ and was ‘derived by the scientific method.’”). 56 See Alaska R. Evid. 104(a). 57 Alaska Evidence Rule 706 provides in pertinent part: (a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint expert witnesses. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness’ duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness’ findings, if any; the witness’ deposition may be taken by any party; and the witness may be called to testify by the court or any party. If the court determines that the interests of justice so require, the party calling an expert appointed under this rule may cross-examine the witness. See also Daubert, 509 U.S. at 595. 58 Compare Daubert, 509 U.S. at 595 (possibly implying that Evidence Rule 706 also governs appointment of non-witness advisors), with *In re Peterson*, 253 U.S. 300, 312(1920) (recognizing courts’ “inherent power” to appoint persons not connected with the court to aid judges in the performance of specific judicial duties). 59 See Note, *Improving Judicial Gatekeeping*, supra note 25. 60 See *id.* at 954-58. 61 See generally *People v. Kelly*, 549 P.2d 1240, 1348 (Cal. 1976) (“Lay jurors tend to give considerable weight to ‘scientific’ evidence when presented by ‘experts’ with impressive credentials. We have acknowledged the existence of a’.. . misleading aura of certainty which often envelops a new scientific process, obscuring its currently experimental nature.”) (citations omitted); see also *Contreras v. State*, 718 P.2d 129, 135 (Alaska 1986). 62 *State v. Carter*, 524 N.W.2d 763, 779 (Neb. 1994). 63 See Giannelli, *Novel Scientific Evidence*, supra note 25, at 1207. 64 *Kesan, Autopsy*, supra note 3, at 1991. 65 See also *Alberico*, 861 P.2d at 201 (noting that the Frye test is easily manipulated because it is so vague). 66 See, e.g., *Duffee v. Murray Ohio Mfg. Co.*, 879 F. Supp. 1078, 1086-87 (D. Kan. 1995) (excluding expert testimony

because it was devoid of a meaningful and factual basis for weighing the factors involved in the design of a product in defective design case), *aff'd*, 91 F.3d 1410 (10th Cir. 1996); *Richardson v. United States*, 835 F. Supp. 1236, 1239-41 & n.i (ED. Wash. 1993) (excluding testimony of automobile accident reconstructionists because their computations lacked fixed factors based on on-the-scene measurements and their conclusions were opinion-driven). 67 See Schwartz, *Dogma of Empiricism* *supra* note 25, at 156- 57. 68 *Alberico*, 861 P.2d at 203. 69 See *Daubert*, 509 U.S. at 592 n. 11; see also *Giannelli, Novel Scientific Evidence*, *supra* note 25, at 1202. 70 See 509 U.S. at 594. 71 See *Sweet v. Sisters of Providence in Wash.*, 895 P.2d 484, 494 n.10 (Alaska 1995); see also *Hawley v. State*, 614 P.2d 1349, 1361 (Alaska 1980) (“The admissibility of evidence is largely within the trial court’s discretion and its rulings will not be overturned on appeal in the absence of an abuse of discretion.”). 72 476 P.2d at 479. 73 674 P.2d at 799 & n.l 1. See also *State v. Copeland*, 922 P.2d 1304, 13 14-15 (Wash. 1996) (holding that review of admissibility under the Frye test is *de novo* and involves a mixed question of law and fact). But see *State v. Alberico*, 861 P.2d 192, 205-06 (N.M. 1993) (noting that although the abuse of discretion standard “lends itself to the criticism that it will lead to inconsistent results in lower courts throughout the state,” abuse of discretion is the proper standard when reviewing a trial court’s decision to admit scientific evidence under *Daubert* because appellate courts may not have the same access to the most recent data concerning the scientific method). 74 See *Kesan, Autopsy*, *supra* note 3, at 203 8-39; Dissent at 42-43. 75 See *Kesan, Autopsy*, *supra* note 3, at 2038-39; Dissent at 42. 76 See *Harris v. Keys*, 948 P.2d 460, 466 (Alaska 1997) (“This court reviews the superior court’s decisions on the admissibility of evidence for an abuse of discretion.”) (citation omitted); *Sever v. Alaska Pulp Corp.*, 931 P.2d 354, 359 n.5 (Alaska 1996) (“A trial court’s evidentiary rulings are reviewed under the abuse of discretion standard.”) (citation omitted). 77 See Dissent at 42. 78 *Alberico*, 861 P.2d at 169-70. 79 Dissent at 44. 80 See generally, *United States v. Kayne*, 90 F.3d 7, 11(1st Cir. 1996); *Raskin v. Wyatt, Co.*, 125 F.3d 55, 65-66 (2d Cir. 1997); *Benedi v. McNeil P.P.C.*, 66 F.3d 1378, 1384(4th Cir. 1995); *Pedraza v. Jones*, 71 F.3d 194, 197 (5th Cir. 1995); *American & Foreign Ins. Co. v. General Elec. Co.*, 45 F.3d 135, 137(6th Cir. 1995); *Hose v. Chicago N.W. Transp. Co.*, 70 F.3d 968, 972(8th Cir. 1995); *United States v. Chisehilly*, 30 F.3d 1144, 1152(9th Cir. 1994); *Duffee, Thornton v. Murray Ohio Mfg. Co.*, 91 F.3d 1410, 1411(10th Cir.); *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 567 (D.C. Cir. 1993). 81 See also Bruce E. Koenig, *Spectrographic Voice Identification*, 13 FBI Crime Lab. Digest 105, 115 (1986). 82 See *State v. Gortarez*, 686 P.2d 1224, 1233 n.4 (Ariz. 1984). See also *United States v. Smith*, 869 F.2d 348,352(7th Cir. 1989) (defining the relevant scientific community as including “not only those who utilize spectrographic voice identification techniques, but linguists, psychologists and engineers as well” (footnote omitted)); *Cornett v. State*, 450 N.E.2d 498, 503 (Ind. 1983) (defining the relevant scientific community as “linguists, psychologists, and engineers, in addition to the people who use voice spectrography for identification purposes”). 83 See, e.g., *Windemere, Inc. v. International Ins. Co.*, 522 A.2d 405, 408 (N.J. 1987). 84 See,

e.g., *Gortarez*, 686 P.2d at 1236; *People v. Kelly*, 549 P.2d 1240, 1251 (Cal. 1976); *Cornett*, 450 N.E.2d at 503; *People v. Tobey*, 257 N.W.2d 537, 538-40 (Mich. 1977); *Windemere*, 522 A.2d at 408-12. 85 See, e.g., *United States v. Williams*, 583 F.2d 1194, 1198-1201 (2d Cir. 1978); *United States v. Baller*, 519 F.2d 463, 465-67 (4th Cir. 1975); *United States v. Franks*, 511 F.2d 25, 32-34 (6th Cir. 1975). 86 See, e.g., *United States v. Smith*, 869 F.2d 348, 353 (7th Cir. 1989); *United States v. Maivia*, 728 F. Supp. 1471, 1473-74 (D. Haw. 1990). 87 See Bruce E. Koenig, *Spectrographic Voice Identification*, 13 *FBI Crime Lab. Digest*

105, 115 (1986). 88 Bruce E. Koenig, *Selected Topics in Forensic Voice Identification*, 20 *FBI Crime Lab. Digest* 78, 80 (1993). 89 *Id.* at 80, 81. F.A.B.E.,

lead to inconsistent treatment of similarly situated claims.<sup>5</sup> We should strive to avoid such inconsistency for the sake of both litigants and the courts. The existence of conflicting superior court rulings on the admissibility of a certain scientific theory or technique will not only hinder efforts to provide uniformity under the Alaska Rules of Evidence but will also decrease litigants' ability to predict future rulings and to prepare efficiently and conscientiously for future litigation involving expert scientific testimony.<sup>6</sup> Moreover, one commentator has suggested that such inconsistency among trial courts may compromise the integrity of the judiciary in the eyes of the public: This nonuniformity, however, must not be allowed to fester and must be reconciled at the appellate level. Otherwise, inconsistent jury verdicts, widely disparate compensation for similar injuries, and erroneous criminal verdicts will continue to erode public confidence in our justice system. [7] The desire for uniformity in decisions regarding the admissibility of expert scientific testimony does not stem from a concern about trial judges' competency to decide sophisticated scientific questions. As the court acknowledges, two conscientious judges with experience adjudicating disputes involving questions of science can come to well-reasoned yet conflicting decisions rejecting or accepting scientific information as evidence.<sup>8</sup> The court believes such inconsistencies will not be of a problematic magnitude.<sup>9</sup> I hope this optimistic view proves correct. But if it does not, then parties preparing for litigation will not be able to predict with confidence which techniques and theories Alaska courts will view as "real science." <sup>10</sup> The only way to ensure such consistency is to allow appellate courts to review Daubert rulings de novo with respect to the scientific validity of such techniques and theories.<sup>11</sup> <sup>1</sup> Moreover, decisions about the validity of a general scientific theory or principle normally do not turn on an assessment of the credibility of witnesses or other decisions within the exclusive province of the trial judge. The reliability of scientific evidence does not change from one case to the next;<sup>12</sup> a scientific method is either reliable or unreliable. Thus, the validity of a scientific principle, technique, or process "is not the traditional case-specific adjudicative fact to which an appellate court defers to the trial court's findings."<sup>13</sup> Instead, the question of the validity of scientific information should be reviewed de novo by an appellate court, for "[t]he answer to the question about the reliability of a scientific technique or process does not vary according to the circumstances of each case. It is therefore inappropriate to view this threshold question of reliability as a matter within each trial judge's individual, discretion."<sup>14</sup> For example, a significant amount of research has been conducted on the question of whether smoking causes lung cancer. Litigants use this same research to prove their claims in a variety of smoking-related suits. Because the question of whether such studies are scientifically valid is not a case-specific factual inquiry, we should review rulings on the studies' admissibility de novo. In contrast, we should review a trial judge's assessment of the competency of a particular expert witness to render an opinion on the cause of a particular plaintiff's lung cancer for abuse of discretion.<sup>15</sup> Based on these concerns, at least two of the states that have adopted Daubert as the standard for admissibility of scientific evidence apply a de novo standard of review to questions of scientific validity. In *Taylor v. State*,<sup>16</sup> the Oklahoma

Court of Criminal Appeals adopted the Daubert standard and noted the need for independent appellate review: After... considering the permanent impact of a trial judge's decision to admit novel scientific evidence, we find we should subject that decision to an independent, thorough review and not simply ask whether an abuse of discretion was committed.[17] Similarly, in *Craddock v. Watson*, 18 the West Virginia Supreme Court adopted a hybrid standard of review for Daubert rulings: The trial court's determination regarding whether the scientific evidence is properly the subject of scientific, technical, or other specialized knowledge is a question of law that we review de novo. On the other hand, the relevancy requirement compels the trial judge to determine... that the scientific evidence "will assist the trier of fact to understand the evidence or to determine a fact in issue." W. Va. R Evid. 702. Appellate review of the trial court's rulings under the relevancy requirement is under an abuse of discretion standard.[19] The amici curiae in this case, Rex Lamont Butler & Associates and the Alaska Public Defender Agency, direct our attention to two Alaska cases, *Pulakis v. State*<sup>20</sup> and *State v. Contreras*,<sup>21</sup> in which Alaska appellate courts have exercised their independent judgment in determining the admissibility of certain scientific evidence such as polygraph examinations and hypnosis.<sup>22</sup> The court's response to the implication of these cases -- that questions of scientific validity should be subject to a more stringent standard of review -- is that such a view "does not adequately take account of the reality of the judicial process and the variable state of science."<sup>23</sup> The court cites the New Mexico case *State v. Alberico*<sup>24</sup> to argue that appellate courts might not have access to "all of the relevant, most recent data concerning the scientific method" at issue.<sup>25</sup> But appellate courts making an initial determination about the scientific validity of a theory or technique should have access to as much data as the trial court.<sup>26</sup> Additionally, because litigants in Alaska have an appeal as of right, we will have ample opportunity to revisit our decisions on scientific validity of a certain technique if new evidence or literature surfaces on the subject. And if a decision as to the reliability of scientific evidence were ever to hinge on an assessment of a particular witness's credibility, we could review such a decision for abuse of discretion under a hybrid standard. In conclusion, this court should review rulings on the reliability of a general type of scientific evidence or method under a de novo standard and rulings on the evidence's relevance to a particular case for abuse of discretion. Such a hybrid standard of review would allow trial judges in Alaska considerable flexibility in making factual findings and assessments of witness competency and credibility while still preserving needed consistency in judicial decisions regarding the admissibility of scientific evidence. For this reason, I respectfully dissent from section III.D.1 of the court's opinion. Footnotes 1 509 U.S. 579 (1993). 2 Op. at 7 (quoting Daubert, 509 U.S. at 592-93). 3 The Daubert Court explained the subtle difference between validity and reliability: We note that scientists typically distinguish between "validity" (does the principle support what it purports to show?) and "reliability" (does application of the principle produce consistent results?).... [O]ur reference here is to evidentiary reliability -- that is, trustworthiness. In a case involving scientific evidence, evidentiary reliability will be based upon scientific validity. 502 U.S. at 590 n.9. 4

Several legal commentators have suggested such a hybrid standard of review. See, e.g., *Developments in the Law: Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev. 1509, 1528 (1995) (“[C]ourts should consider developing a hybrid approach in which appellate courts review de novo those decisions involving general scientific propositions, but allow trial courts greater discretion with regard to the particular facts of each case.”); David L. Faigman et al., *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Future of Scientific Evidence*, 15 Cardozo L. Rev. 1799, 1822 (1994) (advocating de novo review for scientific knowledge that transcends individual cases but abuse of discretion review for questions of witness competency); Michael H. Gottesman, *From Barefoot to Daubert to Joiner: Triple Play or Double Error?*, 40 Ariz. L. Rev. 753, 776-80 (1998) (listing the dangers of applying abuse of discretion review to Daubert rulings); Jay P. Kesan, *An Autopsy of Scientific Evidence in a Post-Daubert World*, 84 Geo. L.J. 1985, 2038 (1996) (“Examination of scientific theories or methodologies to determine whether they have evolved sufficiently to amount to scientific knowledge is a task that lends itself to de novo appellate review.”). 5 See Alan W. Tamarelli, Jr., *Daubert v. Merrell Dow Pharmaceuticals: Pushing the Limits of Scientific Reliability -- The Questionable Wisdom of Abandoning the Peer Review Standard for Admitting Expert Testimony*, 47 Vand. L. Rev. 1175 (1994): If Daubert decisions are reviewed [for abuse of discretion], inconsistent decisions concerning the admissibility of novel scientific testimony may go unchecked from . . . judge to judge. This inconsistent standard of review inevitably may confound efforts to provide uniformity under the Rules. *Id.* at 1196. 6 See Faigman et al., *supra* note 4, at 1822 (“The validity of scientific knowledge does not change from court to court; assessments of that knowledge also should not change from court to court.”). 7 Kesan, *supra* note 4, at 2037. Michael Gottesman notes that, in the wake of the Supreme Court’s decision in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), directing federal courts to apply the abuse of discretion standard, such inconsistency could undermine the integrity of the courts: This [inconsistency in district courts in light of *Joiner*] will be disquieting, if not promotive of a general disrespect within the populace for the integrity of federal judges. Of course, variance between courtrooms would be predictable even if these issues were given to juries in every case, but disagreement among juries is likely to be less offensive to shared communal values than sanctioned disagreement among judges. Gottesman, *supra* note 4, at 778. 8 *Op.* at 31. The flexible nature of the Daubert criteria allows more inconsistency among judges than the comparatively rigid Frye standard. See Kaushal B. Majmudar, *Daubert v. Merrell Dow: A Flexible Approach to the Admissibility of Novel Scientific Evidence*, 7 Harv. J.L. & Tech. 187, 204 (1993) (noting the potential for inconsistency and the irony that “the main reason offered by the Court for its grant of certiorari [in *Daubert*] was that the lower courts had been inconsistent in their methods and results”). 9 *Op.* at 31. 10 This uncertainty may be especially troubling in criminal cases in which a defense theory rests primarily on the admissibility of scientific testimony about a subject like eyewitness identification. 11 See Kesan, *supra* note 4, at 2038 (“As appellate

courts repeatedly face the same sorts of scientific evidence, more uniform adjudication at the trial and appellate levels will result.”). 12 See Gottesman, supra note 4, at 777-78 (“[T]he issue of general causation -- whether substance A is capable of causing disease B-- does not vary from case to case...” ). 13 Faigman et al., supra note 4, at 1821. 14 Daubert v. Merrell Dow Pharmaceuticals, Inc., 951 F.2d 1128, 1130(9th Cir. 1991) (quoting Reed v. State, 391 A.2d 364, 367 (Md. 1978)), vacated on other grounds, 509 U.S. 579 (1993). The Supreme Court recently decided that federal courts should review lower courts’ Daubert rulings for abuse of discretion. See General Electric Co. v. Joiner, 522 U.S. 136, 118 S. Ct. 512 (1997). But the Joiner Court’s holding on this point appears to rise exclusively out of a concern that courts of appeals were reviewing too strictly those district court rulings excluding scientific evidence on the grounds that the liberal thrust of the Federal Rules of Evidence favors admissibility. See 118 S. Ct. at 517. The Court made clear that decisions excluding and admitting evidence should be subject to the same standard of review. See id. The Court did not address the potential for inconsistency under an abuse of discretion standard or the possibility of a hybrid standard of review. 15 See Faigman et al., supra note 4, at 1822 (discussing the smoking/lung cancer example). 16889 P.2d 319 (Okla. Crim. App. 1995). A few states have cited the Supreme Court’s decision in General Electric v. Joiner, 522 U.S. 136(1997), for the proposition that Daubert rulings should be reviewed only for abuse of discretion. See Smith v. Belle Bonfils Mem’l Blood Ctr., No. 97CA0800, 1998 WL 684332, at \*3 (Cob. App. Sept. 3, 1998); Monette v. Clinch, C8-98-329, 1998 WL 481892, at \*1 (Minn. App. Aug. 18, 1998); Yamaha Motor Co. v. Arnoult, 955 P.2d 661, 666 (Nev. 1998); DeVore v. Deloitte & Touche, No. 01A01-9602-CH00073, 1998 WL 68985, at \*9 (Tenn. App. Feb. 20, 1998). But the Joiner decision is not binding on Alaska courts. Moreover, the Joiner Court’s holding on this point was based on a desire to stop courts of appeals from applying different standards of review to rulings excluding and admitting expert scientific testimony. See supra note 14. The Court did not address issues of consistency or the possibility of a hybrid standard of review. See id. 17 Taylor, 889 P.2d at 332 (footnote omitted). 18475 S.E.2d 62 (W. Va. 1996). 19 Id. at 67 (quoting Gentry v. Mangum, 466 S.E.2d 171, 174 (W. Va. 1995)). 20476 P.2d 474 (Alaska 1970). 21 674 P.2d 792 (Alaska App. 1983), rev’d on other grounds, 718 P.2d 129 (Alaska 1986). 22 See Pulakis, 476 P.2d at 479 (polygraph examinations); Contreras, 674 P.2d at 799 (hypnosis). 23 Op. at 30.24 Op. at 30-3 1 (quoting 861 P.2d 192 (N.M. 1993)). 25 Id. (quoting 861 P.2d at 169). 26 Indeed, the Alberico court itself noted that, with respect to scientific theories about which “peer-reviewed literature or law review articles” have been written, appellate courts might be better suited because of lack of time pressure to make a determination of scientific validity. See 861 P.2d at 205- 06. -64-5091