***DAUBERT* - EPISODE NOTES**

Hello everyone and welcome back to the Good Judge-Ment Podcast. I am Wade Padgett

*And I am Tain Kell.*

Today, we are taking the leap…

*Umm, Wade? Leap? What leap?*

Today, we are going to discuss the topic of *Daubert* in criminal cases.

*Oh, that leap. We are the furthest things from experts on this topic as exist in the entire world. And we have discussed all sorts of ideas on how we might address this topic and we finally gave up and decided to just talk about it ourselves.*

We once again owe a big shout out to FOP Judge Ben Studdard. He made a presentation at the winter conference for Superior Court judges and prepared some materials that helped us understand *Daubert*.

*Once again, the “shout out rule” comes into play. Thanks to Judge Studdard – he’s the best.*

We hope this is not a news flash to anyone listening but there was a major change to the evidence rules that came into effect on July 1, 2022.[[1]](#endnote-1)

O.C.G.A. § 24-7-702 was rewritten to provide that the *Daubert* standard applies to expert testimony in ***all*** Georgia cases, not just civil cases.

The new statute provided that *Daubert* would be the applicable standard “and shall apply to any motion made or hearing or trial commenced on or after [July 1, 2022].”[[2]](#endnote-2)

Previously, expert testimony in criminal cases was governed by something known as the *Harper* standard. That was the old Rule 707.

As of July 1, 2022, *Harper* is no longer the applicable standard in criminal cases. All determinations on the admissibility of expert testimony is now subject to the *Daubert* standard – regardless of whether the case is a criminal case or a civil case.

The two of us finally came to a realization on why we know so little about *Daubert*. The *Daubert* decision from the US Supreme Court was not issued until 1993.

 Both of us had completed law school before *Daubert* was decided.

 We didn’t learn it in law school – because it wasn’t a thing!

Every day, I feel one step closer to the “got off my lawn” old guy.

It will come as no surprise that there are no Georgia criminal appellate cases where issues relating to *Daubert* have been decided. It was not the law until July 2022!

I am sure that are several in the pipeline, but there are no decisions on point from Georgia’s appellate courts.

This change in the evidence code (and the lack of Georgia cases on point) requires us to go back in the evidence time machine – back to when the 2013 changes were first passed.

 Professor Milich said it well:

“As stated in the Preamble to the new Code…‘It is the intent of the General Assembly in enacting this Act to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013, to the extent that such interpretation is consistent with the Constitution of Georgia. Where conflicts were found to exist among the decisions of the various circuit courts of appeal interpreting the federal rules of evidence, the General Assembly considered the decisions of the 11th Circuit Court of Appeals.’”**[[3]](#endnote-3)**

We tell you all of that law and learned treatise language to make a larger point – we are instructed to look first at the law of the 11th Circuit when there are disagreements among the different federal circuits on issues relating to evidence law.

The Georgia Supreme Court made a statement on this point that may even be more succinct. When discussing a hearsay exception in *State v. Almanza,* the Supreme Court held:

“Having found a Federal Rule of Evidence using materially identical language that addresses the evidentiary issue covered by Rule 803(4), the question of whether to apply state or federal precedent ends: we look to federal appellate precedent until a Georgia appellate court decides the issue under the new Code…because the state rule mirrors Federal Rule 803(4), it is now read as interpreted by the federal appellate courts as of the effective date of the new [Georgia evidence] Code.”**[[4]](#endnote-4)**

As you might imagine, there is little federal law on topics such as the admissibility of DUI field sobriety tests and other criminal issues that come before our courts on a regular basis.

They do not have many federal DUI cases. Don’t believe us? Consider this quote from a federal case:

“[b]ecause intoxicated driving offenses are generally state offenses that are tried only in federal courts [under limited circumstances], federal case law on the admissibility of [field sobriety tests] is sparse.”**[[5]](#endnote-5)**

 What an understatement!

We have decided against giving our loyal listeners the full history lesson on how *Daubert* became a thing back in 1993. We don’t want listeners to go into a law school flashback to terms like “the *Frye* standard”…

We all use the phrase “*Daubert* Standard” when discussing this topic but that is really a bit of a misnomer

The standard applicable to the admission of expert testimony really stems from several different cases:

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*;[[6]](#endnote-6)
2. *General Electric v. Joiner*;[[7]](#endnote-7) and
3. *Kumho Tire Co. Ltd. V. Carmichael*.[[8]](#endnote-8)

These cases are actually cited in the body of Rule 702 and they collectively form what we lovingly refer to as the *Daubert* standard.

So we have avoided getting into the nuts and bolts of *Daubert* long enough. You ask, “So what is *Daubert*?” We are glad you asked.

*Daubert* demands that the trial judge act as a gatekeeper to decide what expert testimony is admissible and what is not admissible. That term “gatekeeper” comes up a great deal in cases where *Daubert* is addressed.

In that role as gatekeeper, the trial judge is expected to protect the finder of fact from “junk science” or otherwise irrelevant or unreliable expert testimony.

The trial judge is the initial arbiter of whether the expert’s testimony should even reach the trier of fact.

To make that gatekeeper determination, the trial judge should ask 4 questions (borrowed from Judge Studdard)

1. Is the evidence relevant?
2. Is the methodology reliable?
3. Are the conclusions based on sufficient scientific facts/data?
4. Is the witness qualified?[[9]](#endnote-9)

Rule 702 does not change the fact that an expert can be qualified to render an expert opinion based upon his/her “knowledge, skill, experience, training, or education.”**[[10]](#endnote-10)**

Frankly, the cases on *Daubert* sometimes frame the issues a little differently but there is usually a 3 or 4 element list of issues associated with a *Daubert* analysis.

Cases from the 11th circuit describe the applicable test a little differently from Judge Studdard (but they reach the same result):

1. the expert is qualified to testify competently regarding the matters he intends to address;
2. the methodology by which the expert reaches his conclusion is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and
3. the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.**[[11]](#endnote-11)**

Additionally, the cases note that there is a fourth determination that the trial court must make beyond that of determining qualification, reliability, and helpfulness. That fourth determination lies in Rule 403’s balancing test, applicable to all evidence.

There is a non-exhaustive and non-mandatory list of “reliability” factors when making the “reliability” determination:

1. Testability;
2. Rate of error;
3. Peer review and publication;
4. General acceptance in the scientific community; and
5. Does the analysis fit the data?

The reason these “reliability factors” are not mandatory is because not all expert testimony is subject to things like peer review.

Courts have the discretion needed to avoid unnecessary “reliability proceedings” where the reliability of the expert’s methods are properly taken for granted (i.e. have already been decided).[[12]](#endnote-12)

There are Georgia cases where certain scientific evidence has been determined to have “reached a scientific stage of verifiable certainty.”[[13]](#endnote-13)

It is important to remember a couple of things about *Daubert*:

A pretrial *Daubert* hearing is only required when a challenge is raised – and the challenge does not necessarily have to be raised pretrial.[[14]](#endnote-14)

Triers of fact are always free to accept or reject the testimony of any witness, expert or otherwise;[[15]](#endnote-15) That is not the determination the trial judge must make as part of the *Daubert* gatekeeping process – whether to accept the testimony or place any value in it is up to the trier of fact.

Not all expert testimony is “scientific” – some is merely technical or “beyond the ken of the average juror”[[16]](#endnote-16) [the applicable “test” for reliability may vary so there is no true hard and fast “rule” or factors to be considered]

The trial judge is the gatekeeper and is not expected to make any comparison between competing experts –

Where the methodology utilized by the expert is valid but there is a difference of opinion as to what conclusions can be drawn from that otherwise valid testing procedure, such arguments are the basis for cross-examination and should not prevent the opinion from being admitted.**[[17]](#endnote-17)**

“In most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility.”**[[18]](#endnote-18)**

It is not part of the trial judge’s gatekeeping function to weigh credibility of competing experts or attempt to evaluate the persuasiveness of competing scientific studies.**[[19]](#endnote-19)** Instead, the gatekeeping function of the trial judge is to determine whether the expert’s methods and results were discernable and “rooted in real science.”**[[20]](#endnote-20)** If that threshold is met by the expert, the testimony should be admitted and subjected to the rigors of cross-examination and, potentially, contradictory opinion of other experts.

The one thing that is clear from the change to the *Daubert* standard in criminal cases is that parties seeking to introduce expert testimony are going to be required to present much more foundation evidence than they have been accustomed to – at least until we get some Georgia appellate decisions on point.

**SUGGESTIONS FOR JUDGES:**

If you are ruling on a *Daubert* challenge, make sure your order references your function as a gatekeeper.

You need to note that you considered factors and, regardless of how you reference them, those factors you considered should include:

1. Qualifications of the expert;
2. The methodology used by the expert is reliable;
3. The testimony is relevant and will assist the trier of fact;
4. Rule 403 balancing test

**COUPLE OF EXAMPLES: [Not sure we go though this in detail – just reference that they exist in the outline]**

**DUI CASES:**

Federal law and existing Georgia law are in agreement that SFST such as the Walk and Turn (WAT) and One Leg Stand (OLS) tests are “merely a well-known consequence of intoxication, ‘as obvious to the layperson as to [an] expert.’” **[[21]](#endnote-21)**

The federal case law describes the WAT and OLS as “psychomotor tests that obtain their legitimacy from the known effects of intoxication based upon propositions of common knowledge.”**[[22]](#endnote-22)** “Because psychomotor field sobriety tests are considered non-scientific or non-technical in nature, a description of the test and a defendant’s performance on the test may generally be admitted into evidence as lay opinion testimony under Rule 701, without the need for expert testimony.”**[[23]](#endnote-23)** An officer’s testimony about the inability of a suspect to complete the WAT and OLS does not amount to testimony regarding scientific procedures, “but instead amounts to testimony as to behavioral observations on the officer’s part.”**[[24]](#endnote-24)**

In contrast, both the HGN (Horizontal Gaze Nystagmus) and VGN (Vertical Gaze Nystagmus) are scientific tests that are based in science and not merely upon common knowledge.

A properly conducted HGN or VGN test is admissible as circumstantial evidence of impairment under federal law and Georgia law.**[[25]](#endnote-25)**

However, the federal cases make clear that the record must include evidence that the officer has the requisite training and experience in administering HGN tests, that the officer’s training included the fact that alcohol consumption can cause exaggerated nystagmus, that the officer must testify about his administration of the HGN test, and whether exaggerated nystagmus was detected.**[[26]](#endnote-26)**

So, that’s all for our episode dealing with *Daubert*.

*We have not attempted to answer all of your questions in this episode – we are all going to be required to learn this law through trial and error.*

And we will be awaiting appellate decisions with great anticipation.

*You can count on the Good Judge-Ment Podcast to share some of the important Daubert decisions as they come from the appellate courts.*

We will try to make sure we announce any important “flash” episodes with important cases that come from the appellate courts on our LinkedIn page – so be sure to follow us there.

The outline is full of statutory and case citations and that outline can be found at **goodjudgepod.com**.

Reach out to us on goodjudgepod@gmail.com with all of your podcast topic ideas

**I’m Wade Padgett**

*And I’m Tain Kell…Rolling Stone magazine named their “100 Greatest Artists of All Time” and listed the following people as their top three selections: Elvis Presley, The Rolling Stones and The Beatles. Man, I bet Taylor Swift was mad. I bet she “Shook it off” by saying “Haters gonna’ hate.”*

1. Ga. Laws 2022, Act 742, § 1. [↑](#endnote-ref-1)
2. Ga. Laws 2022, Act 742, § 3. [↑](#endnote-ref-2)
3. *Georgia Rules of Evidence*, Paul S. Milich, October 2021 Update, §1:3. [↑](#endnote-ref-3)
4. *State v. Almanza*, 304 Ga. 553, 558 (2018). [↑](#endnote-ref-4)
5. *U.S. v. Nguyen*, 75 Fed. R. Evid. Serv. 1018 (2008), citing *U.S. v. Van Hazel*, 468 F.Supp.2d 792, 796 (W.D.N.C. 2006). [↑](#endnote-ref-5)
6. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). [↑](#endnote-ref-6)
7. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). [↑](#endnote-ref-7)
8. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999). [↑](#endnote-ref-8)
9. *Wilson v. Redmond Construction, Inc.*, 359 Ga. App. 814 (2021), quoting *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291-1292 (11th Cir. 2005). [↑](#endnote-ref-9)
10. O.C.G.A. § 24-7-702(b). [↑](#endnote-ref-10)
11. *U.S. v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004), citing *City of Tuscaloosa v. Harcross Chems., Inc*, 158 F3d 548, 562 (11th Cir. 1998), citing *Daubert*, at 589. [↑](#endnote-ref-11)
12. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137. 152-153 (1999). (noting that one of the express purposes of the rules is to avoid “unjustifiable expense and delay” as noted in O.C.G.A. § 24-1-1. [↑](#endnote-ref-12)
13. *Santana v. State*, 308 Ga. 706 (2020) (fingerprints); *Fortune v. State*, 304 Ga. App. 294 (2010) (field test for cocaine); *Webb v. State*, 277 Ga. App. 355. 358 (2006) (HGN as indicator of impairment by alcohol); *Bluain v. State*, 242 Ga. App. 125 (2000) (certain DNA testing). [↑](#endnote-ref-13)
14. *Wilson v. Redmond Construction, Inc.,* 359 Ga. App. 814 (2021); *Ga. Dept. of Trans. v. Baldwin*, 292 Ga. App. 816 (2008). [↑](#endnote-ref-14)
15. *Gold Kist, Inc. v. Base Mfg., Inc.,* 289 Ga. App. 690, 693 (2008) (“A jury is not obligated to accept a witness's testimony even when it is uncontradicted.”) The pattern jury charge dealing with credibility of witnesses and the pattern charge on expert witnesses remind the jury that they are not required to accept the testimony of any witness, expert or otherwise. [↑](#endnote-ref-15)
16. *U.S. v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004), citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999). [↑](#endnote-ref-16)
17. *U.S. v. Barton*, 909 F.3d 1323, 1333 (11th Cir. 2018). [↑](#endnote-ref-17)
18. *U.S. v. Barton*, 909 F.3d 1323, 1333 (11th Cir. 2018), citing *Rosenfeld v. Oceania Cruises, Inc.*, 654 F.3d 1190, 1193 (11th Cir. 2011); *Adams v. Laboratory Corp. of America*, 760 F.3d 1322, 1334 (11th Cir. 2014). [↑](#endnote-ref-18)
19. *U.S. v. Barton*, 909 F.3d 1323, 1333 (11th Cir. 2018), citing *Quiet-Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.,* 326 F.3d 1333, 1341 (11th Cir. 2003). [↑](#endnote-ref-19)
20. *U.S. v. Barton*, 909 F.3d 1323, 1333 (11th Cir. 2018). [↑](#endnote-ref-20)
21. *Mitchell v. State*, 301 Ga. 563, 565-566 (2017), overruled on other grounds by *State v. Turnquest*, 305 Ga. 758, n. 15 (2019), citing *Stewart v. State*, 280 Ga. App. 366 (2006) and *Hawkins v. State*, 223 Ga. App. 34, 36 (1996). [↑](#endnote-ref-21)
22. *U.S. v. Nguyen*, 75 Fed. R. Evid. Serv. 1018 (2008), citing *U.S. v. Horn*, 185 F.Supp.2d 530, 558 (D.Md. 2002). [↑](#endnote-ref-22)
23. *U.S. v. Nguyen*, 75 Fed. R. Evid. Serv. 1018 (2008), citing *U.S. v. Horn*, 185 F.Supp.2d 530, 559 (D.Md. 2002); *U.S. v. Daras*, 1998 U.S.App. LEXIS 26552, \*7-\*8 (4th Cir. 1998) [↑](#endnote-ref-23)
24. *State v. Smith*, 329 Ga. App. 646, 649 (2014), citing *State v. Pastorini*, 222 Ga. App. 316-318-319 (1996), overruled by *State v. Turnquest*, 305 Ga. 758, n. 15 (2019). [↑](#endnote-ref-24)
25. *U.S. v. Nguyen*, 75 Fed. R. Evid. Serv. 1018 (2008), citing *U.S. v. Horn*, 185 F.Supp.2d 530, 555 & n. 43 (D.Md. 2002) and *U.S. v. Van Hazel*, 468 F.Supp.2d 792, 797 (W.D.N.C. 2006). [↑](#endnote-ref-25)
26. *U.S. v. Nguyen*, 75 Fed. R. Evid. Serv. 1018, \*13 (2008). [↑](#endnote-ref-26)