
PREMISES SECURITY EXPERTS AND ADMISSIBILITY CONSIDERATIONS UNDER DAUBERT AND KUMHO: A REVISED STANDARD

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I. INTRODUCTION

Challenges to the admissibility of expert testimony have increased substantially in the past decade.¹ Research for this article uncovered

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¹ See TELLUS INSTITUTE, PROJECT ON SCIENTIFIC KNOWLEDGE AND PUBLIC POLICY,

twenty-two cases reported since 1994 in which a premises security expert was challenged.² The majority of these cases were reported in the past eight years.³ This increase can be directly attributed to tort reform measures that require trial judges to limit or exclude the testimony of premises security experts⁴ who are deemed unqualified or whose opinions are found to be unreliable according to current legal theories on admissibility.⁵

Having one's expert excluded or testimony limited can have a

DAUBERT: THE MOST INFLUENTIAL SUPREME COURT CASE YOU'VE NEVER HEARD OF, 4 (2003), <http://www.defendingscience.org/upload/Daubert-The-Most-Influential-Supreme-Court-Decision-You-ve-Never-Heard-Of-2003.pdf> (last visited Feb. 4, 2010) ("Following *Daubert*: [t]he percentage of expert testimony by scientists that was excluded from the courtroom rose significantly.").

² See generally *Briggs v. Wash. Metro. Area Transit Auth.*, 481 F.3d 839 (D.C. Cir. 2007); *Shah v. Pan Am. World Servs., Inc.*, 148 F.3d 84 (2d Cir. 1998); *Del Valle v. Vornado Realty Trust*, 515 F. Supp. 2d 222 (D.P.R. 2007); *Novak v. Capital Mgmt. & Dev. Corp.*, No. 01-00039 (HHK), 2007 WL 6215856 (D.D.C. May 17, 2007); *Childress v. Ky. Oaks Mall Co.*, No. 5:06CV-54-R, 2007 WL 2772299 (W.D. Ky. Sep. 20, 2007); *Birge ex rel. Mickens v. Dollar Gen. Corp.*, No. 04-2531 B/P, 2006 WL 5175758 (W.D. Tenn. Sept. 28, 2006); *Rankin v. Union Pac. R.R. Co.*, No. 04-cv-00372-OES-PAC, 2005 WL 6000492 (D. Colo. Sept. 29, 2005); *Starnes v. Sears Roebuck & Co.*, No. 01-2804 B AN, 2005 WL 3434637 (W.D. Tenn. Dec. 14, 2005); *Peterson v. Scotia Prince Cruises, Ltd.*, 323 F. Supp. 2d 128 (D. Me. 2004); *Bethea v. Bristol Lodge Corp.*, No. CIV. A. 01-612, 2002 WL 31859434 (E.D. Pa. Dec. 18, 2002); *Breiding v. Family Dollar Stores*, No. CS-01-248, 2002 WL 1584281 (S.D. Ohio Jun. 11, 2002); *Maguire v. Nat'l R.R. Passenger Corp.*, No. 99 C 3240, 2002 WL 472275 (N.D. Ill. Mar. 28, 2002); *Grdinich v. Bradlees*, 187 F.R.D. 77 (S.D.N.Y. 1999); *Kerlec v. E-Z Serve Convenience Stores, Inc.*, No. CIV. A. 97-2577, 1998 WL 637244 (E.D. La. Sept. 16, 1998); *Van Blargan v. Williams Hospitality Corp.*, 754 F. Supp. 246 (D.P.R. 1991); *Rogers v. Del. State Univ.*, No. 03C-03-218-PLA, 2007 WL 625060 (Del. Super. Feb. 28, 2007); *Hart v. Resort Investigations & Patrol*, No. C.A. 01C-12-029 ESB, 2004 WL 2050511 (Del. Super. Sept. 9, 2004); *Pyles v. Weaver*, 958 So.2d 753 (La. Ct. App. 2007); *Posecai v. Wal-Mart Stores, Inc.*, 731 So.2d 438 (La. Ct. App. 1999), *rev'd*, 752 So.2d 762 (La. 1999) (rejecting lower court's duty of care analysis); *Smith v. Ameristar Casino Vicksburg, Inc.*, 991 So.2d 1228 (Miss. Ct. App. 2008); *Lincoln Prop. Co. v. DeShazo*, 4 S.W.3d 55 (Tex. App. 1999); *Glasscock v. Income Prop. Servs., Inc.*, 888 S.W.2d 176 (Tex. App. 1994).

³ See *supra* note 2.

⁴ Premises security experts ("security experts"), as discussed in this article, are consultants specializing in evaluating the adequacy of security at various locations including retail establishments, restaurants, hotels, hospitals, and public transportation systems.

⁵ See Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 472 (2005) (stating *Daubert* has become potent tort reform weapon causing closer judicial scrutiny of scientific evidence); see also TELLUS INSTITUTE, *supra* note 1, at 3 (arguing *Daubert* insulates defendants from product and personal injury liability); Ned Miltenberg, *Out of the Fire and into the Fryeing Pan or Back to the Future*, 37 TRIAL 18, March, 2001 at 19 ("[G]roups like the American Tort Reform Association and the Defense Research Institute are urging defense lawyers to file *Daubert* motions whenever possible. These groups advise that the motions provide a relatively low-cost way to exhaust the finances and patience of all but the most well-funded and persistent plaintiff lawyers.").

devastating impact on the outcome of a case.⁶ As such, trial attorneys must be mindful of the potential for challenges to their expert's testimony and take the appropriate steps to avoid or successfully defeat such challenges. The purpose of this article, therefore, is to educate and provide guidance to trial attorneys and members of the judiciary on issues pertinent to the admissibility of expert testimony in premises security cases. This article identifies the lack of specific guidance regarding the appropriate standard to apply in admissibility determinations of premises security experts brought under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁷ and *Kumho Tire Co. v. Carmichael*.⁸ In *Daubert*, the United States Supreme Court outlined a uniform federal standard for the admissibility of scientific expert evidence but failed to address whether the same standard also applied to non-scientific evidence.⁹ *Kumho* answered this question by extending *Daubert* to non-scientific evidence, reasoning that the Federal Rules make no distinction between the types of evidence and, therefore, a uniform admissibility standard should apply to both.¹⁰ However, in failing to draw a distinction between the two types of evidence, *Kumho* has persuaded trial judges to evaluate security and other non-scientific experts according to an incongruous standard.¹¹ While instructive to an admissibility determination of scientific evidence, a strict application of the *Daubert* factors is not suitable for determining the reliability of non-scientific evidence because it fails to contemplate issues unique to non-scientific evidence.¹² This fact necessitates a new admissibility standard that comports with the requirements of the Federal Rules while recognizing the important

⁶ If plaintiff's expert is excluded at time of trial, plaintiff remains vulnerable to a directed verdict for failure to establish the elements of his case. *See Am. & Foreign Ins. Co. v. Gen. Elec. Co.*, 45 F.3d 135, 136 (6th Cir. 1995) (affirming directed verdict for defendant after excluding portions of plaintiff's expert testimony); *Hart v. Resort Investigations & Patrol, No. C.A. 01C-12-029 ESB*, 2004 WL 2050511 (Del. Super. Sept. 9, 2004) (granting defendant's motion for summary judgment in part because expert unqualified to render opinion); *see also* TELLUS INSTITUTE, *supra* note 1, at 3 ("[I]n many cases, pre-trial 'Daubert hearings' exclude so much of the evidence upon which plaintiffs intend to rely that a given case cannot proceed.").

⁷ 509 U.S. 579 (1993).

⁸ 526 U.S. 137 (1999); *see also infra* Part IV (discussing lack of guidance as to correct admissibility standard for non-scientific expert testimony).

⁹ *See infra* Part III.A (exploring development and application of *Daubert* standard).

¹⁰ *Kumho*, 526 U.S. at 147 (holding Rule 702 applies reliability standard to all scientific, technical and other specialized knowledge within its scope).

¹¹ *See infra* Part IV.B.

¹² *See* Kristina L. Needham, Note, *Questioning the Admissibility of Nonscientific Testimony after Daubert: The Need for Increased Judicial Gatekeeping to Ensure the Reliability of All Expert Testimony*, 25 FORDHAM URB. L.J. 541, 564 (1998) ("[T]he *Daubert* factors are not tailored to suit the specific concerns that arise when determining whether to admit nonscientific expert testimony.").

differences between scientific and non-scientific evidence.

This article addresses the difficulties arising from *Kumho*'s extension of *Daubert* to non-scientific evidence. Part II examines the evolution of expert testimony. Part III presents the standards for the admissibility of expert testimony as outlined in *Daubert* and *Kumho*. Part IV discusses the critical differences between scientific and non-scientific expert evidence in the context of *Kumho*'s expansion of *Daubert*. Part V suggests a more appropriate standard for the admissibility of premises security expert testimony based on Federal Rule of Evidence 702, and includes an analysis of the manner in which several lower courts have already applied the language of Rule 702 to the testimony of numerous premises security experts. This standard requires that the expert demonstrate that he is qualified to testify as a security expert, that he will assist the fact-finder in making a determination, that he has employed a reliable methodology by reviewing all relevant facts and identifying applicable industry standards, and that he has applied the methodology to the specific facts of the case.¹³

This focus of this article is on improving the quality of premises security expert testimony, avoiding exclusion of such testimony for failure to meet a strict application of *Daubert*, and reducing the incidence of unsupported, unreliable opinions capable of substantially altering the outcome of a case. By educating legal and security professionals about the current law on the admissibility of expert testimony and by suggesting a new standard for the admissibility of premises security experts, this article aims to achieve these objectives.

II. THE EVOLUTION OF EXPERT TESTIMONY ADMISSIBILITY

There is a long history of development regarding the standards that state and federal courts apply in evaluating the admissibility of expert testimony.¹⁴ In 1923, the United States Court of Appeals for the District of

¹³ See *infra* Part V (discussing standard in more detail).

¹⁴ The use of expert testimony as a means of settling legal disputes can be dated as far back as 1620. See Kimberly M. Hrabosky, Case Note, *Kumho Tire v. Carmichael: Stretching Daubert Beyond Recognition*, 8 GEO. MASON L. REV. 203, 203 (1999). Until the early part of the twentieth century, all expert testimony was admissible if deemed relevant. *Id.* In 1923, the United States Court of Appeals for the District of Columbia articulated the first specific standard for the admissibility of scientific expert evidence in *Frye v. United States*. *Id.*; see also *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). The majority of courts employed the standard enunciated in *Frye* known as the "general acceptance test," until the 1975 adoption of the Federal Rules of Evidence, which caused confusion regarding the appropriate standard of admissibility. See FED. R. EVID. 702; Stewart Lee, *Evidence-Expert Witnesses-Daubert Applies to All Expert Testimony*, 69 MISS. L.J. 979, 982 (1999) (noting confusion over applying *Frye* standard in light

Columbia enunciated the first standard that courts uniformly applied in *Frye v. United States*.¹⁵ The court in *Frye* applied a “general acceptance” test, where scientific expert testimony was admissible if such evidence was “sufficiently established to have gained general acceptance in the particular field in which it belongs.”¹⁶ Following its formation, *Frye*’s general acceptance test was the dominant standard applied in determining the admissibility of novel scientific evidence.¹⁷

However, in 1975, the Federal Rules of Evidence were adopted and, as a result, significant confusion arose concerning which standard should apply.¹⁸ Federal Rule of Evidence 702 states:

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.¹⁹

Nowhere in the text of the rule is an explicit reference to “general acceptance” as a standard by which admissibility of an expert’s testimony is to be determined.²⁰ Nonetheless, courts continued to apply the general acceptance test or a combination of the general acceptance test and the

of Federal Rules). In 1993, the *Daubert* Court addressed whether the Federal Rules standard superseded *Frye*. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993). The *Daubert* Court held that the Rules had superseded *Frye* and that Federal Rule of Evidence 702 established a new standard of admissibility for Federal courts. *Id.*

¹⁵ 293 F. 1013, 1014 (D.C. Cir. 1923).

¹⁶ *Id.*

¹⁷ See *Daubert*, 509 U.S. at 585 (citing E. Green & C. Nesson, PROBLEMS CASES, AND MATERIALS ON EVIDENCE 649 (1983)) (noting widespread application of *Frye* general acceptance test); see also Jon May, *Deconstructing Daubert: Rule 702 and Non-Scientific Evidence*, CHAMPION, June 2007, at 18 (noting the *Frye* “general acceptance test dominated the legal landscape for . . . 70 years”).

¹⁸ See Cassandra H. Welch, Note, *Flexible Standards, Differential Review: Daubert’s Legacy of Confusion*, 29 HARV. J.L. & PUB. POL’Y 1085, 1087 (2006) (observing “sharp divisions” regarding proper admissibility standard of expert testimony developed among circuit courts post-*Frye*); see also Michael C. Polentz, Comment, *Post-Daubert Confusion with Expert Testimony*, 36 SANTA CLARA L. REV. 1187, 1187 (1996) (acknowledging inconsistencies due to federal courts’ use of both *Frye* and Federal Rules of Evidence standard).

¹⁹ FED. R. EVID. 702.

²⁰ *Id.*; see also Xavier Pena, Note, *The Effective Evaluation of Expert Reliability*, 20 REV. LITIG. 743, 744 (2001) (tracing evolution of expert testimony admissibility standards).

Federal Rule's "relevance" standard, which allowed courts to admit expert testimony relevant to the facts at issue.²¹ The absence of a uniform standard continued to cause confusion and the extent to which the Federal Rules overruled *Frye*'s general acceptance test garnered significant debate in the decades following modification of the Rule.²²

In the 1993 case, *Daubert v. Merrell Dow Pharmaceuticals*, the United States Supreme Court sought to clarify the appropriate standard for admitting expert testimony.²³ In *Daubert*, the Court rejected *Frye*'s general acceptance test and held that the Federal Rules' relevance standard superseded *Frye*.²⁴ The new standard that *Daubert* outlined for all federal courts requires trial judges to be "gatekeepers" to ensure that scientific evidence is both relevant and reliable before it is admitted into evidence.²⁵ While state courts are not bound by the *Daubert* opinion, as of the date of this publication, twenty-one states have adopted the Court's ruling, and nine states have noted that their rules of evidence are consistent with *Daubert*.²⁶ This trend is likely to continue as more states adopt the federal

²¹ See *Harris v. Commonwealth*, 846 S.W.2d 678, 681 (Ky. 1992), *overruled by* *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995) (requiring trial courts to follow the dictates of *Frye* standard); *United States v. Kozminksi*, 821 F.2d 1186, 1210 (6th Cir. 1987) (en banc), *aff'd*, 487 U.S. 931 (1988) (combining *Frye* standard with Federal Rule of Evidence relevance standard).

²² Compare *United States v. Downing*, 753 F.2d 1224, 1237 (3rd Cir. 1985) (rejecting *Frye* standard), with *United States v. Tranowski*, 659 F.2d 750, 755-56 (7th Cir. 1981) (adopting *Frye* standard); and compare *United States v. Williams*, 583 F.2d 1194, 1198-1201 (2nd Cir. 1978) (*Frye* superseded by Rules of Evidence), with *Christopherson v. Allied-Signal Corp.*, 939 F.2d 1106, 1111, 1115-1116 (5th Cir. 1991) (en banc) (*Frye* and Federal Rules coexist); see also Geoffrey D. Marshall, *Daubert v. Merrell Dow Pharmaceuticals, Inc.: The Standard for Admitting Expert Scientific Testimony in a Federal Trial*, 1994 DET. C.L. REV. 927, 930 ("The adoption of the Federal Rules of Evidence in 1975 has created a split of authority in the federal courts.").

²³ 509 U.S. 579, 582 (1993).

²⁴ See *Daubert*, 509 U.S. at 587-88 (noting nothing in text or history of Rule 702 establishes "general acceptance" as absolute prerequisite to admissibility).

²⁵ *Id.* at 579-80 ("The Rules-especially Rule 702-place appropriate limits on the admissibility of purportedly scientific evidence by assigning the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."); see also FED. R. EVID. 702. "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. . . ." *Id.*

²⁶ The following states have adopted *Daubert*'s ruling: Alabama (with limited application), Alaska, Arkansas, Connecticut, Delaware, Georgia, Kentucky, Louisiana, Massachusetts, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, Ohio, Oklahoma, South Dakota, Texas, Vermont, West Virginia, Wyoming. See 2005 Ga. Laws Act 1; Miss. R. Evid. 702 (amended May 2003 to adopt *Daubert* standard); *AAA Cooper Transp. v. Philyaw*, 842 So.2d 689, 690-91 (Ala. Civ. App. 2002); *Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Foote*, 14 S.W.3d 512, 519 (Ark. 2000); *State v. Porter*, 698 A.2d 739, 742-43 (Conn. 1997); *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 521-22 (Del. 1999); *Mitchell v. Commonwealth*, 908 S.W.2d 100, 101 (Ky. 1995) *rev'd on other grounds by* *Fugate v. Commonwealth*, 993 S.W.2d

standard.²⁷

III. NAVIGATING *DAUBERT*

The plaintiffs in *Daubert* were two minor children born with serious birth defects, which their parents claimed were caused by the mothers' ingestion of Benedictin, a prescription anti-nausea medication marketed by Merrell Dow Pharmaceuticals.²⁸ Merrell Dow Pharmaceuticals filed a motion for summary judgment to dismiss the suit, arguing that the plaintiffs lacked evidence to establish the drug caused birth defects.²⁹ The plaintiffs offered the expert testimony of eight scientists who asserted the drug did cause birth defects.³⁰ The district court granted the motion for summary judgment holding that such testimony was inadmissible because the studies the experts relied upon in forming their opinions were not the type reasonably relied upon by experts in the field.³¹

931 (Ky. 1999); *State v. Foret*, 628 So.2d 1116, 1121-23 (La. 1993); *Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1348-49 (Mass. 1994); *State v. Moore*, 885 P.2d 457, 471 (Mont. 1994) *rev'd on other grounds by City of Billings v. Bruce*, 965 P.2d 866 (Mont. 1998); *Schafersman v. Agland Coop*, 631 N.W.2d 862, 867 (Neb. 2001); *Baker Valley Lumber, Inc. v. Ingersoll-Rand Co.*, 813 A.2d 409, 415 (N.H. 2002); *State v. Alberico*, 861 P.2d 192, 203 (N.M. 1993); *Miller v. Bike Athletic Co.*, 687 N.E.2d 735, 740-41 (Ohio 1998); *Christian v. Gray*, 65 P.3d 591, 594, 600 (Okla. 2003); *State v. Hofer*, 512 N.W.2d 482, 484 (S.D. 1994); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995); *State v. Brooks*, 643 A.2d 226, 229 (Vt. 1993); *Wilt v. Buracker*, 443 S.E.2d 196, 200-03 (W.Va. 1993); *Bunting v. Jamieson*, 984 P.2d 467, 468 (Wyo. 1999). Idaho, Indiana, Maine, Michigan, New Jersey, Oregon, Rhode Island, Tennessee, and Utah have deemed *Daubert* consistent with state law. *See State v. Parkinson*, 909 P.2d 647, 652 (Idaho Ct. App. 1996); *Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995); *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 532-33 (Iowa 1999); *Green v. Cessna Aircraft Co.*, 673 A.2d 216, 218 (Me. 1996); *Brabant v. St. John River Dist. Hosp.*, No. 263168, 2005 WL 3481511, at *4 (Mich. Ct. App. Dec. 20, 2005); *In re Phenylpropanolamine*, 2003 WL 22417238, at *22 (N.J. Super. Ct. July 21, 2003); *State v. Lyons*, 924 P.2d 802, 804 (Or. 1996); *State v. Morel*, 676 A.2d 1347, 1355 (R.I. 1996); *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 262 (Tenn. 1997); *State v. Crosby*, 927 P.2d 638, 641-42 (Utah 1996); *see also* Eric Helland & Jonathan Klick, *Does Anyone Get Stopped at the Gate? An Empirical Assessment of the Daubert Trilogy in the States* (2009) University of Pennsylvania Law School Paper 270, available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1275&context=upenn/wps> (listing states that have adopted *Daubert* and progeny).

²⁷ *See* Alan C. Hoffman, *The Standard for Admissibility of Evidence: Yesterday and Today*, 19 Annals Health L. 161, 164 (2010) (observing that federal courts apply *Daubert* and state courts split between applying *Daubert* and *Frye*).

²⁸ *Daubert*, 509 U.S. at 579.

²⁹ *Daubert v. Merrell Dow Pharm., Inc.*, 727 F. Supp. 570, 571 (S.D. Cal. 1989).

³⁰ *Id.* at 573-75.

³¹ *Id.* at 572. The court stated that "a necessary predicate to the admission of scientific evidence is that the principle upon which it is based 'must be sufficiently established to have general acceptance in the field to which it belongs.'" *Id.* (quoting *United States v. Kilgus*, 571 F.2d 508, 510 (9th Cir.1978)). Citing to FED. R. EVID. 403, which permits the court to exclude

The United States Court of Appeals for the Ninth Circuit affirmed the decision.³² Citing *Frye*, the Ninth Circuit held that “[e]xpert opinion based on a scientific technique ‘is admissible if it is generally accepted as a reliable technique among the scientific community.’”³³

The United States Supreme Court overturned the Ninth Circuit’s decision and held that the Federal Rules of Evidence, and not *Frye*’s “general acceptance” test, is the appropriate standard for admitting expert testimony.³⁴ The Court reasoned that “[n]othing in the text of [Rule 702] establishes ‘general acceptance’ as an absolute prerequisite to admissibility.”³⁵ The Court also noted that the Federal Rules appropriately limit the admissibility of scientific evidence by assigning to the federal trial judge the role of “ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”³⁶ When faced with an expert who intends to testify, the trial judge must determine “whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.”³⁷

The Court offered four factors for trial judges to consider when carrying out this “gatekeeping” function.³⁸ The Court first noted that a key factor in determining whether a theory or technique is scientific knowledge which will assist the trier of fact is “whether it can be (and has been) tested.”³⁹ The Court next noted that trial judges may consider “whether the theory or technique has been subjected to peer review and publication,” and the “known or potential rate of error.”⁴⁰ Finally, the Court stated that the “general acceptance” test can have a bearing on the inquiry, as “widespread acceptance can be an important factor in ruling particular evidence admissible.”⁴¹ The Court emphasized that these factors consist of general observations rather than a definitive checklist or test and concluded that

confusing relevant evidence, the court found that “expert opinion not based on facts or data ‘of a type reasonably relied upon by experts in the particular field’ is not helpful, but instead is confusing or misleading and should therefore be excluded.” *Id.*

³² See *Daubert v. Merrell Dow Pharm., Inc.*, 951 F.2d 1128, 1131 (9th Cir. 1991).

³³ *Id.* at 1129 (quoting *United States v. Solomon*, 753 F.2d 1522, 1526 (9th Cir. 1985)).

³⁴ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 579 (1993).

³⁵ *Id.* at 588.

³⁶ *Id.* at 597; see also FED. R. EVID. 702.

³⁷ *Daubert*, 509 U.S. at 592.

³⁸ *Id.* at 593-94 (describing factors for judges to consider). The Court’s factors included: 1) whether the theory or technique can be (and has been) tested; 2) whether it has been subjected to peer review; 3) the known or potential rate of error; and 4) whether the technique has garnered widespread acceptance with the particular community. *Id.*

³⁹ *Id.* at 593.

⁴⁰ *Id.* at 593-94.

⁴¹ *Id.* at 594.

Rule 702 permits a flexible inquiry whose ultimate focus should be “solely on principles and methodology, not on the conclusions that they generate.”⁴²

Following the Court’s holding in *Daubert*, confusion remained among the circuit courts concerning whether or not the standard enunciated in *Daubert* also applied to non-scientific expert testimony.⁴³ Given that the testimony in *Daubert* was based on scientific knowledge, the circuit courts were split as to whether the holding extended to testimony based on non-scientific knowledge.⁴⁴ Some circuit courts did extend the *Daubert* factors to non-scientific evidence, thereby anticipating the Court’s holding in *Kumho*.⁴⁵ In contrast, other circuit courts applied their own standards of reliability to non-scientific evidence, which resulted in more confusion as to what was the appropriate standard.⁴⁶ In *Kumho*, the Court attempted to

⁴² *Id.* at 594-95 (acknowledging factors affecting Rule 702 admissibility determinations are not limited to those listed in opinion); see also *Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 870 (7th Cir. 2001) (“*Daubert* is a flexible test and no single factor, even testing, is dispositive.”); *Maguire v. Nat’l R.R. Passenger Corp.*, No. 99 C 3240, 2002 WL 472275, at *2 (N.D. Ill. Mar. 28, 2002) (“*Daubert* provided a non-exclusive, non-dispositive list of guidelines courts can use in performing its gatekeeper function of determining the reliability of an expert’s methodology. . .”).

⁴³ See *United States v. Webb*, 115 F.3d 711, 713-15 (9th Cir. 1997) (holding police expert testimony does not constitute scientific knowledge to which *Daubert* admissibility standards apply); Chris Kelly & Derek Squire, *Scope of Judicial Gatekeeping: Does Daubert Apply to Areas Other Than New Science?*, Berkman Center for Internet & Society and Harvard Law School, (1999), <http://cyber.law.harvard.edu/daubert/ch5.htm> (examining differing views of *Daubert*’s effect on admissibility of non-scientific evidence pre-*Kumho*); see also *Clair v. Burlington N.R.R. Co.*, 29 F.3d 499, 501 n.2 (9th Cir. 1994) (stating *Daubert* applies “to all proffered expert testimony-not just testimony based on novel scientific methods or evidence.”); Jeffrey M. Schumm, *Precious Little Guidance to the “Gatekeepers” Regarding Admissibility of Nonscientific Evidence: An Analysis of Kumho Tire Co. v. Carmichael*, 27 FLA. ST. U. L. REV. 865, 869 (2000); *infra* notes 45-46.

⁴⁴ See *Watkins v. Telesmith, Inc.* 121 F.3d 984, 991 (5th Cir. 1997) (holding *Daubert* factors relevant to assessing all expert testimony); *Thomas v. Newton Int’l Enters.*, 42 F.3d 1266, 1270 n.3 (9th Cir. 1994) (“*Daubert* was clearly confined to the evaluation of scientific expert testimony.”); see also *supra* notes 45-46 (listing circuit court decisions addressing whether *Daubert* applies to all expert testimony).

⁴⁵ See *Dancy v. Hyster Co.*, 127 F.3d 649, 652 (8th Cir. 1997) (applying *Daubert* to non-scientific expert evidence); *Watkins*, 121 F.3d at 991 (stating *Daubert* extends to admissibility of all expert testimony including “economic valuation, advertising psychology, or engineering. . . .”); *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 263 (7th Cir. 1996) (holding *Daubert* framework appropriate for all expert testimony); *Vadala v. Teledyne Indus., Inc.*, 44 F.3d 36, 39 (1st Cir. 1995) (underlining importance of relevancy and reliability of expert testimony regardless of scientific principles); see also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (extending *Daubert* to non-scientific expert testimony); *United States v. Velasquez*, 64 F.3d 844, 849-50 (3d Cir. 1995) (declining to expressly address whether *Daubert* applies to non-scientific evidence).

⁴⁶ See *Davis v. Six Sixteen, Inc.*, No. 96-1238, 1997 WL 565850, at *5 (4th Cir. Sept. 12, 1997) (holding “helpfulness standard” appropriate for reliability determination of non-scientific

resolve this confusion.

A. Expanding Daubert: Kumho Tire v. Carmichael

In 1999, the Supreme Court extended its ruling in *Daubert* to hold that the *Daubert* criteria apply to *all* expert testimony and not only to expert testimony based on scientific knowledge.⁴⁷ Following an automobile accident, the plaintiffs in *Kumho* filed suit against tire manufacturer Kumho Tire Company, arguing that the tire was defective and that the defect was the cause of the accident.⁴⁸ The plaintiffs hired an expert who concluded that a defect in the tire's manufacture or design caused the blowout.⁴⁹

The defendant filed a motion with the district court to exclude the testimony of the plaintiff's expert, arguing that the methodology he relied upon in reaching his conclusions failed to meet the reliability requirements under Rule 702 of the Federal Rules of Evidence.⁵⁰ The defendant also argued that *Daubert's* reliability requirements should apply to the expert's testimony, despite the fact that the court viewed his testimony as technical rather than scientific.⁵¹ The district court granted the motion to exclude, so the plaintiffs appealed to the Eleventh Circuit, arguing the district court

expert); *McKendall v. Crown Control Corp.*, 122 F.3d 803, 807 (9th Cir. 1997), *overruled by* *White v. Ford Motor Co.*, 312 F.3d 998, 1007 (9th Cir. 2002) (granting admission of non-scientific testimony because "facially helpful and relevant"); *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, 1436 (11th Cir. 1997), *rev'd by* *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 145 (1999) (suggesting reliability of non-scientific expert based on whether testimony sufficiently reliable and relevant to assist jury); *Compton v. Subaru of Am., Inc.*, 82 F.3d 1513, 1519 (10th Cir. 1996), *overruled by* *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (affirming admission of "facially helpful and relevant" non-scientific testimony); *Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 25 (2nd Cir. 1994) (looking at conventions of expert's field for reliability determination of non-scientific evidence); *Berry v. City of Detroit*, 25 F.3d 1342, 1348-49 (6th Cir. 1994) (emphasizing training and experience necessary to qualify as expert); *see also* *Pena*, *supra* note 20, at 753 (listing circuits that applied their own standards for non-scientific experts).

⁴⁷ *Kumho*, 526 U.S. at 141.

⁴⁸ *Id.* at 143. The plaintiffs were injured while driving a minivan whose rear tire blew out. *Id.* at 137. The plaintiffs include the driver of the van, Patrick J. Carmichael, and seven passengers. *Carmichael v. Samyang Tires, Inc.*, 923 F.Supp. 1514, 1516 (S.D. Ala.1996), *rev'd by* *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, 1437 (11th Cir. 1997). One of the van's passengers was killed. *Kumho*, 526 U.S. at 137.

⁴⁹ *Kumho*, 526 U.S. at 143-44.

⁵⁰ *Carmichael*, 923 F.Supp. at 1520 (arguing testimony inadmissible as expert testimony under *Daubert*).

⁵¹ *Id.* at 1522. The court reasoned that while the expert's opinion did "not concern a scientific concept per se," *Daubert* nonetheless applied because his testimony concerned "an application of scientific concepts involved in physics, chemistry, and mechanical engineering." *Id.*

should not have applied the *Daubert* criteria to non-scientific expert testimony.⁵² The Eleventh Circuit ruled for the plaintiffs, holding the district court erred as a matter of law by applying a *Daubert* analysis to the expert's testimony because the expert did not rely on "the application of scientific principles" but "on skill- or experience-based observation."⁵³ The court reasoned that because "*Daubert* explicitly limited its holding to cover only the 'scientific context,'" the expert's testimony "falls outside the scope of *Daubert*."⁵⁴ On appeal, the defendant requested that the United States Supreme Court rule on whether or how *Daubert* applied to expert testimony that might be characterized as based not upon "scientific" knowledge, but rather upon "technical" or "other specialized" knowledge.⁵⁵ The Court granted this request and ultimately held that the "gatekeeping" function, which the Court enunciated in *Daubert*, applies to all expert testimony and not *only* to "scientific" testimony.⁵⁶

IV. SCIENTIFIC VS. NON-SCIENTIFIC EXPERT TESTIMONY

The Court in *Kumho* held that Rule 702 of the Federal Rules of Evidence "makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge" and that "[t]here is no clear line that divides the one from the others."⁵⁷ In other words, scientific, technical or other specialized knowledge are all considered "knowledge" under Rule 702 and thus may be the subject of expert testimony.⁵⁸ The Court noted that *Daubert* specified it is "the Rule's word 'knowledge,' not the words (like 'scientific') that modify that word, that establishes a standard of evidentiary reliability."⁵⁹ *Kumho* further held "it would prove

⁵² *Carmichael*, 131 F.3d at 1435, *rev'd by Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 145 (1999); *see also Kumho*, 526 U.S. at 145 (noting plaintiffs argued court's application of *Daubert* factors too inflexible); *supra* note 38 (describing *Daubert*'s admissibility factors). The Eleventh Circuit held that the expert could neither identify any specific tests or procedures to corroborate or refute the results of his visual tire inspection, nor point to any publication or papers to support his techniques for tire failure analysis. *Carmichael*, 923 F.Supp. at 1519-20. Moreover, the expert was unable to testify to the potential error rate of his methods and could not demonstrate that his methods were generally accepted in the relevant scientific community. *Id.* at 1521-23. For these reasons, the court held that the expert's analysis failed scrutiny under *Daubert* and therefore failed to meet Rule 702 reliability requirements of admissibility. *Id.* at 1520-21.

⁵³ *Carmichael*, 131 F.3d at 1435.

⁵⁴ *Id.* at 1435-36.

⁵⁵ *Kumho*, 526 U.S. at 146 (granting certiorari to determine if gatekeeping function applies only to scientific testimony).

⁵⁶ *Id.* at 147.

⁵⁷ *Id.* at 147-48.

⁵⁸ *Id.* at 147.

⁵⁹ *Id.* (citing *Daubert*, 509 U.S. at 589-90); *see also* FED. R. EVID. 702; *Daubert*, 509 U.S. at

difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge."⁶⁰ By "abolishing the distinction between scientific and nonscientific evidence under Rule 702," *Kumho* attempted to eliminate the confusion resulting from *Daubert*.⁶¹ However, the Court's holding created additional confusion by leaving trial judges with inadequate means to determine the reliability of non-scientific expert testimony.⁶² While the Court noted that the *Daubert* factors are flexible, that they "do not constitute a 'definitive checklist or test,'" and "that the gatekeeping inquiry must be "'tied to the facts'" of a particular 'case,'" the court offered no specific guidance as to how any of the *Daubert* criteria applies to non-scientific evidence.⁶³ Furthermore, allowing federal courts to exercise such broad discretion increases the likelihood that courts will choose to strictly apply *Daubert*'s criteria and exclude premises security and other non-scientific experts for failing to meet criteria devised for and more appropriately suited to scientific experts.⁶⁴

600 (Rehnquist, J., concurring in part and dissenting in part) (explaining Rule 702 also applies to "technical or other specialized knowledge" and not only to scientific knowledge). The *Daubert* Court's discussion was limited to the scientific context because of the scientific nature of expertise offered in the case. *Id.*

⁶⁰ *Kumho*, 526 U.S. at 148; see also May, *supra* note 17, at 18 (explaining important differences between scientific and non-scientific based expert testimony).

⁶¹ K. Isaac deVyver, Comment, *Opening the Door But Keeping the Lights Off: Kumho Tire Co. v. Carmichael and the Applicability of the Daubert Test to Nonscientific Evidence*, 50 CASE W. RES. L. REV. 177, 193 (1999). "There is no clear line that divides the one from the others." *Kumho*, 526 U.S. at 148. The Court also noted that there is "no convincing need to make such distinctions." *Id.* at 138; see also May, *supra* note 17, at 19 (analyzing weaknesses of *Kumho* decision).

Although the Court understood that the tests it suggested in *Daubert* would not always apply to non-scientific evidence, it failed to understand the vast difference among knowledge derived from the application of the scientific method, knowledge developed through the application of scientific principles, and knowledge gained from the study of conventional human activity.

Id.

⁶² See deVyver, *supra* note 61, at 193 (summarizing effects of *Kumho* decision).

⁶³ *Kumho*, 526 U.S. at 150 (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591, 593 (1993)); Schumm, *supra* note 43, at 866 (explaining *Kumho* offered no consistent methodology as to when, where, and how *Daubert* factors apply to non-scientific testimony); see also Note, *Reliable Evaluation of Expert Testimony*, 116 Harv. L. Rev. 2142, 2144 (2003) ("Departing from its attempts in *Daubert* to guide trial courts in their evaluation of experts' methodologies, the Court declined either to formulate a set of factors for analyzing non-scientific expertise or to enumerate additional categories of expertise.").

⁶⁴ See James T. Richardson et. al., *The Problems of Applying Daubert to Psychological Syndrome Evidence*, 79 JUDICATURE 10, 11 (1995) (noting some theories may run contrary to

A. The Distinction

There is a clear line dividing scientific from non-scientific knowledge. Judicial recognition of this fact is crucial to premises security and other non-scientific experts whose testimony requires an admissibility standard derived from this understanding.⁶⁵ A scientific expert is one who relies on the application of the scientific method for the basis of his opinion.⁶⁶ For knowledge to qualify as scientific, “an inference or assertion must be derived by the scientific method.”⁶⁷ Similarly, scientific expert testimony refers to testimony grounded in the “methods and procedures of science.”⁶⁸ Generally, a scientific expert makes an “observation of a natural phenomenon” and offers a hypothesis as to the cause of the phenomenon.⁶⁹ The scientist must “formulate a hypothesis based upon already established principles and design experiments that would either confirm or deny the hypothesis,” and, “[o]ver time, hundreds or thousands of attempts may be made to reproduce the phenomenon.”⁷⁰ As a result, the hypothesis will either be “refined or replaced.”⁷¹ Consistency with the scientific method requires generating and testing a hypothesis to determine if the hypothesis can be falsified.⁷²

In contrast, non-scientific expert testimony, “by its very nature, is purely experience-based.”⁷³ A non-scientific expert relies on education,

Daubert ‘falsifiability’ and ‘error rates’ criteria); David E. Bernstein, “Non-Scientific” Experts: What Degree of Judicial Scrutiny Should they Face?, at 12 (Critical Legal Issues Working Paper No. 89, Oct. 1998) available at <http://ssrn.com/abstract=141115> (“To apply the four *Daubert* factors to non-scientific expert testimony would mean excluding all non-scientific expert testimony.”).

⁶⁵ See Edson McClellan, Comment, *Sharpening the Focus on Daubert’s Distinction Between Scientific and Nonscientific Expert Testimony*, 34 SAN DIEGO L. REV. 1719, 1766 (1997) (“Because the classification of an expert’s testimony should affect a court’s analysis of the expert’s choice of methodology, the determination of whether testimony is scientific or nonscientific should be a court’s first step in its reliability analysis.”).

⁶⁶ *Carmichael v. Samyang Tire, Inc.* 131 F.3d 1433, 1435 (11th Cir.1997); see also Bernstein, *supra* note 64, at 15 (discussing appropriate distinction between scientific and non-scientific evidence for Rule 702 admissibility determinations).

⁶⁷ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993) (explaining expert’s proposed testimony must be supported by “appropriate validation-*i.e.*, ‘good grounds,’ based on what is known”).

⁶⁸ *Id.* at 590 (1993).

⁶⁹ May, *supra* note 17, at 19.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 593 (explaining scientific method distinguishes science from other fields of human inquiry); see also May, *supra* note 17, at 19 (noting scientific method requires testing, peer review, rate of error and acceptance in relevant community).

⁷³ Schumm, *supra* note 43, at 890.

experience, and training when forming an opinion and not on the application of the scientific method.⁷⁴ The reliability of non-scientific expert testimony cannot be substantiated with external testing as it is with testimony derived from scientific knowledge.⁷⁵ Instead, the focus must be on the principles and methodology the expert employed.⁷⁶

In *Berry v. City of Detroit*,⁷⁷ the Sixth Circuit noted that the “distinction between scientific and non-scientific expert testimony is a critical one.”⁷⁸ To illustrate its importance, the court offers the following explanation:

[I]f one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts. On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness *if* a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.⁷⁹

The differences between scientific and non-scientific evidence make it clear that a strict application of the four *Daubert* criteria to evidence not based on scientific principles is unwarranted.⁸⁰ By definition,

⁷⁴ *Carmichael v. Samyang Tire, Inc.* 131 F.3d 1433, 1435 (11th Cir.1997) (analyzing distinction between scientific and non-scientific expert testimony); *see also* Bernstein, *supra* note 64, at 10 (exploring differences between scientific and non-scientific experts).

⁷⁵ Schumm, *supra* note 43, at 890 (“Unlike scientific expert knowledge, the reliability of nonscientific knowledge is not validated by external testing, but rather by considering the soundness of the methodology and principles on which the testimony is based . . .”).

⁷⁶ *Id.*

⁷⁷ 25 F.3d 1342 (6th Cir. 1994).

⁷⁸ *Id.* at 1349.

⁷⁹ *Id.* at 1349-50.

⁸⁰ *See* Dara Loren Steele, Note, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 DUKE L.J. 932, 956 (1999) (explaining difficulty in applying *Daubert* and *Frye* to social and behavioral sciences).

Despite the differences in the nature of Newtonian and social science and the

non-scientific evidence cannot meet the *Daubert* criteria, given that “non-scientific testimony is based on subjective training and experience” and, therefore, is not “testable, cannot be peer reviewed or published, is unlikely to have a known rate of error, and cannot be proven to be ‘generally accepted.’”⁸¹ Furthermore, “applying *Daubert*’s four-part test to nonscientific expert testimony produces an illogical result because it excludes such testimony solely because it is not scientific.”⁸²

The United States District Court for the Western District of Kentucky recognized the potential for this result when the testimony of a premises security expert was challenged under *Daubert* in *Childress v. Kentucky Oaks Mall Co.*⁸³ The court noted that “[n]ot all types of expert testimony may be evaluated on the *Daubert* factors of testing, peer review and publication, potential rate of error, and general acceptance in the relevant community, because certain types of expert testimony do not rely on any scientific method.”⁸⁴ The court explained that the testimony of a premises security expert belongs in this category, as it does not rely on the scientific method but rather on experience and specialized training.⁸⁵ An admissibility determination of a security expert’s testimony should therefore focus on experience and professional qualifications and the reliability of the principles and methodology the expert employs in forming his opinions.⁸⁶

B. Daubert and Kumho as Applied to Premises Security Experts

The Sixth Circuit has held that the four admissibility factors outlined in *Daubert* were neither exhaustive nor pertinent to the facts of every case.⁸⁷ This holding is consistent with *Kumho*, in which the Court stated that a “trial court should consider the specific factors identified in

incompatibility of the Newtonian standards of both *Daubert* and *Frye* with social science, many courts continue to apply the Newtonian paradigm to social science expert testimony. Not surprisingly, when social science-based testimony is subjected to the *Frye* test or to the *Daubert* factors, that testimony fails either standard.

Id.

⁸¹ See Bernstein, *supra* note 64, at 15.

⁸² See Hrabosky, *supra* note 14, at 223.

⁸³ No. 5:06CV-54-R, 2007 WL 2772299 (W.D. Ky. Sept. 20, 2007).

⁸⁴ *Id.* at *3.

⁸⁵ *Id.*

⁸⁶ Schumm, *supra* note 43, at 890 (arguing reliability of non-scientific testimony validated through expert’s principles and methodology).

⁸⁷ See *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001) (holding *Daubert* “neither definitive, nor exhaustive, and may or may not be pertinent” to given case).

Daubert where they are reasonable measures of the reliability of expert testimony.”⁸⁸ This discretionary determination has resulted in instances where courts have strictly applied the *Daubert* criteria to challenges of expert testimony even though a strict application is not a reasonable and appropriate measure of reliability.⁸⁹ If a trial judge chooses a strict application of the *Daubert* criteria for an admissibility determination of a premises security expert, the judge risks excluding the expert’s testimony because it is experience-based and, therefore, by definition cannot meet all four criteria.⁹⁰ While the requirements of “peer review” and “publication” set forth in *Daubert* can frequently be established through a substantial body of knowledge existing in the security and crime prevention disciplines, fulfilling *Daubert*’s “testing” requirement poses difficulties for the premises security expert.⁹¹ The opinion of one security expert cannot be “re-tested for accuracy or duplicated in a laboratory” by a second security expert.⁹² Two security experts may use their experience in forming an opinion but “[b]oth experts have different subjective interpretations of what they observe and both will use different experiences when interpreting those observations.”⁹³

Ethical issues arising from *Daubert*’s testing requirement also present a considerable challenge to security experts and crime prevention

⁸⁸ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

⁸⁹ See, e.g., *Birge ex rel. Mickens v. Dollar Gen. Corp.*, No. 04-2531 B/P, 2006 WL 5175758, at *6 (W.D. Tenn. Sept. 28, 2006) (applying testing requirement to reliability analysis of premises security expert testimony); *Bethea v. Bristol Lodge Corp.*, No. CIV.A. 01-612, 2002 WL 31859434, at *5-6 (E.D. Pa. Dec. 18, 2002) (applying *Daubert* “testing” criterion to non-scientific evidence); *Maguire v. Nat’l R.R. Passenger Corp.*, No. 99 C 3240, 2002 WL 472275, at *5 (N.D. Ill. Mar. 28, 2002) (applying *Daubert*’s testing requirement to reliability determination of expert).

⁹⁰ See Steele, *supra* note 80, at 956 (arguing *Daubert* and *Frye* standards inappropriate for social science expert testimony). “Because experience-based knowledge is neither created nor tested according to the traditional Newtonian scientific method, it does not easily conform to the standards of *Daubert* or *Frye*, which were created according to a Newtonian science paradigm.” *Id.*

⁹¹ See INTERNATIONAL ASSOCIATION OF PROFESSIONAL SECURITY CONSULTANTS, Best Practice No. 2: Forensic Methodology 7-8 (2008), available at <http://www.iapsc.org/sites/default/files/bp2.pdf> (listing bibliography of references detailing process of crime risk analysis); see also *Childress v. Ky. Oaks Mall Co.*, No. 5:06CV-54-R, 2007 WL 2772299, at *7 (W.D. Ky. Sept. 20, 2007) (“By all indications, the IAPSC *Forensic Methodology* has been subject to peer review and accepted by security industry professionals. It is the product of a consensus reached by security practitioners who are at the top of their field.”); Needham *supra* note 12, at 564-65 (“The first *Daubert* factor is perhaps the most inapplicable to nonscientific testimony. Falsifiable experimental testing is employed to check scientific testimony for the presence of objective standards. However, nonscientific testimony is often subjective.”).

⁹² deVyver, *supra* note 61, at 194.

⁹³ *Id.*

professionals and, as such, the probability of fulfilling this requirement is low. In the study and application of crime prevention theories and practices, in order to “test” one or more theories, a test group and a control group would have to be created where the control group would not be provided with comparable security measures or protections as provided to the population of the test group.⁹⁴ Consider the following hypothetical example:

Two apartment complexes of the same size, population base, demographics, crime rates, economic conditions and other related factors are evaluated for crime risk to determine the potential success of applying certain crime prevention measures. In this example, one apartment complex would be treated as the control group or population and the other complex treated as the test group or population. In the control group, no additional crime prevention measures would be provided to the residents. However, in the test group, a number of additional measures would be utilized. These measures could include additional lighting, the installation of closed-circuit television cameras, better locking devices, and uniformed security patrols. Similar security measures are often found in apartment complexes around the country, depending upon their size, needs, and their financial ability to afford such measures.

The problems with such a “test” are twofold. First, the existence of two sites that could be considered identical for all factors that may affect the occurrence of crime is highly improbable. Second, and most disturbing, is the fact that residents in the control group run the risk of being victimized at a higher rate. In short, the residents’ safety would be jeopardized in order for such a “test” to be conducted. The problem, therefore, of applying the *Daubert* testing requirement to premises security experts presents self-evident ethical issues, yet at least two courts have excluded the testimony of a security expert after the expert failed to provide an opinion that could be verified through re-testing.⁹⁵ For

⁹⁴ See Tara Marie La Morte, Comment, *Sleeping Gatekeepers: United States v. Llera Plaza and the Unreliability of Forensic Fingerprinting Evidence under Daubert*, 14 ALB. L.J. SCI. & TECH. 171, 186 (2003) (noting control groups are fundamental aspect of experimental process).

⁹⁵ See *Bethea v. Bristol Lodge Corp.*, No. CIV.A. 01-612, 2002 WL 31859434, at *5 (E.D. Pa. Dec. 18, 2002) (excluding security expert testimony on the basis of unreliable methodology). In *Bethea*, the security expert testified that the defendant’s lack of security contributed to the plaintiff’s murder. *Id.* The court reasoned that the expert’s testimony was unreliable because he failed to cite industry standards and provide any explanation that could be tested or subjected to peer-review to support his opinion. *Id.*; see also *Birge ex rel. Mickens v. Dollar Gen. Corp.*, No. 04-2531 B/P, 2006 WL 5175758, at *11 (W.D. Tenn. Sept. 28, 2006) (excluding defendant’s security expert’s testimony due to unreliability based on failure to utilize reliable methodology). The court found that the expert failed to provide any explanation that could be tested. *Id.* at *6; see also *Maguire v. Nat’l R.R. Passenger Corp.*, No. 99 C 3240, 2002 WL 472275, at *5 (N.D. Ill. Mar. 28, 2002) (excluding security expert’s testimony because methodology unreliable). The

example, in *Bethea v. Bristol Lodge Corp.*,⁹⁶ the court excluded the testimony of the plaintiff's security expert after finding, among other things, that the expert failed to provide any explanation that could be tested.⁹⁷ Though *Bethea* noted that "[b]ecause the proffered testimony is not scientific in nature, the methodology need not be subjected to rigorous testing for scientific foundation or peer review," the court nonetheless applied *Daubert*'s testing requirement even though the testimony could not be verified through traditional scientific testing.⁹⁸

Daubert's testing requirement could pose further difficulties for premises security experts referring to research as a means of supporting their opinions. There is a large body of national and international research evaluating the effect of specific security measures on premises safety, crime rates and fear of crime, but not all of these studies may be considered per se "scientific."⁹⁹ Such studies differ from the hypothetical above in that they generally involve a "before and after" analysis of crime rates at a particular location.¹⁰⁰ For example, a study may analyze the crime rate at an apartment complex or shopping center for a period of time (e.g., three years) prior to the implementation of certain security measures. After another period of time has passed (e.g., a year or more), the crime rate may again be analyzed. A decrease in reported crime after the implementation of the additional measures may suggest a nexus between the security measure and reduction in crime. However, courts might not construe such an analysis as "scientific" as other variables affecting crime may not have been controlled for and thus a strict scientific test of the suggested theory may not have been achieved. A premises security expert who finds such a study helpful may be vulnerable to exclusion for failing to rely on studies that adhere to a strict application of the scientific method. For these

court's decision in *Maguire* to exclude the expert's testimony was based, in part, on the security expert's failure to "test" his conclusions. *Id.*

⁹⁶ No. CIV. A. 01-612, 2002 WL 31859434 (E.D. Pa. Dec. 18, 2002).

⁹⁷ *Id.* at *5.

⁹⁸ *Id.*

⁹⁹ See, e.g., Martin Gill & Angela Spriggs, *Assessing the Impact of CCTV*, Home Office Research Studies, 13 (February 2005) available at <http://www.homeoffice.gov.uk/rds/pdfs05/hors292.pdf> (evaluating impact of closed circuit television on crime in variety of settings); Martin Gill et al., *Public Perceptions of CCTV in Residential Areas: It's Not as Good as We Thought it Would Be*, 17 INT'L CRIM. JUSTICE REV. 304, 304-05 (2007) available at <http://icj.sagepub.com/cgi/reprint/17/4/304> (presenting public attitudes towards closed circuit television in residential areas); John R. Minnery & Bill Lim, *Measuring Crime Prevention through Environmental Design*, 22 J. ARCHITECTURAL AND PLANNING RESEARCH 340, 340-43 (2005) available at http://espace.library.uq.edu.au/eserv/UQ:76602/Minnery_Measuring.pdf (evaluating crime prevention measures in reducing crime and fear of crime in Queensland, Australia).

¹⁰⁰ *Id.* (observing representative premises liability studies).

reasons, *Daubert*'s testing criterion is simply not an appropriate measure of reliability in an admissibility determination of a premises security expert and, yet, trial courts have been granted the discretion to apply this factor as if it were.¹⁰¹

V. PREMISES SECURITY EXPERTS: THE APPROPRIATE ADMISSIBILITY STANDARD

Kumho's extension of *Daubert* to non-scientific evidence and grant of broad discretion to trial courts to determine the appropriateness of *Daubert*'s strict application necessitates a more suitable and clearly defined admissibility standard for premises security experts.¹⁰² This standard can be derived from the language of Rule 702. In fact, several lower courts have already interpreted Rule 702 in a way that embodies a standard for premises security experts based on the expert's professional qualifications and the methodology the expert employed in rendering an opinion.¹⁰³

The Federal Rules of Evidence require the expert to possess the requisite knowledge, education, training and experience in his or her field in order to "qualify" as an expert witness.¹⁰⁴ Further, the expert must convey the opinion in a manner that assists the trier of fact in evaluating the evidence.¹⁰⁵ The expert must also demonstrate that the methodology followed is reliable.¹⁰⁶ For the methodology to be considered reliable, the expert must demonstrate that existing research was reviewed and applied to the facts of the case, along with relevant facts and data.¹⁰⁷ In addition, the

¹⁰¹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993) (providing federal judges with testing as one factor when undertaking admissibility review).

¹⁰² See *supra* Part III.A.

¹⁰³ See *Maguire v. Nat'l R.R. Passenger Corp.*, No. 99 C 3240, 2002 WL 472275, at *1 (N.D. Ill. Mar. 28, 2002) (outlining issues in Rule 702 determination). The court noted that the first issue in a Rule 702 determination is whether the expert is qualified by knowledge or skill to testify as an expert in that particular field. *Id.* The second issue is whether the methodology underlying the expert's opinions is reliable. *Id.*; see also *Childress v. Ky. Oaks Mall Co.*, No. 5:06CV-54-R, 2007 WL 2772299, at *3 (W.D. Ky. Sep. 20, 2007) (citing Rule 702 Advisory Committee Notes to establish criteria for evaluating reliability of non-scientific expert testimony).

¹⁰⁴ FED. R. EVID. 702 ("a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise"); see also *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000) (detailing FED. R. EVID. 702 requirements).

¹⁰⁵ See FED. R. EVID. 702 (expert testimony must "assist the trier of fact"); see also *Bethea v. Bristol Lodge Corp.*, No. CIV.A. 01-612, 2002 WL 31859434, at *5 (E.D. Pa. Dec. 18, 2002) (excluding expert whose opinion provided no assistance to trier of fact).

¹⁰⁶ See FED. R. EVID. 702 (requiring testimony based on "sufficient facts or data" and a "product of reliable principles and methods"); see also *Smith*, 215 F.3d at 718 (holding qualified experts permitted to testify only if expert's opinions are based upon recognizable method).

¹⁰⁷ See *Maguire*, 2002 WL 472275, at *2 ("After finding that a qualified expert's theory is

expert must show that applicable industry standards, where they exist, were identified.¹⁰⁸ Finally, the expert must be able to demonstrate that the methodology was applied to the facts of the case.¹⁰⁹

This admissibility standard accounts for the differences between scientific and non-scientific knowledge and is therefore more appropriately tailored to premises security and other non-scientific experts than the standard enunciated in *Daubert* and *Kumho*. It offers premises security experts guidance in how to form a reliable opinion and provides specific guidelines to trial judges for evaluating the testimony of a premises security expert in a manner that adequately comports with the nature of the evidence. Finally, this standard provides additional guidelines to attorneys who want to avoid a challenge or prepare to overcome a potential challenge to their security expert.

A. Qualifications

To qualify as an expert, a witness must possess specialized “knowledge, skill, experience, or training” pertaining to his field.¹¹⁰ When an expert witness is testifying to matters of a non-scientific nature, “‘experience alone-or experience in conjunction with other knowledge, skill, training, or education’ may be sufficient to qualify an expert.”¹¹¹ To qualify as a *security* expert, therefore, one may possess experience in the field of security, in conjunction with specialized knowledge and education.¹¹² If the expert’s opinion is based solely on experience, the

based on sufficient data and a reliable methodology, the court must then determine whether the expert’s opinion is based upon a sound application of the methodology to the particular facts of the case”); see also FED. R. EVID. 702 (stating requirements for expert qualification).

¹⁰⁸ See FED. R. EVID. 702 (requiring that expert assist trier of fact to understand evidence); *Bethea*, 2002 WL 31859434, at *5 (finding expert’s opinion unreliable partially due to failure to cite to industry standards); *Hart v. Resort Investigations and Patrol*, No. C.A. 01C-12-029 ESB, 2004 WL 2050511, at *5 (Del. Super. Ct. Sept. 9, 2004) (holding expert’s opinion must be based on information reasonably relied on in field).

¹⁰⁹ FED. R. EVID. 702 (requiring expert witness to apply “principles and methods reliably to the facts of the case”).

¹¹⁰ *Id.*

¹¹¹ *Childress v. Ky. Oaks Mall Co.*, No. 5:06CV-54-R, 2007 WL 2772299, at *3 (W.D. Ky. Sept. 20, 2007) (citing FED. R. EVID. 702 Advisory Committee Notes); FED. R. EVID. 702 advisory committee’s note (“the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience”).

¹¹² See *Lincoln Prop. Co. v. DeShazo*, 4 S.W.3d 55, 59-60 (Tex. App. 1999) (upholding lower court’s qualification of plaintiff’s police officer witness as expert). The court found the plaintiff’s expert’s extensive experience as a police officer, security officer, and agent of the Drug Enforcement Agency qualified him to testify as a security expert. *Id.* at 59; see also *Hart*, 2004 WL 2050511, at *6 (finding plaintiff’s expert not qualified). Because the witness had no experience or training in security, the court found he was not qualified to render an opinion about

expert “must 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.”¹¹³

However, the expert must be careful not to render an opinion that extends beyond his area of expertise.¹¹⁴ In *Birge ex rel. Mickens v. Dollar General Corp.*,¹¹⁵ the plaintiff’s security expert rendered an opinion regarding the effect security measures would have had on the criminal defendants who were “detractable opportunist type offenders.”¹¹⁶ The court concluded this opinion exceeded the expert’s “area of expertise” and therefore he was not qualified to give an opinion as to the defendant’s motivation in attacking the plaintiff.¹¹⁷ The court also excluded the opinion because the expert lacked education, training, or experience in the area of crime deterrence.¹¹⁸

While an individual may possess specialized knowledge in the area of premises security, it is important to recognize that to qualify as an expert witness, the individual must offer an opinion that goes beyond what is obvious to the average layperson.¹¹⁹ The court in *Childress* noted that “[i]n other cases alleging inadequate premises security, courts have found that the specialized knowledge of a security expert may be based on practical experience, academic training, and credentials, as long as the expert ‘possesses specialized knowledge beyond the average layman in the area of security for commercial properties.’”¹²⁰

In addition, an expert’s opinion must not already be within the “common knowledge” of the average juror.¹²¹ In *Smith v. Ameristar*

defendant’s alleged lack of security and its relation to a house fire. *Id.*

¹¹³ *Childress*, 2007 WL 2772299, at *3 (quoting FED. R. EVID. 702 advisory committee’s note).

¹¹⁴ See *Birge ex rel. Mickens v. Dollar Gen. Corp.*, No. 04-2531 B/P, 2006 WL 5175758, at *17-18 (W.D. Tenn. Sept. 28, 2006) (excluding expert testimony on criminal motivations for lack of experience, skill, or training).

¹¹⁵ No. 04-2531 B/P, 2006 WL 5175758 (W.D. Tenn. Sept. 28, 2006).

¹¹⁶ *Id.* at *13. The expert opined that the criminal defendants were offenders who would have been deterred from committing their crime had Dollar General implemented the appropriate security measures. *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See *Smith v. Ameristar Casino Vicksburg, Inc.*, 991 So. 2d 1228, 1230 (Miss. Ct. App. 2008) (affirming exclusion of plaintiff’s expert testimony as common knowledge opinion). The court found that the expert would have offered an opinion that was not helpful to the jury because it would have amounted to telling it something already within its common knowledge. *Id.*

¹²⁰ *Childress v. Ky. Oaks Mall Co.*, No. 5:06CV-54-R, 2007 WL 2772299, at *3 (W.D. Ky. Sept. 20, 2007) (quoting *Starnes v. Sears Roebuck & Co.*, No. 01-2804 B AN, 2005 WL 3434637 (W.D. Tenn. Dec. 14, 2005)).

¹²¹ *Smith*, 991 So. 2d at 1230-31 (finding expert would not have assisted jury’s

Casino Vicksburg, Inc.,¹²² the court excluded the testimony of a casino security expert who testified that the casino was vicariously liable to a customer who was injured after an employee bumped her.¹²³ The court held that admitting the testimony would have amounted to telling the jury how to decide a fact that was already within its common knowledge.¹²⁴ Similarly, in *Bethea* the court excluded the testimony of the defendant's expert, finding that his opinion was common to an average person and that it offered only general information which did not rise to the level of expert, solely because it was offered by someone with a specialized education.¹²⁵ The court excluded the testimony of the plaintiff's expert, who based much of his opinion on "common sense."¹²⁶ The *Bethea* court found that the expert's opinion posed no benefit in assisting "the trier of fact to understand or determine a fact in issue" as required by the Federal Rules of Evidence.¹²⁷ The court also noted that the jury could "use its own common sense as juries do daily in deciding whether defendants were negligent."¹²⁸

Another important aspect of qualifying as an expert witness is the ability of that expert to establish a connection between professional experience and the conclusions the expert reaches when forming his opinion.¹²⁹ To assist the trier of fact, the expert must be able to explain

understanding of facts); *see also* FED. R. EVID. 702 (requiring experts to "assist the trier of fact to understand the evidence"); *Story Serv., Inc. v. Ramirez*, 863 S.W.2d 491, 499 (Tex. Ct. App. 1993) ("Expert testimony should be admitted only when it will aid the jury in making inferences regarding the fact issues more effectively" (citation omitted)); *Hill v. Metro. African Methodist Episcopal Church*, 779 A.2d 906, 908 (D.C. 2001) (noting expert testimony not required when subject "within the common knowledge and experience of the reasonable juror").

¹²² 991 So. 2d 1228 (Miss. Ct. App. 2008).

¹²³ *Id.* at 1230-31.

¹²⁴ *Id.* at 1230 (holding opinion as to implications of collision between two people within jury's common knowledge).

¹²⁵ *Bethea v. Bristol Lodge Corp.*, No. CIV.A. 01-612, 2002 WL 31859434, at *7 (E.D. Pa. Dec. 18, 2002) (quoting *ID Sec. Sys. Can., Inc. v. Checkpoint Sys., Inc.*, 198 F. Supp.2d 598, 611 (E.D. Pa. 2002)).

¹²⁶ *Id.* at *5.

¹²⁷ *Id.*; *see also* FED. R. EVID. 702 (requiring experts to "assist the trier of fact to understand the evidence or determine a fact in issue").

¹²⁸ *Bethea*, 2002 WL 31859434, at *5.

¹²⁹ *See* FED. R. EVID. 702 advisory committee's note.

Nothing in [the Rule] is intended to suggest that experience alone-or experience in conjunction with other knowledge, skill, training or education-may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a

how his professional experience enabled him to form an opinion, how that experience supports his opinion, and how that experience reliably applies to the facts of the case.¹³⁰ In *Birge*, the court excluded the plaintiff's security expert, finding that although his opinion was "based on his experience, he ha[d] not explained how his experience [led] to the conclusion reached."¹³¹ Finally, it is essential to recognize that because the function of an expert witness is to assist the jury in making its determination, the expert is ultimately an agent of the court, and not simply an "advocate for the party who calls him as a witness."¹³²

B. Methodology

The methodology a security expert utilizes to evaluate the facts of a case and form an opinion is crucial to a determination of admissibility under the Federal Rules of Evidence.¹³³ According to Rule 702, the methodology an expert employs must be "reliable."¹³⁴ To meet the reliability standard, the security expert must demonstrate that he or she reviewed and applied existing research, reviewed relevant facts and data, and identified and applied industry standards.¹³⁵ Finally, the expert must demonstrate that this methodology was applied to the facts of the case at hand.¹³⁶

sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable.

Id. (internal citations omitted).

¹³⁰ *Birge ex rel. Mickens v. Dollar General Corp.*, No. 04-2531 B/P, 2006 WL 5175758, at *11 (W.D. Tenn. Sept. 28, 2006).

¹³¹ *Id.*

¹³² May, *supra* note 17, at 22. "Assuming an unbiased judge, the court's only concern is whether your expert can assist the jury. Should the court conclude that the witness is nothing more than a partisan in expert's clothing, the court will find good reason to exclude the testimony." *Id.*

¹³³ See *Bethea*, 2002 WL 31859434, at *7 (excluding plaintiff's security expert for failure to utilize reliable methodology in forming opinions); see also *Birge ex rel. Mickens*, 2006 WL 5175758, at *11 (noting security expert must provide methodology that can be proven reliable); *Starnes v. Sears Roebuck & Co.*, No. 01-2804 B AN, 2005 WL 3434637 at *4 (W.D. Tenn. Dec. 14, 2005) (excluding expert opinion for lack of reliability).

¹³⁴ FED. R. EVID. 702.

¹³⁵ See *Bethea*, 2002 WL 31859434, at *5, *7 (excluding security expert for failure to cite to industry standards).

¹³⁶ *Breiding v. Family Dollar Stores*, No. CS-01-248, 2002 WL 1584281, at *3 (S.D. Ohio Jun. 11, 2002) (noting necessity of relevance between opinion and facts to ensure a "fit" between expert's testimony and trial issues).

i. Apply Existing Research

When offering an opinion about negligent security, experts should do so only after they have adequately examined existing studies, statistics, and research publications regarding the issues central to their testimony.¹³⁷ Doing so will not only strengthen the expert's opinion, it will also prepare the expert should an admissibility challenge arise. Federal courts have consistently placed importance on the effort security experts make to apprise themselves of pertinent research.¹³⁸ In fact, not doing so has constituted grounds for exclusion.¹³⁹ For example, in *Maguire v. National Railroad Passenger Corp.*,¹⁴⁰ the court excluded the testimony of the plaintiff's expert after finding that he failed to consult pertinent research in forming an opinion.¹⁴¹ The plaintiff, who was injured while boarding a train, hired an expert to testify that the defendant's failure to implement and enforce appropriate safety procedures proximately caused the plaintiff's injuries.¹⁴² The expert, however, did not refer to any studies on crowd control or on group size and its effect on crowd behavior, despite stating that he was aware such studies existed.¹⁴³ Ultimately, failing to review such literature contributed to the court's finding that his methodology was unreliable.¹⁴⁴ Similarly, in *Starnes v. Sears Roebuck & Co.*,¹⁴⁵ the court excluded the testimony of the plaintiff's expert after finding that he failed to offer any support for his opinions other than experience.¹⁴⁶ The court

¹³⁷ See *Maguire v. Nat'l R.R. Passenger Corp.*, No. 99 C 3240, 2002 WL 472275, at *3-5 (N.D. Ill. Mar. 28, 2002) (excluding expert testimony for failure to rely on existing publications or studies or conduct independent studies).

¹³⁸ See *Maguire*, 2002 WL 472275, at *5 (excluding expert testimony). The court noted that the railroad security expert failed to apprise himself of independent research or studies and he did not conduct any general research of literature relating to railroad security. *Id.* at *3. Compare *Starnes v. Sears Roebuck & Co.*, No. 01-2804 B AN, 2005 WL 3434637, at *4-5 (W.D. Tenn. Dec. 14, 2005) (affirming exclusion of security expert's opinion based only on general experience), and *Bethea*, 2002 WL 31859434, at *6-7 (excluding defendant's security expert who relied on studies with inconclusive results), with *Rogers v. Del. State Univ.*, No. 03C-03-218-PLA, 2007 WL 625060, at *2 (Del. Super. Ct. Feb. 28, 2007) (finding expert's testimony reliable). The *Rogers* court found the testimony of plaintiff's security expert to be reliable, in part, because he "relied on several authoritative texts, treatises, and reports, as a foundation for his opinions." *Id.*

¹³⁹ See *supra* note 138 (observing instances where federal courts have excluded expert testimony for failure to substantiate conclusions with research).

¹⁴⁰ No. 99 C 3240, 2002 WL 472275 (N.D. Ill. Mar. 28, 2002).

¹⁴¹ *Id.* at *3.

¹⁴² *Id.* at *1.

¹⁴³ *Id.* at *4.

¹⁴⁴ *Id.* at *5-6.

¹⁴⁵ No. 01-2804 B AN, 2005 WL 3434637 (W.D. Tenn. Dec. 14, 2005).

¹⁴⁶ *Id.* at *4-5 (affirming magistrate judge's finding expert relied on no tests, statistical data

held that the expert's opinion was neither relevant nor reliable.¹⁴⁷

When reviewing pertinent research, the expert should be careful not to rely on research that could be considered outdated, especially when there is more recent and relevant research available.¹⁴⁸ In *Bethea*, the plaintiff hired an expert to offer an opinion regarding the adequacy of security in a restaurant.¹⁴⁹ When asked whether he had reviewed research on the efficacy of security cameras and lighting for restaurants, he stated that he had but had not reviewed the studies in fifteen years.¹⁵⁰ This fact contributed to the court's finding that his methodology was unreliable.¹⁵¹

Utilizing a reliable methodology also requires that the security expert review all relevant facts and data *before* he or she forms an opinion about the security of a premise.¹⁵² The expert must consider all factual evidence, including photographs of the premise where the incident took place, as well as prior police and security reports, if applicable.¹⁵³ It is also necessary for the security expert to review past and present security manuals, to be cognizant of all security practices and policies, and to ascertain whether such practices have been consistently employed.¹⁵⁴ For example, in *Maguire*, the court based its decision that the plaintiff's security expert utilized an unreliable methodology in part on the fact that he failed to "review all factual evidence available to him before reaching his conclusions."¹⁵⁵ Therefore, security experts should be mindful of the

or empirical studies).

¹⁴⁷ *Id.* at *4.

¹⁴⁸ See *Bethea v. Bristol Lodge Corp.*, No. CIV.A. 01-612, 2002 WL 31859434, at *5 (E.D. Pa. Dec. 18, 2002) (noting significance of outdated expert studies). The expert relied on studies he had reviewed fifteen years prior to the case despite being aware of newer, more pertinent studies. *Id.*

¹⁴⁹ *Id.* at *1.

¹⁵⁰ *Id.* at *5.

¹⁵¹ See *id.* (factoring lack of reliance on pertinent studies into determination that expert's testimony was unreliable).

¹⁵² See *Maguire v. Nat'l R.R. Passenger Corp.*, No. 99 C 3240, 2002 WL 472275, at *5 (N.D. Ill. Mar. 28, 2002) (finding expert's opinion unreliable in part because he formed opinion before investigation). The security expert failed to review any photographs or visit the scene of the incident before forming an opinion. *Id.*

¹⁵³ *Id.* (excluding expert who failed to review photographs and review entire security manual); see also *Ancho v. Pentek Corp.*, 157 F.3d 512, 519 (7th Cir. 1998) (affirming exclusion of expert who failed to visit scene of accident).

¹⁵⁴ See *Maguire*, 2002 WL 472275, at *5 (stating testimony was of questionable reliability because expert only reviewed portion of defendant's security manual).

¹⁵⁵ *Id.* Specifically, the *Maguire* court found that the expert "did not review photographs of the scene" nor did he visit the actual platform where the plaintiff was assaulted. *Id.* Additionally, the expert "apparently read only portions of Amtrak's security procedures." *Id.* These facts directly contributed to the court's holding that the expert's methodology was unreliable and that his testimony should not be admitted into evidence. *Id.*

importance courts place on demonstrating knowledge and application of relevant research, facts, and data because failure to do so will likely result in the court's exclusion of the expert's testimony.

ii. Identify Industry Standards

Another important component of ensuring the use of a reliable methodology is to require the security expert to identify and apply industry standards.¹⁵⁶ When examining a case and forming an opinion, a security expert should employ the methods and standards of care that security industry professionals have already developed.¹⁵⁷ The expert should "clearly articulate and reference a standard of care by which the defendant's actions can be measured."¹⁵⁸ Specifically, the expert should choose a standard of care that accurately reflects the practices of other facilities comparable to the defendant's premises in determining whether the defendant provided adequate security.¹⁵⁹ Courts have placed significant emphasis on this practice and have found that security experts who did not rely on clearly articulated industry standards employed an unreliable methodology in forming their opinions.¹⁶⁰ In *Bethea*, the court found the expert's opinion was unreliable because he had failed to cite any "industry standard for his opinions on the requisite necessities for adequate security."¹⁶¹ In *Grdinich v. Bradlees*,¹⁶² the court found the expert's testimony unreliable after noting that nothing in the expert's deposition or report showed reliance on or consideration of any industry standard.¹⁶³ Similarly, in *Birge*, the court largely attributed the unreliable methodology of an expert who provided an opinion about the adequacy of security in a retail store to his "inability to cite to any standards in the retail security

¹⁵⁶ By citing to industry standards, the expert will increase his chances that a court will find that his opinions are more than the product of common sense and that they will assist the trier of fact to determine or understand a fact in issue. See *Bethea*, 2002 WL 31859434, at *8 (excluding expert who failed to support opinions with security standards).

¹⁵⁷ *Id.*

¹⁵⁸ *Briggs v. Wash. Metro. Area Transit Auth.*, 481 F.3d 839, 846 (D.C. Cir. 2007).

¹⁵⁹ *Id.* at 846-47 (finding expert failed to establish proffered standard relied on by similar entities).

¹⁶⁰ See *id.* (excluding plaintiff's and defendants' experts for failing to rely on industry standards); *Grdinich v. Bradlees*, 187 F.R.D. 77, 81 (S.D.N.Y. 1999) (finding expert's opinion no more than unsupported speculation for failing to rely on industry standards); *Birge ex rel. Mickens v. Dollar General Corp.*, No. 04-2531 B/P, 2006 WL 5175758, at *12 (W.D. Tenn. Sept. 28, 2006) (finding expert's unreliable methodology based on failure to cite industry standards).

¹⁶¹ *Bethea*, 2002 WL 31859434, at *5.

¹⁶² 187 F.R.D. 77 (S.D.N.Y. 1999).

¹⁶³ *Id.* at 81-82.

industry to support his opinion.”¹⁶⁴ In *Briggs v. Washington Metropolitan Area Transit Authority*,¹⁶⁵ the court excluded the testimony of the plaintiff’s security expert after finding that none of the expert’s recommendations embodied a “discernible standard” which was applicable to the case.¹⁶⁶ In contrast, in *Childress*, the court admitted the testimony of the plaintiff’s expert over the objection of the defendant partly because the expert *did* cite to industry standards developed by a highly qualified association of premises security professionals.¹⁶⁷

When applying industry standards to a security case, the expert should take care to identify and apply standards that have been developed by a *reputable* professional security association, in addition to thoroughly reviewing research publications and materials recommended by the association to ensure the reliability of any opinion derived from such standards.¹⁶⁸ A reputable association is one that employs industry methods or standards that have withstood adequate peer review and are generally accepted by the profession as a reliable means of evaluating the security of a premise.¹⁶⁹ The court in *Childress* underscored the importance of such reliance when it ruled that the testimony of the defendant’s security expert was admissible (over the objection of the plaintiff) after finding that he had based his security examination on standards “used for retrospectively assessing premises security litigation cases.”¹⁷⁰ The *Childress* court noted that the *International Association of Professional Security Consultants*, a reputable professional security association, developed the methodology the expert utilized.¹⁷¹ Identifying and employing the industry standards of a reputable security association are, therefore, important components of a Rule 702 reliability determination.

¹⁶⁴ *Birge ex rel Mickens*, 2006 WL 5175758, at *12.

¹⁶⁵ 481 F.3d 839 (D.C. Cir. 2007).

¹⁶⁶ *Id.* at 847.

¹⁶⁷ *Childress v. Ky. Oaks Mall*, No. 5:06CV-54-R, 2007 WL 2772299, at *8 (W.D. Ky. Sept. 20, 2007).

¹⁶⁸ Industry standards developed by a reputable professional association will help to insulate the expert who relies on such standards from a challenge to the expert’s reliability. *See Childress*, 2007 WL 2772299 at *8 (rejecting plaintiff’s argument that industry standards relied upon by defendant’s expert rendered his opinions unreliable). The court determined the industry standards were the product of the International Association of Professional Security Consultants, a reputable professional security association. *Id.*

¹⁶⁹ *See Childress*, 2007 WL 2772299, at *7-8 (stating IAPSC *Forensic Methodology* subject to considerable peer review and is reliable methodology in security profession).

¹⁷⁰ *Id.* at *4; *see also supra* note 109 and accompanying text (discussing Rule 702 requirement that expert testimony be based on reliable principles and methods).

¹⁷¹ *Childress*, 2007 WL 2772299, at *4.

iii. Apply the Methodology to the Facts of the Case

In reviewing all relevant facts and data and identifying applicable industry standards, the security expert will have a reliable methodology which he must in turn apply to the facts of his case.¹⁷² The ultimate outcome of doing this is a reliable and relevant opinion admissible under the Federal Rules of Evidence and insulated from exclusion, should an admissibility challenge under *Daubert* arise.¹⁷³

Applying a reliable methodology to the facts of one's case requires the security expert to establish whether there was a causal relationship between the defendant's failure to implement adequate security and the injury that occurred.¹⁷⁴ Establishing a causal relationship requires that the expert provide a detailed explanation of how the injury would have been prevented had the defendant employed recommended security precautions.¹⁷⁵ Alternatively, if the security expert finds no causal relationship, he or she must provide an adequate explanation as to why the injury would have occurred regardless of whether suggested security precautions were in place prior to the injury.¹⁷⁶ Courts have excluded testimony of security experts for failure to provide such an explanation.¹⁷⁷ In *Maguire*, the court excluded the testimony of the plaintiff's security expert after finding that he did not sufficiently connect the defendant's

¹⁷² See *Maguire v. Nat'l R.R. Passenger Corp.*, No. 99 C 3240, 2002 WL 472275, at *5-6 (N.D. Ill. Mar. 28, 2002) (excluding security expert after finding failure to apply methodology and conclusions to facts of the case). The expert "did not describe how the assault would have been deterred by the presence of cameras, security personnel, or warning signs." *Id.* at *6.

¹⁷³ The second prong of Rule 702 of the Federal Rules of Evidence requires an expert to assist the trier of fact to determine or understand a fact in issue. See FED. R. EVID. 702. Generally, an expert who applies a reliable methodology to the facts of the case will meet this requirement. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, at 589 (1993) (noting Rules require trial judge ensure expert testimony is relevant and reliable); *Grdinich v. Bradlees*, 187 F.R.D. 77, 81-82 (S.D.N.Y. 1999) (finding expert whose methodology was unreliable would not assist trier of fact).

¹⁷⁴ A reliable security assessment requires the security expert to determine that but for inadequate security, the injury would not have occurred. See *Maguire*, 2002 WL 472275 at *3, *6 (finding expert failed to connect methodology to facts of case). In *Maguire*, the court held that the expert did not adequately link the defendant's failure to implement adequate security procedures with the plaintiff's assault. *Id.* at *6.

¹⁷⁵ See *supra* note 172 (explaining expert's failure to establish a causal connection).

¹⁷⁶ See *Bethea v. Bristol Lodge Corp.* No. CIV.A. 01-612, 2002 WL 31859434, at *7 (E.D. Pa. Dec. 18, 2002) (excluding defendants' security expert for failure to establish injury would have occurred regardless of precautions). The defendants' expert rendered an opinion that the defendants were not negligent or unreasonable in their operation of their business on the day in question but provided no basis for this conclusion. *Id.* at *8.

¹⁷⁷ *Id.*; see also *Maguire*, 2002 WL 472275, at *6.

failure to implement security procedures with the assault on the plaintiff.¹⁷⁸ The court held that the expert failed to adequately explain how security cameras and or signs with adequate warning language could have prevented the incident.¹⁷⁹ In other words, the court found that the expert did not apply a reliable methodology to the facts of the case.¹⁸⁰ In *Bethea*, the court excluded the defendants' security expert after finding he failed to adequately establish why the plaintiff's injuries would have occurred regardless of whether the premise had offered better lighting and closed circuit television monitoring.¹⁸¹ The failure to provide an adequate explanation as to the relationship between the injury that occurred and the security of the premise (or lack thereof) is a fatal mistake on the part of the expert because it forces the jury "to engage in idle speculation, which is prohibited."¹⁸² To avoid exclusion on this basis, the expert must narrowly tailor a reliable methodology comprised of all relevant facts, data, and a discernible standard of care to any proffered opinion.¹⁸³

VI. CONCLUSION

Premises security cases are still relatively new in the arena of personal injury tort law. Consequently, challenges to the opinions of security experts are a fairly recent development. As indicated in the beginning of this article, the majority of the reported cases where a security expert was challenged under *Daubert* or other legal theories have occurred in the past eight years. The impact an admissibility challenge may have on a case can be far reaching if the security expert's opinions are excluded. It is imperative, therefore, that courts apply an appropriate standard when determining if an expert is qualified to testify and render an opinion regarding the adequacy of security in a particular situation.

The current admissibility standard, derived from *Kumho*'s extension of *Daubert*, grants wide latitude to trial courts when applying *Daubert* to premises security and other non-scientific experts. Unfortunately, allowing courts such considerable discretion risks

¹⁷⁸ *Maguire*, 2002 WL 472275, at *6.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Bethea*, 2002 WL 31859434, *7. The plaintiffs argued that the decedent would not have been shot and killed had defendants provided lighting and security sufficient to maintain a reasonably safe premise. *Id.* at *1.

¹⁸² *Hughes v. District of Columbia*, 425 A.2d 1299, 1303 (D.C. 1981) (stating expert testimony is required to aid jury in making determination and avoid forcing jury to speculate).

¹⁸³ *Briggs v. Wash. Metro. Area Transit Auth.*, 481 F.3d 839, 846-47 (D.C. Cir. 2007) (explaining expert must proffer specific standards and relate directly to defendant's conduct).

unwarranted exclusion of security experts. Though neither *Daubert* nor *Kumho* intended that *Daubert* be viewed as setting out a definitive checklist or test, a trial court may strictly adhere to its relevance and reliability criteria. This standard, however, does not contemplate the differences between non-scientific and scientific evidence. The opinion of a premises security expert cannot be verified through re-testing, and yet it is at a court's discretion whether to apply this factor in a reliability determination. Allowing this discretion can lead to unnecessary exclusion of a party's expert which can have a significant effect on the outcome of a case.

A more appropriate admissibility standard focuses on the expert's qualifications and training, and the principles and methods the expert relies on in forming an opinion. Derived from Federal Rule of Evidence 702 and the decisions in several negligent security cases, this standard articulates the requirements necessary to proffer a relevant and reliable opinion as a qualified security expert and offers tailored, specific guidance to trial judges, where *Daubert* and *Kumho* do not. Under this standard, the expert must qualify as a security expert by demonstrating professional training and ability to assist the fact-finder. The expert must employ a reliable methodology which requires a review of all relevant facts and data and identification of a discernible industry standard. The expert must then apply the methodology to the particular facts of the case by establishing whether there was a deviation from the industry standard and, if so, whether that deviation proximately caused injury. An opinion fulfilling these requirements will be reliable under the Federal Rules of Evidence and should, ultimately, survive an admissibility challenge brought under *Daubert* and *Kumho*.

As presented in this article, the distinction between scientific and non-scientific evidence demonstrate that a strict application of the *Daubert* criteria to the testimony of a premises security expert is not appropriate. The new standard suggested here will more effectively assist trial courts in conducting a fair and consistent reliability determination, while also affording trial counsel the opportunity to properly vet potential security experts. Finally, this standard will assist security experts by providing better guidance as to how to offer only relevant and reliable expert opinions.