

# What are the Effects of the Daubert Decision on Fingerprint Identification?

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## Introduction

Fingerprint identification has enjoyed a long history of judicial acceptance throughout the world. The first courts that acknowledged fingerprints as scientific evidence were in India and Argentina in the late 1800's. In the United States, fingerprint evidence was first offered into evidence in *People v. Jennings*, 254 Ill. 534, 96 N.E. 1077, 43 L.R.A. (N.S.) 1206, (1911). In *Jennings*, the Court ruled that:

“We are disposed to hold from the evidence of the four witnesses who testified, and from the writings we have referred to on the subject, that there is a scientific basis for the system of fingerprint identification and the courts are justified in admitting this class of evidence.”

Since *Jennings* in 1911, the courts have embraced fingerprints as the “gold standard” for forensic identification and have taken “judicial notice” of the permanence and uniqueness (individuality) of each person’s fingerprints (Moenssens, 2005). In *Grice v. State*, 142 Tex. Crim. 4, 151 S.W. 2nd 211, (1941), the Texas Court of Criminal Appeals wrote in part in a ruling on fingerprints:

“It has occurred to us that instead of the state being called upon to offer proof that no two fingerprint prints are alike, it may now be considered in order for those taking the opposing view to assume the burden of proving their position.”.

For the past fifty plus years fingerprint evidence not only enjoyed judicial acceptance, but was rarely challenged. This all changed after a ruling on scientific evidence in 1993. This paper will explore the effects of a Supreme Court decision in the landmark case of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 592, (1993) on fingerprint evidence in the court system.

## Daubert

*William Daubert, et Ux., Etc., et Al., Petitioners V. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469; 1993 U.S. LEXIS 4408; 61 U.S.L.W. 4805; 27 U.S.P.Q.2D (BNA) 1200; CCH Prod. Liab. Rep. P13,494; 93 Cal. Daily Op. Service 4825; 93 Daily Journal DAR 8148; 23 ELR 20979; 7 Fla. L. Weekly Fed. S 632.

In 1993, the U.S. Supreme Court ruled in *Daubert* that the trial judge was the “gatekeeper” to prevent “junk science” from entering the courtroom. *Daubert* was the result of a

lawsuit involving the drug Bendectin and its possible link to birth defects. At the trial, a series of “expert witnesses” testified to both sides of the issue. The Court, in its opinion partially ruled that “(1) the “general acceptance” test of *Frye v United States* (1923) 54 App DC 46, 293 F 1013, 34 ALR 145, was superseded by the Federal Rules of Evidence (FRE), and thus general acceptance is not a necessary precondition to the admissibility of scientific evidence under the FRE, given that (a) nothing in the text of Rule 702 of the FRE, governing expert testimony, establishes general acceptance as an absolute prerequisite to admissibility, and (b) there is no indication that Rule 702 or the FRE as a whole were intended to incorporate a general acceptance standard; (2) under the FRE, a federal trial judge must insure that any and all scientific testimony or evidence is not only relevant but reliable; and (3) in a federal case involving scientific evidence, evidentiary reliability is based on scientific validity. The Court also provided the trial judge with some guidelines to use when deciding if scientific evidence should be admitted at trial. The Court suggested four factors to consider, they have become to be known as the “Daubert Factors”, they are; testing and validation, peer review, error rates, and lastly, the traditional Frye factor of general acceptance in the relevant scientific community.

### **Daubert and Fingerprints**

The defense bar saw an opportunity and a possible weakness in fingerprint evidence by incorrectly believing that fingerprint evidence had never been subjected to the rigors of scientific validation and testing. In addition to the new federal guidelines established by Daubert, a few academics and law professors were also advocating that there was a lack of research and acceptance in the scientific community for fingerprint identification. One common charge was that fingerprint identification was created by and for law enforcement.

The first challenge of fingerprint evidence under Daubert occurred in 1999 in *US v. Byron Mitchell*, Criminal Action No. 96-407, US District Court for the Eastern District of Pennsylvania.. Fingerprint evidence was obtained from a get away car, used in an armored car robbery. After a five day Daubert evidence hearing, the District court ruled testimony that the prosecution's fingerprint experts to be reliable and the fingerprint evidence admissible. The District Court ruling was upheld on appeal in *United States v. Mitchell*, 365 F.3d 215 (3<sup>d</sup> Cir. 2004). The 3<sup>rd</sup> Circuit Court of Appeals held that fingerprint identification satisfies the standards for reliability established in *Daubert* and *Kumho Tire*.

The second Daubert hearing challenging the admissibility of fingerprint evidence occurred in Los Angeles Federal Court in *Anthony Golden v. County of Los Angeles, et. al.*, US District Court for the Central District of California, Case #CV 97-6140, (1999). This was the first challenge in a federal civil rights lawsuit. Golden was shot and killed by sheriff's deputies. The suit alleged that the deputies planted a gun near the body of Golden. Fingerprint evidence that matched Golden's fingerprints were found on the gun and the magazine inside the gun. After a Daubert hearing, the trial court held fingerprint evidence admissible.

Since these first cases in 1999, there have been approximately forty challenges in state and federal courts. None have been successful. Many of these rulings have now been appealed and all appeals have affirmed the admissibility of fingerprint evidence, (See appellate bibliography).

## **Conclusion**

The challenges lodged against fingerprint evidence since 1999 has awakened the fingerprint examiner community. Due to the fact that fingerprint evidence was so well established in the courts and society in general, most of today's examiners were not trained in the extensive scientific foundation of fingerprint identification. Some examiners still have difficulty answering questions relating to how fingerprints are formed and why all areas of friction skin are unique. Many fingerprint examiners during the 1970's and 80's were trained in how to compare and identify fingerprint evidence and how to testify to their findings, not in the scientific foundation of friction skin identification.. Because of Daubert and other attacks alleging that there is a lack of a scientific basis of fingerprint identification, today's fingerprint examiners needed to be introduced to the over three hundred years of scientific and medical research that has taken place that has established all areas of friction skin as unique and permanent (Leo, 2004).

In addition to the retraining of fingerprint examiners, the government (National Institute of Justice) has provided various grants to compile existing research into a source book and to allow for new and continuing research to reinforce the well established fact that all areas of friction skin are both permanent and unique. This has been the positive effect of Daubert and the other challenges on friction skin identification..

### **Appellate Court Rulings on Fingerprints Since Daubert**

***United States v. Mitchell***, 365 F.3d 215 (3<sup>d</sup> Cir. 2004). ***Admissibility affirmed; exclusions affirmed.*** Fingerprint identification satisfies standards for reliability established in *Daubert* and *Kumho Tire*. "[T]his case does not announce a categorical rule that latent fingerprint identification evidence is admissible in this Circuit, though we trust that the foregoing [extensive] discussion provides strong guidance." District court properly excluded trial testimony on whether fingerprint evidence is scientific because such testimony would not assist trier of fact.

***United States v. Crisp***, 324 F.3d 261 (4<sup>th</sup> Cir.), *cert. denied*, 124 S. Ct. 220 (2003). ***Admissibility affirmed.*** Defendant says scientific validation of fingerprinting is weak, and points out that no study has shown individual human fingerprints to be unique. But no study has shown otherwise either, and technique has long enjoyed general acceptance in forensic community. Moreover,

fingerprint evidence has been employed in court since 1911. Standards governing technique's application do exist, and other courts have credited testimony that error rate is low. Further research would be welcome, but meanwhile, to bar use of this bedrock forensic identifier is unwarranted. Cross-examination can test foundations and reliability of testimony from fingerprint experts.

***United States v. George***, 363 F.3d 666 (7<sup>th</sup> Cir. 2004). ***Admissibility affirmed***. Seventh Circuit has previously held that fingerprint identification is generally accepted, has low rate of error, and can be objectively tested. As for defendant's complaint that identification was unreliable because based on partial prints, issue of whether prints match is best left to trier of fact.

***United States v. Havvard***, 260 F.3d 597 (7<sup>th</sup> Cir 2001). ***Admissibility affirmed***. Fingerprinting passes *Daubert* muster. Results are objective, capable of testing, and have low error rate. Method has been subjected to "peer review" via adversary system for 100 years.

***United States v. Rogers*** No. 01-4455 (4th Cir. Dec. 20, 2001) (unpublished).

While Rogers contends the underlying theory of fingerprinting evidence, that all fingerprints are unique, is untested and unproven, the Government's expert testified to the existence of numerous studies supporting this conclusion. Further, Rogers cites no evidence suggesting that fingerprint evidence is unreliable. To the extent that fingerprint analysis involves some measure of subjective interpretation by the examiner, the possibility of error was mitigated in this case by having two experts independently review the evidence. And although Rogers also claims no uniform standards exist to pinpoint exactly when a fingerprint match can be declared, such standards do exist through professional training, peer review, presentation of conflicting evidence and double checking, which is standard operating procedure with latent print examiners.

***United States v. Janis***, 387 F.3d 682 (8<sup>th</sup> Cir. 2004). ***Admissibility confirmed***. Defendant did not challenge reliability at trial. District court nevertheless made reliability determination. Fingerprint evidence is generally accepted.

***United States v. Collins***, No. 02-3353 (8<sup>th</sup> Cir. Aug. 25, 2003). ***Admissibility affirmed***. Defendant did not object at trial, fingerprint identification is generally accepted, and district court did not commit plain error.

***United States v. Hernandez***, 299 F.3d 984 (8<sup>th</sup> Cir. 2002), *cert. denied*, 537 U.S. 1134 (2003). ***Admissibility affirmed***. Fingerprint evidence is admissible, subject to court oversight, and in this case, testimony did not determine outcome.

*United States v. Rojas-Torres*, No. 02-30338 (9<sup>th</sup> Cir. June 9, 2003) (unpublished), **Admissibility affirmed**. Defendant argues that fingerprint evidence does not satisfy *Daubert's* requirements for scientific reliability. District court conducted *Daubert* hearing and weighed relevant *Daubert* factors. No abuse of discretion.

*United States v. Navarro-Fletes*, No. 01-30247 (9<sup>th</sup> Cir. Oct. 24, 2002) (unpublished). District court admits fingerprint testimony in criminal case over defendant's objections. **Admissibility affirmed**. District court properly considered *Daubert* factors and permissibly determined that fingerprinting passes muster. Nor did lower court err in finding fingerprint expert qualified. She had twelve years' experience identifying thousands of prints, as well as suitable training.

*United States v. Ambriz-Vasquez*, No. 01-10144 (9<sup>th</sup> Cir. May 2, 2002) (unpublished). **Admissibility affirmed**. Defendant objects to district court's failure to hold *Daubert* hearing on (1) reliability of fingerprinting techniques and (2) agent's qualifications. Defendant's first objection falsely assumes that district courts may not take judicial notice of reliability of fingerprint analysis. It would be unduly onerous to require *Daubert* hearings every time defendants object to fingerprinting, and Ninth Circuit has previously held that district courts do not commit clear error in admitting fingerprint evidence without first conducting *Daubert* hearings. As for qualifications, agent had extensive coursework and experience. Defendant had ample opportunity to impeach agent's testimony at trial.

*United States v. Sanchez-Birruetta*, No. 04-30150 (9<sup>th</sup> Cir. Mar. 18, 2005) (unpublished). In criminal prosecution, government relies on expert testimony from fingerprint identification specialist Thomas Liszkiewicz. Jury convicts. Admissibility affirmed. Defendant says FBI's solicitation of new research on reliability of fingerprint identification establishes that existing research does not validate its reliability. But validity of existing studies on which expert relied was not called into question by FBI solicitation. Moreover, expert's comparison was between two sets of rolled prints, and such comparisons are more reliable than comparisons involving partial prints

*United States v. Turner*, 285 F.3d 909 (10<sup>th</sup> Cir. 2002). District court rejects criminal defendant's *Daubert* challenge to prosecution's fingerprint evidence without conducting *Daubert* hearing, believing fingerprint identification to constitute example of evidence whose reliability "is properly taken for granted" under *Kumho*. **Conviction affirmed**. More detailed findings by district court would have been desirable, but any error was harmless.

*United States v. Ward*, No. 03-6005 (10<sup>th</sup> Cir. Apr. 29, 2004) (unpublished). Criminal defendants object to admission of expert fingerprint evidence at trial. District court overrules objection and jury convicts. **Admissibility affirmed**. Defendant here raises same argument that Tenth Circuit rejected when it was raised by defendant in *United States v. Turner*, 285 F.3d 909 (10<sup>th</sup> Cir.

2002) [infra]. Any error in admitting fingerprint testimony was harmless in light of overwhelming evidence against defendant.

#### **References**

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