No. 72PA14 TWENTY-THIRD JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wilkes
	)	
CHARLES ANTHONY McGRADY	)	

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AMICUS CURIAE BRIEF
NORTH CAROLINA ADVOCATES FOR JUSTICE

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Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, the North Carolina Advocates for Justice submits this brief as *amicus curiae* in support of Defendant Charles McGrady.

INTRODUCTION

The "sacred and inviolable" right to trial by jury guaranteed by the North Carolina Constitution is the foundational principle upon which all Rules of Evidence must be construed. *N.C. Const. art. I*, § 25. This Court has long held that the right to a jury trial shall not be abridged by overly stringent rules governing the admissibility of expert opinion. Here, in excluding the opinions of David Cloutier under the newly revised Rule 702(a), the trial court employed – and the Court of Appeals panel affirmed – the type of strict and mechanistic gatekeeping this Court has consistently repudiated. This *amicus curiae* respectfully urges the Court to clarify the proper role of the trial court in making admissibility determinations of expert testimony at trial, and in so doing reaffirm that this state will not engraft the convoluted patchwork of federal *Daubert* case law onto its interpretation and application of Rule 702(a). Instead, the deep-rooted tenets of reliability, relevancy, and flexibility should remain guideposts for our trial judges.

ARGUMENT

I. The Right to Trial by Jury Must Not Be Diminished by the Rules of Evidence Governing Expert Admissibility

Our State Constitution provides that "in all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and *shall remain sacred and inviolable*." *N.C. Const. art. I,* § 25 (emphasis added). In criminal cases, "[t]he right of a defendant charged with a criminal offense to present to the jury his version of the facts is a fundamental element of due process of law" guaranteed by Article I, Sections 19 and 23 of the North Carolina Constitution. *State v. Miller*, 344 N.C. 658, 673, 477 S.E.2d 915, 924 (1996). Thus, it has always been the case in North Carolina that the determination of facts, and the conclusions to be drawn from those facts, "solely belongs to the province of the jury." *State v. Twitty*, 2 N.C. 102, 103 (1794). This safeguard of the rights of the people stands as the bedrock principle on which this Court has constructed North Carolina law governing the admission of evidence at trial.

In an era long before the advent of modern scientific testimony, this Court delineated the roles of judge and jury and declared that "it belongs to the jury alone, to *weigh* the evidence." *Doe ex dem. Jones v. Fulgham*, 6 N.C. 364, 367 (1818) (emphasis in original). Although a trial court has an obligation to "determine whether the evidence is *conducive* to prove a fact," and thus whether it may be admitted, only the jury may "pronounce what it *does* weigh." *Fulgham*, 6 N.C. at 367-68 (emphasis in original). This Court has consistently recognized "the

fundamental distinction between the admissibility of evidence and its weight, the latter of which is a matter traditionally reserved for the jury." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 460, 597 S.E.2d 674, 687 (2004).

In *Howerton*, this Court limited the trial court's role in assessing expert testimony to "a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant)." *Id.* at 461. 597 S.E.2d at 688. This determination adequately and completely answers the question of whether the evidence is conducive to prove a fact at issue. Once that threshold has been met, the evidence offered should be placed into the scales and "any lingering questions or controversy concerning the quality of the expert's conclusions" must be tested through the adversarial process and weighed by the jury. *Id.* A more sweeping style of exclusionary gatekeeping by the trial court would "unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence." *Id.* at 468, 597 S.E.2d at 692. This Court should adhere to its longstanding protection of the right to trial by jury – a constitutional guarantee that legislation cannot abridge – in interpreting the latest revision of the Rule of Evidence governing admission of expert testimony.

II. The Admissibility Determination Envisioned by *Daubert* Is a Flexible One Favoring Inclusion, Not a Mechanistic Checklist Leaning Toward Exclusion

> "The inquiry envisioned by Rule 702 is, we emphasize, a flexible one." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L.E.2d 469 (1993).

When the United States Supreme Court decided *Daubert* in 1993, the question presented was whether, after the adoption of the Federal Rules of Evidence, expert testimony still had to satisfy the requirement that "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." *Frye v. United States*, 54 App. D.C. 46, 47, 293 F. 1013, 1014 (1923). The Court found the "austere standard" of general acceptance to be both "absent from, and incompatible with the Federal Rules of Evidence." *Daubert*, 509 U.S. at 589, 125 L.E.2d at 480. Instead, the Court held that under the Rules all the trial judge must ensure is that scientific testimony or evidence admitted is both relevant and reliable. *Id*.

Daubert's primary holding, which rejected the *Frye* test as incompatible with the "liberal thrust" of the Federal Rules, was unanimous. *Id*. at 588, 125 L.E.2d at 480. *Daubert* thus made clear that expert testimony should not be rejected simply because it does not meet the austere standard of "general acceptance." All of the Justices agreed that Rule 702 also "confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony." *Id.* at 600, 125 L.E.2d at 487 (Rehnquist, J., concurring in part and dissenting in part). These points were (and remain)

uncontroversial in North Carolina. Before *Daubert*, this Court had already rejected application of the more rigorous *Frye* "general acceptance" test and instead made clear that the responsibility of our trial judges is to determine that proposed expert testimony is sufficiently reliable. *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852-853 (1990).[1]

The second portion of the *Daubert* opinion, which drew a prescient dissent from Justices Rehnquist and Stevens, spawned an approach to "gatekeeping" that has since morphed into a federal practice more exacting, and far more complex, than the "general acceptance" standard *Daubert* sought to relax. A majority of the Court held that, when faced with a proffer of expert ***scientific***[2] testimony, the trial court should make "a preliminary assessment of whether the reasons or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*,

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[1] North Carolina's nearly identical version of Rule 702 came into force in 1984. An Act to Simplify and Codify the Rules of Evidence, c. 701, sec. 1, 1983 N.C. Sess. Laws 666, 719; *compare*, Fed. Rule. Evid. 702 (1993).

[2] The Supreme Court's holding in *Daubert* was "limited to the scientific context because that is the nature of the expertise offered here." *Daubert*, 509 U.S. at 590, 125 L.Ed.2d. at 481, n.8. The Court recognized that Rule 702 also allows admission of non-scientific testimony based on "technical, or other specialized knowledge." *Id*. Neither *Daubert* nor the rule gives "scientific" testimony a special presumption of admissibility, and courts have recognized that "genuine expertise may be based on experience or training." *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 263 (7th Cir. 1996). As discussed in Section V below, the Court of Appeals erred by approaching Cloutier's testimony in this case as if its admissibility hinged on its status as "science," rather than its reliability.

509 U.S. at 592-93, 125 L.E.2d at 482. The Supreme Court made clear that for determining reliability of scientific opinions, "we do not presume to set out a definitive checklist or test." Instead, the Court made what it referred to as "some general observations" about the factors that suggest scientific validity. *Id.* at 593, 125 L.E.2d at 482.

The Supreme Court later cautioned that "*Daubert* makes clear that the factors it mentions do *not* constitute a 'definitive checklist or test.'" *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150, 143 L.Ed.2d 238, 251 (1999). Despite the Supreme Court's clear statements that *Daubert* did not establish a gatekeeping checklist, other courts,[3] including the trial court and the Court of Appeals in this case, have apparently reduced the *Daubert* factors to a strict, four-point test of admissibility. Perhaps because it is easier and more efficient to view *Daubert* as establishing a bright line test to be used in every case, these four factors have mutated into the rigid bars of the "gate" many lower courts now believe they must zealously keep. The Court of Appeals' formula in this case was typical:

> In deciding whether the proffered scientific theory or technique will assist the trier of fact, the trial court may consider, among other things, (1) "whether [a theory or technique] can be (and has been) tested," (2) "whether the theory or technique has been subjected to

[3] *See, e.g., EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749, 752-753 (6th Cir. 2014) (upholding the trial court's exclusion of expert testimony after noting that the trial court "considered every one of the *Daubert* factors."); *Higgs v. State*, 222 P.3d 648, 657 (Nev. 2010) (noting that "lower courts have applied Daubert in a rigid manner" and collecting cases).

> peer review and publication," (3) "the known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation," and (4) whether the theory or technique is generally accepted as reliable in the relevant scientific community.

State v. McGrady, ___ N.C. App. ___, ___, 753 S.E.2d 361, 368 (2014) (quoting *Daubert*, 509 U.S. at 593-94, 125 L. Ed. 2d at 482-83). While the Court of Appeals correctly pointed out that "other things" may be considered besides the *Daubert* quartet, the panel affirmed the trial court's adherence to *only* these four factors in excluding Cloutier's opinions were largely based on his experience, training, and education; not the purely scientific territory in which *Daubert* was born[4].

Both Rule 702(a) and prior North Carolina law condition the admissibility of expert testimony on its helpfulness to the trier of fact, rather than its status as science. Experience-based expert testimony has a long history in this State.

> [I]n a proper case, a jury may be enlightened by the opinion of an experienced cellar-digger, or factory worker, or shoe merchant, or a person experienced in any other line of human activity. Such a person,

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[4] As scholars have noted, the tendency of trial courts in *Daubert* jurisdictions to focus too heavily on the "scientific validity" of expert testimony is a real concern -- one that highlights the unrealistic expectations the federal approach places on overworked and understaffed state court judges. "The notion of resources is only infrequently included in a discussion of the merits of *Daubert*," and "[m]aking the standards too exacting and difficult for judges untrained in science and technical errors is almost certain to lead to errors, or to the direct translation of judicial bias into the admissibility decision." Robert P. Mosteller, *Finding the Golden Mean with Daubert: An Elusive, Perhaps an Impossible, Goal*, 52 Vill. L. Rev. 723, 757-758 (2007).

> when performing such a function, is as truly as "expert" as is a learned specialist on mental disorders in a particular field.

2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 184, at 701-02 (7th ed. 2011) (citing North Carolina Supreme Court cases from 1888 through 1975). This type of expertise – acquired through experience in a relevant activity or field – remains of critical importance. *See*, *e.g.*, *State v. Aguallo*, 322 N.C. 818, 820-22, 370 S.E.2d 676, 677-78 (1988) (holding that years of experience and numerous investigations qualified social services caseworkers to testify as experts regarding the characteristics of abused children); *Rabon v. Hopkins*, 208 N.C. App. 351, 359, 703 S.E.2d 181, 187 (2010), *disc. rev. denied*, 365 N.C. 195, 710 S.E.2d 22 (2011) (holding that an expert who had conducted "thousands of truck inspections" was qualified to testify regarding "whether the air line was designed to stay attached during the normal course of transport" and did not need to be an engineer).

While in theory a rigid test should foster equality of application, that has decidedly not been the case in the federal courts since *Daubert*. Analyses of the growing body of decisions purporting to apply the *Daubert* test have found that courts apply a more lenient standard to expert testimony offered by the prosecution in criminal cases and by defendants in civil cases. One extensive analysis of the application of *Daubert* through 1999 found a pattern of unequal application:

> [A]s to proffers of asserted expert testimony, civil defendants win their *Daubert* reliability challenges to plaintiffs' proffers most of the time, and … criminal defendants virtually always lose their reliability challenges to government proffers. And, when civil defendants' proffers are challenged by plaintiffs, those defendants usually win, but when criminal defendants' proffers are challenged by the prosecution, the criminal defendants usually lose.

D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards Being Left on the Dock?*, 64 Alb. L. Rev. 99, 99 (2000). This pattern has continued, and persists even under more nuanced analyses of similar types of expert testimony in the civil and criminal realms. *See, e.g.*, Julie A. Seaman, *Symposium on Evidence Reform: Article: A Tale of Two Dauberts*, 47 Ga. L. Rev. 889 (2013) (analyzing the different treatment of fire origin and handwriting expert testimony in civil and criminal federal trials).

III. After *Daubert* and Its Progeny, North Carolina and Other States Have Protected the Right to Trial by Jury

Two years after *Daubert*, this Court cited with approval the Supreme Court's recognition that assessing proposed scientific expert testimony "requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid and whether that reasoning or testimony can be properly applied to the facts at issue." *State v. Goode*, 341 N.C. 513, 527, 461 S.E.2d 631, 639 (1995). However, this Court did not discuss or adopt the four "*Daubert* factors" or their application. Nine years later, this Court clarified that North Carolina's approach to expert testimony, rooted in the "sacred and

inviolable" right to trial by jury, should remain "decidedly less mechanistic and rigorous that the 'exacting standards of reliability' demanded by the federal approach." *Howerton*, 358 N.C. at 464, 597 S.E.2d at 690. The North Carolina approach consists of a three-step test which asks: "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Id.* at 458, 597 S.E.2d at 686 (citations omitted).

In *Howerton*, this Court reviewed the transformation of *Daubert* from an announcement by the Supreme Court of a liberal admissibility standard into a sea of undulating case law that is "anything but liberal or relaxed." *Id*. at 466, 597 S.E.2d at 691. The *Howerton* court noted that "trial courts, such as the one in the present case, have often been reluctant to stray far from the original *Daubert* factors in their analysis of the reliability of expert testimony." *Id*. This observation remains true today, as clearly evidenced by the trial court's analysis of Cloutier's testimony.

This Court in *Howerton* chose to protect North Carolina's right to trial by jury in order to avoid "trial courts asserting sweeping 'gatekeeping' authority under *Daubert* [that] may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of facts and to assess the weight of the evidence." *Id.* at 468, 597 S.E.2d at 692 (*citing N.C. Const. art I*, § 25). This

decision was based on constitutional principles and established case law, not a distinction between the language of the federal rule and the North Carolina rule. Indeed, at the time of *Howerton*, North Carolina's Rule 702 was identical to the federal rule applied in *Daubert* except for the omission of the words "or otherwise." *Compare* § 8C-1, Rule 702 (2004) and Fed. R. Evid. 702 (1993).

North Carolina was not the only state to reject the mechanistic version of *Daubert* while having a state version of Rule 702 nearly identical to its federal counterpart. The South Carolina Supreme Court declined to adopt *Daubert* in applying the reliability test of Rule 702,[5] reiterating its own test for reliability. *State v. Council*, 515 S.E.2d 508, 518 (S.C. 1999). The Nevada Supreme Court did the same, and specifically distinguished the flexible standard of Rule 702[6] and *Daubert* itself from *Daubert*-as-applied:

> Indeed, to the extent that *Daubert* espouses a flexible approach to the admissibility of expert witness testimony, this court has held it is persuasive. But, to the extent that courts have construed *Daubert* as a standard that requires mechanical application of its factors, we decline to adopt it. We see no reason to limit the factors that trial judges in

[5] South Carolina's Rule 702 was identical to the 1993 federal rule. S.C.R.E. 702 (1999). It has not been amended. S.C.R.E. 702 (2014).

[6] Nevada's rule governing expert testimony read as follows: "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 special knowledge, skill, experience, training or education may testify *to matters within the scope of such knowledge*." Nev. Rev. Stat. Ann. § 50.275 (2010) (emphasis added). Except for the language in italics, it was identical to the 1993 federal rule. It has not been amended. Nev. Rev. Stat. Ann. § 50.275 (2014).

> Nevada may consider when determining expert witness testimony admissibility.

Higgs, 222 P.3d at 657-658 (citations omitted). The Hawaii Supreme Court similarly held that the *Daubert* factors were not definitive,[7] and used a much broader set of factors drawn from its own case law. *State v. Vliet*, 19 P.3d 42, 55-57 (Haw. 2001).

In rejecting the rigid federal approach altogether,[8] the Arizona Supreme Court held:

> Questions about the accuracy and reliability of a witness' factual basis, data, and methods go to the weight and credibility of the witness' testimony and are questions of fact. The right to jury trial does not turn on the judge's preliminary assessment of testimonial reliability. It is the jury's function to determine accuracy, weight, or credibility.

Logerquist v. McVey, 1 P.3d 113, 131 (Ariz. 2000). The Washington Supreme Court also applied the reliability standards of Rule 702[9] in tandem with a modified

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[7] Hawaii's Rule 702 read as follows: "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. *In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.*" Haw. R. Evid. 702 (2001) (emphasis added). The rule was identical to the 1993 federal rule, but added the sentence in italics. It has not been amended. Haw. R. Evid. 702 (2013).

[8] Arizona's Rule 702 was identical to the 1993 federal rule. Ariz. R. Evid. 702 (2000). It was amended in 2012, as discussed in section IV below.

Frye analysis of general acceptance after finding that *Daubert's* primary holding did not apply to the state rule. *State v. Copeland*, 922 P.2d 1304, 1314 (Wash. 1996).

In *Howerton*, North Carolina claimed its place among states that have applied Rule 702 in keeping with the constitutional right to trial by jury. The *Howerton* Court admonished trial judges to maintain the Rules of Evidence as the "flexible" standard envisioned by *Daubert*, rather than the rigid formulation that has evolved in its progeny. Newly revised Rule 702(a) does not require that these principles be abandoned. Instead, this Court should announce an interpretation of Rule 702(a) consistent with the longstanding principles of expert admissibility in North Carolina – a construction that wisely applies the rule as written without the exclusionary gloss added by federal courts.

IV. Other States Have Refused to Abandon Their Prior Admissibility Standards Even After Revisions to Rule 702

Before this Court's decision in *Howerton*, Federal Rule 702 was amended in response to *Daubert* and its progeny. The amended rule read as follows:

> 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, if (1) the testimony is based upon sufficient facts or data,*

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[9] Washington's Rule 702 was identical to the 1993 federal rule. Wash. E.R. 702 (1996). It has not been amended. Wash. E.R. 702 (2014).

> *(2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

Fed. R. Evid. 702 (2001) (emphasis added). In its comment accompanying the amendment, the Federal Rules Advisory Committee cautioned that the rule made no attempt to "codify" the *Daubert* factors, which "were neither exclusive nor dispositive" under *Daubert* itself. Advisory Committee's Note on the 2000 Amendments to Fed. R. Evid. 702, 28 U.S.C. App., p. 894 (2000). The Committee Note sought "to emphasize that the amendment is not intended to limit the right to jury trial." GAP Report—Proposed Amendment to Rule 702, 28 U.S.C. App., p 896.

In 2011, the General Assembly amended North Carolina Rule of Evidence 702(a) to match the Federal Rule as amended in 2000. An Act to Provide Tort Reform for Citizens and Businesses, ch. 283, § 1.3, 2011 N.C. Sess. Laws 1048, 1049. The effect of the amendment was to add the portion of the rule set out in italics above.

The revised version of Rule 702 has not been as widely adopted by the states as its predecessor. Nonetheless, some of the states that rejected the rigid *Daubert* factor test have had the opportunity to comment on the effect of the revision. In *Vliet*, the Hawaii Supreme Court noted the factors added by the revision and held that trial courts could consider these factors "in light of the rational basis

underlying the factors, and the broad standard [of the prior Rule 702]." *Vliet*, 19 P.3d at 57-58. Notably, Hawaii interpreted its rule in this flexible manner despite language in Hawaii's rule similar to the amended Rule 702: "In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert." Haw. R. Evid. 702 (2001). Thus, consideration of data, principles, and methods found in the revised 702(a) was deemed consistent with Hawaii's preexisting flexible approach to expert testimony.

In Arizona, the Rules of Evidence are adopted by its supreme court rather than the legislature. In 2010, the Arizona legislature attempted to codify the specific *Daubert* factors into a new rule of evidence. This effort was struck down as an unconstitutional violation of separation of powers and the Arizona Supreme Court's rulemaking authority. *Lear v. Fields*, 245 P.3d 911, 918 (Ariz. Ct. App. 2011).

The Arizona Supreme Court has since adopted the revised version of Rule 702. Although the court has not issued a decision authoritatively interpreting the new rule, the comment to the amended rule reflects an interpretation consistent with its past protection of the right to jury trial:

> The amendment is not intended to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony, nor is the amendment intended to permit a challenge to the testimony of every expert, preclude the testimony of

> experience-based experts, or prohibit testimony based on competing methodologies within a field of expertise. The trial court's gatekeeping function is not intended to replace the adversary system. 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.

Comment to 2012 Amendment, Ariz. R. Evid. 702. Thus, like Hawaii and other courts, the Arizona Supreme Court has found the adoption of the revised rule consistent with its holding that "the right to jury trial does not turn on the judge's preliminary assessment of testimonial reliability." *Logerquist*, 1 P.3d at 131.

V. A Path Forward for North Carolina Courts

While the amendments to Rule 702 have changed some of the particulars of North Carolina law regarding the assessment of proffered expert testimony, the amended rule does not – either directly or by implication – require this Court to jettison its prior holdings and adopt the inflexible version of *Daubert* popular in the federal courts. This state has a long and instructive body of case law defining the constitutional admissibility of expert testimony across wide-ranging areas of practice, both criminal and civil. The three factors added by the revised rule differ little from the existing requirement in North Carolina that a trial court assess whether "the expert's proffered method of proof [is] sufficiently reliable as an area for expert testimony" and whether the proposed testimony is relevant. *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. The requirements that a court consider whether there are "sufficient facts and data" supporting the opinion and whether the expert

"has applied the principles and methods reliably to the facts of the case," § 8C-1, Rule 702(a), hardly work a sea change in North Carolina law. As explained above, the amended rule was designed to do what this Court has already done – explicitly recognize that a trial court must assess the reliability of proffered expert testimony.

Unlike the rule itself, adoption of the Court of Appeals' interpretation of new Rule 702 in this case would reverse this Court's precedents and place North Carolina with those jurisdictions that follow the rigid federal application of *Daubert*. Such an approach diminishes the right to jury trial and elevates a rote checklist above the adversarial process of challenging expert testimony and qualifications through cross examination, and allowing the jury to weigh the evidence.

Both the trial court and the Court of Appeals rejected the expert testimony in this case because they found that it did not meet the strict application of each *Daubert* factor. *McGrady*, ___ N.C. App. at ___, 753 S.E.2d at 367. The lower courts have missed the mark, as the standard outlined in *Daubert* was a flexible one. In *Howerton* and *Goode*, this Court correctly interpreted Rule 702 in light of this State's longstanding principles and its constitutional protection of the right to jury trial.

The Court of Appeals cited the standard *Daubert* factors of "peer review" and "rate of error" without explaining how either would bear upon the reliability of

Cloutier's testimony regarding the use of force. *Id.* at ___, 753 S.E.2d at 369. The court also cited with approval the trial court's observation that Cloutier "lacked medical credentials" – a point that likewise had no relation to his proffered testimony. *Id.* at ___, 753 S.E.2d at 370. The Court of Appeals' analysis was a rigid application of the *Daubert* factors inconsistent with the liberal thrust of the rule.

The Court of Appeals' comment that it could not find an abuse of discretion "*even if* we were to assume that the doctrine of 'use of force' constitutes scientific knowledge," *McGrady*, ___ N.C. App. at ___, 753 S.E.2d at 370 (emphasis added), provides further evidence that the court applied the *Daubert* factors as a test designed for the exclusion of testimony that does not meet specific "scientific" criteria. Rule 702 specifically contemplates that "technical" and "other specialized knowledge" are proper bases for expert testimony. N.C. R. Evid. 702(a). The trial court's duty was to determine whether the testimony was reliable – not whether it was scientific. The Court of Appeals' suggestion that the testimony needed to meet "scientific" standards reflects its improper one-size-fits-all application of the *Daubert* factors as a bar to the admission of otherwise reliable testimony.

This Court's prior holdings, as well as the analyses of other state courts, show the path forward for North Carolina. Under new Rule 702, trial courts will include in their determination of the reliability of expert testimony both the

sufficiency of the underlying data and the application of the expert's methods to the facts of the case – factors that were always appropriate for consideration under the *Howerton/Goode* standard.

In conducting its analysis a trial court should exercise restraint and not allow revised Rule 702(a) to "unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence." *Howerton*, 358 N.C. at 468, 597 S.E.2d at 692. Rule 702 must be applied equally in civil and criminal cases, and consistently with a defendant's right to present a defense. *See*, *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010) (applying the *Howerton/Goode* analysis to exclude unreliable prosecution evidence). Above all, this Court should protect every litigant's constitutional right to have issues of fact and the weight of expert testimony determined not by checklist, but instead by a jury.

CONCLUSION

The trial court and Court of Appeals erred by applying a rigid admissibility test for expert testimony that is at odds with this Court's precedents and the North Carolina Constitution's protection of the right to trial by jury. The amendments to Rule 702 did not require such a result, and this Court should direct trial courts to apply the new rule in accordance with existing North Carolina law. For the reasons set forth above, the North Carolina Advocates for Justice joins in defendant's

request that this Court reverse the Court of Appeals and remand the case for a new trial.

Respectfully submitted, this 21st day of August, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing BRIEF OF AMICUS CURIAE NORTH CAROLINA ADVOCATES FOR JUSTICE on all parties by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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