

THE DAUBERT DOUBLE STANDARD

*Michael D. Cicchini**

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ABSTRACT

In theory, the Daubert reliability standard for the admissibility of expert testimony requires the judge to act as the gatekeeper and prevent pseudo-expertise from reaching the jury. And in criminal cases, Daubert is supposed to benefit the defense, as prosecutors employ the vast majority of such witnesses—many of whom are merely pro-state advocates masquerading as experts. However, many defense lawyers believe that, in practice, Daubert does nothing to protect defendants from these pseudo-experts and instead makes it more difficult for defendants to call their own legitimate experts.

To test this informal hypothesis, I conducted an intra-state analysis of all Daubert appellate cases since Wisconsin adopted this federal standard in 2011. In the 68 cases consisting of 134 judicial decisions across all levels of the court system—trial courts, appellate courts, and the state supreme court—prosecutors have amassed an undefeated 134–0 record. Shockingly, regardless of the type of case, the type of expert, and the party calling the expert, the defense has never won a single Daubert decision at any level of the court system.

How can a standard that is supposed to benefit the defense produce a record where the prosecutor never loses? This Article goes inside the numbers and identifies eight pro-state judicial tactics on which the government’s towering 134–0 record is built. After exposing and explaining these blatant abuses of judicial discretion, this Article makes easy-to-implement reform recommendations to restore defendants to equal footing with the state.

* Criminal Defense Lawyer, Cicchini Law Office LLC, Kenosha, Wisconsin. J.D., *summa cum laude*, Marquette University Law School (1999); C.P.A., University of Illinois Board of Examiners (1997); M.B.A., Marquette University Graduate School (1994); B.S., University of Wisconsin—Parkside (1990). Thanks to Attorneys Kathleen Quinn, Chuck Blumenfield, Kathleen Pakes, Peter Rotter, Jeff Scott Olson, Jeremiah Meyer-O’Day, and Rob Henak for their comments on the *Daubert* standard and related legal issues. Thanks to Lawrence T. White, Ph.D., for his insights into expert witness testimony.

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INTRODUCTION

In 2010, Wisconsin trial lawyers learned that the state would soon be moving from a mere “relevance” standard of admissibility to the much more stringent *Daubert* “reliability” standard of admissibility for expert testimony at trial.¹ This meant that, instead of merely having to satisfy the low standard of relevance, the proponent of expert evidence would now have to demonstrate to the judge, before trial, that such evidence was reliable under *Daubert*’s rigorous, multi-pronged test.²

This change from relevance to reliability was supposed to be good news for the criminal defense bar, as the state, not defendants, employed the vast majority of expert witnesses.³ Further, many of the state’s so-called experts were really just advocates that the

1. See *infra* Section I.A.

2. See *infra* Section I.B.

3. See *infra* Section I.A.

prosecutor hired to put a gloss of faux expertise on the state's cases.⁴ Therefore, *in theory*, this change to the *Daubert* standard was supposed to greatly curtail what many in the defense bar viewed as prosecutorial abuses.⁵

Nonetheless, because of other double standards in Wisconsin's law of evidence and criminal procedure, we defense lawyers predicted that, *in practice*, the new *Daubert* standard would provide defendants with no additional protection and would instead make things even worse.⁶ That is, we believed *Daubert* would impose a tremendous hurdle *for defendants* in those relatively few cases where the defense wanted to call its own expert.⁷

To test this informal hypothesis, this Article analyzes the first decade of *Daubert* court cases in Wisconsin. I have identified 68 appellate-level cases comprised of 134 decisions on *Daubert* issues across the state's three levels of court: trial courts, appellate courts, and the state supreme court.⁸ The defense bar's dire prediction that *Daubert* would offer no benefit, and instead would make matters worse, was prescient: prosecutors have amassed an undefeated 134–0 record.⁹ In other words, in all cases that have been appealed, regardless of the party calling the expert, the type of expert, the nature of the case, and the procedural posture, the defense has never won a *Daubert* decision at any level of the court system.¹⁰

For several reasons—including the inherent limitations in analyzing only cases that reach the appellate courts—a record of 134–0 is not, in itself, conclusive proof of pro-state bias or a double standard.¹¹ Therefore, this Article goes inside the numbers to explore the judicial reasoning and expose the specific tactics that produced the state's towering, unblemished record.¹²

The *Daubert*-specific judicial tactics¹³ that I identified are: (1) completely exempting the state's experts from *Daubert* by disingenuously labeling their testimony as lay, rather than expert,

4. See *infra* Section I.A.

5. See *infra* Section I.A.

6. See *infra* Section I.B.

7. See *infra* Section I.A.

8. See *infra* Part II.

9. See *infra* Part II.

10. See *infra* Part II.

11. See *infra* Part IV.

12. See *infra* Part III.

13. In addition to *Daubert*-specific tactics, courts have also adapted several preexisting double standards, from other areas of evidence and criminal procedure, for the benefit of the state. See *infra* Section III.F.

testimony;¹⁴ (2) requiring a detailed factual basis for defense expert testimony while requiring no factual basis whatsoever of the state;¹⁵ (3) imposing rigorous reliability standards on defense experts while completely eliminating all reliability standards for the state;¹⁶ (4) requiring that defense experts apply their principles and methods to the facts of the case while permitting the state's experts to give exposition testimony completely detached from the facts;¹⁷ and (5) imposing demanding expert qualifications on defense witnesses while virtually eliminating such standards for the state.¹⁸

Finally, given the state's perfect 134–0 record and the disingenuous tactics used to produce it, this Article analyzes several potential legal reforms.¹⁹ These reforms include, most promisingly: (1) expanding the state's pretrial discovery obligations to allow the defense to better challenge the state's experts before trial, or at least to better cross-examine them at trial;²⁰ and (2) repealing the *Daubert* statute and returning to the relevance test for admissibility to eliminate the double standard and restore the defense to equal footing with the state.²¹

I. FROM RELEVANCE TO RELIABILITY

The standard for the admissibility of expert testimony in Wisconsin began as a simple relevance test and changed, at least in theory, to the much more complex *Daubert* reliability test.²²

A. The Old Relevancy Test

In the pre-*Daubert* era, when a Wisconsin prosecutor or defense lawyer wanted to call an expert witness at trial, the test for admissibility was simple:

14. See *infra* Section III.A.

15. See *infra* Section III.B.

16. See *infra* Section III.C.

17. See *infra* Section III.D.

18. See *infra* Section III.E.

19. See *infra* Part V.

20. See *infra* Section V.C.

21. See *infra* Section V.D.

22. See *State v. Jones*, 791 N.W.2d 390, 396 (Wis. Ct. App. 2010) (stating that at the time of the decision, Wisconsin utilized the relevance test); Daniel D. Blinka, *The Daubert Standard in Wisconsin: A Primer*, 84 WIS. LAW. 14, 14 (2011) (painting a more complicated picture of the *Daubert* reliability test as compared to the relevancy test).

Unlike in the federal system, where the trial judge is a powerful gatekeeper with respect to the receipt of proffered expert evidence, Wisconsin gives to the trial judge a more-limited role: the trial judge “merely requires the evidence to be ‘an aid to the jury’ or ‘reliable enough to be probative.’”²³ Simply stated, this is a “*relevancy test*.²⁴

This relevancy test was a very low hurdle to clear.²⁵ As a result, the prosecutor would call some sort of expert in most cases, and the judge would allow the testimony over the defendant’s objection.²⁶ As one defense lawyer explained, “I have not tried a criminal case in which the prosecutor did not offer some form of expert evidence.”²⁷ It would not be overly cynical to describe the pre-*Daubert* state of affairs this way:

Before 2011, whenever a Wisconsin prosecutor wanted to use an expert witness to help convict a defendant at trial, the expert merely had to pass the “mirror test”: if the judge put a mirror by the expert’s nose and mouth, and the mirror fogged up, the expert could testify. And the prosecutor had a so-called expert on call for just about every situation.²⁸

Prosecutors would call experts to bless the state’s theory of the case, bolster favorable witnesses, discredit unfavorable witnesses, and put the gloss of expertise on the prosecutor’s shaky arguments. But who, exactly, were these experts? Full-time government employees like social workers, child advocates, and domestic abuse counselors were among the most common.²⁹ For example:

Did the alleged victim delay reporting the crime until several months or even years later? There’s an expert for that. Such delayed reporting is

23. *Jones*, 791 N.W.2d at 396 (emphasis added) (citations omitted) (quoting *State v. Walstad*, 351 N.W.2d 469, 487 (Wis. 1984)).

24. See WIS. STAT. § 904.01 (2011) (defining “[r]elevant evidence” broadly as that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”) (emphasis added); 7 DANIEL BLINKA, WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE § 401.1 (4th ed. 2017) (“The overarching purpose of the relevancy provisions in ch. 904 was to *limit the power of the trial judge to exclude evidence* on relevancy grounds.”) (emphasis added); *id.* § 401.102 (“Only where the evidence lacks any probative value should it be excluded as ‘irrelevant.’”) (emphasis added).

25. See, e.g., *Jones*, 791 N.W.2d at 396–97 (suggesting that while expert testimony was a question of credibility for the trial judge in Wisconsin, the evidence provided was “clearly . . . admissible”).

26. Peter J. Neufeld, *The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform*, 95 PUB. HEALTH MATTERS 107, 109 (2005).

27. MICHAEL D. CICCHINI, ANATOMY OF A FALSE CONFESSION: THE INTERROGATION AND CONVICTION OF BRENDAN DASSEY 181 (2018).

28. See *id.* at 182–83.

“very common” among victims of the crime for which the defendant is being prosecuted.

Did the alleged victim recant the allegation by saying that he or she made it up while in a drunken state of anger? Don’t worry, there’s an expert for that, too. Recantations are “very common” among victims who, often, are forced by defendants to recant the truth.²⁹

By contrast, the defense would call experts much less frequently, as “expert evidence in criminal litigation is almost exclusively the preserve of the state.”³⁰ There are several reasons for this, including financial constraints.³¹ “Instead of worrying about the ‘hired gun’ phenomenon as in civil litigation, the criminal defense lawyer often lacks money for *any* ‘gun.’”³²

However, and very importantly, at least this much was true in the pre-*Daubert* era: when the defense *was* able to afford an expert—such as a false confession expert or an eyewitness identification expert—the defense only needed to clear the same low evidentiary hurdle as the prosecutor: *relevance*.³³ As a result, the judge usually allowed the defense to call its expert and, in that respect, the defendant received a fair trial.³⁴

But in 2010, Wisconsin lawyers learned that our state would be moving away from this relevance standard to the *Daubert* reliability test.³⁵ Under this new test, the judge would act as a gatekeeper and would prevent unreliable testimony from reaching the jury.³⁶ Because it was prosecutors, not defense lawyers, who employed almost all of the expert witnesses, this change was supposed to

29. *Id.* at 181.

30. See Déirdre Dwyer, (*Why*) Are Civil and Criminal Expert Evidence Different?, 43 TULSA L. REV. 381, 391 (2007).

31. See *id.* (“[M]ost defendants are unable to afford . . . their own experts, and public defense funds are limited in all jurisdictions.”).

32. Paul C. Giannelli, *The Supreme Court’s “Criminal” Daubert Cases*, 33 SETON HALL L. REV. 1071, 1072 (2003) (emphasis added) (footnotes omitted).

33. See *State v. Jones*, 791 N.W.2d 390, 396 (Wis. Ct. App. 2010).

34. See WIS. STAT. § 904.01 (2011) (defining relevance broadly).

35. See Blinka, *supra* note 22, at 14.

36. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

For the so-called *Daubert* trilogy of cases, see *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Many state court decisions, however, will turn on the language of the state’s statute, and the state court decisions interpreting it, without even mentioning *Daubert* or the other cases in the *Daubert* trilogy.

protect defendants from pro-state advocates masquerading as experts.³⁷

B. The Supposed Shift to Reliability

Effective February 1, 2011, Wisconsin adopted and codified the *Daubert* standard for the admissibility of expert testimony.³⁸ This new, multi-part test is as follows:

If [1] scientific, technical, or other specialized knowledge [2] will assist the trier of fact to understand the evidence or to determine a fact in issue, [3] 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 [4] the testimony is based upon sufficient facts or data, [5] the testimony is the product of reliable principles and methods, and [6] the witness has applied the principles and methods reliably to the facts of the case.³⁹

Element [1] of the rule is the essence of expert testimony and is what separates it from lay testimony: it conveys scientific, technical, or other specialized knowledge.⁴⁰ Element [2] requires the testimony to be relevant given the facts of the case; it must assist the jury.⁴¹ Element [3] relates to the witness's personal qualifications as an expert.⁴²

The *Daubert* additions—the three reliability prongs—comprise the second half of the rule.⁴³ Element [4] requires the expert's testimony to be based on sufficient facts or data.⁴⁴ Element [5] requires the expert's testimony to be based on reliable principles and methods, not junk science, speculation, or personal opinion.⁴⁵ Equally important, element [6] requires that the expert *reliably apply*

37. See Neufeld, *supra* note 26, at 109 (“Many thought *Daubert* would be the meaningful standard that was lacking in criminal cases and that it would serve to protect innocent defendants.”).

38. See Blinka, *supra* note 22, at 14.

39. WIS. STAT. § 907.02 (2011) (adopting and codifying *Daubert*).

40. As the language makes clear, the test applies not only to scientific testimony, but non-scientific expert testimony as well. See FED. R. EVID. 702, advisory committee's notes to 2000 amendments (“An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability”); see also Blinka, *supra* note 22, at 60 (“Medical doctors and physicists are held to the same standard as car mechanics and police gang-unit officers.”).

41. See WIS. STAT. § 907.02 (2011).

42. See *id.*

43. See *id.*

44. See *id.*

45. See *id.*

those reliable principles and methods to the facts of the particular case.⁴⁶

For the reader with a skeptical eye, these three new *Daubert* elements may raise questions. First, how does a judge determine whether the expert's testimony is based upon sufficient facts or data? As one might suspect, this is a highly subjective inquiry which requires, among other things, knowledge of the expert's industry standards and practices.⁴⁷

Second, how is a judge to determine whether the testimony is the product of reliable principles and methods? For that question, there are at least *ten sub-factors* from which the judge can pick and choose to reach a conclusion, and that list of ten is "neither exclusive nor dispositive."⁴⁸ The judge is given tremendous leeway and is even allowed "ingenuity and flexibility" in deciding whether expert testimony is based on reliable principles and methods.⁴⁹

Third, how is the judge to determine whether the expert has reliably applied those principles and methods (which must also be reliable) to the facts of the case? Well, that's anyone's guess. In part, the judge will have to audit the expert's work to determine, for example, if the expert "botche[d] the application of a solid methodology" or is instead applying "a reliable methodology in novel ways."⁵⁰

When Wisconsin announced this change to *Daubert*, I complained aloud to anyone who would listen. I predicted that this new multi-pronged reliability test, with its vague terms and numerous sub-factors, was so malleable that it would pose no hurdle whatsoever for the prosecutor but would create an enormous amount of work and a substantial hurdle for the defense lawyer. In other words, given the tremendous judicial discretion built into the standard, judges' pro-state biases would emerge, and defendants and their lawyers would suffer the consequences.

I cannot claim any novel insight or unique predictive powers, however, as my complaint was shared by many in the Wisconsin

46. See *id.*

47. See *id.* § 907.03 (2020) (discussing what is "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject").

48. See Blinka, *supra* note 22, at 19 (detailing "the original five *Daubert* factors" and five "additional reliability factors based on other federal cases").

49. See *id.* at 17 (quoting FED. R. EVID. 702 advisory committee's note to 2000 amendments).

50. See *id.* at 60.

defense bar.⁵¹ When the change to *Daubert* was announced, the collective groan of defense lawyers could be heard across the state.⁵² Even though *Daubert*, in theory, was supposed to benefit defendants, the experienced lawyers I knew were sure that *Daubert* would be a double standard: a burden to be imposed on the defense but not the state.

We defense lawyers predicted this based on other double standards favoring the state. Sometimes, these double standards are explicit. For example, when the state charges a defendant with a crime, the jury is instructed that the prosecutor need not prove the defendant's motive.⁵³ However, when the defendant wants to demonstrate that a different person actually committed the crime, the defense *must* prove that person's motive or the judge will exclude the defendant's evidence of third-party guilt, no matter how powerful it is.⁵⁴ Even if the guilty party's DNA is found on the murder weapon, the judge will prohibit such a defense unless the defendant proves, to the judge's satisfaction before trial, *why* that person committed the crime.⁵⁵

In other situations, the double standards are implicit. Many legal standards are, on paper, identical for both sides, and it is the court's pro-state application of a facially neutral rule that creates the double standard. One example is other-acts evidence, where both parties are, theoretically, held to the same standard when introducing a witness's other acts at trial. As defense lawyers know, however,

51. See Michael D. Cicchini, *Daubert Strategies for the Criminal Defense Bar*, 2021 U. ILL. L. REV. ONLINE 97, 99.

52. See *id.*

53. See Wis. JI-Crim. 175 (1999) ("Motive refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict.").

54. See Brett C. Powell, *Perry Mason Meets the "Legitimate Tendency" Standard of Admissibility (and Doesn't Like What He Sees)*, 55 U. MIAMI L. REV. 1023, 1050 (2001) ("In order to meet the criterion of most manifestations of the 'legitimate tendency' test, a criminal defendant is required to show *motive* and opportunity as well as direct evidence placing the third party at the scene.") (emphasis added).

55. See *State v. Koepp*, No. 2011AP947-CR, 2012 WL 1623507, at *3 (Wis. Ct. App. May 10, 2012) (rejecting the defendant's proffered third-party motive as "not reasonable"); see also Robert Hayes, *Enough is Enough: The Law Court's Decision to Functionally Raise the "Reasonable Connection" Relevancy Standard in *State v. Mitchell**, 63 ME. L. REV. 531, 536–41 (2011) (discussing how courts simply dismiss third-party motives as weak without any analysis or discussion).

judges almost always allow the state's evidence but will find something in the multi-pronged analytical framework on which to hang their hats when excluding the defendant's evidence.⁵⁶

The *Daubert* standard falls into this facially neutral category: any double standard, if one were to emerge, would be implicit.⁵⁷ And although we defense lawyers didn't realize it at the time, there was actually evidence to support our dire prediction.⁵⁸ An article published in 2000 by D. Michael Risinger identified sixty-seven *Daubert* appellate cases where "the government challenged the exclusion of its experts."⁵⁹ The government's record in those appeals was 61–6.⁶⁰ Similarly, the article identified fifty-four *Daubert* appellate cases where the criminal defendants argued "that their expert was improperly excluded."⁶¹ The government's record in those cases was 44–10.⁶² Further, of the ten defense victories, "only one case was actually remanded for retrial."⁶³

An appellate court record of 105–16—or 114–7, depending on how one defines a defense "victory"—certainly raises a red flag about possible pro-state double standards.⁶⁴ Numbers like that are why "[c]ritics have long complained that a different standard applies when defendants, as opposed to prosecutors, seek to introduce expert

56. In Wisconsin, other-acts evidence is called *Sullivan* evidence. See *State v. Sullivan*, 576 N.W.2d 30, 39 (Wis. 1998). The double standard that Wisconsin defense lawyers complain of has emerged in other states as well. In Minnesota, for example, other-acts evidence is called *Spreigl* evidence. See Jayna M. Mathieu, *Reverse-Spreigl Evidence: Challenging Defendants' Obligation to Exceed Prosecutorial Standards to Admit Evidence of Third Party Guilt*, 86 MINN. L. REV. 1033, 1034–35 (2002) ("[C]ourts tend to reach different results in *Spreigl* and reverse-*Spreigl* cases. Contrary to a *Spreigl* scenario, when defendants attempt to introduce reverse-*Spreigl* evidence, trial courts frequently exclude it."). Or, as one judge candidly admitted, "his work on 'a few hundred' reverse-*Spreigl* cases leaves him certain that if the state had offered similar incidents against the defendant, the evidence 'likely would have been admitted.'" *Id.* at 1035 (footnote omitted).

57. See Jim Hilbert, *The Disappointing History of Science in the Courtroom: Frye, Daubert, and the Ongoing Crisis of "Junk Science" in Criminal Trials*, 71 OKLA. L. REV. 759, 797 (2019).

58. See *id.* at 802–03.

59. *Id.* at 802 (citing D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*?, 64 ALB. L. REV. 99, 105 (2000)).

60. See *id.* at 802–03.

61. *Id.* at 803.

62. See *id.*

63. *Id.* At least one other study had similar findings. See *id.* at 802.

64. See *id.* at 796–97.

evidence.”⁶⁵ In other words, “[i]t would seem that . . . the expert evidence of criminal prosecutors is subject to less scrutiny than that of criminal defendants.”⁶⁶

But these were not Wisconsin cases, as that article was published before Wisconsin even adopted the *Daubert* standard.⁶⁷ This Article therefore seeks to determine whether Wisconsin judges use a double standard when applying *Daubert*, as we defense lawyers predicted would happen.⁶⁸ The first step in such an inquiry is to identify the relevant cases and tally the score.⁶⁹

II. KEEPING SCORE: 134–0

A recent article serves as an excellent model for collecting and analyzing *Daubert* cases.⁷⁰ In 2018, Brandon L. Garret and Chris Fabricant identified 229 *Daubert* cases from criminal courts across the country.⁷¹ In this sense, their study was very broad, as it was national in scope.⁷² In another sense, however, their study was narrow, as the authors identified only those cases that included “language concerning ‘reliable principles and methods’ and reliable application to the facts of the case.”⁷³

In other words, Garret and Fabricant focused on elements [4] and [5] of the *Daubert* test and excluded case decisions that hinged on other elements, such as “whether the expert testimony was relevant to disputed issues” or “whether the expert was properly qualified with sufficient education, training, and experience.”⁷⁴ In the cases they did analyze, they identified a double standard: “It is incredibly rare to find any discussion of reliability, except in one context: when courts exclude defense experts.”⁷⁵ However, as a result of their narrow focus on only two elements of *Daubert*, the

65. See Brandon L. Garret & M. Chris Fabricant, *The Myth of the Reliability Test*, 86 FORDHAM L. REV. 1559, 1577 (2018).

66. Dwyer, *supra* note 30, at 383.

67. See WIS. STAT. § 907.02 (2011) (including the *Daubert* standard in 2011).

68. See *infra* Part II.

69. See *infra* Part II.

70. See Garrett & Fabricant, *supra* note 65, at 1559.

71. See *id.* at 1573.

72. See *id.* at 1565.

73. See *id.* at 1572.

74. See *id.*

75. *Id.* at 1571.

authors included only eleven Wisconsin state court decisions in their study.⁷⁶

In this Article, by contrast, I will take the inverse approach. This Article will be much narrower than Garret and Fabricant's work in this sense: In order to test the accuracy of my prediction that a double standard would emerge in Wisconsin, I will collect and analyze *only* Wisconsin cases. In another sense, however, the scope of this Article will be very broad: I will include *all* such cases, regardless of the prong of the *Daubert* test on which a court's decision turns.⁷⁷

I conducted searches of Westlaw's Wisconsin state court database to return all cases, regardless of type, that included "Daubert" or "907.02," which is the statutory section that codified *Daubert*.⁷⁸ These searches returned 183 appellate cases decided between February 1, 2011 (the effective date of the new *Daubert* standard) and October 11, 2020—nearly a full decade of decisions.

Many of the 183 appellate cases were not relevant. Most of the earlier cases, i.e., those decided at the appellate court within a few years after the change in the law, cited *Daubert* only to indicate that the standard did not apply, as the original filing date of the case under appeal predated the effective date of the new law.⁷⁹ These cases were excluded. Similarly, and very much as expected, many of the cases throughout the near decade-long timeframe were civil cases involving monetary disputes.⁸⁰ These were also excluded.

Many of the remaining cases cited *Daubert* superficially but did not discuss or apply the standard. For example, one case cited *Daubert* only to declare that it is a rule of evidence for trial and,

76. See *id.* at 1597.

77. See *supra* Section I.B for *Daubert*'s six-pronged test.

78. See WIS. STAT. § 907.02 (2011).

79. See, e.g., *State v. Koenig*, No. 2014AP366-CR, 2014 WL 7270241, at *3 (Wis. Ct. App. Dec. 23, 2014) ("Contrary to Koenig's assertion, the amended version of WIS. STAT. § 907.02 does not apply to his case. That standard applies only to actions commenced on or after February 1, 2011. Here, Koenig's case was commenced on January 31, 2011, with the filing of the criminal complaint. Thus, the pre-*Daubert* standard for expert witnesses applied.") (citations omitted).

80. See, e.g., *Seifert v. Balink*, 888 N.W.2d 816, 823 (Wis. 2017). Although termination of parental rights and post-conviction commitment cases are not criminal in nature, I consider them of the same ilk, as the government is attempting to take away valuable rights (parental rights and, in the case of commitments, literal freedom) from the individual. These cases, though technically noncriminal, were therefore included in the analysis.

therefore, did not apply to sentencing hearings.⁸¹ In another case, the dissent cited *Daubert* in a footnote, but no *Daubert* issue was ever litigated in that case at any level of the court system.⁸² These cases were also excluded. Finally, because two cases were appealed to the state's highest court, each appeared in the search results twice.⁸³ To avoid double counting, each was included only once.

After eliminating all irrelevant cases, the initial results of 183 appellate cases were reduced to 68 cases where a *Daubert* issue was addressed at the appellate court level.⁸⁴ These cases included termination of parental rights (TPR); post-conviction sexually violent person commitments (Ch. 980); operating a motor vehicle while intoxicated (OWI); and a wide range of other criminal cases including sexual assaults of both adults and children, a variety of homicides, and drug cases.⁸⁵

81. See *State v. Loomis*, 881 N.W.2d 749, 761 n.27 (Wis. 2016) ("Given that the rules of evidence do not apply at sentencing, we need not address that [*Daubert*] argument here.").

82. See *State v. Finley*, No. 2018AP258-CR, 2019 WL 2443184, at *9 n.7 (Wis. Ct. App. June 12, 2019) (Reilly, J., dissenting).

83. See *State v. Dobbs*, 945 N.W.2d 609 (Wis. 2020); *In re Commitment of Jones*, 911 N.W.2d 97 (Wis. 2018).

84. See *infra* Appendix.

85. In Wisconsin, first-offense OWI cases are civil, not criminal, and the defendant cannot be imprisoned for a first offense. See WIS. STAT. § 346.63 (2011). However, because these cases are so similar to second-and-subsequent OWIs, which are criminal, the few civil OWI cases I located were included in the sixty-eight cases analyzed in this Article. See *infra* Appendix.

| Types of cases: | No. Cases | Pct. of Tot. |
|--|------------------|---------------------|
| OWI | 15 | 22.1% |
| TPR | 12 | 17.6% |
| Sexual assault (child accuser) | 10 | 14.7% |
| Ch. 980 | 6 | 8.8% |
| Possession with intent to deliver (PWID) drugs | 5 | 7.4% |
| Homicide | 4 | 5.9% |
| Homicide, reckless | 4 | 5.9% |
| Homicide, intoxicated use of vehicle | 3 | 4.4% |
| Robbery | 2 | 2.9% |
| Sexual assault (adult accuser) | 2 | 2.9% |
| All other criminal cases | 5 | 7.4% |
| | 68 | 100.0% |

As far as litigation posture, defendants made claims of judicial error at the trial court level and claims of ineffective assistance of counsel (IAC) for failing to properly litigate the issues in the trial court.⁸⁶ Defendants' appellate counsel also filed several no-merit reports leading the appellate courts to analyze *Daubert* issues independently.⁸⁷

86. See, e.g., State v. Garba, No. 2015AP1243-CR, 2016 WL 5794346 (Wis. Ct. App. Oct. 5, 2016); State v. Giles, No. 2018AP1967-CR, 2019 WL 4936622 (Wis. Ct. App. Oct. 8, 2019); State v. Bauer, No. 2018AP169-CR, 2019 WL 477361 (Wis. Ct. App. Feb. 7, 2019); State v. Brown-Troop, No. 2017AP1254-CR, 2018 WL 3756433 (Wis. Ct. App. Aug. 7, 2018); State v. Butler, No. 2014AP1769-CR, 2015 WL 3550028 (Wis. Ct. App. June 9, 2015). For more cases, see *infra* Appendix.

87. See, e.g., State v. Muns, No. 2013AP2290-CRNM, 2015 WL 13134209 (Wis. Ct. App. Apr. 29, 2015); State v. Martinez, No. 2013AP1876-CRNM, 2015 WL 13134264 (Wis. Ct. App. Aug. 19, 2015); State v. D.E., No. 2105AP2271-NM, 2016 WL 8488937 (Wis. Ct. App. Jan. 20, 2016). For more cases, see *infra* Appendix.

| Nature of challenge: | No. Cases | Pct. of Tot. |
|-----------------------------|------------------|---------------------|
| Judicial error | 40 | 58.8% |
| IAC | 17 | 25.0% |
| No-merit reports | 11 | 16.2% |
| | 68 | 100.0% |

As indicated earlier, the commonly held belief among defense lawyers is that prosecutors have expert witnesses at their beck and call and use experts at trial much more frequently than the defense.⁸⁸ The results of this study are consistent with that intuitive belief.⁸⁹

| Party calling the expert: | No. Cases | Pct. of Tot. |
|----------------------------------|------------------|---------------------|
| State / Prosecutor | 58 | 85.3% |
| Defendant | 10 | 14.7% |
| | 68 | 100.0% |

There was a broad range of expert testimony in the sixty-eight cases including, most commonly, experts in OWI cases who would testify about evidence of intoxication.⁹⁰ Also common were TPR cases involving expert testimony about the defendant's parenting capacity, whereas Ch. 980 cases involved expert testimony about the defendant's recidivism risk.⁹¹ In criminal cases other than OWIs, the most common type of expert testimony was syndrome or

88. See Neufeld, *supra* note 26, at 109.

89. See *infra* Appendix.

90. See, e.g., *Garba*, 2016 WL 5794346; *Giles*, 2019 WL 4936622. For more cases, see *infra* Appendix. In addition to evidence of blood alcohol level, another issue that defendants often challenge is the "horizontal gaze nystagmus (HGN), a means of assessing impairment due to intoxication based on an investigator's observations of eyeball tremors when the eyes of a subject are shifted from straight ahead to the side." *Risinger*, *supra* note 59, at 122.

91. See, e.g., *In re J.M.*, No. 2015AP252, 2015 WL 6044967 (Wis. Ct. App. Oct. 16, 2015); *In re J.S.*, No. 2016 AP735, 2016 WL 4384871 (Wis. Ct. App. Aug. 18, 2016); *In re L.D.D., Jr.*, No. 2017AP2390, 2018 WL 1176881 (Wis. Ct. App. Mar. 6, 2018); *In re Commitment of Jones*, 911 N.W.2d 97 (Wis. 2018); *In re Commitment of Lalor*, No. 2015AP1457-NM, 2016 WL 8605320 (Wis. Ct. App. Apr. 13, 2016); *In re Commitment of Mable*, No. 2015AP376, 2016 WL 8606260 (Wis. Ct. App. Jul. 8, 2016). For more cases, see *infra* Appendix.

commonality evidence.⁹² The different types of expert testimony, however, were nearly as far ranging as the facts of the cases.⁹³

| Nature of expert testimony: | No. Cases | Pct. of Tot. |
|---|-----------|---------------|
| BAC, blood drug level, and related | 11 | 16.2% |
| Parenting capacity and related | 11 | 16.2% |
| Recidivism risk | 6 | 8.8% |
| Syndrome evidence | 6 | 8.8% |
| Indicia of Intent to deliver drugs | 4 | 5.9% |
| HGN, field sobriety, and related | 4 | 5.9% |
| Nature and cause of injuries | 4 | 5.9% |
| Child interview protocols | 4 | 5.9% |
| Cell phone location mapping | 3 | 4.4% |
| Canine scent evidence | 2 | 2.9% |
| Firearms | 2 | 2.9% |
| Crash reconstruction | 2 | 2.9% |
| Multiple areas of expertise in one case | 1 | 1.5% |
| All other types of expert testimony | 8 | 11.8% |
| | 68 | 100.0% |

While I identified sixty-eight cases, there were far more judicial decisions than that. All sixty-eight cases began, of course, in a trial court. Sixty-four of those cases involved litigation of a *Daubert* issue at the trial court level, which resulted in sixty-four trial court rulings.⁹⁴

92. See Risinger, *supra* note 59, at 114 (citing various categories of syndrome evidence). “In its general meaning, all ‘syndrome’ means is a group of symptoms or signs typical of an underlying cause . . . where the ‘cause’ may commonly be constructed partly from the symptoms themselves” *Id.* at 112. These symptoms or signs are many and are very malleable. Therefore, no matter the actual evidence in a particular case, the state’s expert will be able to point to several indicia of the defendant’s guilt. In fact, these state experts are often advocates, not scientists. See *id.* at 113 (discussing the role of researchers, therapists, and the “social policy advocate” in the syndrome evidence fields). Therefore, “[i]t is not surprising that the result of all this is not always the most dependable science.” *Id.*

93. See *infra* Appendix.

94. See *infra* Appendix.

These trial court rulings take several forms. For example, the defendant's trial lawyer (or the prosecutor) may file a pretrial motion to exclude the state's (or the defendant's) expert witness, and the trial judge would have to rule on the motion.⁹⁵ As another example, if the defendant's trial lawyer did *not* file such a pretrial motion and the defendant was convicted, the defendant's appellate counsel may file a post-conviction motion with the trial court.⁹⁶ Such a motion would argue that the trial lawyer was ineffective and, therefore, the defendant should receive a new trial.⁹⁷ The trial judge would then have to rule on that motion.⁹⁸

These sixty-four trial court rulings were appealed, resulting in sixty-four appellate court rulings.⁹⁹ There were four *additional* appellate court rulings (for a total of sixty-eight) on issues which had not been raised at the trial court in any form. Finally, two of the appellate cases were appealed to and accepted by the state's highest court, the Supreme Court of Wisconsin (SCOW), resulting in two additional rulings.¹⁰⁰

In total, then, the sixty-eight cases involved sixty-four trial court decisions, sixty-eight intermediate appellate court decisions, and two SCOW decisions for a grand total of 134 decisions on *Daubert* issues.¹⁰¹ Amazingly, regardless of the type of case, the nature of the expert testimony, the party calling the expert, and the procedural posture of the case, the prosecutor won every single *Daubert* issue at every level of the state court system.¹⁰²

In other words, of the Wisconsin cases that have reached an appellate court on a *Daubert* issue, *the defendant has lost every decision at every level of the state court system* since *Daubert* became effective on February 1, 2011.¹⁰³ Back in 2010, on the metaphorical eve of *Daubert*'s adoption, not even a cynical defense lawyer could have predicted such a one-sided score.

95. See Wis. STAT. § 901.04 (2011).

96. See *id.* § 974.02.

97. See *id.*

98. See *id.*

99. See, e.g., State v. Garba, No. 2015AP1243-CR, 2016 WL 5794346 (Wis. Ct. App. Oct. 5, 2016); State v. Giles, No. 2018AP1967-CR, 2019 WL 4936622 (Wis. Ct. App. Oct. 8, 2019). For more cases, see *infra* Appendix.

100. See State v. Dobbs, 945 N.W.2d 609 (Wis. 2020); *In re Commitment of Jones*, 911 N.W.2d 97 (Wis. 2018).

101. See *infra* Appendix.

102. See *infra* Appendix.

103. See *infra* Appendix.

| Wins at each level of court: | State / Prosecutor | Defense |
|-------------------------------------|---------------------------|----------------|
| Trial court wins | 64 | 0 |
| Appellate court wins | 68 | 0 |
| SCOW wins | 2 | 0 |
| 134 | | 0 |

All 68 cases (which produced a total of 134 judicial rulings) are detailed in the Appendix, which includes the case name, case type, party calling the expert, category of expert testimony, the winning party at each level (always the state), and the procedural nature of the challenge.¹⁰⁴ The Appendix is sorted by (1) the party calling the expert; (2) the category of the expert's testimony, e.g., canine scent evidence, cell phone mapping, etc.; (3) the case type, e.g., homicide, robbery, etc.; and (4) the case name.¹⁰⁵

III. INSIDE THE NUMBERS

The defense bar's pessimistic prediction in 2010 appears to have been prescient.¹⁰⁶ The state's record of 134–0 indicates that the *Daubert* standard posed no hurdle whatsoever for the prosecutor but imposed a substantial hurdle for the defense—a hurdle it has *never* been able to clear regardless of the type of case and the nature of the expert testimony it wished to present.¹⁰⁷

For a variety of reasons, some of which are discussed in Part IV, the state's unblemished record of 134–0 is not, in itself, conclusive proof that judicial bias caused the defendant to lose every time at every level.¹⁰⁸ For example, it is theoretically possible, though unlikely, that the state could be winning all the time because it *should be* winning all the time. Perhaps the defense typically tries to use charlatans as experts or routinely raises frivolous challenges to the state's unimpeachable expert testimony about rock-solid science.¹⁰⁹

104. See *infra* Appendix.

105. See *infra* Appendix.

106. See Cicchini, *supra* note 51, at 99.

107. See *infra* Appendix.

108. See *infra* Appendix.

109. See Risinger, *supra* note 59, at 108 (allowing for the possibility that the state wins because it proffers reliable expert testimony and the defense does not). If one were to generalize, however, it is usually prosecutors, not defendants, who use

Such an explanation starts to fall apart, however, upon glancing at a mere summary of the cases. Three categories of expert testimony—blood alcohol levels, child interview protocols, and firearms—have passed *Daubert* for the state but failed *Daubert* for the defense.¹¹⁰ And overall, the state’s 134–0 record is simply too striking to ignore.¹¹¹ How can a rule that should be protecting the defense (because the prosecutor calls 85% of the experts) produce a record where the prosecutor never loses?¹¹²

To adopt the words of Randall P. Munroe, while such a win-loss record might not in itself conclusively prove a pro-state judicial bias, such a tally “does waggle its eyebrows suggestively and gesture furtively while mouthing ‘look over there’” in the direction of such bias.¹¹³ The following sections will indeed “look over there,” as the saying goes, and closely examine the underlying judicial reasoning in order to reveal the specific tactics used in building the state’s 134–0 record.¹¹⁴

A. Lay v. Expert Testimony

The double standards begin, unsurprisingly, at the beginning.¹¹⁵ Recall that the very first element of the *Daubert* test identifies the type of testimony that invokes the standard to begin with: testimony

shaky expert evidence. See Julie A. Seaman, *A Tale of Two Dauberts*, 47 GA. L. REV. 889, 89495 (2013) (“We know that there are serious reliability issues with latent fingerprint identification evidence, handwriting identification, ballistics, bite marks, and the way that these are often presented to criminal juries. We know that other kinds of evidence that are backed up by relatively robust findings—for example, expert testimony about the dangers of unreliable eyewitness identification—have often been excluded, and that these tend to be offered primarily by criminal defendants.”) (footnotes omitted).

110. See *infra* Appendix; see, e.g., City of West Bend v. Smith, No. 2016AP2170, 2017 WL 4708101 (Wis. Ct. App. Oct. 18, 2017); State v. Bauer, No. 2018AP169-CR, 2019 WL 477361 (Wis. Ct. App. Feb. 7, 2019); State v. Taylor, No. 2018AP899-CR, 2019 WL 2998228 (Wis. Ct. App. July 10, 2019); State v. Murphy, No. 2017AP1559-CR, 2018 WL 3954208, (Wis. Ct. App. Aug. 16, 2018); State v. Woodson, No. 2019AP89-CR, 2020 WL 4781499 (Wis. Ct. App. Aug. 18, 2020).

111. See *infra* Appendix.

112. See *supra* Part II.

113. *Munroe on Correlation*, CAUSEWEB, <https://www.causeweb.org/cause/resources/fun/quotes/munroe-correlation> [https://perma.cc/U6ZU-5TMB] (last visited Sept. 13, 2021).

114. See *id.*

115. See WIS. STAT. § 907.02 (2011) (adopting and codifying *Daubert*).

based on “scientific, *technical*, or *other specialized knowledge*.¹¹⁶ This means that testimony does not have to be scientific in nature to be expert testimony.¹¹⁷ “An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist.”¹¹⁸ Consequently, “[m]edical doctors and physicists are held to the same standard as car mechanics and police gang-unit officers.”¹¹⁹

Despite this, in cases where the state uses police officers in an expert capacity, the prosecutor often fails to comply with the state’s discovery obligations for expert witnesses, and defense counsel often fails to raise any of several available objections.¹²⁰ In those cases, after the defendant is convicted, appellate counsel will often seek a new trial. However, instead of finding that the state violated its discovery obligations or that trial counsel was ineffective for failing to object to the expert testimony, courts often employ this tactic: they simply declare that the state’s witness offered *lay testimony*, not expert testimony.¹²¹ This simple declaration completely removes the witness from *Daubert*’s reach which, in turn, allows the court to uphold the conviction.¹²²

Consider the use of a firearms expert at trial. When the *defense* attempts to call such a witness, there is no doubt that it constitutes expert testimony and is subject to *Daubert*.¹²³ Conversely, in many cases the state will want to call a firearms expert—usually a police officer.¹²⁴ In *State v. Woodson*, for example, the state’s police officer

116. See *id.* (emphasis added).

117. See *id.*

118. Garret & Fabricant, *supra* note 65, at 1567 (citing FED. R. EVID. 702 advisory committee’s notes to 2000 amendments).

119. Blinka, *supra* note 22, at 60.

120. See § 971.23(1)(e) (2017) (requiring the state to produce in pretrial discovery “any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert’s findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial”).

121. Lay testimony is defined as that which is not expert testimony. See *id.* § 907.01.

122. See *id.* § 907.02.

123. See, e.g., *State v. Murphy*, No. 2017AP1559-CR, 2018 WL 3954208, at *6 (Wis. Ct. App. Aug. 16, 2018) (criticizing the defense witness’s expert qualifications to discuss different firearms and how they discharge and to testify about his reconstruction of a shooting).

124. See, e.g., *State v. Woodson*, No. 2019AP89-CR, 2020 WL 4781499 (Wis. Ct. App. Aug. 18, 2020).

witness “explained that over the course of his career, he was involved in over a thousand gun cases.”¹²⁵ He further discussed his “experience” and “schooling in characteristics of an armed criminal.”¹²⁶ He then testified that the item seen in the defendant’s pocket, in a surveillance video shown to the jury, was “an extended high capacity magazine for a semiautomatic firearm.”¹²⁷ This testimony was necessary to establish that the defendant in fact possessed a firearm—an essential element of the crime for which he was on trial.¹²⁸

The defendant’s appellate lawyer argued that trial counsel was ineffective for failing to object to such expert testimony.¹²⁹ To dispense with this claim, the court simply declared that the police officer witness offered *lay opinion*, not expert opinion, and therefore was never subject to *Daubert* in the first place.¹³⁰ In declaring that the testimony was somehow *not* based on technical or other specialized knowledge, the court’s own reasoning undermined its conclusion:

The law supports a lay opinion conclusion, as officers routinely gain specific knowledge through the course of their careers about firearms, and their testimony . . . naturally did assist a jury in determining what they are looking at when viewing the video and determining for themselves whether the defendant possessed a firearm. It is clearly within a lay context that an officer/detective, who carries a firearm daily *at work*, and who encounters firearms while *at work*, would have a basic knowledge about types of firearms and how to identify different types of firearm components . . .¹³¹

The court’s reasoning has several problems. First, to the extent the testimony did assist the jury, such testimony was helpful only because the jury was not able to determine on its own whether the object in the defendant’s pocket on the video was “an extended high capacity magazine for a semiautomatic firearm.”¹³² If the jury was capable of determining that, the officer’s testimony would not have been helpful. In other words, because the jury and the police officer witness were viewing the same video, the witness’s testimony was

125. *Id.* at *1.

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.* at *5.

130. *See id.* (holding that the “law enforcement witnesses’ testimony was properly admitted as lay opinion testimony”).

131. *Id.* (emphasis added).

132. *See id.* at *1.

only helpful *because* it was based on technical and specialized knowledge the jury did not have—the very definition of expert testimony.¹³³

Second, that the officer gained his knowledge about firearms through the course of his career as a law enforcement officer and by dealing with guns at work also indicates that his testimony was expert, not lay opinion.¹³⁴ Lay opinion “addresses the experiences of ‘everyday life’ in the community, not the experiences of typical police officers” who “acquire insights and skills that are better assessed through the lens of expert testimony.”¹³⁵

Courts are quick to reclassify such highly technical and specialized testimony from expert to lay whenever it benefits the state but not the defense.¹³⁶ In a similar example, a police detective testified, based on his “sixteen years’ experience” handling sensitive crimes, about the indicia of guilt exhibited by sex criminals and, specifically, by the defendant.¹³⁷ The court held that such opinions “were not expert testimony.”¹³⁸ Rather, the court believed, “[t]hey were lay opinion *within his scope of expertise*, i.e., his many years’ experience in investigating sensitive crimes.”¹³⁹ Amazingly, the court acknowledged that the witness was an expert, literally declared that his testimony was based on his expertise, yet still labeled the testimony as lay testimony.¹⁴⁰

Courts have used this reclassification scheme on many other forms of technical and specialized knowledge, including the administration and interpretation of field sobriety tests,¹⁴¹ highly technical cell phone mapping evidence,¹⁴² and parenting capacity

133. See Wis. STAT. § 907.02 (2011).

134. See *Woodson*, 2020 WL 4781499, at *1.

135. Blinka, *supra* note 22, at 17.

136. See *Woodson*, 2020 WL 4781499, at *5.

137. See *State v. Martinez*, No. 2015AP1458-CR, 2016 WL 3524822, at *1 (Wis. Ct. App. June 29, 2016).

138. See *id.*

139. *Id.* (emphasis added).

140. See *id.*

141. See, e.g., *State v. VanMeter*, No. 2014AP1852-CR, 2015 WL 7432604, at *3 (Wis. Ct. App. Nov. 24, 2015) (holding testimony was lay, not expert, even though the officer “did reference his training and knowledge regarding the application and interpretation of the [field sobriety] test”).

142. See, e.g., *State v. Martinez*, No. 2013AP1876, 2015 WL 13134264, at *5 (Wis. Ct. App. Aug. 19, 2015) (holding that despite the highly technical nature of the subject, “map plotting of cell records to fall within the realm of lay, rather than expert, testimony”).

assessments.¹⁴³ While the facts of the cases will change, the reasoning is always the same: although the witness's testimony is based on highly specialized expertise that is unavailable to the layperson, the court holds that the witness is somehow *not* testifying as an expert.

In using this ploy, courts are intentionally changing the context within which the testimony is examined. The test is not whether something is commonly known *to the witness*, who has the specialized training and unique experiences, but rather to the layperson on the jury. If a witness's testimony was to be classified based on what is within the witness's common knowledge or "scope of expertise," then *everything* would be lay opinion and nothing would qualify as expert testimony.¹⁴⁴ Such an absurd interpretation effectively eliminates the expert witness statute from the statute book and must therefore be rejected as a matter of law.¹⁴⁵

B. Sufficiency of Factual Basis

Recall that element [4], the first of the newly added *Daubert* prongs, requires the expert's testimony to be based on "sufficient facts or data."¹⁴⁶ Here, another double standard emerges from the murky details of the sixty-eight appellate cases. This double standard is most visible in the context of syndrome evidence or, more broadly, commonality evidence.¹⁴⁷ This evidence is exactly what it sounds like: expert testimony that a symptom, event, or occurrence is *common*.¹⁴⁸

For example, in *State v. Murphy*, the defendant was charged with homicide and the defense was that the gun had discharged

143. See, e.g., *In re L.D.D., Jr.*, 2017AP2390, 2018 WL 1176881, at *3 (Wis. Ct. App. Mar. 6, 2018) ("[T]he social worker's opinion, 'while informed by their education, experience and training, is primarily based on personal knowledge and interaction with the client,' and is therefore considered to be lay witness testimony.").

144. See *Martinez*, No. 2015AP1458-CR, 2016 WL 3524822, at *1 (Wis. Ct. App. June 29, 2016).

145. For a discussion of some major rules of statutory construction and the absurdity doctrine, see Michael D. Cicchini, *Criminal Repeater Statutes: Occasions, Convictions, and Absurd Results*, 11 Hous. L. Rev. OFF REC. 1, 9–15 (2020).

146. See WIS. STAT. § 907.02 (2011).

147. See Risinger, *supra* note 59, at 112–14 (describing syndrome evidence).

148. See *id.*

accidentally.¹⁴⁹ In support of that defense, a firearms expert intended to testify that accidental discharges are common with Glock firearms, which was the brand of gun involved in the case.¹⁵⁰

Based on two-plus decades of formal education, professional training, experience inside and outside of law enforcement, and publishing in professional journals, the expert would have testified, in part, that “the Glock pistol is ‘notorious for accidental/unintended discharges.’ . . . and ‘[s]omewhere between 7 to 8 out of every 10 accidental discharges [the expert] investigates involve a Glock.’”¹⁵¹

The trial court excluded the proffered testimony because, as the state had argued, there were “insufficient facts or data to support this opinion.”¹⁵² The appellate court then bailed out the trial court: although the trial court failed to “adequately set forth its reasoning in reaching its discretionary decision, [the appellate court decided to] search the record for reasons to sustain that decision.”¹⁵³ The appellate court then simply adopted the following arguments of the prosecutor.¹⁵⁴

First, the court held that the defense did not provide the sample size of the expert’s observations, making it “impossible to determine if his cases are a representative sample of all accidental gun discharges so as to make the data reliable.”¹⁵⁵ In other words, “a small sample size is generally unreliable.”¹⁵⁶ Second, Glock pistols may not be more dangerous or prone to accidental discharges at all; it could just be that “proportionally more Glock pistols are in general use than other types of guns,” and, therefore, the Glock may actually have “a lower accident rate” than other guns.¹⁵⁷

This discussion of sample size, population details, and comparative data is reasonable enough on its face. But the double

149. See No. 2017AP1559-CR, 2018 WL 3954208, at *1 (Wis. Ct. App. Aug. 16, 2018).

150. See *id.*

151. *Id.* at *5; see Brief of Defendant-Appellant at 17–18, *State v. Murphy*, No. 2017AP1559-CR, 2018 WL 3954208 (Wis. Ct. App. Aug. 16, 2018) (discussing the expert’s qualifications).

152. See *Murphy*, 2018 WL 3954208, at *4, *6.

153. *Id.* at *5 (quoting *State v. Manuel*, 694 N.W.2d 811 (Wis. 2005)). The court “conclude[d] that there [was] an adequate basis in the record to affirm the circuit court’s decision to exclude [the expert’s] opinion about the relative safety of Glock pistols.” *Id.*

154. See *id.* at *6.

155. See *id.*

156. *Id.*

157. See *id.*

standard is that such judicial scrutiny completely disappears when *the state* offers the commonality evidence.¹⁵⁸

For example, in *State v. Smith*, the state intended to strengthen a child sexual assault allegation with expert testimony that such victims commonly delay reporting the incident to authority figures and commonly exhibit post-abuse behavioral changes.¹⁵⁹ Though less credentialed than the defendant's gun expert in *Murphy*, the state's expert in *Smith* "had a bachelor's degree in social work" and worked "in child protective services for two decades" as a social worker before taking a bureaucratic position in that government agency.¹⁶⁰ When the defendant objected to the expert witness, the state made this barebones pretrial offer of proof about the expert's testimony:

[The state's expert] . . . would testify about what, oftentimes, she sees victims of child sexual assault do. And she would testify about delayed disclosure, how it's quite common for children to wait to disclose. The State also provided that [the expert] would testify how child sexual assault victims often, perhaps, become withdrawn, their mood changes, they struggle academically, may act out as well as a wide range of behaviors that are common in child sexual assault cases.¹⁶¹

First, unlike the defendant's very specific commonality testimony that the court rejected in *Murphy*, the state's proffered testimony is unbelievably vague.¹⁶² What does "quite common" mean?¹⁶³ What does "often, perhaps" mean?¹⁶⁴ What constitutes the "wide range of behaviors that are common" in cases such as this?¹⁶⁵ These vague descriptions convey no useful information whatsoever.

Second, to apply the *Murphy* court's reasoning when it excluded the defendant's expert, the state's expert offered no sample size for her observations.¹⁶⁶ This is important, the *Murphy* court held, because "a small sample size is generally unreliable."¹⁶⁷ And without knowing that information, how do we know whether the witness's personal observations about delayed reporting constitute "a

158. See, e.g., *State v. Smith*, 874 N.W.2d 610, 613 (Wis. Ct. App. 2015).

159. See *id.*

160. See *id.* at 614.

161. *Id.* at 613 (internal quotation marks omitted).

162. See *Murphy*, 2018 WL 3954208, at *5.

163. See *Smith*, 874 N.W.2d, at 613.

164. See *id.*

165. See *id.*

166. See *id.* at 612–13.

167. See *Murphy*, 2018 WL 3954208, at *6.

representative sample of all [child sex allegations] so as to make the data reliable”?¹⁶⁸

Third, the state’s witness in *Smith* was also going to testify that child victims commonly have mood changes and struggle academically.¹⁶⁹ The entire purpose of such testimony is to imply causation: the child-accuser exhibited such symptoms *because* the defendant committed the charged crime.¹⁷⁰ But just as in *Murphy*, hasn’t the expert “failed to consider another possible explanation for [her] perception” of these matters?¹⁷¹ Don’t children who have *not* been sexually assaulted *also* have mood changes and struggle academically? Of course they do, such as when the child’s parents have divorced, the family has relocated to another city, a family pet has died, or for no obvious reason at all. But where is this type of comparative data—the type of data the court demanded of the defendant’s expert in *Murphy*?¹⁷²

In *Smith*, instead of asking these questions, the court used a double standard: it completely abandoned all curiosity and critical thought, along with the “sufficient facts or data” requirement of *Daubert*, in order to allow the state’s expert to testify.¹⁷³ Based solely on the state’s vague and paltry offer of proof from a social worker “about what, oftentimes, she sees victims of child sexual assault do[,]” the appellate court found “[t]his provided a *sufficient factual basis* for the court’s decision . . . to admit [the witness’s] testimony.”¹⁷⁴ This stands in stark contrast to the unforgiving standards that courts impose on defendants.¹⁷⁵

C. Dispensing with Reliability

The reason Wisconsin moved from a relevance test to a reliability test was to impose a gatekeeping obligation on trial judges who are now required to prevent unreliable testimony from reaching the jury.¹⁷⁶ Prong [5] of *Daubert* specifically requires the testimony

168. See *id.*

169. See *Smith*, 874 N.W.2d at 613.

170. See *id.*

171. See *Murphy*, 2018 WL 3954208, at *6.

172. See *id.*

173. See *Smith*, 874 N.W.2d at 612–14.

174. *Id.* at 613 (emphasis added).

175. See *Murphy*, 2018 WL 3954208, at *6.

176. See *Blinka*, *supra* note 22, at 60.

to be “the product of reliable principles and methods.”¹⁷⁷ Reliability is the entire essence and purpose of *Daubert*.

But in a nationwide study discussed earlier, Garret and Fabricant analyzed how state court judges determined whether testimony is reliable:

While state courts do at times cite to the language of Rule 702, they often at most then recite *Daubert* factors regarding reliability without explaining what reliability means and without demanding that experts demonstrate any type of reliability as prescribed by the Rule. The courts instead . . . state that *the qualifications or expertise of the expert suffice as a proxy for reliability . . .* It is incredibly rare to find any discussion of reliability, except in one context: when courts exclude defense experts.¹⁷⁸

In other words, courts are serious about reliability when it comes to a defendant’s expert but completely ignore reliability when assessing the state’s expert. Courts do this, Garret and Fabricant explained, simply by using the state’s witness’s “qualifications” as “a proxy for reliability.”¹⁷⁹ The problem is that witness expertise is a completely different part of the *Daubert* test, specifically prong [3]; it cannot substitute for the witness’s use of “reliable principles and methods” which is required by prong [5].¹⁸⁰

Unsurprisingly, this particular double standard was one of the most typical ploys used by the Wisconsin courts in the sixty-eight appellate cases. For example, when one defendant attempted to exclude the state’s commonality evidence as unreliable, the court conceded that such “proposed expert testimony did not neatly fit the *Daubert* factors.”¹⁸¹ This, of course, was a dramatic understatement, as the testimony miserably failed all of the factors.¹⁸² Nonetheless, the court found reliability based on “other factors bearing upon the reliability of the testimony”—specifically, the witness’s “qualifications . . . as an expert,” even though that is a completely different prong of the test.¹⁸³

Although reliable principles and methods are the very essence and purpose of *Daubert*, another court announced a similar judge-

177. See WIS. STAT. § 907.02 (2011).

178. See Garret & Fabricant, *supra* note 65, at 1571 (emphasis added).

179. See *id.*

180. See § 907.02.

181. See *State v. Smith*, 874 N.W.2d 610, 613 (Wis. Ct. App. 2015).

182. See *id.*

183. See *id.*

made rule, which is not evident from the language of the statute.¹⁸⁴ It amazingly held that “[a]ll *Daubert* factors . . . are simply *suggested ways* to assess methodology, not boxes which must be checked.”¹⁸⁵

The practical implication of this pro-prosecutor judicial activism is that once the state satisfies prong [3] of the test, reliability is also deemed satisfied—or, perhaps more accurately stated, dispensed with.¹⁸⁶ But isn’t *the court*, rather than the state’s advocate-witness, supposed to determine whether testimony is reliable? Well, yes, that is the whole point of making the trial judge the gatekeeper of the evidence. In fact, deferring to witness qualifications as a way to determine the reliability of his or her testimony even has a name: “ipse dixit (‘because I said so’) testimony.”¹⁸⁷ And such testimony is specifically prohibited: “The trial court’s gatekeeping function requires more than simply ‘taking the expert’s word for it.’”¹⁸⁸

D. Application v. Exposition

Moving through the *Daubert* factors, another double standard emerges with regard to element [6], which requires that “the witness has *applied* the principles and methods reliably to the facts of the case.”¹⁸⁹ When it comes to defense experts, this is an incredibly high hurdle to clear; for the state’s experts, it is disregarded entirely.

I will begin, this time, with the state’s experts. Recall from an earlier case, *Smith*, that the state called an expert on the commonalities of child sexual assault reporting.¹⁹⁰ The expert testified that “delayed disclosure” and other post-assault behavior such as “act[ing] out” may “oftentimes” and “often, perhaps” occur.¹⁹¹ Further, the expert would discuss only generalities, and “would not ‘testify about specifics involving this case[.]’”¹⁹² In other

184. See *In re Q.R.P.*, No. 2016AP1701, 2016AP1702, 2017 WL 2859876, at *4 (Wis. Ct. App. July 5, 2017).

185. See *id.* (emphasis added).

186. See *id.*

187. See Blinka, *supra* note 22, at 60.

188. See *id.* (quoting FED. R. EVID. 702 advisory committee note 2000 amendment).

189. See WIS. STAT. § 907.02 (2011) (emphasis added).

190. See *State v. Smith*, 874 N.W.2d 610, 611–12 (Wis. Ct. App. 2015).

191. See *id.* at 613. Of course, both true and false allegations can be immediate or delayed, and most children, including those who have never been assaulted, will “act out” for any number of reasons or even no reason at all.

192. See *id.*

words, the expert made no attempt whatsoever to apply her expertise “to the facts of the case,” as required by element [6] of *Daubert*.¹⁹³ Nonetheless, the witness was allowed to testify.¹⁹⁴

By comparison, consider *State v. Bauer*, where the defense attempted to call an expert to testify that suggestive questioning of children can lead them to adopt the questioner’s suggestions and make false allegations of sexual abuse.¹⁹⁵ The expert even identified specific suggestive questions that were, in fact, asked of the child during the state’s video recorded interview.¹⁹⁶ Yet the court excluded the witness.¹⁹⁷ Why? Because, the court claimed, the defense expert failed to “sufficiently connect his opinions to the facts of the case.”¹⁹⁸

In *Smith*, the state’s witness did not even attempt to connect her testimony to the facts, as she “would *not* ‘testify about specifics involving this case[.]’”¹⁹⁹ By contrast, the defense expert in *Bauer* actually *did* connect his opinions about suggestive questioning to the facts of the case: he identified actual, suggestive questions asked of the child in the recorded interview.²⁰⁰ Nonetheless, somehow it was the defense that supposedly failed to clear *Daubert*’s hurdle.²⁰¹

Not only did a court entirely eliminate this application-based hurdle for the state, but the other court erected an impossible double standard for the defense.²⁰² It excluded the defense expert because, the court held, the expert “fail[ed] to draw any conclusions about the reliability of the victim’s accusations.”²⁰³ That is, he failed to testify that the suggestive questioning had “*actual effects* on the child or her statements that incriminate[d]” the defendant.²⁰⁴

This double standard is impossible for the defense to satisfy because the court is requiring the defense expert to do the very thing

193. See WIS. STAT. § 907.02 (2011).

194. See *Smith*, 874 N.W.2d at 614.

195. See *State v. Bauer*, No. 2018AP169-CR, 2019 WL 477361, at *4 (Wis. Ct. App. Feb. 7, 2019). See also Appendix for similar cases where the defendant’s evidence was excluded.

196. See *Bauer*, 2019 WL 477361, at *4 (“[T]he practice of asking a child [interviewee] to name body parts before the child interviewee has made any allegations has been criticized as suggestive.”).

197. See *id.* at *4.

198. See *id.* at *3.

199. See *State v. Smith*, 874 N.W.2d 610, 613 (Wis. Ct. App. 2015) (emphasis added).

200. See *Bauer*, 2019 WL 477361, at *4.

201. See *id.*

202. See *id.*; see also *Smith*, 874 N.W.2d at 613.

203. See *Bauer*, 2019 WL 477361, at *4.

204. See *id.* (emphasis added).

the law prohibits.²⁰⁵ An expert *may* legally testify, for example, that (1) the research shows suggestive questioning can lead children to make false allegations and (2) suggestive questioning occurred in this particular case.²⁰⁶ However, the expert is *not* permitted to testify that the suggestive questioning had “actual effects” on the child in this case and, therefore, produced a false allegation.²⁰⁷ That is a matter for the jury to decide. While the expert may assist the jury in identifying factors that may influence the reliability of a witness’s statement, the credibility of the witness is solely within the province of the jury.²⁰⁸

Returning, once again, to the state’s half of the double standard where the witness is allowed to testify by lecturing on a subject without ever applying it to the case at bar, this approach is known as “exposition testimony”²⁰⁹ or “summarizational or educational expertise.”²¹⁰ This form of testimony poses several problems.

First, testifying at such a general level without applying the principles to the facts of the case has no basis whatsoever in the law. The statute reads: “If scientific, technical, or other specialized knowledge will assist the trier of fact . . . a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise, *if . . . the witness has applied the principles and methods reliably to the facts of the case.*²¹¹ As a concurring justice astutely observed when the majority of Wisconsin’s highest court blessed the use of exposition testimony:

Today, we made [the statute] say something that no reasonably capable English-speaker would understand it to say.

. . . Ordinary folk like me see the “if” and conclude that what precedes it is contingent on what follows. Thus, I understand this language to mean that the expert may testify “in the form of an opinion or otherwise” but only if he can meet the conditions following the “if.” The court, however, acting on a plane of understanding to which I apparently do not have access, says

205. *See id.*

206. *See id.*

207. *See id.*

208. *See State v. Haseltine*, 352 N.W.2d 673, 676 (Wis. Ct. App. 1984) (“[T]he psychiatrist’s opinion, with its aura of scientific reliability, creates too great a possibility that the jury abdicated its fact-finding role to the psychiatrist and did not independently decide [the defendant’s] guilt.”); Wis. JI–Crim. 300 (2000) (“You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.”).

209. *See State v. Dobbs*, 945 N.W.2d 609, 614 (Wis. 2020).

210. *See Risinger, supra* note 59, at 132 (omitting internal quotation marks).

211. *See* Wis. STAT. § 907.02 (2011) (emphasis added).

that only testimony in the form of an opinion is subject to the listed conditions. Testimony in the “otherwise” category, for some reason, is not. . . . The actual words [of the statute] flat-out contradict the court inasmuch as they do not distinguish between “opinion” testimony and “otherwise” testimony. They say an expert “may testify thereto in the form of an opinion or otherwise, if” In ordinary English, this means the “if” applies with just as much force to “otherwise” as it does to “opinion.”²¹²

Second, this new category of exposition testimony, which was judicially created in violation of the statute, benefits the state.²¹³ As Risinger observed in his in-depth study of *Daubert* cases, “[w]hen it comes to ‘summarizational’ or ‘educational’ expertise, prosecution witnesses almost always are allowed to testify, and defense witnesses are rejected in a majority of cases.”²¹⁴ In our Wisconsin cases, the difference is even starker. The state benefited from this judicially created category of evidence several times,²¹⁵ while the defense experts were required not only to apply their principles and methods to the facts of the case,²¹⁶ but also to reach a level of certainty in their testimony that is both practically impossible and (paradoxically) would be legally inadmissible.²¹⁷

212. See *Dobbs*, 945 N.W.2d at 642–43 (Kelly, J., concurring).

213. See *id.* at 644.

214. See *Risinger*, *supra* note 59, at 132.

215. See *infra* Appendix. Whenever the state introduces syndrome testimony such as battered women’s syndrome or child sexual assault accommodation syndrome, such testimony is provided by a state advocate-witness, who is uninformed about the facts of the case at bar, in the form of exposition testimony.

216. In *State v. Dobbs*, 945 N.W.2d 609, 614 (Wis. 2020), where the Supreme Court of Wisconsin (SCOW) officially blessed the use of exposition testimony, a *defense expert* was actually at issue in the case. The trial court had excluded the defense expert “because he never reviewed Dobbs’s case and therefore could not explicitly apply his expertise to the specific facts of the case.” *Id.* at 617. Perhaps recognizing the potential future damage to the state if it were to uphold the trial court’s ban on exposition testimony, SCOW approved the use of exposition testimony, but not for defendant Dobbs; it upheld the trial court’s exclusion of the defense expert on other grounds. *Id.* at 626. In order to accomplish that feat, SCOW created yet another rule not present in the statute: exposition testimony must pass the “fitness” test. *Id.* at 644, 645. This “has no counterpart in the statute and is instead a purely judicial creation.” *Id.* at 644. The court is “trying to patch a hole of [its] own making.” *Id.*

217. See *State v. Bauer*, No. 2018AP169-CR, 2019 WL 477361, at *4 (Wis. Ct. App. Feb. 7, 2019) (excluding the defense expert because he could not conclude that the witness was, in fact, being untruthful); see also *State v. Haseltine*, 352 N.W.2d 673, 676 (Wis. Ct. App. 1984) (prohibiting witnesses from testifying that another witness is testifying truthfully or untruthfully); Wis. JI-Crim. 300 (explaining that witness credibility is a matter for the jury).

E. Expert Qualifications

In addition to *Daubert's* reliability elements, element [3] requires that the witness is personally “qualified as an expert by knowledge, skill, experience, training, or education.”²¹⁸ And the double standard here is dramatic. Recall, for example, in *State v. Murphy*, that the defendant attempted to use a firearms expert to discuss how and how easily a particular kind of gun accidentally discharges.²¹⁹ The defendant’s witness, who had two previous stints in law enforcement, also had the following qualifications:

He is a gunsmith holding an associate degree in gunsmithing with extensive experience in private practice and industry employment. He does hold a Bachelor of Science degree in criminal justice. He is an NRA certified *firearms safety instructor*. He has been published numerous times on firearms topics. He has been recognized by courts as a firearms expert in 28 cases, and acted as a consultant in over 100 other cases.

. . . [F]or approximately 25 years, he has been employed or occupied in some capacity involving the manufacture or maintenance of firearms, law enforcement, shooting investigations frequently involving *reconstructions* and routinely has been published on these subjects.²²⁰

As the defense argued, “[t]here is no question that [the witness] possesses more than adequate training and experience to be qualified as an expert on the subject of *firearm safety* and shooting *reconstruction221*

Yet despite that extensive background that actually satisfied *all* of the statute’s alternative sub-elements—“knowledge, skill, experience, training, or education”²²²—the court not only excluded the testimony for reasons discussed earlier, but also refused to find that the witness was even qualified as an expert.²²³ “Rather, the Court remarked unflatteringly upon [the witness’s] testimony at the . . . motion hearing[.]”²²⁴ Further, as the appellate court described it, the trial court “analyzed pertinent defects in [the witness’s] qualifications” en route to excluding his testimony from the trial.²²⁵

218. WIS. STAT. § 907.02 (2011).

219. See No. 2017AP1559-CF, 2018 WL 3954208, at ¶ 32 (Wis. Ct. App. 2018).

220. Brief of Defendant-Appellant, *supra* note 151, at 17–18.

221. *Id.* at 17 (emphasis added).

222. WIS. STAT. § 907.02 (2011).

223. See *Murphy*, 2018 WL 3954208, at ¶¶ 25, 30.

224. Brief of Defendant-Appellant, *supra* note 151, at 16.

225. See *Murphy*, 2018 WL 3954208, at ¶ 24.

By comparison, courts always—literally always, in our population of cases—accept the state’s witnesses as experts.²²⁶ For example, to testify as an expert about the very malleable line of evidence called battered women’s syndrome (BWS), the hurdle is quite low: “[a] person with significant experience working with domestic-abuse victims is qualified to testify as an expert on domestic abuse.”²²⁷ End of analysis. Similarly, to testify about the equally flexible line of evidence called child sexual assault accommodation syndrome (CSAAS)—which would, like BWS, seem to require the testimony of a research psychologist—merely being employed as a child advocate for the government qualifies as expertise:

The State submitted a curriculum vitae for [the witness] that showed she had a bachelor’s degree in social work and had been employed . . . in child protective services for two decades followed by five years as director of the . . . Child Advocacy Center. [The witness] had extensive training in child maltreatment and had provided training for others in the areas of child maltreatment, interviewing children, sexualized behaviors, and mandatory reporting.²²⁸

But the bar for state-witness expertise is even lower than that. To testify on that same subject of CSAAS, one need not have a bachelor’s degree or be a social worker or know anything about sexualized behaviors. In another case, a police officer was allowed to testify about such syndrome evidence based only on “about a hundred adolescent or teen” interviews²²⁹ conducted in his “seven years of experience in the sensitive crimes division of the . . . Police Department investigating sexual assault, child abuse, and similar offenses.”²³⁰ Once again, such lax requirements stand in stark contrast to the near-impossible-to-satisfy standards that courts impose on defense experts.

F. Standby Double Standards

In addition to the above double standards, which courts developed exclusively for their unequal application of the multi-

226. See generally *infra* Appendix.

227. See *State v. Stevlic*, No. 2018AP2289-CR, 2020 WL 5542004, at *6 (Wis. Ct. App. Sept. 16, 2020).

228. *State v. Smith*, 874 N.W.2d 610, 614 (Wis. Ct. App. 2016).

229. See *State v. Hayes*, No. 2015AP1357-CR, 2016 WL 7108388, at *7 (Wis. Ct. App. Dec. 6, 2016).

230. *Id.*

pronged *Daubert* test, courts have also reached deep into their bag of tactics for some standby double standards that are good for multiple occasions.

1. *Leaving It for the Jury*

In their study of cases that hinged on elements [4] and [5] of the *Daubert* test, Garret and Fabricant identified another double standard: when the defense has good arguments to exclude the state's expert, many courts have simply abdicated their role as gatekeeper and instead punted by deferring all issues to the jury.²³¹ Unsurprisingly, I detected this double standard at play in the Wisconsin cases as well.

For example, when the defendant challenged the state's expert based on the insufficiency of facts and data underlying the expert's opinion, one court held that such things are matters to be addressed at trial, where the defendant would be "free to challenge the accuracy of the expert's assumptions and propose competing scenarios including his own alleged scenario" on cross-examination.²³²

But when the tables are turned, courts have rejected that reasoning.²³³ For example, when excluding the defendant's expert, one court conceded: "It is true . . . that, instead of exclusion, the more usual means of attacking shaky but admissible . . . expert testimony is by vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof."²³⁴ Nonetheless, the court invoked a double standard and upheld the exclusion of the defense expert's testimony, condescendingly and erroneously declaring that it was nothing more than "conjecture dressed up in the guise of expert opinion."²³⁵

231. See Garret & Fabricant, *supra* note 65, at 1568 (describing cases where the *Daubert* reliability elements were "left for the jury to decide" and "more lenient admissibility standards" were used).

232. See *State v. Durski*, No. 2018AP1750-CR, 2019 WL 3949705, at *7 (Wis. Ct. App. Aug. 21, 2019) (internal quotation marks omitted).

233. See *State v. Murphy*, No. 2017AP1559-CF, 2018 WL 3954208, at ¶ 39 (Wis. Ct. App. Aug. 16, 2018).

234. See *id.*

235. See *id.* (quoting *State v. Giese*, 854 N.W.2d 687, 691 (Wis. Ct. App. 2014) (internal quotation marks omitted)).

2. Confusing the Jury

As discussed earlier, judicial double standards have even infected cases with identical evidence.²³⁶ Whether a given line of evidence is admissible often depends upon whether it would confuse the jury;²³⁷ this, in turn, depends upon which party is offering it.

For example, when children are interviewed about sexual assault or physical abuse allegations, those interviews are often recorded; then, through a hearsay exception, those recordings are played to the jury and are usually the state's primary—if not its sole—piece of evidence.²³⁸ In order to bolster such allegations, prosecutors will call those interviewers as expert witnesses to testify that their questioning method—known as the “Step-Wise protocol”—is designed to extract from the child “the most accurate information” possible.²³⁹ This is arguably impermissible vouching, as the state's expert is implying “that another mentally and physically competent witness is telling the truth.”²⁴⁰ Nonetheless, because the testimony falls short of declaring that such interview protocols “guarantee truthfulness,” it is permitted.²⁴¹

But what's good for the goose is apparently not good for the gander. When a defendant wants to call an expert witness to critique the interviewer's method of questioning, and to demonstrate where the interviewer *deviated from* the vaunted Step-Wise protocol, another double standard emerges: the defense expert is *not* allowed to testify on such matters, as the testimony would “simply confuse the issues about whether some questions are better than others.”²⁴²

To summarize, when the state wants to bolster a child's recorded allegation, it may call an expert to explain why some

236. See *supra* Part III; see *infra* Appendix.

237. See Fed. R. Evid. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).

238. See WIS. STAT. § 908.08 (2020) (“In any criminal trial or hearing . . . the court or hearing examiner may admit into evidence the audiovisual recording of an oral statement of a child who is available to testify, as provided in this section.”).

239. See State v. Taylor, No. 2018AP899-CR, 2019 WL 2998228, at *5 (Wis. Ct. App. July 10, 2019).

240. See *id.* (quoting State v. Haseltine, 352 N.W.2d 673, 676 (Wis. Ct. App. 1984)).

241. See *id.* (emphasis added).

242. See State v. Mick, No. 2017AP1642-CR, 2018 WL 3004636, at *5 (Wis. Ct. App. June 14, 2018).

questions will produce more accurate accusations than other questions; however, when the defense wants to challenge the reliability of a child's recorded allegation in that same manner, such an expert would merely confuse the jury and, therefore, is excluded.²⁴³

3. Nonbinding Precedent

When my defense lawyer colleagues and I cite authority for a legal proposition, we go to great lengths to avoid citing any authority, no matter how persuasive, that is nonbinding. We feel that some judges begin with a presumption they will rule for the state, and then look for any perceived flaw in one of our authorities—for example, that it is merely persuasive rather than binding—as an excuse to reject our argument and adopt the prosecutor's.

To demonstrate this rather peculiar phenomenon, consider a case where the Wisconsin defense lawyer argued, based on simple language and logic, that our state's pattern jury instruction failed to adequately explain the burden of proof.²⁴⁴ Among other problems, the instruction literally told the jury "not to search for doubt," which is the very thing it is constitutionally obligated to do.²⁴⁵ In support of his argument, the lawyer also cited two published studies (that I coauthored) finding that mock jurors who received the defective instruction in controlled experiments convicted at significantly higher rates than those who received a legally proper instruction, all else being equal.²⁴⁶

In response, the judge criticized the studies and then stated: "Frankly, Mr. [defense lawyer], I think you can just ask [to modify the jury instruction] without going through the statistical stuff, I would probably be more inclined to grant it."²⁴⁷ Of course, "[i]t is clearly illogical to assert that an argument has merit *per se* but will be rejected because the meritorious argument is also supported by

243. See *id.*

244. See Michael D. Cicchini & Lawrence T. White, *Educating Judges and Lawyers in Behavioral Research: A Case Study*, 53 GONZ. L. REV. 159, 161–62 (2017).

245. See *id.* at 162 ((citing State v. Berube, 286 P.3d 402, 411 (Wash. Ct. App. 2012)) (stating that "[i]n a criminal case, the State must prove its case beyond a reasonable doubt. The jury cannot discern whether that has occurred without examining the evidence for reasonable doubt") (emphasis added)).

246. See Cicchini & White, *supra* note 244, at 162.

247. *Id.* at 180.

empirical data.”²⁴⁸ What was really going on was that the judge wanted to rule against the defense, so he created several perceived flaws in the nonbinding authorities (the studies) as an excuse to reject the defense argument en route to his predetermined conclusion.²⁴⁹

So where is the double standard? In *Daubert* cases, judges become incredibly lax about the legal authorities upon which they will rely to rule for the state.²⁵⁰ For example, despite the fact-intensive analysis inherent in a *Daubert* decision, courts have accepted the nonbinding, unwritten decisions of *other trial courts*.²⁵¹ They have also relied upon out-of-state authorities—again, without any analysis whatsoever or even a citation to the actual cases—in order to rule for the state.²⁵²

Most baffling of all, courts have even relied upon pre-*Daubert* cases, applying the old relevancy standard, to justify allowing the state’s expert to testify under *Daubert*’s new, much more demanding reliability standard.²⁵³ Far from being controlling authority, or even persuasive but nonbinding authority, such cases are *at best* irrelevant. This tactic of using pre-*Daubert* cases as a basis to admit evidence under *Daubert* entirely ignores the change in the law and makes a complete mockery of the court’s duty to act as a gatekeeper.

248. *Id.* (internal emphasis removed).

249. *Id.* at 165–79 (discussing and debunking the judge’s criticisms of the studies).

250. See *State v. Zamora*, No. 2016AP1923-CR, 2017 WL 4317783, at * 4 (Wis. Ct. App. Sept. 27, 2017); *State v. Smith*, 874 N.W.2d 610, 613 (Wis. Ct. App. 2015).

251. See *Zamora*, 2017 WL 4317783, at *4 (The defendant “argues that the [trial] court erred by taking judicial notice of the transcribed decisions from the other [trial] courts. Without these transcripts, Zamora asserts, the court lacked sufficient facts to properly exercise its discretion”).

252. See *Smith*, 874 N.W.2d at 613 (stating that the witness’s “proposed testimony was similar to what had been allowed in federal courts already subject to the *Daubert* standard”).

253. See *Zamora*, 2017 WL 4317783, at *6 (relying on two pre-*Daubert* cases to admit the testimony under *Daubert*); *Smith*, 874 N.W.2d at 613 (relying on “pre-*Daubert* Wisconsin courts” to admit the testimony under *Daubert*); *see also Seaman, supra* note 109, at 902 (“[J]udges are quite reluctant in criminal cases to exclude prosecution evidence that carries a long historical pedigree even where they have some concern about its reliability.”).

IV. LIMITS OF THE CASE STUDY METHOD

I previously warned that a record of 134–0 in favor of the state does not, in and of itself, prove a pro-state bias.²⁵⁴ There are several reasons for this. First, as discussed earlier, perhaps the state is winning because it *should be* winning.²⁵⁵ This does not seem like a satisfying explanation, however, given that (1) *Daubert* was implemented to make it more difficult to use expert testimony, (2) the vast majority of cases involve the state’s (not the defendants’) experts, and yet (3) the state won 100% of the time.²⁵⁶

Further, this Article’s analysis of the judicial reasoning underlying the court decisions actually eliminated this innocent explanation—i.e., that the state *should be* winning 100% of the time—from contention.²⁵⁷ This Article not only identified cases where the same type of expertise was approved for the state but rejected for the defense, but also detailed the great variety of judicial double standards that were used to build the state’s 134–0 record.²⁵⁸

But there is a limitation inherent in this Article’s case study method. Because Wisconsin trial court decisions are not reported unless appealed, this Article analyzed only those cases that reached an appellate court. In reality, it is *possible* that the defense *is* winning some *Daubert* motions at the trial court level, but the state simply never appeals those decisions. We therefore cannot rule out the possibility that the state’s 100% win rate in cases that reach an appellate court might substantially overstate its actual win rate in *all cases with Daubert issues.*²⁵⁹

254. See *supra* Part II.

255. See *id.*

256. See Edward J. Imwinkelried, *Defense Attacks on Prosecution Scientific Evidence: The Standard for Defense Rebuttal Evidence is Already Lower than the Standard for Prosecution Evidence*, 93 TEMPLE L. REV. 55, 64–65 (2020).

257. See *supra* Part III.

258. See *supra* Part III.

259. I am sure, of course, that the state’s 100% win rate is *technically* overstated; I know that some defense lawyers have sometimes been allowed to call some types of experts at trial over the prosecutor’s objection. However, I am not aware of any Wisconsin trial court ever excluding a prosecutor’s expert. Interestingly, in a 2002 national study of appellate court cases and the underlying trial court decisions, the authors found that “[a]t the trial court level, prosecution experts were admitted 95.8% (n=497) of the time, and [defense] experts were admitted only 7.8% (n=13) of the total number of times they were offered.” See Imwinkelried, *supra* note 256, at 64–65 (quoting Groscup et al., *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCH., PUB. POL’Y, & L. 339, 346 (2002)).

However, I suspect there are not enough unreported defense victories to put a substantial dent in the state's winning percentage. In other words, I doubt the defense is metaphorically "cleaning up" in the trial courts in cases that never reach the appellate courts. The reason is that when litigating *Daubert* issues at the trial court level, the die has already been cast: the defense cannot cite a single case where any defense expert has ever been allowed to testify or any state's expert has ever been excluded.²⁶⁰ This leaves little for the defense to work with, and it gives defendants little chance of winning at the trial court level.

In addition to any possible cases where the defense wins a *Daubert* issue in the trial court and the state does not appeal, there are no doubt volumes of cases where the defense loses a *Daubert* issue at trial court and then (1) accepts a plea bargain and therefore waives the *Daubert* issue on appeal;²⁶¹ (2) is acquitted at trial and therefore has nothing to appeal; or (3) is convicted at trial but does not appeal or appeals on completely different grounds. These defense losses also go unreported because they never reach an appellate court; however, if they were counted, they would dramatically increase the state's win total.

Finally, while it is accurate to claim that the state won all sixty-eight cases in our population of cases, and it is accurate to say that the state's record at all levels of the court system was 134–0, it is important to realize that not all decisions are created equal.²⁶² It is theoretically possible that if the appellate courts had been making their decisions from scratch regarding the admission or exclusion of experts, they might have reached different conclusions than they actually did.

But appellate courts do not make their decisions from scratch; they are instead applying standards of review which, at least in theory, require them to focus on more narrow issues, including whether the defendant was prejudiced by counsel's performance or whether the trial court abused its discretion.²⁶³ Despite these

260. See *supra* Part II.

261. This is known as the "guilty-plea-waiver rule" as "a guilty, no contest, or *Alford* plea waives all nonjurisdictional defects, including constitutional claims[.]" *State v. Kelty*, 716 N.W.2d 886, 892 (Wis. 2006) (internal quotations omitted).

262. See *supra* Part II.

263. See, e.g., *In re E.H.*, No. 2015AP1529, 2016 WL 155772, at *5 (Wis. Ct. App. Jan. 13, 2016) ("We need not decide whether J.H.'s trial counsel was deficient in these three instances, because we conclude the alleged errors did not

standards, however, the appellate courts in our cases never came close even to hinting that a trial court made the wrong decision when ruling on the underlying *Daubert* issue.²⁶⁴

Consequently, while the case study method of analyzing appellate court decisions is not perfect, it certainly provides an excellent indication of the double standards used by courts at all levels of the court system, and it probably provides an accurate indication of the kind of treatment defendants typically receive in trial courts throughout the state.

V. LEGAL REFORM PROPOSALS

How do lawmakers correct this bizarre situation where a legal standard that is supposed to benefit the defense produces a 100% win rate for the state? At least four reform measures have been proposed.²⁶⁵

A. More Forceful Language

Garret and Fabricant propose rewriting the expert witness statute “to sharpen the language regarding reliability” and force judges to take the *Daubert* standard more seriously.²⁶⁶ They further propose incorporating “Advisory Committee notes that highlight the importance of addressing error and reliability of expert methods and their application in particular cases.”²⁶⁷

This proposed reform is quite simple and, if executed with even minimal clarity, certainly could not hurt. However, given the brazenness with which Wisconsin trial and appellate courts have ignored *Dauber*’s mandates—sometimes even dispensing with the

individually or cumulatively result in prejudice to J.H.”) (emphasis added); *State v. Dobbs*, 945 N.W.2d 609, 614 (Wis. 2020) (“We conclude that the circuit court *properly exercised its discretion* when it excluded Dr. White’s exposition testimony for a lack of fit with the facts.”) (emphasis added).

264. See *infra* Appendix.

265. Many more recommendations have been made, of course, but are beyond the scope of this Article. For example, Peter Neufeld recommends highly technical “reforms upstream of the courthouse” within the context of the forensic sciences. See Neufeld, *supra* note 26, at 111–13. For reform proposals and strategies focused on defense experts in the context of rebutting the state’s forensic evidence, see Myeonki Kim, *The Need for a Lenient Admissibility Standard for Defense Forensic Evidence*, 86 U. CIN. L. REV. 1175 (2018); Imwinkelried, *supra* note 256.

266. Garret & Fabricant, *supra* note 65, at 1580.

267. *Id.*

test entirely—such a lukewarm reform measure likely would not be enough to force judges to fulfill their gatekeeping duties.²⁶⁸

B. Banning Pre-*Daubert* Cases

Garret and Fabricant also suggest rewriting the statute, “clarifying that precedent cannot serve as a proxy for reliability[.]”²⁶⁹ To the extent they are referring to pre-*Daubert* precedent, this recommendation simply recognizes the change in the law; to the extent they are referring to post-*Daubert* precedent, this recommendation recognizes the fact-specific nature of the inquiry and would, in theory, force judges to analyze reliability in the context of the specific expert and the specific facts in the case before them.²⁷⁰

The authors are correct that courts rely upon pre-*Daubert* cases to justify admitting the state’s expert witnesses after *Daubert*.²⁷¹ This is absolutely amazing, as the old, pre-*Daubert* standard determined only relevance—an incredibly low threshold for admissibility.²⁷² *Daubert* was adopted specifically because that test was too low of a hurdle and too much junk evidence was reaching the jury.²⁷³

Once again, though, in order for such a change to have any effect, the courts would have to apply the new law in good faith.²⁷⁴ But if they were capable of doing that, there would be no reason to amend the law to ban pre-*Daubert* cases as a basis to admit the state’s evidence under *Daubert*. Therefore, this reform measure would likely have little, if any, impact.

C. More Discovery

With regard to government experts, Garret and Fabricant also propose requiring “more discovery” to allow the defense to explore the witness’s underlying data, the reliability of his or her methods, and the application of those methods to the facts of the case.²⁷⁵ This is an excellent recommendation, as discovery in criminal cases is

268. See *id.* at 1561.

269. *Id.* at 1564.

270. See *id.*

271. See *supra* Subsection III.F.3.

272. See *supra* Section I.A.

273. See *supra* Section I.B.

274. See *id.* (discussing the adoption of the Wisconsin law).

275. Garret & Fabricant, *supra* note 65, at 1580.

currently quite minimal: counterintuitively, “[t]he discovery available by statute and case law to a defendant who is sued for money greatly exceeds the discovery available for a defendant facing execution.”²⁷⁶ Requiring more discovery would be tremendously beneficial for the defense.²⁷⁷

This additional discovery could take the form of a mandatory *Daubert* hearing—something that is currently left to the trial judge’s discretion in Wisconsin—or more traditional discovery methods commonly used in civil cases, such as depositions or even the less intrusive interrogatory.²⁷⁸ Such discovery could aid the defense in drafting motions to exclude the state’s experts and, if nothing else, in effectively cross-examining them at trial.

This additional discovery would be even more valuable in cases where the state’s witness is not really an expert but is merely an advocate posing as an expert.²⁷⁹ For example, as discussed earlier, a common prosecutorial tactic is to call a child advocate or social worker to testify *not* based on published research, but rather on the witness’s memory about what is common in his or her own experiences.²⁸⁰ Such testimony, even when the witness makes a good faith attempt to be truthful, could be highly prone to confirmation bias and selective memory.

Therefore, when a child advocate intends to testify for the state about how, for example, “child sexual assault victims often, perhaps, become withdrawn, their mood changes, they struggle academically, may act out,”²⁸¹ the proposed, expanded pretrial discovery procedures would allow the defense to ask several questions, including:

- (1) What do words such as “often, perhaps” and “act out” even mean?
- (2) What is your sample size of cases?

276. Neufeld, *supra* note 26, at 110.

277. See *id.* (detailing a story about additional discovery leading to a defendant’s acquittal).

278. See Blinka, *supra* note 22, at 18 (“[T]he trial judge is not obligated to conduct an evidentiary hearing whenever she is confronted with a challenge to expert testimony.”). In Wisconsin criminal cases, depositions are only available under the rarest of circumstances. See Wis. STAT. § 967.04 (2021).

279. See, e.g., *State v. Smith*, 874 N.W.2d 610, 613 (Wis. Ct. App. 2015).

280. See, e.g., *id.* (The state’s social-worker witness “would testify about what, oftentimes, she sees victims of child sexual assault do”) (internal quotations omitted).

281. *Id.* (internal quotation marks omitted).

- (3) Have you seen any sexual assault allegations where those reactions, such as “act[ing] out,” were not present?
- (4) Have those reactions been present in other circumstances where sexual assault is not alleged?
- (5) Do any of those reactions you describe, or the absence thereof, allow you to diagnose whether a sexual assault or other crime actually occurred? If yes, what is your error rate and how is that determined?
- (6) Do you contemporaneously document your cases for the presence of these various commonalities? If not, how do you guard against selective memory and confirmation bias years later when the prosecutor asks you to testify about what, in your experience, is common?
- (7) Are you familiar with the published research on commonalities in reporting and post-incident behavior? If yes, which studies are you referring to and how do they compare with your own experiences?²⁸²

Currently, it is very difficult to get answers to these questions before trial in a Wisconsin criminal case, particularly when the judge refuses to hold a *Daubert* hearing and instead defers a decision on admissibility until after the witness testifies at trial—a sure signal that the evidence *will* be admitted at trial and the judge doesn’t want to waste time on a pretrial hearing.²⁸³

In sum, the existing discovery statute offers the defendant virtually nothing. It merely requires that, “if an expert does not prepare a report or statement”—and in my experience, state experts rarely do—the prosecutor merely has to produce “a written summary of the expert’s findings or the subject matter of his or her testimony[.]”²⁸⁴ Prosecutors then seize upon the words “or the subject

282. For a case that debunks CSAAS, and also cites numerous other cases and published studies debunking the subject matter, *see generally* State v. J.L.G., 190 A.3d 442 (N.J. 2018). This case is an excellent starting point in preparing a motion to exclude CSAAS testimony and preparing for cross-examination of the state’s pseudo-expert at a *Daubert* hearing or even at trial.

283. *See* Blinka, *supra* note 22, at 17–18 (“When reliability is contested, the options include . . . [t]aking testimony at trial, subject to a motion to strike.”).

284. Wis. Stat. § 971.23(1) (2017).

matter of his or her testimony” and merely produce a couple of paragraphs from a canned document that lists the various topics the witness may testify about.²⁸⁵ Then, no matter how disconnected these topics might be from the actual facts of the case, even those judges who are capable at times of ruling against the state will take the path of least resistance and allow the testimony, subject to relevancy objections at trial.

D. Back to Basics

Trial and appellate judges have proven that, at best, they are incapable of understanding and applying the multi-pronged *Daubert* standard.²⁸⁶ At worst, as the judicial tactics exposed in this Article have demonstrated, judges simply refuse to apply the standard evenhandedly.²⁸⁷ Consequently, fairness could be restored by a return to the relevancy test and a complete repeal of the multi-pronged *Daubert* statute.²⁸⁸

Pre-*Daubert*, this relevancy test resulted in virtually all expert testimony being admitted for the state and most, or virtually all, being admitted for the defense.²⁸⁹ Since *Daubert*, however, nothing whatsoever has changed for the state—it has won the admission of its testimony in every single case that reached an appellate court—but *everything* has changed for the defense. In cases that have reached the appellate court system, no court at *any* level has admitted *any* type of expert testimony in *any* case for *any* defendant.

It is difficult to imagine how a return to the relevancy standard could possibly harm defendants, but it is easy to envision how it would benefit them and how they would be restored to equal footing

285. See *id.*

286. See Daniel D. Blinka, *Expert Testimony and the Relevancy Rule in the Age of Daubert*, 90 MARQ. L. REV. 173, 175 (2006) (“Under the relevancy test . . . it is unnecessary for trial judges to first screen the testimony for reliability, especially as judges may be no better equipped for the task than the lay jury.”) (emphasis added).

287. See *supra* Part III.

288. See Blinka *supra* note 286, at 177 (“[E]xperience had shown that lay juries could adequately weigh expert testimony and that [judicial] reliability determinations may themselves be arbitrary.”). For different reasons, Julie Seaman also recommends, in part, that courts use a “less stringent reliability standard” for the admissibility of expert testimony in criminal cases. Seaman, *supra* note 109, at 921. She adds, “[t]hough this suggestion may seem perverse, if implemented carefully, it has the benefit of being more transparent and honest.” *Id.*

289. See *supra* Part II.

with the state.²⁹⁰ A simple, single-pronged test—i.e., whether the evidence has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable”—is far more difficult to manipulate than a multi-pronged test where one of the prongs has at least ten possible sub-factors, each of which can be assigned any weight the judge wishes.²⁹¹ But when it comes to legal reform, criminal law is only half the picture. Civil defendants, particularly corporations, may be benefiting from *Daubert* and their lobbying groups may not be willing to relinquish that protection without a fight. Research has shown, after all, that judges kowtow to *civil* defendants and take *Daubert* much more seriously when corporate money, rather than individual liberty, is at stake.²⁹²

So be it. But nothing seems to require that civil and criminal defendants are ostensibly treated identically.²⁹³ In Missouri, for example, *Daubert* was originally implemented only in civil cases; according to its Governor, it was intended to “prevent ‘crooked trial lawyers’ from using ‘shady witnesses that act as experts while peddling junk science.’”²⁹⁴ Other Missouri cases were, at least at that time, governed by other standards of admissibility.²⁹⁵ Similarly, at least as of 2013, Georgia explicitly acknowledged “that different standards govern the admissibility of scientific evidence in criminal and civil cases.”²⁹⁶

Finally, and just as important, repealing the *Daubert* statute would free up a tremendous amount of time for defense lawyers to use more productively in other areas of trial preparation. Currently, it

290. See *supra* Section I.A.

291. See WIS. STAT. § 904.01 (2020) (emphasis added).

292. Examination of a large random sample of court of appeals civil cases shows that nearly 90% of such cases involved challenges by *civil defendants* of plaintiff-proffered expertise, and that the defendants *prevailed nearly two-thirds of the time*. See Risinger, *supra* note 59, at 108 (emphasis added). Further, “Professor Risinger would like to see ‘the highest standards being imposed on the prosecution in criminal cases.’ I do not disagree that this would be the ideal; my position is simply that this is *never going to happen*.” Seaman, *supra* note 109, at 913.

293. Differences exist in many areas of the law including the discovery rules which, as discussed in Part V.C. of this Article, provide a great deal of discoverable material for civil defendants but offer virtually nothing for criminal defendants. For Wisconsin’s criminal discovery statute, see WIS. STAT. § 971.23(1) (2021).

294. Tim McCurdy, *Missouri Adopts Daubert: Sea Change or Ripple on the Pond?*, 73 J. MO. BAR 304, 304 (2017).

295. See *id.* at 305 (discussing the different standards of admissibility for different types of cases).

296. Seaman, *supra* note 109, at 892.

is difficult for defense lawyers *not* to waste time litigating *Daubert* issues. We certainly know that the odds are, in practice, stacked against us and that *Daubert* litigation is a time-draining exercise in futility. But the plain language of the statute gives us false hope. Every time we prepare a case for trial, we naively hope the judge will act as gatekeeper, follow the law, and apply *Daubert's* factors to prevent the state's junk testimony from reaching the jury.

In other words, to borrow the Missouri Governor's terminology, it is the state's experts that are "shady"—or, as I've called them, chameleon-like—and peddle malleable, putty-like "junk science" for the benefit of their employer.²⁹⁷ And the *Daubert* elements should, at least in theory, exclude such charlatans. So time and again, we defense lawyers waste valuable hours researching, writing, and arguing about *Daubert*, all to no avail. A return to the relevancy standard of admissibility would likely reduce the disparity in outcomes and, just as important, reduce the incredibly heavy but fruitless workload that *Daubert* has heaped on the criminal defense bar.

CONCLUSION

When the state of Wisconsin moved from the relevancy test to the much more stringent *Daubert* reliability test for the admissibility of expert testimony, the change was supposed to benefit defendants.²⁹⁸ The reason is that the state calls the vast majority of expert witnesses in criminal trials, and many of their witnesses are nothing more than pro-state advocates masquerading as experts in order to put the gloss of faux expertise on the state's case.²⁹⁹

Despite what was supposed to happen in theory, defense lawyers were skeptical that it would actually happen in practice.³⁰⁰ And now that nearly a decade has passed since Wisconsin adopted the *Daubert* standard, this Article tests defense lawyers' dire hypothesis by identifying and analyzing all sixty-eight *Daubert*

297. See, e.g., *State v. J.L.G.*, 190 A.3d 442, 458 (N.J. 2018) ("Another study outlined twenty-one problems with CSAAS—including that it is vague and has not been scientifically tested—and described it 'as an exemplar of junk science.'").

298. See *supra* Section I.A.

299. See *supra* Section I.A.

300. See *supra* Section I.B.

appellate cases decided since the standard became effective on February 1, 2011.³⁰¹

These 68 cases produced 134 separate judicial decisions across all levels of the court system: trial courts, appellate courts, and the state's supreme court.³⁰² The result: in all cases that reached the appellate court level, the state built a perfect and towering 134–0 record.³⁰³ In other words, regardless of the type of expert, the party calling the expert, and the nature of the case, the defense was unable to win a single *Daubert* issue at any level of the court system.³⁰⁴

How can a rule that is supposed to benefit the defense produce a record where the state never loses? The answer is that courts have used at least eight identifiable judicial tactics, or double standards, to bypass *Daubert* for the state's experts while imposing rigid, sometimes impossible, standards on defense experts.³⁰⁵

The five of these double standards that courts designed specifically for *Daubert* issues³⁰⁶ are: (1) completely exempting the state's experts from *Daubert* by disingenuously classifying their testimony as lay, rather than expert, testimony;³⁰⁷ (2) requiring a detailed factual basis for defense expert testimony while requiring no factual basis whatsoever of the state;³⁰⁸ (3) imposing rigorous reliability standards on defense experts while completely eliminating all reliability standards for the state;³⁰⁹ (4) requiring that defense experts apply their principles and methods to the facts of the case while permitting the state's experts to give exposition testimony completely detached from the facts;³¹⁰ and (5) imposing demanding expert qualifications on defense witnesses while virtually eliminating such standards for the state.³¹¹

Finally, given the state's 134–0 record and the double standards that courts used to build that staggering record, this Article analyzed

301. See *supra* Part II.

302. See *supra* Part II.

303. See *supra* Part II.

304. See *supra* Part II.

305. See *supra* Part III.

306. In addition to *Daubert*-specific tactics, courts have also adapted several preexisting double standards, from other areas of evidence and criminal procedure, for the benefit of the state. See *supra* Section III.F.

307. See *supra* Section III.A.

308. See *supra* Section III.B.

309. See *supra* Section III.C.

310. See *supra* Section III.D.

311. See *supra* Section III.E.

four potential legal reforms.³¹² The most promising of these reforms are: (1) expanding pretrial discovery obligations to allow the defense to better challenge the state’s experts before trial, or at least to better cross-examine them at trial;³¹³ and (2) repealing the *Daubert* statute entirely and reinstating the relevance test to eliminate the double standard and return defendants to equal footing with the state.³¹⁴

APPENDIX: DATABASE OF CASES

The following table summarizes all Wisconsin *Daubert* appellate cases decided from the standard’s adoption on February 1, 2011, through October 11, 2020. The last column indicates the nature of the challenge, which was usually an appeal of the trial judge’s decision (“Judge”) or a claim of IAC at trial. “NM” means that the defendant’s appellate counsel filed a no-merit report, and “SJ” means that the case was disposed of via summary judgment, usually (but not always) after a no-merit report.

The cases are sorted by (1) the party calling the expert; (2) the category of the expert’s testimony, e.g., canine scent evidence, cell phone mapping, etc.; (3) the case type, e.g., homicide, robbery, etc.; and (4) the case name.

312. See *supra* Part V.

313. See *supra* Section V.C.

314. See *supra* Section V.D.

| Case Name | Case Type | Expert (S / D) | Category of Expert Testimony | Trial Win | App. Win | SCOW Win | Attack |
|--|-------------------|----------------|------------------------------|-----------|----------|----------|--------|
| <i>State v. Ayala</i> , 918 N.W.2d 644 (Wis. Ct. App. 2018) | OWI | D | BAC & related | s | s | | Judge |
| <i>State v. Garba</i> , No. 2015AP1243-CR, 2016 WL 5794346 (Wis. Ct. App. Oct. 5, 2016) (unpublished table decision) | OWI | D | BAC & related | s | s | | Judge |
| <i>State v. Giles</i> , No. 2018AP1967-CR, 2019 WL 4936622 (Wis. Ct. App. Oct. 8, 2019) (unpublished table decision) | OWI | D | BAC & related | s | s | | Judge |
| <i>State v. Bauer</i> , No. 2018AP169-CR, 2019 WL 477361 (Wis. Ct. App. Feb. 7, 2019) (unpublished table decision) | Child sex related | D | Child interview protocols | s | s | | IAC |
| <i>State v. Mick</i> , No. 2017AP1642-CR, 2018 WL 3004636 (Wis. Ct. App. June 14, 2018) (unpublished table decision) | Child sex related | D | Child interview protocols | s | s | | Judge |
| <i>State v. Schmidt</i> , 884 N.W.2d 510 (Wis. Ct. App. 2016) | Homicide | D | Child interview protocols | s | s | | Judge |

| Case Name | Case Type | Expert (S / D) | Category of Expert Testimony | Trial Win | App. Win | SCOW Win | Attack |
|---|--|----------------|------------------------------------|-----------|----------|----------|--------|
| <i>State v. Cooper</i> , No. 2015AP2261-CR, 2017 WL 3269052 (Wis. Ct. App. Aug. 1, 2017) (unpublished table decision) | Homicide | D | Defendant's ability to form intent | s | s | | Judge |
| <i>State v. Phillips</i> , No. 2014AP2519, 2015 WL 5102938 (Wis. Ct. App. Sept. 1, 2015) (unpublished table decision) | Failure to pay child support | D | Defendant's ability to work | s | s | | Judge |
| <i>State v. Dobbs</i> , 945 N.W.2d 609 (Wis. 2020) | Homicide by intoxicated use of vehicle | D | False confessions | s | s | s | Judge |
| <i>State v. Murphy</i> , No. 2017AP1559-CF, 2018 WL 3954208 (Wis. Ct. App. Aug. 16, 2018) (unpublished table decision) | Homicide, reckless | D | Firearms | s | s | | Judge |
| <i>City of West Bend v. Smith</i> , No. 2016AP2170, 2017 WL 4708101 (Wis. Ct. App. Oct. 18, 2017) (unpublished table decision) | OWI | S | BAC & related | s | s | | Judge |
| <i>County of Marathon v. DeBuhr</i> , No. 2011AP2959, 2012 WL 4490784 (Wis. Ct. App. Oct. 2, 2012) (unpublished table decision) | OWI | S | BAC & related | s | s | | Judge |

| Case Name | Case Type | Expert (S / D) | Category of Expert Testimony | Trial Win | App. Win | SCOW Win | Attack |
|--|-----------|----------------|------------------------------|-----------|----------|----------|--------|
| <i>State v. Chough</i> , No. 2016AP406-CR, 2017 WL 389856 (Wis. Ct. App. Jan. 25, 2017) (unpublished table decision) | OWI | s | BAC & related | s | s | | Judge |
| <i>State v. Durski</i> , No. 2018AP1750-CR, 2019 WL 3949705 (Wis. Ct. App. Aug. 21, 2019) (unpublished table decision) | OWI | s | BAC & related | s | s | | Judge |
| <i>State v. Giese</i> , 854 N.W.2d 687 (Wis. Ct. App. 2014) | OWI | s | BAC & related | s | s | | Judge |
| <i>State v. Kerk</i> , No. 2015AP2608-CR, 2016 WL 476603 (Wis. Ct. App. Sept. 13, 2016) (unpublished table decision) | OWI | s | BAC & related | s | s | | Judge |
| <i>State v. Muns</i> , No. 2013AP2290-CRNM, 2015 WL 13134209 (Wis. Ct. App. Apr. 29, 2015) | OWI | s | BAC & related | s | s | | NM/SJ |
| <i>State v. Spizzirri</i> , No. 2015AP84-CR, 2015 WL 930920 (Wis. Ct. App. Dec. 23, 2015) (unpublished table decision) | OWI | s | BAC & related | s | s | | Judge |

| Case Name | Case Type | Expert (S / D) | Category of Expert Testimony | Trial Win | App. Win | SCOW Win | Attack |
|--|--------------------|----------------|------------------------------|-----------|----------|----------|--------|
| <i>State v. Bucki</i> , 947 N.W.2d 152 (Wis. Ct. App. 2020) | Homicide | s | Canine scent evidence | s | s | | Judge |
| <i>State v. Brown-Troop</i> , No. 2017AP1254-CR, 2018 WL 3756433 (Wis. Ct. App. Aug. 7, 2018) (unpublished table decision) | Robbery | s | Canine scent evidence | s | s | | IAC |
| <i>State v. Butler</i> , No. 2014AP1769-CR, 2015 WL 3550028 (Wis. Ct. App. June 9, 2015) (unpublished table decision) | Arson | s | Cell phone mapping | s | s | | IAC |
| <i>State v. Cameron</i> , 885 N.W.2d 611 (Wis. Ct. App. 2016) | Homicide | s | Cell phone mapping | s | s | | Judge |
| <i>State v. Martinez</i> , No. 2013AP1876-CRNM, 2015 WL 13134264 (Wis. Ct. App. Aug. 19, 2015) | Homicide, reckless | s | Cell phone mapping | s | s | | NM/SJ |
| <i>State v. Taylor</i> , No. 2018AP899-CR, 2019 WL 2998228 (Wis. Ct. App. July 10, 2019) (unpublished table decision) | Child sex related | s | Child interview protocols | s | s | | Judge |

| Case Name | Case Type | Expert (S / D) | Category of Expert Testimony | Trial Win | App. Win | SCOW Win | Attack |
|--|--|----------------|------------------------------|-----------|----------|----------|--------|
| <i>State v. Baumann</i> , No. 2016AP2243-CR, 2018 WL 3469203 (Wis. Ct. App. July 17, 2018) (unpublished table decision) | Homicide by intoxicated use of vehicle | S | Crash reconstruction | S | S | | IAC |
| <i>State v. Benitez</i> , 884 N.W.2d 535 (Wis. Ct. App. 2016) (unpublished table decision) | Homicide by intoxicated use of vehicle | S | Crash reconstruction | S | S | | IAC |
| <i>State v. King</i> , No. 2016AP319-CR, 2017 WL 1240157 (Wis. Ct. App. Apr. 4, 2017) (unpublished table decision) | Possession with intent to deliver | S | Decoding slang language | S | S | | Judge |
| <i>State v. D.E.</i> , No. 2105AP2271-NM, 2016 WL 8488937 (Wis. Ct. App. Jan. 20, 2016) (unpublished table decision) | TPR | S | Defendant's minimization | | S | | NM/SJ |
| <i>State v. Martinez</i> , No. 2015AP1458-CR, 2016 WL 3524822 (Wis. Ct. App. June 29, 2016) (unpublished table decision) | Child sex related | S | Denials as evidence of guilt | S | S | | Judge |
| <i>State v. Jump</i> , No. 2013AP1404-CRNM, 2015 WL 13119598 (Wis. Ct. App. Jan. 27, 2015) | Child sex related | S | Facebook messages | S | S | | NM/SJ |

| Case Name | Case Type | Expert (S / D) | Category of Expert Testimony | Trial Win | App. Win | SCOW Win | Attack |
|--|----------------------------|----------------|--|-----------|----------|----------|--------|
| <i>State v. Khalid</i> , No. 2014AP251-CRNM, 2014AP252-CR NM, 2014 WL 12666820 (Wis. Ct. App. July 15, 2014) | Robbery | s | Fingerprints | s | s | | NM/SJ |
| <i>State v. Woodson</i> , No. 2019AP89-CR, 2020 WL 4781499 (Wis. Ct. App. Aug. 18, 2020) (unpublished table decision) | Poss'n of firearm by felon | s | Firearms | s | s | | IAC |
| <i>State v. Chitwood</i> , 879 N.W.2d 786 (Wis. Ct. App. 2016) | OWI | s | HGN, field sobriety tests, and related | s | s | | Judge |
| <i>State v. Millard</i> , No. 2016AP1474-CR, 2017 WL 1434264 (Wis. Ct. App. Apr. 20, 2017) (unpublished table decision) | OWI | s | HGN, field sobriety tests, and related | s | s | | IAC |
| <i>State v. VanMeter</i> , No. 2014AP1852-CR, 2015 WL 7432604 (Wis. Ct. App. Nov. 24, 2015) (unpublished table decision) | OWI | s | HGN, field sobriety tests, and related | s | s | | Judge |
| <i>State v. Warren</i> , No. 2012AP1727-CR, 2013 WL 163520 (Wis. Ct. App. Jan. 16, 2013) (unpublished table decision) | OWI | s | HGN, field sobriety tests, and related | s | s | | Judge |

| Case Name | Case Type | Expert (S / D) | Category of Expert Testimony | Trial Win | App. Win | SCOW Win | Attack |
|---|--------------------|----------------|------------------------------|-----------|----------|----------|--------|
| <i>State v. Alvarez</i> , No. 2014AP753-CR, 2015 WL 158899 (Wis. Ct. App. Jan. 14, 2015) (unpublished table decision) | PWID | S | Indicia of intent to deliver | S | S | | Judge |
| <i>State v. Evans</i> , No. 2015AP2315, 2016 WL 5922863 (Wis. Ct. App. Oct. 12, 2016) (unpublished table decision) | PWID | S | Indicia of intent to deliver | S | S | | Judge |
| <i>State v. Grant</i> , No. 2014AP2965-CR, 2015 WL 7432609 (Wis. Ct. App. Nov. 24, 2015) (unpublished table decision) | PWID | S | Indicia of intent to deliver | S | S | | IAC |
| <i>State v. Reyes</i> , No. 2016AP2400-CR, 2018 WL 3005939 (Wis. Ct. App. June 12, 2018) (unpublished table decision) | PWID | S | Indicia of intent to deliver | S | S | | Judge |
| <i>State v. Johnson</i> , No. 2018AP971, 2020 WL 1264066 (Wis. Ct. App. Mar. 17, 2020) (unpublished table decision) | Homicide, reckless | S | Multiple experts | S | S | | IAC |
| <i>State v. Black</i> , No. 2017AP837-CR, 2018 WL 1445118 (Wis. Ct. App. Mar. 22, 2017) (unpublished table decision) | Homicide, reckless | S | Nature and cause of injuries | S | S | | Judge |

| Case Name | Case Type | Expert (S / D) | Category of Expert Testimony | Trial Win | App. Win | SCOW Win | Attack |
|---|--------------------------------------|----------------|-------------------------------|-----------|----------|----------|----------|
| <i>State v. Zuniga</i> , No. 2015AP2306-CRNM, 2016 WL 8614418 (Wis. Ct. App. Oct. 5, 2016) | Recklessly causing great bodily harm | s | Nature and cause of injuries | | s | | NM/SJ |
| <i>State v. Johnson</i> , No. 2013AP65-CR, 2013 WL 12185148 (Wis. Ct. App. Dec. 11, 2013) | Sex assault (adult accuser) | s | Nature and cause of injuries | s | s | | Judge/SJ |
| <i>State v. Neitzel</i> , No. 2016AP274-CRNM, 2017 WL 1380779 (Wis. Ct. App. Apr. 17, 2017) | Strangulation | s | Nature and cause of injuries | s | s | | NM/SJ |
| <i>In re J. B.-A.</i> , No. 2016AP2422, 2017 WL 663203 (Wis. Ct. App. Feb. 16, 2017) (unpublished table decision) | TPR | s | Parenting capacity assessment | s | s | | Judge |
| <i>In re J.M.</i> , No. 2015AP252, 2015 WL 6044967 (Wis. Ct. App. Oct. 16, 2015) (unpublished table decision) | TPR | s | Parenting capacity assessment | s | s | | IAC |
| <i>In re J.S.</i> , No. 2016 AP735, 2016 WL 4384871 (Wis. Ct. App. Aug. 18, 2016) (unpublished table decision) | TPR | s | Parenting capacity assessment | s | s | | Judge |

| Case Name | Case Type | Expert (S / D) | Category of Expert Testimony | Trial Win | App. Win | SCOW Win | Attack |
|---|-----------|----------------|-------------------------------|-----------|----------|----------|--------|
| <i>In re L.D.D., Jr.</i> , No. 2017AP2390, 2018 WL 1176881 (Wis. Ct. App. Mar. 6, 2018) (unpublished table decision) | TPR | S | Parenting capacity assessment | S | S | | Judge |
| <i>In re Q.R.P.</i> , No. 2016AP1701, 2016AP1702, 2017 WL 2859876 (Wis. Ct. App. July 5, 2017) (unpublished table decision) | TPR | S | Parenting capacity assessment | S | S | | Judge |
| <i>In re T.S.J.</i> , No. 2017AP547, 2018 WL 3758252 (Wis. Ct. Aug. 7, App. 2018) (unpublished table decision) | TPR | S | Parenting capacity assessment | S | S | | IAC |
| <i>State v. Johnnie J.</i> , No. 2014AP144, 2014AP145, 2014 WL 4098134 (Wis. Ct. App. Aug. 21, 2014) (unpublished table decision) | TPR | S | Parenting capacity assessment | S | S | | IAC |
| <i>In re B.L.V.</i> , No. 2016AP2369, 2017 WL 2438709 (Wis. Ct. App. June 6, 2017) (unpublished table decision) | TPR | S | Parenting capacity assessment | S | S | | IAC |
| <i>In re Tierra M.</i> , No. 2013AP2526-NM, 2014 WL 12668138 (Wis. Ct. App. May 6, 2014) | TPR | S | Parenting capacity assessment | S | S | | NM/SJ |

| Case Name | Case Type | Expert (S/D) | Category of Expert Testimony | Trial Win | App. Win | SCOW Win | Attack |
|---|-----------|--------------|-------------------------------|-----------|----------|----------|----------|
| <i>In re E.H.</i> , No. 2015AP1529, 2016 WL 155772 (Wis. Ct. App. Jan. 13, 2016) (unpublished table decision) | TPR | s | Parenting capacity assessment | s | s | | IAC |
| <i>In re D.S.</i> , No. 2015AP1463, 2016 WL 743961 (Wis. Ct. App. Feb. 25, 2016) (unpublished table decision) | TPR | s | Parenting capacity assessment | s | s | | Judge |
| <i>In re Commitment of Anderson</i> , No. 2016AP1209-NM, 2017 WL 1364110 (Wis. Ct. App. Apr. 12, 2017) | Ch. 980 | s | Recidivism risk | | s | | NM/SJ |
| <i>In re Commitment of Jones</i> , 911 N.W.2d 97 (Wis. 2018) | Ch. 980 | s | Recidivism risk | s | s | s | Judge |
| <i>In re Commitment of Lalor</i> , No. 2015AP1457-NM, 2016 WL 8605320 (Wis. Ct. App. Apr. 13, 2016) | Ch. 980 | s | Recidivism risk | | s | | NM/SJ |
| <i>In re Commitment of Mable</i> , No. 2015AP376, 2016 WL 8606260 (Wis. Ct. App. July 8, 2016) | Ch. 980 | s | Recidivism risk | s | s | | Judge/SJ |

| Case Name | Case Type | Expert (S / D) | Category of Expert Testimony | Trial Win | App. Win | SCOW Win | Attack |
|---|---------------------|----------------|------------------------------|-----------|----------|----------|--------|
| <i>In re Commitment of Perren</i> , No. 2013AP1195-NM, 2015 WL 13119689 (Wis. Ct. App. Feb. 18, 2015) | Ch. 980 | s | Recidivism risk | s | s | | NM/SJ |
| <i>In re Commitment of Thomas</i> , No. 2014AP1998, 2016 WL 2905153 (Wis. Ct. App. May 19, 2016) (unpublished table decision) | Ch. 980 | s | Recidivism risk | s | s | | Judge |
| <i>State v. Stevlic</i> , No. 2018AP2289-CR, 2020 WL 5542004 (Wis. Ct. App. Sept. 16, 2020) | Sex assault (adult) | s | Syndrome evidence (BWS) | s | s | | IAC |
| <i>State v. Hayes</i> , No. 2015AP1357-CR, 2016 WL 7108388 (Wis. Ct. App. Dec. 6, 2016) (unpublished table decision) | Child sex related | s | Syndrome evidence (CSAAS) | s | s | | IAC |
| <i>State v. Kinsley</i> , No. 2016AP1836-CR, 2017 WL 4708099 (Wis. Ct. App. Oct. 18, 2017) (unpublished table decision) | Child sex related | s | Syndrome evidence (CSAAS) | s | s | | Judge |
| <i>State v. Reynosa</i> , No. 2013AP1780, 2014 WL 3359319 (Wis. Ct. App. July 10, 2014) (unpublished table decision) | Child sex related | s | Syndrome evidence (CSAAS) | s | s | | IAC |

| Case Name | Case Type | Expert (S / D) | Category of Expert Testimony | Trial Win | App. Win | SCOW Win | Attack |
|---|-------------------|----------------|------------------------------|-----------|----------|----------|--------|
| <i>State v. Smith</i> , 874 N.W.2d 610 (Wis. Ct. App. 2015) | Child sex related | s | Syndrome evidence (CSAAS) | s | s | | Judge |
| <i>State v. Zamora</i> , No. 2016AP1923-CR, 2017 WL 4317783 (Wis. Ct. App. Sept. 27, 2017) (unpublished table decision) | Child sex related | s | Syndrome evidence (CSAAS) | s | s | | Judge |