

NOTES

Offender Profiling and Expert Testimony: Scientifically Valid or Glorified Results?

I.	INTRODUCTION	222
II.	UNDERSTANDING OFFENDER PROFILING AND EXPERT TESTIMONY	225
A.	<i>Offender Profiling</i>	225
1.	Historical Origin	226
2.	Goals, Theories, and Method of Offender Profiling	227
3.	Offender Profiling in the Courtroom	230
B.	<i>Admissibility of Expert Testimony</i>	231
1.	General Acceptance of <i>Frye</i> and the Old Rule 702	232
2.	The <i>Daubert</i> Trilogy and the New Rule 702	233
III.	THE IMPERMISSIBLE ADMISSION OF OFFENDER PROFILING	236
A.	<i>Willful Ignorance: The Theoretical and Methodological Invalidity of Offender Profiling</i>	237
B.	<i>Judicial Decisions on the Admissibility of Offender Profiling Testimony</i>	240
1.	Failed Attempts by Defendants to Proffer Expert Profiling Testimony	243
2.	Mixed Results for Prosecutors Who Proffer Expert Profiling Testimony	244
C.	<i>Explanations for Decisions to Admit Expert Offender Profiling Testimony</i>	251
IV.	A PRESUMPTION AGAINST SELF-VALIDATING TECHNIQUES	255
V.	CONCLUSION	259

I. INTRODUCTION

Holmes laughed. 'Watson insists that I am the dramatist in real life,' said he. 'Some touch of the artist wells up within me, and calls insistently for a well-staged performance. Surely our profession, Mr. Mac, would be a drab and sordid one if we did not sometimes set the scene so as to glorify our results. The blunt accusation, the brutal tap upon the shoulder—what can one make of such a denouement? But the quick inference, the subtle trap, the clever forecast of coming events, the triumphant vindication of bold theories—are these not the pride and the justification of our life's work?'¹

A hallmark of Sherlock Holmes is his ability to solve complex crimes with well-staged performances. His flair for the shrewd and dramatic apprehension of a suspect in an inscrutable case often left his loyal companion Watson in awe, the local police investigators mystified, and the perpetrator thwarted. Holmes's admirers speculated that he must have had a special gift, maybe even psychic powers, which allowed him to solve any case. In reality, as Holmes always explained to his slow-witted companions, it was his insightful, rational, and logical approach to solving the mystery that inexorably led him to the solution.

Depictions of modern-day profilers are similar to depictions of Holmes, as they relate stories about bold predictions that eventually are vindicated. For example, a popular account of one of the first profilers, a psychiatrist named James A. Brussel, relates how he was contacted by police in 1957 to assist in identifying the "Mad Bomber" of New York, who was responsible for over thirty bombings in the city.² After poring over photographs of the bomb scenes and letters from the bomber to newspapers, Dr. Brussel issued the following directive to police in a city in Connecticut: "Look for a heavy man. Foreign born. Roman Catholic. Single. Lives with a brother or sister. When you find him, chances are he'll be wearing a double-breasted suit. Buttoned." Based on this profile, police identified a suspect named George Metesky. Metesky matched the profile in almost every respect. Indeed, when the officers, after arriving at his house to arrest him, asked him to get dressed for the trip to the station, he emerged in a double-breasted suit . . . buttoned.

John Douglas, a profiler for the Federal Bureau of Investigation ("FBI") and the inspiration for the character Jack

1. 2 SIR ARTHUR CONAN DOYLE, *The Valley of Fear*, in THE COMPLETE SHERLOCK HOLMES 229, 283 (2003).

2. For the relevant facts of this account, see JOHN DOUGLAS & MARK OLSHAKER, MINDHUNTER: INSIDE THE FBI'S ELITE SERIAL CRIME UNIT 21 (1995) [hereinafter DOUGLAS & OLSHAKER, MINDHUNTER].

Crawford in the novel and movie *The Silence of the Lambs*,³ recounts a similar story.⁴ Assisting in the investigation of unsolved murders that occurred along hiking paths in heavily wooded areas around San Francisco, Douglas presented a profile to a crowded room of sheriff's deputies and investigators, describing a white blue-collar worker in his low- to mid-thirties with an IQ well above normal. After asserting that the offender would have a background of bed-wetting, fire-starting, and cruelty to animals, Douglas gave a pregnant pause and added: "Another thing . . . the killer will have a speech impediment." According to Douglas, the officers in the room reacted skeptically, one even asking sarcastically if he came to that conclusion because the stab wounds looked like "stutter stab[s]." Like Holmes, Douglas was vindicated when police arrested a suspect who closely resembled the profile, all the way down to his lifelong stutter.⁵

However, the similarities between modern-day profilers and Holmes become more important and consequential when the dramatic flair and glorified results extend beyond investigative work and enter the criminal courts as expert testimony. Douglas and other FBI agents from the Behavioral Analysis Unit ("BAU") have refined and popularized the offender profiling techniques originally developed by Dr. Brussel and BAU founders Howard Teten and Patrick Mullany.⁶ Offender profiling originally was developed to assist local law enforcement in narrowing leads and identifying suspects in difficult serial killer and rapist cases.⁷ Not long after its widespread adoption in such investigations, profilers began assisting in the prosecution of these crimes.⁸ Scholars have not explored whether courts admit or reject expert offender profiling testimony, perhaps because they have assumed that judges would rarely, if ever, admit it in criminal trials because it represents improper character testimony.⁹ However, this

3. THOMAS HARRIS, *THE SILENCE OF THE LAMBS* 1-5 (1988); *THE SILENCE OF THE LAMBS* (Orion Pictures 1991); see also DOUGLAS & OLSHAKER, *MINDHUNTER*, *supra* note 2, at 171-72.

4. For the relevant facts of this account, see DOUGLAS & OLSHAKER, *MINDHUNTER*, *supra* note 2, at 148-56.

5. The analogy to Holmes has support from Douglas himself, who considers a comparison to the fictional sleuth "the highest compliment." *Id.* at 20.

6. *Id.* at 81. The BAU's original title was the "Behavioral Science Unit." To maintain consistency and reduce confusion, this Note employs the abbreviation "BAU" throughout. For additional information about the BAU, see the Investigative Programs Critical Incident Response Group Home Page, <http://www.fbi.gov/hq/isd/cirg/ncavc.htm#bau> (last visited Oct. 14, 2007).

7. DOUGLAS & OLSHAKER, *MINDHUNTER*, *supra* note 2, at 94-96.

8. See *infra* note 29 and accompanying text (discussing techniques of offender profiling).

9. See D. Michael Risinger & Jeffrey L. Loop, *Three Card Monte, Monty Hall, Modus Operandi and "Offender Profiling": Some Lessons of Modern Cognitive Science for the Law of*

Note demonstrates that offender profiling testimony frequently is offered as scientific, technical, or other specialized knowledge, rather than character testimony, and correspondingly is evaluated and occasionally admitted as expert testimony.

This Note also argues that offender profiling should not be admissible as expert testimony. Judges traditionally evaluated expert testimony under the "general acceptance" standard articulated in *Frye v. United States*, which requires judges to determine whether a technique generally is accepted by the relevant scientific community before expert testimony can be admitted.¹⁰ Although some state courts still retain the *Frye* standard, federal courts and an increasing number of state courts now scrutinize expert testimony according to Federal Rule of Evidence 702 ("Rule 702"). This rule codified the Supreme Court decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹¹ and *Kumho Tire Co. v. Carmichael*,¹² which together established new standards for scientific and nonscientific expert witness testimony in federal court.¹³ *Daubert* and *Kumho Tire* identify trial judges as the "gatekeepers" of expert witness testimony in the courtroom and require judges to determine whether testimony is scientifically reliable before permitting its admission.¹⁴ Accordingly, this Note argues that state and federal judges should not admit expert offender profiling testimony under Rule 702, state rules equivalent to Rule 702, or the *Frye* standard because it lacks both evidentiary reliability and general acceptance.¹⁵

Although the existing scholarly literature generally focuses on expert profiling testimony that attempts to link multiple crimes to a single offender ("linkage analysis"), this Note does not address linkage analysis for two reasons. First, other scholars already have

Evidence, 24 CARDOZO L. REV. 193, 253 (2002) (indicating that courts have generally rejected testimony frankly concerning profiling).

10. 293 F. 1013, 1013 (D.C. Cir. 1923).

11. 509 U.S. 579, 588-90 (1993) (holding that "general acceptance" is not required for scientific evidence under Federal Rules of Evidence, and that it is incumbent upon the trial judge simply to ensure testimony is based upon a reliable foundation and is relevant).

12. 526 U.S. 137, 147 (1999) (holding that *Daubert* applies to all expert testimony, not just scientific testimony).

13. Although Rule 702 and the Supreme Court decisions relate to federal standards, many state legislatures have adopted the same language of Rule 702, and state courts often rely on *Frye*, *Daubert*, and *Kumho Tire* when interpreting equivalent state rules. See, e.g., David E. Bernstein & Jeffrey D. Jackson, *The Daubert Trilogy in the States*, 44 JURIMETRICS J. 351, 356-65 (2004) (stating that by mid-2003, 27 states had adopted *Daubert*, while some states had retained *Frye*, and the remainder had rejected *Frye* but had not fully adopted *Daubert*).

14. *Kumho Tire*, 526 U.S. at 147; *Daubert*, 509 U.S. at 598.

15. As discussed in more detail *infra* Subsection II.B.2, *Daubert* defines evidentiary reliability as scientific validity, or trustworthiness.

demonstrated some of the theoretical and methodological deficiencies of linkage analysis and have analyzed judicial decisions addressing its admissibility.¹⁶ Second, linkage analysis is premised on essentially the same fundamental assumptions as offender profiling; therefore, by exposing the deficiencies of offender profiling, this Note supplements existing scholarship that criticizes linkage analysis.

Part II of this Note discusses the history, goals, theories, and application of offender profiling to criminal investigations and prosecutions. This Part also describes the history and current status of judicial standards for the admission of expert testimony. Part III begins with a critical assessment of the theory and methodology of offender profiling and argues that it is not suitable for expert testimony. In addition, this Part examines how courts have treated expert offender profiling testimony and attempts to explain decisions to admit the testimony despite its unreliability. Part IV proposes a solution to the problems identified in Part III, primarily arguing for a judicial presumption against admitting expert testimony related to disciplines developed principally for the investigation and prosecution of crimes.

II. UNDERSTANDING OFFENDER PROFILING AND EXPERT TESTIMONY

A. Offender Profiling

The scientific study of criminology began in the late nineteenth century. From the beginning, theorists have attempted to predict criminality based on physical, mental, and psychological attributes.¹⁷ Cesare Lombroso, a nineteenth-century criminologist, pioneered this approach, as he theorized that physical attributes are related to personality traits and that criminals possess identifiable physical attributes that indicate their failure to evolve.¹⁸ Lombroso posited that the "born criminal" could be identified by characteristics held over from remote ancestors, such as large jaws, broad sloping foreheads, hard shifty eyes, long arms, and hawk-like noses.¹⁹ Most of Lombroso's theories were discredited quickly, but new approaches to predicting

16. Risinger & Loop, *supra* note 9.

17. JOHN DOUGLAS ET AL., CRIME CLASSIFICATION MANUAL: A STANDARD SYSTEM FOR INVESTIGATING AND CLASSIFYING VIOLENT CRIMES 3-8 (2d ed. 2006).

18. CESARE LOMBROSO, CRIMINAL MAN 45, 50-57, 117 (Mary Gibson & Nicole Rafter trans., Duke University Press 2006) (1876).

19. *Id.* at 51-52.

criminality based on mental, physical, and personality characteristics continued to emerge throughout the twentieth century.²⁰

Although the prediction of future criminality based on the physical or psychological characteristics of individuals has a long history, it is only since the 1970s that investigators have engaged in a systematic effort to profile the personality characteristics of unknown offenders by examining crime scene evidence. Subsection 1 defines key terms and discusses the historical development of offender profiling using crime scene evidence. Subsection 2 explores the goals of profiling, its theoretical underpinnings, and the mechanics of its application as an investigative tool. Finally, Subsection 3 identifies how profiling is extended to applications beyond the investigations, particularly to criminal trials.

1. Historical Origin

In the 1970s, Howard Teten and Patrick Mullany, members of the BAU, pioneered a technique that became known as "offender profiling," in which profilers examined crime scenes in order to predict offender behavior and motives that would aid in offender identification.²¹ Teten and Mullany initially assisted local law enforcement in narrowing leads or identifying potential suspects by producing informal profiles derived primarily from their experiences in the field and their extrapolations from psychological literature.²² Within a few years, other members of the BAU, John Douglas and Robert Ressler, began interviewing prisoners informally to ascertain their motivations and learn about their behavior both before and after their offenses.²³ Encouraged by these initial interviews, the BAU

20. DOUGLAS ET AL., *supra* note 17, at 4-6 (describing the progression from Lombroso's theories to theories that attributed criminality to defective intelligence or insanity, and eventually to multiple theories and typologies that focused on defective personalities).

21. DOUGLAS & OLSHAKER, MINDHUNTER, *supra* note 2, at 81. *See also id.* at 95 (noting the initial skepticism in the "Hoover days" of the Bureau toward behavioral science and the practice of profiling). "Offender profiling" often is termed simply "profiling." The former is more precise, however, as a means of differentiating this practice from the controversial practice of racial profiling or other types of profiling in which investigators use stereotypical characteristics to pick out, for example, suspected terrorists or drug couriers. The admissibility of expert testimony related to drug courier profiles is a complex issue that is not addressed in this Note.

22. *Id.* at 94-96.

23. *Id.* at 99. Douglas and Ressler began conducting these interviews in the late 1970s. *Id.* at 111. Typically, they would conduct their interviews whenever official business, usually conducting local training sessions, brought them near a prison holding a notable prisoner. Within a few months, the agents were able to interview several notable serial killers and would-be assassins, including Ed Kemper (murdered six college-aged women, his grandmother and grandfather, his mother, and his mother's friend), Arthur Bremmer (attempted assassination of

launched a formal project to collect data about violent criminals and their crimes and to synthesize that data into an organized and useful investigative framework.²⁴ This project resulted in the creation of a tool to help investigators classify violent crimes based on information about the victim, the crime scene, and the nature of the exchange between the victim and the offender.²⁵

2. Goals, Theories, and Method of Offender Profiling

Originally, BAU profilers primarily assisted local law enforcement with serial murder and serial rape investigations, as these crimes pose unique challenges at the local level.²⁶ Specifically, a victim of this type of crime often is targeted opportunistically by a repeat offender who commits crimes across multiple jurisdictions.²⁷ The goal of the profile is to narrow a pool of suspects, sift through thousands of leads, or provide new leads.²⁸ Over time, profilers began using their techniques for other purposes: to provide interrogation strategies to law enforcement, to assist prosecutors in developing cross-examination strategies, to determine the seriousness of threatening letters, or to set traps in the media to flush out offenders.²⁹

presidential candidate George Wallace), Sara Jane Moore and Lynette "Squeaky" Fromme (attempted assassination of Gerald Ford), and Charles Manson. *Id.*

24. *Id.* at 117-18. The agents of the BAU recruited Ann Burgess, a professor of psychiatric mental health nursing, to assist in developing more rigorous methods of data collection and analysis. Burgess developed a fifty-seven page instrument to code responses of thirty-six prisoners, mostly serial killers, interviewed by the BAU agents. The agents also compiled detailed descriptions of each crime scene. Burgess subsequently performed analyses of the data. *Id.*

25. DOUGLAS ET AL., *supra* note 17, at 6-11.

26. Robert J. Homant & Daniel B. Kennedy, *Psychological Aspects of Crime Scene Profiling—Validity Research*, 25 CRIM. JUST. & BEHAV. 319, 321 (1998).

27. *Id.* These characteristics pose unique challenges because the offender has no preexisting relationship with the victim, so it is difficult to identify suspects and uncover leads. In addition, crimes committed across jurisdictions involve multiple law enforcement agencies, which creates difficulty in coordinating investigations and facilitating awareness of similar crimes in neighboring jurisdictions.

28. *Id.* at 322.

29. *Id.* at 322-23. For example, after Douglas developed a profile for the killer of a twelve-year-old girl, police indicated that they had previously interviewed a suspect who substantially met the profile. Police were about to give him a polygraph, as the previous interrogations were unsuccessful, but based on his profile of the killer, Douglas suggested that police instead re-interview the suspect at night in a room that contained the murder weapon and stacks of boxes with the suspect's name on them. He also told the police to sympathize with the suspect and project blame onto the victim. The police followed his advice and the interrogation resulted in a full confession. DOUGLAS & OLSHAKER, MINDHUNTER, *supra* note 2, at 189-91.

The validity of offender profiling and its value to law enforcement depends on two fundamental assumptions: First, that a specific class of offenders exhibits similar behavioral traits that persist over time.³⁰ Second, that a particular offender's behavioral traits are consistent across crimes and also affect non-criminal aspects of the offender's personality and lifestyle.³¹ If these assumptions are valid, then a profiler can ascertain characteristics of the offender who committed a crime by examining the crime scene for expressions of specific behavioral traits. Once a profiler has identified traits of an offender, he can extrapolate theories about other aspects of the offender's personality and lifestyle.³²

For profiling to narrow leads effectively, the identified behavioral traits must distinguish the offender from others in the same class; that is, within each class of offenders, there must be reliably identifiable subtypes.³³ As a result, much of the BAU's research has focused on identifying subtypes of offenders based on the motives for their crimes.³⁴ The culmination of this research, the *Crime Classification Manual*, is organized principally according to motive.³⁵ For example, murder is divided into four broad groups, each of which has multiple subgroups.³⁶ A profiler classifies a crime into a motive category by assessing multiple variables: victimology, crime scene indicators frequently noted for a specific subtype, forensic findings

30. Homant & Kennedy, *supra* note 26, at 328. This is essentially a narrow application of trait theory. Unfortunately, most psychological research suggests that traits exhibit little consistency across time and situations, and that different traits do not accurately predict different personality types. *Id.*

31. See *id.* ("[C]rime scene profiling rests on the assumption that at least certain offenders have consistent behavioral traits."); see also DOUGLAS ET AL., *supra* note 17, at 21-22 (discussing the notion that some "criminal conduct goes beyond the actions necessary to perpetrate the crime—the modus operandi—and points to the unique personality of the offender").

32. See Homant & Kennedy, *supra* note 26, at 328 (noting that antisocial behavior, for instance, might "be an especially stable behavior trait for aggressive persons—whether because their personalities do not change much, the genetic contribution remains constant, or they tend to remain in aggression-fostering environments").

33. *Id.* at 328-29. For example, the behavioral traits of a particular serial rapist must be distinguishable from the general behavioral traits of known serial rapists. *Id.* Otherwise, the profile could only serve to identify that a serial rapist is responsible for a given crime, but would offer no additional details to distinguish one serial rapist from another.

34. DOUGLAS ET AL., *supra* note 17, at 98 (describing the FBI's decision in the 1980s to develop a systematic classification by motive for murder, arson, and sexual assault).

35. See *id.* (identifying the *Crime Classification Manual* as a "motivational model for classification of homicide").

36. *Id.* For example, murder motivated by "personal cause" includes: erotomania-motivated killing, domestic killing, argument murder, conflict murder, authority killing, revenge killing, nonspecific motive killing, extremist murder, mercy/hero homicide, and hostage murder. *Id.* at 93, 153-220.

frequently noted for a specific subtype, crime scene staging, and other investigative considerations.³⁷

Douglas classifies these considerations into seven discrete steps that can be followed to generate a profile of the offender: (1) evaluate the criminal act; (2) evaluate the specifics of the crime scene (including the surrounding area); (3) analyze the victim (considering lifestyle and behavior prior to incident); (4) evaluate police reports; (5) evaluate the medical examiner's autopsy report; (6) develop a profile with critical offender characteristics; and (7) formulate investigative suggestions based on the profile.³⁸ The profile is intended to render a comprehensive picture of the offender, including "gender, age, race or ethnicity, level of intelligence or schooling, military service status, job status, living circumstances, nature of interpersonal relationships, and even the make and color of the perpetrator's car."³⁹ Law enforcement then uses this comprehensive profile to supplement its investigation.

Profilers tend to focus on a few specific variables to distinguish offenders when reviewing the crime scene, victim characteristics, forensic data, and other evidence used to generate a profile.⁴⁰ One of the primary variables is the organization of the crime scene, which profilers treat as characteristic of the offender himself.⁴¹ The BAU asserts that the differences between organized and disorganized offenders persist across their personality characteristics, socioeconomic backgrounds, and crime scene behaviors.⁴² For example, with respect to personality and socioeconomic factors, organized offenders are described as more intelligent, more socially competent, more likely to live with a partner, more likely to commit offenses in response to precipitating situational stress, more likely to be employed in skilled work, and more likely to drive a car in good condition than disorganized offenders.⁴³ Regarding crime scene differences, organized offenders are more likely than disorganized offenders to plan the offense, target a stranger, use restraints, hide the body, remove the weapon or other evidence from the crime scene, and personalize the

37. *Id.* at 8-12.

38. JOHN DOUGLAS & MARK OLSHAKER, *JOURNEY INTO DARKNESS* 26 (1997) [hereinafter DOUGLAS & OLSHAKER, *JOURNEY*].

39. Homant & Kennedy, *supra* note 26, at 321-22.

40. *Id.* at 331.

41. *Id.*

42. *Id.*

43. Robert Ressler & Ann Burgess, *Crime Scene and Profile Characteristics of Organized and Disorganized Murderers*, 54 FBI L. ENFORCEMENT BULL., Aug. 1985, at 18.

victim.⁴⁴ In practice, on a spectrum ranging from purely organized to purely disorganized behaviors, most offenders fall somewhere in between, thus complicating the inferences a profiler can make based on the evidence at the crime scene.⁴⁵

Offender profiling arguably has become a useful tool for investigators to narrow the list of possible suspects and generate new leads in uniquely challenging serial murder and rape cases, particularly those committed against random victims and spanning multiple jurisdictions.⁴⁶

3. Offender Profiling in the Courtroom

It was Holmes who broke the silence. 'Our difficulties are not over,' he remarked, shaking his head. 'Our police work ends, but our legal work begins.'⁴⁷

Offender profiling now is applied to contexts outside of criminal investigations. Due largely to the efforts of FBI profilers, offender profiling has entered the arena of criminal prosecutions. Not long after its genesis, members of the BAU, like the fictional Holmes, extended offender profiling beyond investigations into legal applications.⁴⁸ Profilers initially provided strategic advice to prosecutors,⁴⁹ but they eventually asserted a more active role in criminal prosecutions by serving as witnesses.⁵⁰ From the beginning, prosecutors presented profilers as expert witnesses, perhaps because

44. *Id.*

45. DOUGLAS ET AL., *supra* note 17, at 10; Homant & Kennedy, *supra* note 26, at 332.

46. Homant & Kennedy, *supra* note 26, at 338 (describing an FBI study in 1981 finding that when one was used, a profile helped identify the suspect in 17% of solved cases and, according to law enforcement statements, was "of at least some help" in 83% of solved cases).

47. DOYLE, *The Adventure of Wisteria Lodge*, in *THE COMPLETE SHERLOCK HOLMES*, *supra* note 1, at 371, 379.

48. DOUGLAS & OLSHAKER, *MINDHUNTER*, *supra* note 2, at 198-224. The first legal application arose when FBI agents created a profile of the killer responsible for the famous Atlanta child murders from 1979-1981. The profilers suggested multiple strategies for catching the perpetrator, resulting in the arrest of Wayne Williams. The district attorney then asked the profilers to assist the prosecution in developing its trial strategy. *Id.* at 212-17. The publicity surrounding the case and the FBI's role in its prosecution resulted in national prominence for the new offender profiling program. *Id.* at 224.

49. *Id.* at 217.

50. DOUGLAS & OLSHAKER, *JOURNEY*, *supra* note 38, at 293-95. The first time a member of the BAU testified as an expert witness, the testimony was not used to link the defendant to a profile nor to establish him as the killer. Instead, it was admitted strictly to refute the defense's claim that the defendant's calm behavior after the murders took place was inconsistent with behavior normally displayed by murderers. *Anthony v. State*, No. A-2755, 1993 WL 13156613, at *7 (Alaska Ct. App. Feb. 17, 1993) (affirming the trial court's admission of the BAU member as an expert to "rebut an intuitive conclusion that [the defendant] wanted to exploit: that the person who committed the murders would necessarily exhibit extreme emotional symptoms").

prosecutors assumed that courts rarely would admit offender profilers as character evidence. Rather than directly asserting that a defendant fits the profile of a certain kind of offender, profiling experts were proffered to educate factfinders about crime scene classification, including behavioral characteristics such as "organization" and "disorganization," and to discuss in general terms how these features relate to offenders' motivations.⁵¹

In addition, members of the BAU, led by Douglas, created a new application of profiling called "linkage analysis" with the explicit goal of gaining admission as expert witnesses.⁵² In linkage analysis, profilers examine multiple crime scenes and attempt to link them to a single offender. Like offender profiling, linkage analysis assumes that individual behavior, especially criminal behavior, is consistent across time and multiple crime scenes. However, linkage analysis goes a step beyond offender profiling: where offender profiling assumes that behavioral traits can distinguish a subtype of offender from the general class of the same kind of offenders, linkage analysis actually assumes that behavioral traits can distinguish a particular offender from the entire population of offenders.

Before considering how courts have responded to profilers' efforts to create admissible forms of expert testimony, this Note will summarize the statutory and common law standards for the admissibility of expert testimony.

B. Admissibility of Expert Testimony

The U.S. legal system has a long history of admitting expert testimony to aid factfinders in their decisionmaking duties. Until the early twentieth century, courts freely allowed qualified experts to provide relevant testimony on matters that likely were beyond the average juror's range of knowledge.⁵³ In the twentieth century, however, as the pace and quantity of scientific research exploded, the distinction between cutting-edge discoveries and junk science became

51. This strategy is discussed in more detail *infra* Section III.B.

52. This Note will not present a thorough explication of linkage analysis but will instead describe the assumptions it shares with offender profiling in order to demonstrate that they rely on the same principles. For thorough discussions of linkage analysis, see Risinger & Loop, *supra* note 9, which criticizes linkage analysis, and DOUGLAS & OLSHAKER, JOURNEY, *supra* note 38, at 39, which describes Douglas's theory on signature evidence and how he applies it to link crimes.

53. See TAL GOLAN, LAWS OF MEN AND LAWS OF NATURE: THE HISTORY OF SCIENTIFIC EXPERT TESTIMONY IN ENGLAND AND AMERICA 250 (2004) (explaining that the admissibility of expert testimony was subject to two traditional evidentiary criteria: its logical relevance and helpfulness to a jury, and the qualifications of the witness).

difficult for many courts to discern.⁵⁴ Courts therefore began establishing standards to determine the admissibility of expert testimony. Subsection 1 discusses the initial admissibility standards developed in the twentieth century, including the 1923 Court of Appeals decision in *Frye v. United States*⁵⁵ and the 1975 Federal Rules of Evidence. Subsection 2 explores the more recent developments in admissibility standards triggered by the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁵⁶ Both standards are relevant to a discussion of the admissibility of expert profiling testimony because some states continue to retain the *Frye* standard, while other states have elected to follow the new federal standard established by *Daubert*.⁵⁷

1. General Acceptance of *Frye* and the Old Rule 702

For most of the twentieth century, *Frye* governed the admissibility of expert testimony in federal courts. In *Frye*, the defendant was convicted of murder based in part on a confession he gave to a police investigator.⁵⁸ The defendant asserted that the confession was false and sought to introduce an expert's testimony that he passed a lie detection test as proof.⁵⁹ The lie detector test was premised on the theory that systolic blood pressure displays a certain pattern when a person is untruthful.⁶⁰ The trial court excluded the expert's testimony, and the appellate court affirmed the trial court's exclusion.⁶¹ The court held that for a novel scientific principle or discovery to be admissible, it "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."⁶² While commentators criticized the holding as too inflexible to accommodate cutting-edge techniques that were not yet widely accepted by scientists,⁶³ this decision established the dominant

54. 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6266 (Supp. 2006).

55. 293 F. 1013, 1013-14 (D.C. Cir. 1923).

56. 509 U.S. 579, 585-89 (1993).

57. See Bernstein & Jackson, *supra* note 13 (discussing admissibility standards currently adopted by the different states).

58. GOLAN, *supra* note 53, at 245.

59. *Id.*

60. 293 F. at 1013-14.

61. *Id.*

62. *Id.* at 1014.

63. WRIGHT & GOLD, *supra* note 54.

standard for admissibility of novel scientific evidence that remained in place for the next seventy years.⁶⁴

In 1975, when the Federal Rules were enacted, Rule 702 codified the standard for the admissibility of expert testimony.⁶⁵ Rule 702 employed a more liberal approach than *Frye*, allowing admission of scientific, technical, or other specialized testimony if it "will assist the trier of fact to understand the evidence."⁶⁶ Unfortunately, the Federal Rules conflicted with *Frye*, thereby creating confusion as to whether *Frye* remained good law in federal court.⁶⁷

2. The *Daubert* Trilogy and the New Rule 702

The Supreme Court resolved this confusion in *Daubert*, holding that Rule 702 superseded *Frye*.⁶⁸ But while the Court addressed this question, it also interpreted Rule 702, introducing additional confusion regarding the exact nature of the trial court's evaluation of expert testimony. In *Daubert*, two minors and their parents brought suit against Merrell Dow Pharmaceuticals alleging that the drug Bendectin, taken by the children's mothers to prevent nausea during pregnancy, was the cause of the children's major birth defects.⁶⁹ In its motion for summary judgment, the defense presented an affidavit from a doctor who, relying on several published studies, asserted that Bendectin did not cause birth defects. The plaintiffs attempted to admit the testimony of eight experts to refute the defense witness, but the trial court held that the methods employed by the plaintiffs' experts did not satisfy *Frye*'s general acceptance requirement. The district court awarded summary judgment in favor of the defense, and the United States Court of Appeals for the Ninth Circuit affirmed the decision to exclude the testimony.

The Supreme Court granted certiorari, and Justice Blackmun, writing for the majority, asserted that the Federal Rules of Evidence superseded *Frye*.⁷⁰ In interpreting Rule 702, the Court emphasized the "gatekeeping" duty of trial judges "to ensure that any and all scientific

64. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585 (1993).

65. Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

66. *Id.* This language has been referred to as the "helpfulness" requirement. *Daubert*, 509 U.S. at 591-92.

67. Compare *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987) (holding that the *Frye* standard did not survive the enactment of the Federal Rules), with *U.S. v. Smith*, 869 F.2d 348, 350-51 (7th Cir. 1989) (holding that the *Frye* standard did survive the enactment of the Federal Rules).

68. 509 U.S. at 587.

69. For the relevant facts of this case, see *id.* at 582-84.

70. *Id.* at 587.

testimony or evidence admitted is not only relevant, but reliable.”⁷¹ The Court also interpreted the “helpfulness” language of Rule 702 as conferring responsibility on trial judges to ensure the existence of a valid scientific connection between the testimony offered and the facts of the case.⁷² This requires trial judges to make an initial inquiry to determine “whether the reasoning or methodology underlying the testimony is scientifically valid.”⁷³ The Court identified five factors to assist trial judges in making this determination: (1) whether the scientific theory or technique can and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the technique’s known or potential rate of error; (4) the existence and maintenance of standards controlling the technique’s operation; and (5) whether the technique is “generally accepted” in the scientific community.⁷⁴ These factors indicate that the focus of this analysis is on the scientific validity of the principles and methodology underlying the expert’s testimony.⁷⁵

Although *Daubert* resolved the confusion between *Frye* and Rule 702 for scientific testimony, it remained unclear whether *Daubert* also applied to testimony based on technical or other specialized knowledge.⁷⁶ The Supreme Court resolved this question in *Kumho Tire Co. v. Carmichael*, which held that *Daubert* applies to such testimony.⁷⁷ The Court recognized that the five factors articulated in *Daubert* may have little relevance to determining the validity of non-scientific testimony; therefore, it suggested that the admissibility of nonscientific expert testimony requires consideration of factors specific to the area of expertise involved, as well as the use of logic and common sense.⁷⁸

The *Daubert* opinion also was unclear as to whether it created a more permissive standard than *Frye*, as suggested by much of the Court’s dicta, or a more exacting standard, as suggested by its charge to trial judges to perform “gatekeeping” duties to ensure scientific validity.⁷⁹ The Court steered toward the more exacting standard in

71. *Id.* at 589. The court clarifies “reliability,” indicating that it means “evidentiary reliability—that is, trustworthiness.” *Id.* at 590 n.9. Therefore, the Court concluded, in a case involving scientific evidence, evidentiary reliability is based on scientific validity.

72. *Id.* at 591-92.

73. *Id.* at 592-93.

74. *Id.* at 593-94.

75. *Id.* at 594-95.

76. *Id.* at 600 (Rehnquist, C.J., concurring in part and dissenting in part).

77. 526 U.S. 137, 141 (1999).

78. *Id.*

79. See *Daubert*, 509 U.S. at 587-88 (noting that Rule 702’s “basic standard of relevance . . . is a liberal one” and that *Frye*’s “rigid” general acceptance requirement is “at odds with the

General Electric Co. v. Joiner, circumscribing the permissive language of *Daubert* by asserting that the Federal Rules admit only "a somewhat broader range of scientific testimony than would have been admissible under *Frye*."⁸⁰ The Court noted that the range is "broader in that *Daubert* applies to testimony based on technical and other specialized knowledge, not just purely scientific testimony."⁸¹ The Court rejected a permissive interpretation of *Daubert* in *Weisgram v. Marley Co.*, stating that, since *Daubert*, "parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet."⁸² Although *Daubert* initially appeared to chart a permissive course for the admission of scientific testimony, its progeny gradually moved toward a broader and stricter test than *Frye*.⁸³

The Supreme Court's decisions in *Daubert*, *Joiner*, and *Kumho Tire* were codified in the 2000 amendment of Rule 702. The rule currently reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.⁸⁴

Rule 702(1) requires an expert to consider all of the pertinent evidence and alternative explanations to ensure that his conclusion is sufficiently supported.⁸⁵ The "principle" prong of Rule 702(2) requires that the theory on which the expert bases his testimony is valid; this prong must be satisfied whether the testimony is scientific, technical, or based on experience.⁸⁶ The "method" prong of Rule 702(2) requires that the expert's theories are derived through reliable means; thus, scientific evidence must be derived through the scientific method and non-scientific evidence must be derived through common sense, logic,

'liberal thrust' of the Federal Rules"). But see *id.* at 589 (emphasizing the importance of the "gatekeeping" function in ensuring that scientific testimony "is not only relevant, but reliable").

80. 522 U.S. 136, 142 (1997).

81. *Id.*

82. 528 U.S. 440, 442 (2000).

83. David E. Bernstein, *Frye, Again: The Past, Present, and Future of the General Acceptance Test*, 41 JURIMETRICS J. 385, 386 (2001). *Kumho Tire* broadened the *Daubert* test beyond *Frye* by applying it to technical and specialized knowledge, as well. At the same time, later courts viewed *Daubert* as a more stringent test than *Frye* in that it required judges to apply "exacting scrutiny."

84. FED. R. EVID. 702.

85. WRIGHT & GOLD, *supra* note 54.

86. *Id.*

and practices common to the area of expertise in question.⁸⁷ Finally, Rule 702(3) requires experts to apply the valid principles and methods reliably to the facts of the particular case.⁸⁸

Rule 702(2)'s inquiry into the principles and methods underlying an expert's testimony provides the meat for a trial judge's admissibility decision. Questions related to whether an expert properly applied an established principle to the facts, or questions related to an expert's bias, are matters that a jury is competent to evaluate.⁸⁹ The *Daubert* Court confirmed this role for the jury when it asserted that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."⁹⁰ Thus, the trial judge's role is to determine if the evidence, such as offender profiling testimony, is admissible, which requires an inquiry into whether the expert's testimony rests on valid principles and methodology.

III. THE IMPERMISSIBLE ADMISSION OF OFFENDER PROFILING

Despite flaws in the fundamental logic underlying offender profiling and the absence of any scientific study validating its methodology, trial courts have admitted expert profiling testimony routinely, and these decisions have been affirmed by some appellate courts. Section A of this Part examines the validity of offender profiling, as well as its general acceptance, and concludes that judges should not admit this evidence as expert testimony under either Rule 702 or *Frye*. Section B discusses the different approaches adopted by defendants and prosecutors who introduce expert offender profiling testimony and surveys how courts have ruled on its admissibility. Section C presents explanations for why offender profiling is admitted as expert testimony despite its lack of evidentiary reliability.

87. *Id.* For instance, an expert testifying about polygraph results relies on a theory that certain metabolic processes are affected when someone tells a lie, and that these changes can be measured and interpreted accurately. A judge can evaluate this theory under the traditional *Daubert* factors for scientific testimony to determine if it is valid. On the other hand, a police officer testifying about the meaning of code words in a drug transaction—which qualifies as specialized knowledge—relies on a theory that drug dealers use code words to disguise their true intent. A judge can evaluate the validity of this theory using logic, common sense, and other relevant considerations.

88. *Id.*

89. *Id.*

90. 509 U.S. 579, 596 (1993).

A. *Willful Ignorance: The Theoretical and Methodological Invalidity of Offender Profiling*

Offender profiling has inspired a plethora of novels, movies, and television programs.⁹¹ But until recently, it inspired little academic research; instead, most of the published literature on offender profiling came from nonacademic sources such as FBI bulletins, memoirs of the agents who started the BAU, and a few articles published by FBI agents—usually coauthored with Ann Burgess.⁹² Most of these sources reiterate the fundamental principles on which offender profiling is based, as described in Subsection II.A.2 of this Note and summarized here: (1) offender behavior is consistent across crime scenes, across time, and across non-criminal activities; and (2) within each type of offender class, there are identifiable subtypes of offenders. The validity of these principles has only recently been studied, and the results suggest that these assumptions are more complicated than the FBI profilers assert.⁹³

A particular concern is that the majority of the assumptions, typologies, and classifications regarding offender profiling that are promulgated by the FBI rely on Douglas's and Ressler's interviews of thirty-six prisoners (mostly serial killers), conducted using the interview instrument created by Burgess.⁹⁴ This initial research project, which Ressler characterized as an exploratory study, suffers from serious methodological flaws. In particular, the project did not use "a random, or even large, sample of all offenders," nor did it "explore how they may be divided appropriately into subgroups"; instead, the FBI agents assumed from the beginning that certain

91. Novels include: HERB CHAPMAN'S *THE BOOK OF CAIN* (2001); THOMAS HARRIS'S *HANNIBAL* (1999), *HANNIBAL RISING* (2006), *RED DRAGON* (1981), and *THE SILENCE OF THE LAMBS* (1988); ALEX KAVA'S *AT THE STROKE OF MADNESS* (2003), *A NECESSARY EVIL* (2006), *A PERFECT EVIL* (2000), *SOUL CATCHER* (2002), and *SPLIT SECOND* (2001); and MARIAH STEWART'S *A DEAD END: A NOVEL* (2005), just to name a few. Movies include: *HANNIBAL* (MGM 2001), *MANHUNTER* (De Laurentiis Entertainment Group 1986), *MINDHUNTERS* (Dimension Films 2005), *RED DRAGON* (Universal Pictures 2002), *SILENCE OF THE LAMBS* (Orion Pictures Corp. 1991), *TAKING LIVES* (Warner Bros. Pictures 2004). Television programs include: *Body of Evidence: From the Case Files of Dayle Hinman* (CourtTV television broadcast 2002-present), *Criminal Minds* (CBS television broadcast 2005-present), and *Profiler* (NBC television broadcast 1996-2000).

92. For a discussion of Ann Burgess's affiliation with the BAU, see *supra* note 24.

93. See David Canter, *Offender Profiling and Investigative Psychology*, 1 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 1, 4-6 (2004) (discussing psychological studies that call into question these fundamental assumptions).

94. David Canter et al., *The Organized/Disorganized Typology of Serial Murder: Myth or Model?*, 10 PSYCHOL. PUB. POL'Y & LAW 293, 296 (2004) ("[Since the] initial limited sample of thirty-six offenders, no subsequent test of the reliability [of the BAU's conclusions] can be found in the academic literature."); see *supra* text accompanying note 23.

behaviors and characteristics would discriminate between subgroups of offenders and then simply categorized the offenders they interviewed into subgroups based on these behaviors and characteristics.⁹⁵ This circularity is a fundamental flaw in the FBI's methodology.⁹⁶ As a result, the majority of the publications distributed by the FBI, which are the primary basis for the entire practice of offender profiling, are "based on an informal exploratory study of thirty-six offenders put forward as exemplars, rather than a specific test of a representative sample of a general population of serial murderers."⁹⁷ Although FBI profilers have had extensive and unparalleled access to all of the data needed to evaluate the effectiveness of their method, either they have never made a systematic and scientific attempt to do so, or they have never made public the results of such an attempt.

Independent researchers such as David Canter and his colleagues, however, recently have begun to examine and discredit some of the FBI's foundational conclusions. The first FBI classification lined up in the crosshairs of the scientific method was the distinction between organized and disorganized offenders—"one of the most widely cited classifications of violent, serial offenders."⁹⁸ Despite its widespread adoption and application since the inception of offender profiling, this subtype classification has been criticized only occasionally and was never empirically tested.⁹⁹

In the first empirical test, Canter and his colleagues examined whether serial killers could be categorized reliably as either organized or disorganized based on features of their crime scenes.¹⁰⁰ The study used a sample of 100 randomly selected crime scenes of 100 serial killers in the United States, using the criteria listed in the *Crime Classification Manual* to distinguish disorganized from organized crime scenes.¹⁰¹ After examining the data, the authors concluded that "all serial killers are likely to exhibit some aspects that are organized and some that are disorganized, but the differences between them are,

95. *Id.*

96. *Id.* Canter has also criticized the study's methodology for lacking a theoretical foundation, failing to use the scientific method, and simply speculating about differences among people. See *id.* for a discussion of these criticisms.

97. *Id.*

98. *Id.* at 293.

99. *Id.* at 296-97.

100. *Id.* at 302.

101. *Id.* at 302-04.

more than likely, differences in the particular subset of disorganized variables that they exhibit."¹⁰²

The data did not provide any support for the FBI's dichotomy. The authors therefore concluded that the organized/disorganized subtype "is certainly not widely recognized in the scientific community as a psychometrically valid test of personality."¹⁰³ These findings—the product of the only scientific attempt to validate the FBI's profiling methodology to date—severely undermine one of the cornerstones of the FBI's methodology. Because this study is the only empirical attempt to validate offender profiling, these results also suggest that offender profiling is not generally accepted in the scientific community.

In addition, members of the scientific community also criticize the profilers' misrepresentation of established psychological theory, as current psychological research does not support profilers' presumptions that traits are consistent across time and situations and that different traits predictably relate to different personality types, as well as the lack of any empirical support for their claims.¹⁰⁴ While profilers assert the validity of their method when they are offered as expert witnesses, they admit elsewhere that "there have been no systematic efforts to validate [the] profile-derived classifications" described by the *Crime Classification Manual*.¹⁰⁵ Moreover, Douglas asserts in his memoirs that the "key attribute necessary to be a good profiler is judgment—a judgment based not primarily on the analysis of facts and figures, but on instinct."¹⁰⁶ If profilers themselves admit that their technique is based primarily on subjective instincts, then trial judges should be circumspect in admitting their expert witness testimony.

Regardless whether profilers describe their technique as scientific or nonscientific (e.g., based on specialized knowledge), judges should not admit it as expert testimony. As a purported science, the fundamental assumptions of offender profiling have no scientific support, the scientific community has challenged its methodology, denying its general acceptance, and peer reviewed journals fail to find empirical support for the theory. As a non-scientific technique, FBI profilers do not claim any validity or reliability for their method, and some admit that offender profiling is based, at least in part, on

102. *Id.* at 313.

103. *Id.* at 313, 315.

104. *Id.* at 296 (summarizing criticisms from several authorities).

105. DOUGLAS ET AL., *supra* note 17, at 22.

106. DOUGLAS & OLSHAKER, JOURNEY, *supra* note 38, at 31.

"instinct," which seems to violate the common sense and logic required to admit it as expert testimony. Therefore, expert testimony related to offender profiling, whether considered as scientific testimony or other specialized knowledge, should not be admissible in criminal trials under either Rule 702 or *Frye*.

*B. Judicial Decisions on the Admissibility of Offender
Profiling Testimony*

His testimony was as old as Sherlock Holmes, and was properly admitted to help the jury understand certain characteristics of the crime scene.¹⁰⁷

To determine whether courts admit or reject expert offender profiling testimony, I examined published and unpublished appellate decisions regarding the use of profiling testimony in criminal cases. This research indicates that profiling testimony can appear in different forms, not all of which rely on crime scene analysis. Thus, this Note limits its in-depth analysis to offender profiling; that is, to cases in which the prosecution or defense submitted profiling testimony through an expert, and the expert relied on crime scene analysis to generate the offender profile.¹⁰⁸ Before analyzing offender profiling cases, however, this Note will discuss briefly how courts treat other forms of expert profiling testimony. This discussion is necessary to highlight how courts' treatment of offender profiling testimony is exceptional compared to other forms of profiling testimony.

Expert profiling testimony that is not based on crime scene analysis generally is not permitted in criminal trials. For example, appellate courts consistently reject profiling testimony as to whether a defendant matches a general profile describing a certain type of sex offender.¹⁰⁹ Appellate courts also reject attempts to use profiling

107. *People v. Duvardo*, No. A098935, 2004 WL 2458585, at *16 (Cal. Ct. App. Nov. 3, 2004) (affirming trial court's admission of offender profiling testimony).

108. Because not all cases report the expert's methodology, this Note includes cases in which the expert used the jargon of offender profiling (e.g., by describing a crime scene as organized or disorganized). This Note's criteria excludes cases in which law enforcement used a profile as a basis for probable cause (e.g., drug courier profiles), an expert described a general profile that was not developed by analyzing the crime scene (e.g., most sex offender profiles), or an expert in crime scene analysis opined on an offender's future dangerousness.

109. Jurisdictions that have rejected sex offender profiling offered by the prosecution include: the Ninth Circuit, the U.S. Court of Military Appeals, and Massachusetts. *See, e.g.*, *United States v. Gillespie*, 852 F.2d 475, 479-80 (9th Cir. 1988); *United States v. Banks*, 36 M.J. 150, 152 (C.M.A. 1992); *Commonwealth v. Poitras*, 774 N.E.2d 647, 651 (Mass. App. Ct. 2002).

Jurisdictions that have rejected sex offender profiling offered by the defendant include: the Eighth Circuit, Connecticut, Georgia, Iowa, Kentucky, Louisiana, Minnesota, Missouri, New Hampshire, New York, Tennessee, and Texas. *See, e.g.*, *United States v. Pierre*, 812 F.2d 417, 420 (8th Cir. 1987); *State v. Person*, 20 Conn. App. 115, 124 (1989), *aff'd*, 568 A.2d 796 (1990);

testimony to match defendants to general profiles of other types of offenders.¹¹⁰

Although courts consistently reject expert testimony that compares the defendant to a general profile, the cases identified for this Note indicate that trial courts routinely permit expert offender profiling testimony that compares the defendant to a profile developed from analysis of the crime scene, and appellate courts occasionally affirm these decisions.¹¹¹ Moreover, the appellate decisions suggest an interesting observation: expert offender profiling testimony may be offered more frequently by the prosecution than by the defense and its admission is more frequently permitted by the appellate court for the prosecution.¹¹²

Several explanations may account for this observation. One explanation is that this result has nothing to do with offender profiling per se, but is instead an artifact of a broader pattern—judges in criminal trials routinely admit expert testimony offered by the prosecution and exclude expert testimony offered by the defense.¹¹³ Moreover, the greater prevalence of appellate decisions related to prosecution attempts to admit offender profiling testimony may be evidence that experts in offender profiling are less accessible for

Gilstrap v. State, 215 Ga. App. 180, 181 (1994); State v. Hulbert, 481 N.W.2d 329, 334 (Iowa 1992); Pendleton v. Commonwealth, 685 S.W.2d 549, 554 (Ky. 1985); State v. Armstrong, 587 So. 2d 168, 170 (La. Ct. App. 1991); State v. Fitzgerald, 382 N.W.2d 892, 896 (Minn. Ct. App. 1986); State v. Elbert, 831 S.W.2d 646, 648 (Mo. Ct. App. 1992); State v. Cavaliere, 140 N.H. 108, 114 (1995); People v. Berrios, 568 N.Y.S.2d 512, 515 (N.Y. Crim. Ct. 1991); State v. Campbell, 904 S.W.2d 608, 616 (Tenn. Crim. App. 1995); Williams v. State, 649 S.W.2d 693, 695-96 (Tex. Ct. App. 1983).

110. See, e.g., Brunson v. State, 79 S.W.3d 304, 305 (Ark. 2002) (reversing trial court's admission of testimony from domestic violence expert that placed defendant in a profile of batterers who become murderers); Penson v. State, 474 S.E.2d 104, 106 (Ga. App. 1996) (reversing the trial court's decision to admit expert testimony describing an FBI serial arsonist profile); Commonwealth v. Day, 569 N.E.2d 397, 400 (Mass. 1991) (reversing trial court's admission of child abuse expert's testimony about family characteristics that are related to child abuse); Kaps v. State, No. 05-97-00328-CR, 1998 WL 209060, at *8 (Tex. App. 1998) (affirming trial court's refusal to admit expert testimony that defendant did not fit the profile of a typical abusive man); Ryan v. State, 988 P.2d 46, 56 (Wyo. 1999) (reversing trial court's admission of testimony from an expert in battered woman syndrome indicating that the defendant matched the profile of offenders who commit separation violence).

111. See *infra* Subsections III.B.1-2.

112. Appellate courts affirmed trial court decisions to exclude expert testimony on offender profiling introduced by the defense in the decisions identified by this author. With respect to expert testimony on offender profiling introduced by the prosecution, ten of eleven trial courts permitted the testimony, and only three of those ten were reversed by the appellate court. See *infra* Subsections III.B.1-2, III.C, for discussion and citation to all of these cases.

113. D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 99, 109-10 (2000) (indicating that 92% of prosecution experts in federal criminal trials survive challenges from opposing counsel, compared to only 33% of defense experts).

defendants, or that criminal defendants are more likely than prosecutors to appeal trial court decisions. Alternatively, this discrepancy may relate to the manner in which and purposes for which the testimony is presented by each party—suggesting that prosecutors' strategies are not only more effective than those of defendants, but also are not generally available to defendants. The remainder of this Section explores this final explanation by analyzing judicial decisions that have considered expert profiling testimony proffered by defendants and prosecutors.

Borrowing from the Holmes quotation found in the Introduction,¹¹⁴ the primary difference between the strategies of prosecutors and defendants, and the resulting difference in their effectiveness, is that unsuccessful defense attorneys resort to blunt assertions that a defendant does not fit a profile, while successful prosecutors produce well staged performances—using a subtle inference that allows the jury to conclude on its own that the defendant fits a profile.¹¹⁵ A prosecutor's expert educates the jury about crime scene classification, including behavioral characteristics such as organization and disorganization, and discusses how these features relate to an offender's motivation, personality, and general behavior. The prosecutor then submits evidence about the defendant that reflects the characteristics described by the profilers, thus inviting the jury to conclude that the defendant meets the profile of a typical offender. For example, drawing from Douglas's profile of the trail-side killer described in the Introduction, the profiler might testify in court that, based on the crime scene evidence, the offender who committed this type of murder is likely to have a disability, such as a speech impediment. Later, when the jury learns of the defendant's stutter, it is invited to conclude that the defendant must be a murderer, even though millions of people who stutter never murder. Some trial and appellate courts have detected and exposed this clever ruse, but others have either fallen into the same trap as the jury or have opted to ignore its implications.¹¹⁶

This Section analyzes courts' treatment of offender profiling testimony. Subsection 1 addresses defense attempts to introduce expert testimony on profiling, and discusses several representative cases and each court's reasoning. Subsection 2 examines prosecution attempts to introduce expert testimony on offender profiling, and appellate courts' responses.

114. See *supra* text accompanying note 1.

115. See *infra* Subsections III.B.1-2.

116. For a discussion of these decisions, see *infra* Subsection III.B.2.

1. Failed Attempts by Defendants to Proffer Expert Profiling Testimony

Both trial and appellate courts rejected expert offender profiling testimony introduced by the defendant in two of the three cases identified in this Note.¹¹⁷ In *State v. Fain*, the Idaho Supreme Court affirmed a trial court's refusal to allow the defendant to introduce a psychological profile of the perpetrator that he did not fit, which was prepared by the FBI during their investigation of the crime.¹¹⁸ The court reasoned that "[a] profile, of course, is not a physical scientific test conducted upon actual evidence using well-established scientific principles."¹¹⁹ In dicta, the court also noted that the profile "would not have been relevant evidence as to the issue of the identity of the perpetrator of the crimes charged."¹²⁰

Similarly, in *State v. Stevens*, the Supreme Court of Tennessee affirmed a trial court's decision to exclude the testimony of a former FBI profiler regarding a murderer's motive.¹²¹ The defendant was accused of hiring an associate to kill his wife and mother-in-law and sought to qualify the erstwhile FBI profiler as an expert to testify that the crime scene was a "disorganized sexual homicide."¹²² Invoking the *Daubert* trilogy, the court reasoned that exclusion of the testimony was appropriate because "this type of crime scene analysis, developed by the FBI as a means of criminal investigation, relies on the expert's subjective judgment to draw conclusions as to the *type of individual* who committed this crime."¹²³ In addition, the court reasoned that an individual's guilt or innocence cannot be determined by "opinion evidence connected to existing data only by the *ipse dixit* of the expert."¹²⁴ The failed attempts to proffer expert offender profiling testimony in *Fain* and *Stevens* are the only appellate decisions identified in which appellate courts discussed the admissibility of defendants' use of this testimony.¹²⁵

117. In the third case, *People v. Tuite*, No. D044943, 2006 WL 3628819, at *8-9 (Cal. Ct. App. Dec. 14, 2006), discussed *infra* Section III.C, the trial court permitted the defendant to introduce expert offender profiling testimony, but the prosecution did not contest its admissibility.

118. 774 P.2d 252, 257 (Idaho 1989).

119. *Id.*

120. *Id.*

121. 78 S.W.3d 817, 823, 836 (Tenn. 2002).

122. *Id.* at 823, 830.

123. *Id.* at 835.

124. *Id.* (quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

125. A fourth case discusses offender profiling testimony offered by a defendant, but does not rule on its admissibility. In *State v. Spann*, 513 S.E.2d 98 (S.C. 1999), the Supreme Court of South Carolina reversed a trial court's decision to reject a motion for a new trial by a defendant

2. Mixed Results for Prosecutors Who Proffer Expert Profiling Testimony

In contrast to defendants, prosecutors have successfully proffered expert offender profiling testimony at the trial court level and have had mixed, as opposed to no, success at the appellate level. In particular, trial courts admitted offender profiling testimony offered by the prosecution in ten of eleven decisions identified for this Note, and appellate courts affirmed seven of the ten decisions to admit the testimony. The following discussion first describes a case that exposes how a prosecutor can present profiling testimony indirectly without asserting outright that a defendant fits the profile, which improperly invites the jury to conclude that a defendant is a certain type of offender. It then examines cases in which appellate courts failed to reject expert offender profiling testimony that relied on this improper inference.

In *People v. Robbie*, the defendant was convicted of kidnapping a sixteen-year-old girl for sexual purposes, oral copulation, and penetration with a foreign object.¹²⁶ According to the prosecution's witnesses, the defendant kidnapped the victim, took her to a remote hill where he threatened her with a knife and forced her to perform oral sex, and then drove her home, acting in a friendly manner and asking her about her school and work. The defendant did not contest that he had a sexual encounter with the victim, but asserted that she approached him seeking to purchase methamphetamine, and the sexual acts were payment for the drugs. The prosecution proffered a member of the California Department of Justice to testify that the defendant's conduct, particularly the friendly banter after the criminal act, was consistent with a certain type of rapist. The expert testified that she supervised the Violent Crime Profiling Unit, spending half of her time creating offender profiles for unsolved cases and half evaluating known offenders and attempting to link them to unsolved

convicted of sexual assault, murder, and burglary and sentenced to death. At the new trial hearing, the defendant presented the testimony of a crime scene analyst asserting that the perpetrator of the murder for which the defendant was convicted was responsible for two similar murders, and that the profile of the perpetrator did not match that of the defendant. The trial court denied the motion, holding that this evidence was available at the time of the defendant's original trial eighteen years earlier. The South Carolina Supreme Court ordered the new trial on the basis that the similarities between the crime scenes, which suggested they were committed by the same perpetrator, could not have been discovered by the exercise of due diligence. *Id.* at 621-22. After pleading a reduced sentence from the death penalty to a life sentence, the defendant was paroled in 2006. For a complete description of this case, see Keith Morrison, *A 20-Year Quest for Freedom*, MSNBC.COM, June 11, 2007, <http://www.msnbc.msn.com/id/19161103/>.

126. For the relevant facts of this case, see 112 Cal. Rptr. 2d 479, 479-83 (Cal. Ct. App. 2001).

crimes. Her expertise was based on more than a dozen years of experience, law enforcement courses, review of research material, and consultation with other analysts. The trial court permitted her testimony "to show that certain conduct of the type engaged in by defendant in this case was or is *consistent with* the conduct of a person who has committed the kinds of sexual crimes alleged here."

The First District Court of Appeal of California reversed the trial court's decision to permit the testimony of the prosecution's expert witness.¹²⁷ The court rejected her testimony principally because she opined that certain hypothetical conduct—friendly banter with the victim, which happened to be the exact conduct attributed to the defendant—was the most prevalent type of post-offense behavior displayed by sex offenders.¹²⁸ The court emphasized that this form of profile testimony is inherently prejudicial because it invites a flawed syllogism: "[C]riminals act in a certain way; the defendant acted that way; therefore, the defendant is a criminal."¹²⁹ The flaw in the syllogism is that it implies that innocent individuals never could act in the same manner, even though certain behavior—here, friendly banter—is consistent with both legal and illegal conduct.¹³⁰ The court held that the admission of this testimony was reversible error because the "jury was invited to conclude that if defendant engaged in the conduct described," then "he was indeed a sex offender."¹³¹ Although the court did not apply any admissibility standard explicitly, its exclusion based on logic and common sense is consistent with the inquiry required by *Daubert* and *Kumho Tire*. Several appellate courts have either recognized this flawed syllogism or properly rejected the testimony as unreliable and unscientific.¹³²

127. *Id.* at 488.

128. *Id.* at 482, 486.

129. *Id.* at 485.

130. *Id.*

131. *Id.* at 486. The court suggested that the expert testimony would have been permitted if it was proffered to disabuse the jury of common misconceptions about how rape is committed. Rather than testifying that certain behaviors are typical of sex offenders, the expert could have testified that rapists exhibit a variety of behaviors and that there is no typical sex offender. *Id.* at 487.

132. See *State v. Garcia*, No. 79917, 2002 WL 1874535, at *7 (Ohio Ct. App. Aug. 15, 2002) (holding that trial court's admission of crime scene analyst's testimony that an arson was committed for profit was harmless error, and reasoning that the testimony invaded the province of the jury without addressing its admissibility under Ohio's version of Rule 702); *State v. Roquemore*, 620 N.E.2d 110, 116-17 (Ohio Ct. App. 1993) (reversing trial court's decision to admit offender profiling testimony, asserting that the crime was "disorganized" and indicated an anger-retaliatory motivation because it is inherently prejudicial and the witness based his opinion "on his own 'studies' rather than upon an accepted scientific basis"); *State v. Haynes*, No. 4310, 1988 WL 99189, at *2-7 (Ohio Ct. App. Sept. 21, 1988) (reversing trial court's admission of

For example, in *State v. Lowe*, the Court of Appeals of Ohio affirmed a trial court's decision to exclude Douglas's testimony that a homicide was sexually motivated and that the defendant's writings were "sexually motivated and represented the defendant's plan or mission for power."¹³³ In rejecting Douglas's testimony, the court reasoned that "the purported scientific analytical processes to which Douglas testified are based on intuitiveness honed by his considerable experience in the field of homicide investigation," and that "sufficient evidence of reliability [was not] adduced to demonstrate the relevancy of the testimony or to qualify Douglas as an expert witness."¹³⁴ *Lowe* is the only case identified for this Note in which the prosecution appealed a trial court's decision to reject expert offender profiling testimony.

Although a few appellate courts have reversed trial court decisions to permit prosecutors' expert offender profiling testimony, most appellate courts have affirmed. In *United States v. Meeks*, a military court-martial convicted the defendant of the grisly murders of two of his acquaintances.¹³⁵ The prosecution submitted Judson Ray, an FBI profiler, as an expert witness to offer his opinion "concerning certain generic characteristics of the perpetrator derived from evidence at the crime scene."¹³⁶ The prosecution indicated that Ray's proposed testimony would be limited to explaining that the crime scene was organized and that the crime likely was committed by a single offender who knew the area and the victims.¹³⁷ He would further assert that it was a personal crime, that the offender committed it with controlled rage, and that the offender directed his anger and emotion at the victims.¹³⁸ The trial judge admitted the testimony, but prohibited Ray from describing physical characteristics of the suspected offender, such as age, and instructed that the testimony be limited to the analysis of the physical aspects of the crime scene.¹³⁹ Ray proceeded to testify in the manner summarized by the prosecution, also indicating that the offender went to the crime

expert offender profiling testimony—presented by the same expert that testified in *Roquemore*—because it is inherently prejudicial to the defendant and the State did not establish that it is scientifically reliable or would assist the jury).

133. 599 N.E.2d 783, 784-85 (Ohio Ct. App. 1991).

134. *Id.* at 785.

135. 35 M.J. 64, 65 (C.M.A. 1992).

136. *Id.* at 69.

137. *Id.* at 65-66.

138. *Id.*

139. *Id.* at 66.

scene "with sex and killing on his mind" and that the offender was known by the victims "because he ha[d] a right to be there."¹⁴⁰

The United States Court of Military Appeals affirmed the trial court's admission of Ray's testimony. Applying the Military Rule of Evidence 702, which was identical to the 1975 version of Rule 702, the court reasoned that Ray's crime scene analysis was based on scientific, technical, or other specialized knowledge, and it was not pure speculation, as the defense asserted. In support of this conclusion, the court cited the trial judge's inquiry into the basis of Ray's testimony, which had elicited the following response from the prosecution:

It's based on statistics, personal interviews . . . The [National Center for the Analysis of Violent Crime] itself has been studying these types of crimes for over ten years; they have interviewed all types of criminals; they examine the crime scene; they find out why criminals do certain things; and they are able to zero in on what counts. Using statistical analysis, computer analysis, they are able to determine the common denominators and what those items mean.¹⁴¹

Based on this assertion, the trial judge concluded that the "showing of expertise can hardly be considered speculation."¹⁴² The appellate court also noted that crime scene analysis, "the gathering and analysis of physical evidence, is generally recognized as a body of specialized knowledge."¹⁴³

Curiously, the *Meeks* court failed to acknowledge that much of Ray's testimony related to psychological characteristics of the offender, not physical aspects of the crime scene.¹⁴⁴ In addition, the court accepted at face value that the FBI had developed a statistical and scientific method of isolating distinct psychological motivations based purely on physical evidence, which, as discussed above, is not supported by any currently accepted scientific theory or empirical data—or even by FBI profilers themselves, who describe the process as "intuitive," not scientific. The court simply accepted the validity of the expert's method based on the *ipse dixit* of the prosecutor.

Similarly, in *Masters v. People*, the defendant was convicted of murdering a woman whose body was found several hundred feet from his home.¹⁴⁵ After the body was discovered, investigators searched the defendant's home and conducted multiple interviews, which revealed

140. *Id.* at 66-67.

141. *Id.* at 67. The BAU is a division of the National Center for the Analysis of Violent Crime.

142. *Id.* at 68.

143. *Id.*

144. *See id.* at 66-67 ("[T]he perpetrator in the instant case was 'an organized individual, an individual that had planned and spent some time in the preparation of this crime.'").

145. 58 P.3d 979, 983 (Colo. 2002).

substantial circumstantial evidence, but no direct evidence, linking the defendant to the crime.¹⁴⁶ Several years later, a forensic psychologist, Dr. Reid Meloy, examined the evidence and prepared a report that implicated the defendant as the offender.¹⁴⁷ The defense sought to prevent the admission of Dr. Meloy's testimony on the grounds that it was improper character evidence.¹⁴⁸ The prosecution asserted that Dr. Meloy's testimony did not relate to the defendant's character, but was "relevant to prove the identity of the perpetrator, the motivation and premeditation of the defendant, the defendant's planning of the crime, his opportunity to commit the crime, and his subsequent knowledge of the crime."¹⁴⁹

At a pretrial hearing, Dr. Meloy testified that he had expertise in sexual homicide; that sexual homicides are either organized, disorganized, or mixed; and that this crime was a disorganized sexual homicide with some organized features. Dr. Meloy also testified that fantasy can serve as the primary motivation for sexual homicide and that the defendant's writings reflected his fantasies.¹⁵⁰ The trial judge ultimately permitted Dr. Meloy to discuss "sexual homicide and identify the characteristics of the murder that were consistent therewith," to explain the relevance of fantasy and identify examples of the defendant's written productions that met the definition of fantasy, and to describe the types of events that might trigger a sexual homicide.¹⁵¹ However, the court prohibited Dr. Meloy from opining that the defendant committed the crime or that he fit the profile of a sexual homicide offender.¹⁵² Largely based on Dr. Meloy's testimony,¹⁵³ the defendant was convicted of first degree murder. The court of appeals affirmed the trial court's decision.

On appeal, the Supreme Court of Colorado held that the trial court did not abuse its discretion in admitting Dr. Meloy's testimony.¹⁵⁴ The court based its analysis on Colorado Rule of

146. *Id.* at 985. The circumstantial evidence included hundreds of writings and drawings conveying a hatred of women, some of which accurately depicted aspects of the crime scene, an admission from the defendant that he had thought about committing the kind of crime that had occurred, and the defendant's possession of specialized weapons that were necessary to commit the crime. *Id.* at 983-84.

147. *Id.* at 985.

148. *Id.*

149. *Id.*

150. *Id.* at 985-87.

151. *Id.* at 987, 992.

152. *Id.* at 987.

153. *Id.* at 985.

154. *Id.* at 988.

Evidence 702, which is identical to the 1975 version of Rule 702.¹⁵⁵ In particular, the court focused on whether the principles underlying Dr. Meloy's testimony were reasonably reliable.¹⁵⁶ The court found that the prosecution had established that Dr. Meloy's testimony was generally accepted in the forensic community, that an extensive body of specialized literature about sexual homicide exists, and that the research systematically compares groups of sexual homicide perpetrators to control groups.¹⁵⁷ The court also dismissed the claim that Dr. Meloy's testimony constituted impermissible profile evidence.¹⁵⁸ In previous cases, the court had rejected the use of profile testimony based on the "subjective, if not intuitive" judgment of the expert, which also described behaviors and characteristics that could apply equally to law-abiding citizens.¹⁵⁹ Applying these standards to Dr. Meloy's testimony, the court concluded that it was far from the "subjective, if not intuitive" judgment of experts in previous cases; instead, "Dr. Meloy relied on an objective, widely-recognized psychological theory, one which was founded on research and study, and one which the trial court determined was generally recognized within the forensic community."¹⁶⁰ In reaching this conclusion, the court rejected the assertions of the defense's expert, who argued that the prosecution expert's theories were not generally accepted because they had not been validated, the research was new, sample sizes were small, and the studies failed to use control groups.¹⁶¹

The Supreme Court of Colorado's decision in *Masters* is bothersome for many reasons. At a logical level, setting aside for now the validity of the science behind Dr. Meloy's testimony, the court walked directly into the flawed syllogism exposed by the *Robbie* court. The court plainly endorsed the proposition that profiling testimony can describe how certain criminals behave, that it can establish that innocent individuals never behave in the same manner, that a prosecutor can present evidence of the defendant's behavior, and that the jury can conclude that the defendant is a criminal because he behaved in conformity with the profile. Turning to the scientific validity of profiling, the court's decision that Dr. Meloy's method of offender profiling was valid and objective, despite the complete lack of any scientific validation and the claims of FBI agents that it is not

155. *Id.* at 988-89.

156. *Id.*

157. *Id.* at 989.

158. *Id.* at 993.

159. *Id.* (citing *Salcedo v. People*, 999 P.2d 833, 838 (Colo. 2000)).

160. *Id.* at 993-94.

161. *Id.* at 1010 (Bender, J., dissenting).

objective and is in fact "intuitive," is cause for concern.¹⁶² For the court to reach this conclusion, given the survey of the existing science presented in Section III.A., either the trial judge failed to evaluate critically Dr. Meloy's substantiation of his testimony, or Dr. Meloy wholly misrepresented the science behind his techniques.¹⁶³ Several other appellate courts also have affirmed trial court decisions to admit expert offender profiling testimony.¹⁶⁴

162. *Id.* at 993-94. Dr. Meloy was almost certainly applying the methodology developed by the BAU, or a technique inspired by it, because he used terminology such as "organized" and "disorganized," jargon which is unique to the BAU technique.

163. On January 22, 2008, a Colorado judge released Timothy Masters from prison based on new DNA evidence indicating that someone else committed the crime. Elliott C. McLaughlin, *Masters: Cop's Big Ego Stole Half My Life*, CNN, Jan. 24, 2008, <http://www.cnn.com/2008/CRIME/01/23/masters.case/>. A few days later, prosecutors asked a judge to dismiss the murder charge pending against Masters. See Elliott C. McLaughlin, *D.A.: Dismiss Murder Charge Against Tim Masters*, CNN, Jan. 25, 2008, <http://www.cnn.com/2008/CRIME/01/25/masters.charges/index.html>. The vacated conviction and dropped charges followed an inquiry by special prosecutors, which revealed that statements of a renowned FBI profiler disagreeing with Dr. Meloy's findings were withheld from defense attorneys. See Elliott C. McLaughlin, *Convicted by Doodles, Masters if Freed by DNA*, CNN, Jan. 25, 2008, <http://www.cnn.com/2008/CRIME/01/22/masters.case/index.html>. The new evidence also suggests that the FBI profile on which Dr. Meloy based his testimony either never existed or was a fraudulent profile created with the purpose of flushing out Masters. See Letter from Maria Liu and David Wymore, Att'ys for Timothy Masters, to Michael Goodbee, Assistant Dist. Att'y, and Chief Deputy Dist. Att'y, Tom Quammen, (Oct. 23, 2007), <http://i.a.cnn.net/cnn/2008/images/01/16/letter.pdf>. This case illustrates that admitting expert offender profiling testimony can result in wrongful convictions, especially when it is the primary evidence for the prosecution's case. Moreover, this case also suggests that defense attorneys may face significant obstacles to obtaining favorable expert offender profiling evidence.

164. In *Toney v. State*, No. 01-94-00239-CR, 1996 WL 183411, at *4 (Tex. Ct. App. Apr. 18, 1996), the court held that the failure of defendant's counsel to object to offender profiling testimony did not render counsel ineffective because the expert never concluded that the defendant matched the profile, even though the defendant did match in many respects. *Toney* is also noteworthy because both the trial and the appellate court appeared to accept the offender profiler's testimony that in her "career of sixteen years in police work, [she has] found that profiling is truly a science." *Id.* at *2. In *Simmons v. State*, 797 So.2d 1134, 1158 (Ala. Crim. App. 1999), the Alabama Appeals Court affirmed the trial court's admission of offender profiling testimony to establish that a murder was sexually motivated. Applying *Daubert* and *Kumho Tire*, the court determined that offender profiling is reliable as specialized knowledge because the expert testified that "research has been published within the field and subjected to peer review." *Simmons*, 797 So. 2d at 1155. Furthermore, the court found that offender profiling is generally accepted because the expert testified that "numerous law enforcement agencies rel[y] upon crime-scene analysis." *Id.* Both the *Toney* and *Simmons* courts apparently accepted the experts' bare assertions that offender profiling is a science, rather than conducting an actual inquiry into the question. See also *People v. Duvardo*, No. A098935, 2004 WL 2458585, at *15-16 (Cal. Ct. App. Nov. 3, 2004) (affirming the trial court's admission of offender profiling testimony, and accepting expert's testimony that it was not a "fledgling scientific technique," it was not "junk science," and it was as "old as Sherlock Holmes"); *State v. Patton*, 120 P.3d 760, 785 (Kan. 2005) (affirming trial court's admission of offender profiling testimony because it represented pure opinion testimony and was not subject to the requirements of *Frye*); *State v. Carlson*, Nos. 30435-0-II, 30435-0-II, 2006 WL 1237279, at *25 (Wash. Ct. App. May 10, 2006) (affirming trial court's admission of offender profiling testimony under the *Frye* standard).

C. Explanations for Decisions to Admit Expert Offender Profiling Testimony

Many factors explain why prosecutors' expert offender profiling testimony is admitted in criminal trials routinely despite its lack of scientific validity. One factor is the self-validating character of offender profiling—because law enforcement developed it to identify and convict criminals, experts in the field have no incentive to validate its principles and methodology scientifically. Thus, experts may present offender profiling as a non-scientific technique (deflecting questions regarding its scientific acceptance and whether it is supported in peer-reviewed literature), even though it is based on scientific claims and is subject to scientific verification.¹⁶⁵ Another factor is that defense attorneys may face many obstacles in rebutting prosecutors' expert offender profiling testimony. Finally, the increasing prevalence of offender profiling in the popular media may cause judges and juries to assign unwarranted credibility to the technique.

In his dissent in *Daubert*, Chief Justice Rehnquist expressed his concern that trial judges now held "either the obligation or the authority to become amateur scientists in order to perform" their gatekeeping role.¹⁶⁶ Professor Nance, echoing Rehnquist's concern, has argued that judges have difficulty in deferring to non-legal concepts of reliability (such as scientific validity) rather than assessing reliability based on legal standards.¹⁶⁷ But Rehnquist's concerns remain largely unattended in the context of criminal prosecutions, as judges do not appear to strictly scrutinize prosecution experts' qualifications, methodology, and application of their methods to the facts.¹⁶⁸ A review

165. See Risinger & Loop, *supra* note 9, at 251 (arguing that the FBI has the data to confirm or disconfirm its claims regarding linkage analysis, and it should not benefit from its "own failure to aid the generation of defensible data").

166. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 601 (1993) (Rehnquist, C.J., dissenting).

167. Dale A. Nance, *Reliability and the Admissibility of Experts*, 34 SETON HALL L. REV. 191, 208 (2003).

168. See Henry F. Fradella et al., *The Impact of Daubert on the Admissibility of Behavioral Science Testimony*, 30 PEPP. L. REV. 403, 444 (2003) ("There appears to be only one area in which *Daubert* is not being rigorously applied to behavioral science testimony. Courts are highly deferential to the 'expert opinions' offered by law enforcement officers based on their years of experience in the field when they offer opinions with regard to *modus operandi* or other aspects of 'the working criminal mind.' Explorations into their theoretical knowledge base, as well as the validity and reliability of both their methodologies and their conclusions, appear to have escaped *Daubert* review." (citations omitted)); Joelle A. Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?*, 79 TUL. L. REV. 1, 5-6 (2004) (evaluating post-*Daubert* case law).

of federal criminal court cases supports this conclusion, revealing that ninety-two percent of prosecution experts survive defense challenges, compared to only thirty-three percent of defense experts.¹⁶⁹

Judges' lack of scrutiny is particularly problematic when it occurs in the context of expert testimony related to a self-validating discipline.¹⁷⁰ This is a problem inherent in offender profiling because the only practitioners are current or former FBI agents, or others trained or influenced by the FBI.¹⁷¹ As a result, if a judge inquires into the extent of peer-reviewed research related to offender profiling, these practitioners are likely to respond by citing their experience and the self-validating studies produced by the FBI to support their technique, rather than the scientific research discussed above—of which most practitioners likely are unaware—that undermines much of their technique.¹⁷² Some scholars have addressed this problem by suggesting that “an opponent of self-validating evidence could establish that the field of expertise itself lacks adequate indicia of reliability (e.g., norms, standards, data collection, testing mechanisms).”¹⁷³ However, defense attorneys (as the typical opponents) encounter significant obstacles in establishing that offender profiling lacks these indicia of reliability.

An initial obstacle occurs when judges refuse to scrutinize expert testimony as amateur scientists, which shifts the responsibility to become amateur scientists to defense attorneys. A defense attorney may attempt to establish through cross-examination that the field of offender profiling lacks these indicia of reliability, but this is a daunting challenge that likely exceeds the resources, time, and training of most defense attorneys. As a result, a defense attorney may be more likely to submit her own expert in offender profiling to challenge the conclusions reached by the prosecution's expert. As soon as she resorts to this measure, however, she abandons the argument against the admissibility of offender profiling and instead shifts the focus to the weight of competing experts' testimony.

169. Risinger, *supra* note 113.

170. See Nance, *supra* note 167, at 207 (suggesting that deference to non-scientific expertise is inappropriate due to the lack of checks on this discipline).

171. For example, the state investigator in *Robbie*, 112 Cal. Rptr. 2d 479, 482-83 (Cal. Ct. App. 2001), and the forensic psychologist in *Masters*, 58 P.3d 979, 985-87 (Colo. 2002), both described crime scene analysis using the FBI's organized/disorganized jargon, thus indicating the FBI's influence on their training.

172. For examples of experts citing the self-validating studies or asserting the veracity of offender profiling, see the discussion of *Toney* and *Simmons*, *supra* note 164.

173. Moreno, *supra* note 168, at 32.

Introducing a defense expert in offender profiling may present additional challenges resulting from the status of offender profiling as a self-validated law enforcement technique. In particular, many current or former FBI and law enforcement agents may not be inclined to testify on behalf of defendants accused of violent crimes. Even if such agents are willing in principle to testify for defendants, practical pressures may prevent some from ultimately testifying. For example, in *People v. Tuite*, police arrested a transient named Richard Tuite for the murder of a twelve-year-old girl after his behavior following her murder aroused suspicion.¹⁷⁴ On the evening of the girl's death and during the following morning, Tuite had roamed around her neighborhood behaving strangely and repeatedly knocking on doors and looking into windows asking for someone named Tracy.¹⁷⁵ As part of Tuite's defense, Special Agent Mary Ellen O'Toole of the BAU testified that the crime scene was organized, the victim was targeted, and that the crime probably was committed by multiple perpetrators.¹⁷⁶ This testimony supported the defense theory that the murder was committed by the victim's brother and his friends and challenged the prosecution's theory that Tuite wandered into the girl's house and randomly attacked her.¹⁷⁷ As a rebuttal expert, the prosecution submitted retired FBI agent Gregg McCrary to attack O'Toole's crime scene reconstruction.¹⁷⁸ McCrary concluded that the crime scene was more disorganized than organized, supporting the prosecution's theory.¹⁷⁹ Tuite was convicted by a jury of voluntary manslaughter.¹⁸⁰

On appeal, Tuite argued that the trial court erred by precluding his defense counsel from cross-examining McCrary about his attempt to prevent O'Toole from testifying.¹⁸¹ At issue was a letter McCrary sent to the International Criminal Investigative Analysts

174. No. D044943, 2006 WL 3628819, at *2-5 (Cal. Ct. App. Dec. 14, 2006).

175. *Id.* Tracy and Tuite were friends ten years before the girl's death.

176. *Id.* at *8-9. O'Toole based her conclusions on a variety of factors. She testified that the victim was targeted "because (1) of six people in the house, only she was attacked; (2) the attacker had to pass other rooms to reach her bedroom; (3) there was no evidence of sexual assault or theft;" and (4) her injuries were stab wounds all located above her chest. *Id.* at *8.

177. *Id.* at *1.

178. *Id.* at *9.

179. *Id.*

180. *Id.* at *1. The prosecution's primary evidence was samples of blood taken from Tuite's t-shirt that matched the victim's DNA, but there were indications that cross-contamination could have occurred between Tuite's belongings and officers who investigated the crime scene.

181. *Id.* at *16.

Fellowship ("ICIAF") charging O'Toole with ethical violations.¹⁸² In his letter, McCrary asserted that O'Toole's defense testimony was an "attempt to obstruct justice and undermine the successful prosecution of . . . the true killer," which "damage[d] the relationship between the FBI, the ICIAF, and law enforcement agencies."¹⁸³ Despite asserting that investigators linked Tuite to the murder through "incontrovertible physical, forensic and circumstantial evidence," McCrary concluded by urging O'Toole not to testify, as her testimony is "an unnecessary obstacle to what is already a complicated and difficult prosecution."¹⁸⁴ The appellate court held that Tuite's defense counsel should have been allowed to impeach McCrary with his letter, but that the exclusion of the letter was harmless error.¹⁸⁵ McCrary's letter suggests that there is strong pressure from the offender profiling community against providing defense testimony, which may limit defense attorneys' access to expert witnesses of their own.¹⁸⁶

Not only is offender profiling subject to self-validation, but its increasing popularity in novels, films, and television programs suggests that judges, juries, and even law enforcement may attribute extra credibility to the technique.¹⁸⁷ Canter and his colleagues describe this process as the "Hollywood effect," which occurs when "loosely formulated and often unsubstantiated theories and models are featured in widely disseminated movies and given extra credibility" through mainstream broadcast.¹⁸⁸ Another result of this phenomenon is that offender profiling may be incorporated into practice casually and applied less systematically than some of the FBI profilers originally intended,¹⁸⁹ but it nonetheless will continue to carry significant persuasive authority.¹⁹⁰ Evidence of this effect can be

182. *Id.*; see also Katherine Ramsland, *Interview with Gregg O. McCrary—Violent Crimes Expert*, available at http://www.crimelibrary.com/criminal_mind/profiling/mccrary/3.html (last visited Dec. 27, 2007) (describing the ICIAF as an organization created by a group of FBI-trained profilers who conduct training sessions, establish standards, and certify profilers).

183. *Tuite*, 2006 WL 3628819, at *16.

184. *Id.*

185. *Id.* at *19.

186. See Interview with Gregg McCrary, Defense Expert Witness, *State v. Parker* (Oct. 27, 1998), available at http://www.corpus-delicti.com/McCrary_parker102798.htm (indicating that many current and former FBI-trained profilers have "harshly derided others in the profiling community for performing defense casework").

187. Canter et al., *supra* note 94, at 295.

188. *Id.*

189. *Id.*

190. See, e.g., Donald Q. Cochran, *Alabama v. Clarence Simmons: FBI "Profiler" Testimony to Establish an Essential Element of Capital Murder*, 23 LAW & PSYCHOL. REV. 69, 89 (1999) ("Because of the status of the FBI's Profiling and Behavioral Assessment Unit as the only

drawn from the *Robbie* and *Masters* cases, which involved offender profiling testimony offered by a local investigator and a forensic psychologist, respectively, who may have misrepresented (intentionally or unintentionally) the scientific support for the FBI's technique.¹⁹¹

Additional support for the increasing dissemination, dilution, and exaggeration of the capabilities of offender profiling comes from Gregg McCrary, who commented in an interview that a major issue "with profiling now is professionalism. Anyone can raise his hand and declare himself a 'profiler.' This discipline is in its embryonic stages and perhaps it's a bit like medicine was in the Wild, Wild West. You get a lot of quacks and snake oil salesmen running around."¹⁹² While McCrary directs his skepticism at "snake oil salesman" who are not members of or trained by the FBI, the same criticism could be leveled fairly at FBI profilers who insist that instinct is required for their job but simultaneously insist that it is a reliable form of expert testimony, who reject criticism of their techniques but prefer well staged courtroom performances over scientific validity. Until both FBI-trained profilers and other amateur profilers stop avoiding or ignoring attempts at scientific validation, courts should examine all expert testimony on offender profiling with exacting scrutiny.

IV. A PRESUMPTION AGAINST SELF-VALIDATING TECHNIQUES

As the popularity of FBI offender profiling continues to increase and its practitioners continue to enter the courtroom, trial judges will face the question of the admissibility of offender profiling testimony with more frequency. This Note has detailed the substantial deficiencies of offender profiling's evidentiary reliability, has discussed the challenges faced by trial judges in assuming the role of amateur scientists in their gatekeeping duties and has presented instances where trial and appellate courts have admitted expert offender profiling testimony erroneously. A single solution to the myriad issues raised by this form of expert testimony is difficult to formulate, but reference to other discussions of expert testimony in criminal trials serves as a starting point.

At least one scholar has argued that the admissibility of expert testimony for the prosecution and defense should be evaluated under

organization in the world that specializes in the investigation of bizarre and brutal crimes, testimony by members of the unit will always be powerful evidence.").

191. *People v. Robbie*, 112 Cal. Rptr. 2d 479, 482-83 (Cal. Ct. App. 2001); *Masters v. People*, 58 P.3d 979, 985-87 (Colo. 2002).

192. Ramsland, *supra* note 182.

different standards in criminal cases.¹⁹³ Professor Slobogin has argued that *Daubert* and its progeny will limit the admissibility of defense experts disproportionately (as compared to prosecution experts) because defense theories are more likely to rely on claims about the defendant's mental state.¹⁹⁴ Prosecution theories, on the other hand, are more likely to rely on testimony related to physical facts that are more verifiable.¹⁹⁵ To adjust for the different theories underlying defense and prosecution strategies, Professor Slobogin proposes that courts should admit unverified defense expert testimony if (1) it is "considered plausible among the relevant professionals" and (2) the expert employed accepted evaluation methods.¹⁹⁶

The adoption of different admissibility standards is unlikely to occur, as the Supreme Court rejected a more relaxed reliability standard for the admission of polygraph tests offered by criminal defendants in *United States v. Scheffer*.¹⁹⁷ An alternative admissibility standard such as Professor Slobogin's, even if it were employed, still would not correct trial courts' improper admission of offender profiling submitted by the prosecution. At best, relaxed admissibility standards would result only in more admissions of defendants' offender profiling evidence, which this Note argues is unwarranted, rather than fewer admissions of prosecutors' expert offender profiling testimony.

Professor Moreno has suggested that Professor Slobogin's argument may be grounded in the type of expert testimony introduced, rather than in which party is introducing it.¹⁹⁸ For example, both prosecution and defense expert testimony might be subject to more permissive standards if the evidence relates to mental state evidence and the more stringent *Daubert* requirements if it relates to physical evidence.¹⁹⁹ But Professor Moreno rejects this solution as both untenable and undesirable.²⁰⁰ Even if this solution was viable, it likely would produce the undesired result of increasing the admission of expert offender profiling testimony proffered by the prosecution. Rather than attempting to ground their technique in the

193. Christopher Slobogin, *The Structure of Expertise in Criminal Cases*, 34 SETON HALL L. REV. 105, 108-09 (2003).

194. *Id.*

195. *Id.* at 110.

196. *Id.* at 124.

197. In *Scheffer*, the Court rejected a defendant's contention that stringent admissibility standards prejudicially prevented the introduction of expert polygraph testimony to bolster his credibility, reasoning that the defendant could have bolstered his credibility by testifying in his own defense. 523 U.S. 303, 317 (1998).

198. Moreno, *supra* note 168, at 50.

199. *Id.*

200. *Id.*

physical characteristics of the crime scene, profilers would be free to characterize their testimony as inferences regarding the mental characteristics of the offender, thus enjoying a more permissive standard of admissibility.

Different admissibility standards are unlikely to correct the problems associated with the admissibility of expert offender profiling testimony; therefore, a more realistic solution may be to improve existing admissibility standards. Professor Moreno has proposed that admissibility standards can be improved in the context of law enforcement testimony related to drug jargon, which, like offender profiling, has been criticized for its self-validating nature and lack of reliability.²⁰¹ Professor Moreno argues that drug jargon expert testimony, which primarily is based on the expert's experience in law enforcement, should be excluded "unless the expert can explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."²⁰² Adopting Professor Moreno's proposal as a starting point, this Note proposes a similar solution to the problem of expert offender profiling testimony. This solution also may apply to other forms of expert testimony proffered by experts in disciplines that are created for the sole purpose of investigating or prosecuting crimes.

Expert testimony presented by law enforcement in criminal trials is inherently different from expert testimony presented by those with scientific, technical, or specialized knowledge in other fields. Other fields of expertise do not exist for the express purpose of investigating crimes or convicting criminal defendants; rather, they typically exist for other purposes, and it is only later that practitioners apply the field's techniques to criminal cases. For example, DNA analysis originally was developed for purposes of biological research, not criminal investigations.²⁰³ Although it often is applied in criminal investigations, and entire labs are now devoted to the analysis of DNA evidence, its foundation remains as a biological science that only secondarily informs criminal investigations. The analysis under *Daubert* is fairly straightforward when judges consider the admissibility of expert testimony related to disciplines outside of law enforcement such as DNA analysis, as these techniques are grounded in theories and methodologies that are not devoted solely to the conviction of criminal defendants. For example, objective critiques of

201. *Id.* at 54.

202. *Id.* (quoting Fed. R. Evid. 702 advisory committee note) (internal quotations omitted).

203. *See id.* (citing DNA evidence as an example of an evidentiary method "derived from a scientific field of well-established validity").

existing methods are more likely to appear in the scholarly publications of disciplines that exist independent of criminal investigations because practitioners have an incentive to refine their techniques to achieve the goals that originally animated the discipline. In addition, a *Daubert*-style analysis is more equitable as between the defense and prosecution in disciplines outside of criminal investigations because experts are more or less equally available for both sides, and law enforcement agencies are not in a position to exert undue influence on experts testifying on behalf of defendants.

Experts in disciplines devoted primarily to the investigation and prosecution of crimes, however, have the perverse incentive to self-validate their techniques and avoid the theoretical and methodological rigor that can produce disconfirming results. In addition, individuals submitted as experts in these disciplines may misrepresent—intentionally or unintentionally—the evidence that exists to validate their technique.²⁰⁴ Offender profiling experts have asserted that published research exists to support offender profiling by referring to the *Crime Classification Manual*,²⁰⁵ despite the fact that this manual expressly states that no effort has been made to validate its contents.²⁰⁶ Finally, experts in disciplines devoted primarily to criminal investigations and prosecutions may be disinclined to appear or pressured against appearing as experts for the defense.

For all of the above reasons, trial courts should adopt a presumption against admitting testimony proffered by experts in disciplines that are created for the sole purpose of investigating or prosecuting crimes. Judges should insist on hearing convincing evidence that the expert's discipline is reliable and valid, require the expert to explain the assumptions underlying the technique in detail, and determine whether the expert can apply the technique reliably to individual cases.

To rebut the presumption, the party introducing the expert can produce published literature supporting the technique. When

204. Such unintentional misrepresentation is more likely to occur as practitioners become further removed from the individuals who originally developed the discipline.

205. Dr. Park Dietz, a highly regarded forensic psychiatrist and expert witness, made this assertion during his pretrial testimony in the civil lawsuit against O.J. Simpson. He stated that the best known work in crime scene analysis is the *Crime Classification Manual*, then went on to say that profiling is not a new scientific technique and should not be excluded by the trial court under the *Frye* standard. See CourtTV Case Files, O.J. Simpson Transcript (Nov. 7, 1996), available at <http://www.courtTV.com/casefiles/simpson/transcripts/nov/nov07.html>.

206. DOUGLAS ET AL., *supra* note 17, at 22 (indicating that "there have been no systematic efforts to validate [the] profile-derived classifications" described by the *Crime Classification Manual*).

reviewing this literature, the judge should consider its source, content, and relevance. This review need not be a scientific examination of the literature, but the judge must demand more than the expert's unsupported representations that the method is valid and reliable. For instance, if a judge examined the *Crime Classification Manual*, she would recognize that it is published by FBI agents and is not peer-reviewed, and she may even discover that its introduction expressly disclaims any validity for its method. If an expert does not have published literature at his disposal to substantiate his technique, he can produce personal records or a database of investigations in which the technique was applied. The judge then can evaluate how frequently the technique is used, how successful it is, how frequently it produces errors, the nature and magnitude of its errors, and so forth. In addition, this requirement will force experts to disclose to opposing counsel information and data regarding their techniques, thus alleviating a recurrent information asymmetry faced by opponents of law enforcement techniques.

Unfortunately, this presumption apparently is necessary to incentivize some law enforcement experts to validate their theories and methodologies scientifically. Ironically, a strong presumption against the admission of un-validated offender profiling testimony may dovetail with profilers' long term goal of more effectively identifying and prosecuting serial murderers and rapists. As scientists empirically examine offender profiling, they may discover new techniques that not only are logically coherent, scientifically valid, and admissible as expert testimony, but also are more effective and reliable than current techniques at identifying unknown offenders. To this end, FBI profilers and other practitioners of law enforcement techniques should make their methods and data more widely available and encourage scientific validation.

V. CONCLUSION

This Note makes a valuable contribution to scholarly research related to the admissibility of expert offender profiling testimony introduced in high-stakes murder and rape cases. Scholars have not explored whether courts admit or reject expert offender profiling testimony, perhaps because they believed that judges rarely, if ever, would admit it in criminal trials due to its prejudicial nature as character evidence. However, this Note demonstrates that trial and appellate courts have permitted the use of offender profiling when the prosecution introduces it as expert testimony related to crime scene analysis, which can effectively disguise its prejudicial features. In

addition, this Note supplements existing critiques of linkage analysis by demonstrating the limitations of the theoretical and methodological assumptions that underlie both offender profiling and linkage analysis.

This Note proposes a judicial presumption against the admission of expert testimony related to disciplines developed primarily for use in criminal investigations and prosecutions. Experts can rebut this presumption by producing convincing, objective evidence of the validity of the discipline, as well as its propensity for reliable application to individual cases. A presumption against admission is necessary to incentivize practitioners in disciplines related solely to the investigation and prosecution of crimes to analyze objectively and validate their techniques. This presumption also will help compensate for the inability of defense counsel to access experts in these disciplines. Such a presumption also will limit testimony from practitioners who are far removed from the original developers of the discipline and who casually may overstate or exaggerate the validity of the discipline. Finally, this presumption is preferable from a policy perspective because criminal defendants in cases where offender profiling testimony is proffered typically are facing convictions for murder or rape—and the severe sentences that accompany these crimes—so trial courts should be especially guarded against well-staged performances and glorified results.

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