

Professional Expert Witnesses and the Problem of the Hired Gun

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I. Introduction

Every day, juries of lay people must reach verdicts by sifting through vast amounts of information. The evidence before the jury virtually always consists of contradictory information. In addition, cases often involve complex issues and questions of fact, making it difficult for lay jurors to truly understand the material issues in many cases. Parties to a case therefore rely on expert witnesses to assist jurors, or judges, as the case may be, in understanding the information and evidence offered by the parties¹. Unfortunately, expert witness testimony is rarely bipartisan; rather, each side to a controversy puts forth its own expert witness to offer testimony that supports that party's position. Thus, rather than helping to elucidate the information before a jury, expert witnesses may instead add to the confusion and controversy.²

The problems arising from expert testimony are made worse by the existence of "professional expert witnesses" and "hired guns."³ Professional expert witnesses are those who make a large portion of their living by offering trial consultation services and by testifying in court.⁴ Often, these experts will testify about issues that go beyond their

¹ See Lora M. Levitt & Margaret Bull Kovera, *Psychological Mediators of the Effects of Opposing Expert Testimony on Juror Decisions* 15 PSYCHOL. PUB. POL'Y & L. 124, 125 (2009).

² Levitt, *supra* note 1, at 124.

³ For an anecdotal example, see the article in *Williamette Weekly* about a doctor who earns up to \$200,000 from doing independent medical examinations in preparation for trials. Chris Lydgate, *Doctor for Sale, Williamette Week*, Nov. 13, 1996, available at http://www.injuredworker.org/doctors_for_sale.htm. According to the article, the doctor works almost exclusively for insurance companies and employers, as "he can usually be relied on . . . to testify that illness is probably caused by pre-existing conditions or that the patient's symptoms are exaggerated. *Id.*

⁴ Richard S. Masella & Malcolm Meister, *The Ethics of Health Care Professionals' Opinions for Hire*, 132 J. AM. DENTAL ASS'N 361, 363 (2001).

levels of expertise. A hired gun refers to an expert witness that is willing to testify based on the needs of the party that hires him, that is, the expert's opinion can be bought.⁵

Although there are safeguards meant to weed out unreliable or unethical expert testimony, these safeguards are currently ineffective.⁶ In this paper, I argue that the judge's role as "gatekeeper" to screen expert witness testimony has the potential to be the most effective safeguard against unreliable and unethical expert testimony, but that this safeguard is underutilized. In addition, I assert that increased gatekeeper activity could be especially effective at curbing unreliable expert testimony if used in conjunction with other safeguards, such as use of neutral expert panels.⁷

In Part II, I discuss the problems that arise from use of expert witnesses, particularly with regard to hired guns. I examine the safeguards that currently exist to deal with these problems and explain why these safeguards are inadequate. In Part III, I review the legal background of the judge's gatekeeper role, and I argue based on modern case examples that this essential safeguard is underutilized. In Part IV, I conclude that higher utilization of the judge's gatekeeper role is essential to ensure that courtroom expert testimony is both ethical and reliable.

II. The Problem of the "Hired Gun"

⁵ Masella, *supra* note 4, at 363.

⁶ *See, e.g.*, Levitt, *supra* note 1, at 143 (discussing presentation of an opposing expert witness); Murphy, *supra* note 43, at 219 (discussing ethical guidelines); Dep't of Justice, Expert Witnesses, 58 U.S. Att'y Bull. 8 (2010) (discussing the judges gatekeeper role in the context of *Daubert*); Bridget A. Larson & Stanley L. Brodsky, *When Cross-Examination Offends: How Men and Women Assess Intrusive Questioning of Male and Female*, 40 J. APPLIED SOC. PSYCHOL. 811, 824 (2010) (discussing cross-examination using intrusive questioning).

⁷ *See* Masella, *supra* note 4, at 365.

In this section, I address (1) some of the problems that arise from the use of hired guns as expert witnesses, specifically expert bias, increased litigation costs, and verdicts based on junk science; and (2) why the existing safeguards against these problems are inadequate.

(1) Problems Caused by Hired Guns

Bias

An obvious concern that arises when a party hires an expert to give testimony in support of that party's case is that the expert has an incentive to give testimony that is skewed in favor of the hiring party.⁸ As a result, the expert's testimony may lack adequate objectivity.⁹ In addition to the financial incentive, the expert witness may have other reasons for providing slanted testimony.¹⁰ For example, the expert may feel pressure to please the hiring party so that the attorney will hire the expert again in the future.¹¹ In addition, the expert's own ego may impede the expert's ability to offer objective testimony, for instance, where the expert is "so mesmerized by [his] creative thinking . . . that reality or scientific principle or both are forgotten."¹² Other potential sources of bias include the expert's perception of the trial as a competition and the

⁸ See David B. Resnik, *Punishing Medical Experts for Unethical Testimony: A Step in the Right Direction or a Step too Far?* 4 J. PHIL. SCI. & L. 1, 10 (2004).

⁹ See Jeffrey J. Parker, *Note, Contingent Expert Witness Fees: Access and Legitimacy* 64 S. CAL. L. REV. 1363, 1382 (1991).

¹⁰ See Larry B. Howard, *The Dichotomy of the Expert Witness*, 31 J. FORENSIC SCI. 337, 339 (1986).

¹¹ *Id.* at 339. The author notes that, in the eyes of defense attorneys, this pressure is particularly pervasive for scientists working with police officers or prosecutors. *Id.*

¹² *Id.*

expert's desire for recognition.¹³ These sources of bias are distinct from the direct financial benefit the expert obtains from testifying. That is, even if expert witness fees were disallowed, these potential sources of bias would remain. Thus, reducing or modifying experts' financial incentives is an insufficient remedy for expert witness bias.

Litigation costs

The problems with hired guns are not limited to those problems arising from bias in the expert's testimony. Use of hired guns also reduces judicial efficiency and increases litigation costs because litigants can avoid summary judgment by presenting questionable expert testimony that raises some question of fact.¹⁴

Junk science

Junk science refers to "judicial acceptance of unreliable expert testimony."¹⁵ Jurors' reliance on junk science leads to results that later seem to defy common sense;¹⁶ in some cases the results may be so unjust as to "shock the conscience."¹⁷ For example, in the case of Randall Dale Adams, Adams was wrongfully convicted of murdering a police officer and received the death sentence after Dr. James Grigson testified that Adams

¹³ *Id.*

¹⁴ See Douglas R. Richmond, *The Emerging Theory of Expert Witness Malpractice* 22 CAP. U. L. REV. 693, 694 (1993).

¹⁵ Paul C. Gianelli, "Junk Science": *The Criminal Cases* 84 J. CRIM. L. & CRIMINOLOGY 105, 107 (1993).

¹⁶ See, e.g., Masella, *supra* note 4, at 364 (discussing lawsuit against Dow Corning Corporation, in which plaintiffs secured a large settlement by producing anecdotal and unpublished evidence that the company's silicone breast implants cause autoimmune diseases; following the settlement, several studies disproved plaintiffs' claims).

¹⁷ Gianelli, *supra* note 15, at 114 n.56 (applying Justice Frankfurter's famous phrase to the case of *Barefoot v. Estelle*, 463 U.S. 880 (1983)).

would kill again if released.¹⁸ Even after Adams' conviction was overturned, Grigson maintained his belief that Adams would kill again.¹⁹ Similarly, Grigson testified in *Barefoot v. Estelle*, with "one hundred percent" certainty, that defendant Thomas Barefoot would commit future acts of criminal violence.²⁰ Grigson offered this testimony, despite never examining Barefoot, and despite the American Psychiatric Association's position that the "unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession."²¹

(2) Inadequacy of Existing Safeguards

Several safeguards against unreliable and unethical expert testimony exist, but they are largely inadequate. These safeguards include: (a) the right to produce an opposing expert witness; (b) cross-examination; (c) professional ethical guidelines; (d) reputation; and (e) judicial gatekeeping.

(a) The right to produce an opposing expert witness

One safeguard against a party's use of unreliable expert testimony is the right of the opposing party to produce its own expert witness. However, there are two major limitations on the effectiveness of this right as a safeguard. First, many litigants cannot afford to hire experts to testify. Second, a party's use of an opposing expert witness may end up confusing the jury instead of advancing the party's case.

¹⁸ See Gianelli, *supra* note 15, at 115-116.

¹⁹ *Id.* (quoting RON ROSENBAUM, TRAVELS WITH DR. DEATH 218 (1991)).

²⁰ Gianelli, *supra* note 15, at 115 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 919 (1983))

²¹ *Id.* at 113-14.

First, the right to produce an opposing expert witness means little to litigants who cannot afford to hire an expert witness.²² Hiring an expert to review one's case and to testify in court is expensive, and may act as a bar to effective litigation.²³ For example, if a consumer seeks damages from a large company for an injury caused by the company's product, the company can likely afford to hire numerous experts to testify that the company's product did not cause the injury. The consumer, on the other hand, will have fewer financial resources to expend to hire an expert. Moreover, if the consumer's attorney is working on a contingency-fee basis, the attorney may be unable to advance the money necessary to hire an expert because the attorney might be unable to absorb the loss should the consumer lose in court.²⁴ These considerations make the right to produce an opposing expert witness ineffective as a safeguard against unreliable expert witness testimony.

Second, use of an opposing expert witness may fail to advance a party's case because it may lead to jury confusion and cause jurors to decide based on heuristic factors, such as the expert's likeability or the presence of an opposing expert.²⁵ This

²² See Parker, *supra* note 9, at 1369.

²³ *Id.* An expert may charge as much as \$500 per hour to review a party's case or sit for a deposition, and the expert may charge several thousand dollars for one day of testifying. See Resnik, *supra* note 8, at 10; see, e.g., Deposition of Charles Wetli at 19, Hippele v. Bradshaw, 2010 U.S. Dist. LEXIS 79906 (S.D. Fla. Jul. 20, 2010) (No. 09-80089) (expert witness charging \$450 per hour to perform a medical review, \$500 per hour for a deposition, \$4,500 for a day with court testimony, and \$5,000 for an autopsy).

²⁴ *Id.* One proposed remedy for this is to allow parties to hire expert witnesses on a non-percentage contingency fee basis. *Id.* 1372.

²⁵ See Howard, *supra* note 10, at 337; see, e.g., Robert J. Cramer et al., *A Confidence-Credibility Model of Expert Witness Persuasion: Mediating Effects and Implications for Trial Consultation*, 63 CONSULTING PSYCHOL. J. 129, 131 (2011); Levitt, *supra* note 1, at 126.

becomes a problem, for example, where opposing experts testify about highly technical matters that the jury cannot understand, leading jurors to focus on factors other than the content of the experts' testimonies in reaching their decisions.²⁶

Research suggests that a juror's decision-making may be affected by factors such as the juror's gender, the expert's perceived likeability, the expert's perceived credibility, and the expert's degree of confidence.²⁷ One study evaluating juror decision-making proposed that jurors rely on two routes of persuasion in making decisions, a central route and a peripheral route.²⁸ The central route involves active cognitive processing of substantive content, while the peripheral route involves evaluating the value of substantive content based on the credibility of its source, rather than the content itself.²⁹ In other words, a juror relying on the central route is actively processing the content of the expert's testimony, while a juror relying on the peripheral route is evaluating whether to trust the content of the expert's testimony based on the fact that the expert is a doctor.³⁰ The significance of this study was that when jurors were ambivalent about the experts'

²⁶ *Id.* at 127; *see also* Masella, *supra* note 3, at 363.

²⁷ *See, e.g.*, Stanley L. Brodsky et al., *Credibility in the Courtroom: How Likeable Should an Expert Witness Be?* 37 J. AM. ACAD. PSYCHIATRY L. 525, 530-31 (2009) (finding that extraversion plays a role in jurors' decision-making, and that the impact was more pronounced among female jurors); Cramer, *supra* note 25, at 131 (finding that an expert's degree of confidence affects jurors' perceptions of credibility and decision-making). Interestingly, the research suggests that jurors prefer experts who display moderate levels of confidence, as opposed high or low levels of confidence, whereas judges and attorneys prefer experts who display high levels of confidence. Cramer, *supra* note 25, at 131. Overly high confidence actually detracted from expert testimony in the eyes of jurors. Cramer, *supra* note 25, at 135.

²⁸ Stanley L. Brodsky et al., *The Witness Credibility Scale: An Outcome Measure for Expert Witness Research* 28 BEHAV. SCI. & L. 892, 895 (2010).

²⁹ *Id.*

³⁰ *Id.*

arguments, the jurors' relied on the peripheral route of persuasion and evaluated the perceived credibility of the expert instead of the content of the expert's testimony.³¹ Credibility was measured based on the expert's confidence, likeability, trustworthiness, and knowledge.³² The problem here is that jurors are allowing themselves to be persuaded by the expert that they like most, instead of the expert that presents the most valid testimony.

Another study suggested that the mere presence of an opposing expert witness causes jurors discount both experts' testimonies.³³ The study theorized that jurors presented with opposing expert witnesses engage in peripheral route processing and interpret the experts' opposing views as evidence that neither view is generally accepted in the experts' fields.³⁴ If this is the case, then the right to produce an opposing expert witness will not significantly advance a party's case, though it may cause the jurors to discount the testimony of the original expert.³⁵

(b) Cross-examination

The intended purpose of expert witness cross-examination is to give the opposing party an opportunity to expose the expert's bias, the expert's lack of qualifications, problems with the expert's methodology, or inaccuracies in the expert's conclusions.³⁶ Research suggests that jurors are receptive to cross-examination that reveals an expert

³¹ *Id.* at 896.

³² *Id.* 903.

³³ Levitt, *supra* note 1, at 126.

³⁴ *Id.*

³⁵ *Id.* at 143.

³⁶ See Masella, *supra* note 4, at 363-64.

witness's bias.³⁷ Specifically, jurors tend to dislike and discredit expert witnesses who are highly paid or testify often.³⁸ However, despite being able to recognize such bias, jurors may nonetheless be unable to extract the truth from opposing expert testimonies.³⁹

One drawback of cross-examination is that it may backfire, causing the jury to look unfavorably upon the examining attorney.⁴⁰ Another limitation on cross-examination as a safeguard against unreliable expert testimony is that lawyers may lack the necessary knowledge to know when expert testimony is faulty.⁴¹ Lastly, even if an attorney successfully discredits an expert witness's invalid testimony on cross-examination, the jury may then disbelieve the attorney's own expert witness testimony, even if valid, by reasoning that the issue lacks general consensus in the field.⁴²

(c) Professional ethical guidelines

Most expert witnesses are subject to a code of professional ethics, however such codes often lack bite.⁴³ Professional organizations are rarely able to oversee expert testimony so as to discover and investigate potential ethical violations.⁴⁴ In addition, an expert who is a member of a professional organization has the option of withdrawing his

³⁷ See Levitt, *supra* note 1, at 127.

³⁸ *Id.* This was particularly true where the expert testimony was hard for jurors to understand. *Id.*

³⁹ See Parker, *supra* note 9, at 1378.

⁴⁰ See Larson, *supra* note 6, at 826 (finding that the use of intrusive questions on cross-examination "left the jurors with a negative impression of the prosecuting attorney and thus the prosecution's case").

⁴¹ See Levitt, *supra* note 1, at 125.

⁴² See *id.* at 126. In addition, research suggests that jurors are largely unable to differentiate between valid and invalid scientific evidence. See *id.* at 142.

⁴³ See Parker, *supra* note 9, at 1382; Justin P. Murphy, *Expert Witnesses at Trial: Where are the Ethics?* 14 GEO. J. LEGAL ETHICS 217, 235 (2000).

⁴⁴ Murphy, *supra* note 43, at 235-36.

membership, thereby rendering the organization's ethical guidelines unenforceable against him.⁴⁵

(d) Reputation

The need for an expert witness to maintain a reputation for credibility may serve as another safeguard against unreliable testimony.⁴⁶ Without this reputation, the expert risks being discredited through cross-examination.⁴⁷ However, it is unclear whether reputation actually serves as an effective safeguard against unreliable testimony.⁴⁸

(e) Judicial gatekeeping

Judicial gatekeeping has the potential to be the most effective safeguard against unreliable expert witness testimony. The judge's gatekeeping role derives from *Daubert v. Merrell Dow*, where the Supreme Court held that it is the responsibility of the trial court to determine whether an expert is qualified to testify and whether the expert's testimony is both relevant and reliable.⁴⁹ The Court set up a framework for judges to determine the reliability of proffered expert testimony.⁵⁰ In so doing, the court replaced

⁴⁵ *Id.*

⁴⁶ See Gianelli, *supra* note 15, at 1384.

⁴⁷ *Id.*

⁴⁸ See, for example, the case of Dr. Grigson, discussed *supra* text accompanying notes 15-21. Amid criticism from the psychiatric community for offering unethical expert witness opinions, Grigson continued testifying in capital murder proceedings. See Gianelli, *supra* note 15, at 114-15. His reputation earned him the nickname, "Dr. Death," but his notoriety for offering opinions based on junk science did not prevent him from continuing to testify. *Id.*

⁴⁹ See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993).

⁵⁰ *Id.* at 593-94.

the previous rule under *Frye v. United States*, whereby general acceptance of a technique as reliable in the relevant scientific community was a prerequisite to admissibility.⁵¹

To determine whether the testimony is reliable, the court must decide whether “the reasoning or methodology underlying the testimony is scientifically valid [and] whether that reasoning or methodology properly can be applied to the facts in issue.”⁵² In making this determination, the court should consider whether the expert’s theory or technique can be tested, whether the theory or technique has been subject to peer review, the technique’s known rate of error, whether standards exist to control the technique’s operation, and whether the theory or technique has general acceptance in the relevant scientific community.⁵³ The focus of the inquiry “must be solely on principles and methodology, not on the conclusions that they generate.”⁵⁴

Where the methodology might be faulty, the trial court should “undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand.”⁵⁵ The court need not determine whether the expert’s technique or theory is correct, but it must ensure that the expert’s conclusions are based on a sound and reliable methodology.⁵⁶

⁵¹ See *id.* at 584, 597; see also *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

⁵² *Id.*

⁵³ See *id.* at 593-94.

⁵⁴ *Id.* at 595.

⁵⁵ *Amorgianos v. Amtrak*, 303 F.3d 256, 266 (2d. Cir. 2002).

⁵⁶ See *United States v. Monteiro*, 407 F. Supp. 2d. 351, 358 (D. Mass 2006) (citing *Ruiz-Troche v. Pepsi Cola*, 161 F.3d 81, 85 (1st Cir. 1998)).

The requirements under *Daubert* and Rule 702 aim to ensure that jurors hear only reliable expert testimony that is based on sound methodology. Unfortunately, unreliable testimony still makes its way into the courtroom. In Part III below, I discuss compare a case where the court exemplified the type of inquiry that *Daubert* envisioned with another recent case where the court seemed to lapse in its gatekeeper role.

III. Examples of Good and Bad Gatekeeping

The Good: *United States v. Monteiro* (2006)

In *Monteiro*, a federal judge in Massachusetts had to determine whether to allow a firearm examiner testify for the government that, in his opinion, cartridge cases recovered from the scenes of various shootings matched the cartridge cases test-fired from the guns linked to the defendants in the case.⁵⁷ The judge conducted a thorough analysis and investigation, pursuant to Evidence Rule 702, *Daubert*, and *Kumho Tire*, and concluded that the proffered expert could not testify because the expert’s methodology fell short of the field standards for peer review and documentation.⁵⁸

In embarking on its analysis, the court noted the importance of careful analysis on this issue: “The Court’s vigilant exercise of this gatekeeper role is critical because of the latitude given to expert witnesses to express their opinions on matters about which they have no firsthand knowledge, and because an expert’s testimony may be given greater

⁵⁷ *Id.* at 356.

⁵⁸ *Id.* at 375.

weight by the jury due to the expert's background and approach."⁵⁹ The court then sought to define the challenged methodology.⁶⁰

The court engaged in a detailed review of firearm identification procedures and literature.⁶¹ It then noted, "For decades, both before and after the Supreme Court's seminal decisions in *Daubert* and *Kumho Tire*, admission of the type of firearm identification testimony challenged by the defendants has been semi-automatic; indeed, no federal court has yet deemed it inadmissible."⁶² Despite the clear precedence, the court continued the *Daubert* analysis.

The court reasoned that firearm identification evidence straddles the line between testimony based on science and testimony based on experience, as the methodology is both "subjective in nature, founded on scientific principles and based on the examiner's training and experience."⁶³ Thus, the court concluded that it must determine the reliability of both the underlying science and its application.⁶⁴ In this case, the proffered expert would rely primarily on his experience to identify the alleged match between the cartridge cases and the firearm, thus the 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. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'"⁶⁵

⁵⁹ *Id.* at 358.

⁶⁰ *Id.* at 359.

⁶¹ *See id.* 359-364.

⁶² *Id.* at 364.

⁶³ *Id.* at 365.

⁶⁴ *Id.*

⁶⁵ *Id.* at 366.

The court then assessed the expert's methodology according to the *Daubert* and *Kumho Tire* frameworks.⁶⁶ First, the court concluded that the peer-reviewed literature showed a lack of consensus in the field of firearm identification about the proffered expert's methodology.⁶⁷ However, "consensus is not necessary."⁶⁸ The court then considered whether there was a known or potential error rate for the expert's technique, and found that the known error rate was not unacceptably high.⁶⁹

Next, the court asked whether the expert's methodology is testable.⁷⁰ The court looked for documentation of the expert's results such that another examiner could check the accuracy of those results.⁷¹ The court held that documentation and peer review by a second qualified examiner would ensure the reliability of the expert's identification methodology.⁷² Upon a showing of documentation and peer review, the expert would be permitted to testify, to a reasonable degree of ballistic certainty, as to his expert opinion on the firearm identification.⁷³ However, because there is currently no reliable method to permit a firearm examiner to be absolutely certain, or to assert any degree of statistical certainty as to a firearm match, the expert would not be permitted to testify that he could be absolutely certain or certain to any arbitrary statistical degree that there was a match.⁷⁴

⁶⁶ *Id.*

⁶⁷ *Id.* at 367.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 368.

⁷¹ *Id.*

⁷² *Id.* at 372.

⁷³ *Id.*

⁷⁴ *Id.* at 372-73.

In evaluating the expert's qualifications, the court commented that his education was underwhelming, but that he nonetheless had sufficient experience from conducting prior identifications to render him qualified as an expert.⁷⁵ The court then returned to the issue of testability and the lack of both documentation as to the basis of the expert's identification and peer review of his methods and results by an independent second firearm examiner.⁷⁶ Thus, the court concluded that the proffered expert could not testify.⁷⁷

The courts' detailed inquiry into the firearm examiner's methodology and qualifications should set an example for other judges. This was the first time a court looked closely at this kind of expert testimony, whereas previous judges gave the issue little thought before admitting the possibly unreliable testimony.⁷⁸ Indeed, if this judge had followed suit, she would have admitted expert testimony that lacked the *Daubert* requirements of reliability. Moreover, the judge made her decision very carefully, noting that evidence that is merely "shaky," but still admissible, ought to be dealt with through cross-examination, production of contrary evidence, and careful jury instructions.⁷⁹ On the other hand, the judge also noted that the defendants' ability to challenge the expert's methods and conclusions would be hindered if the expert did not produce documentation and peer review allowing the defendants to test the expert's methods.⁸⁰ Thus, with this holding, the judge ensured that if the expert were to testify, he would only do so under

⁷⁵ *Id.*

⁷⁶ *Id.* at 374.

⁷⁷ *Id.* at 375.

⁷⁸ *See id.* at 364.

⁷⁹ *See id.* at 358 (quoting *Daubert*, 509 U.S. at 596).

⁸⁰ *See id.* at 369.

conditions that would allow the defendants to properly challenge his methods and conclusions.

The Bad: *Cruz v. Kagan* (2011)

In *Cruz*, another federal judge in Massachusetts dealt with a similar issue to that in *Monteiro*; however in *Cruz*, the outcome was different. *Cruz* involved a civil suit by the Marcy Cruz, as administratrix of her husband's estate, against New Bedford Police Officers Justin Kagan and Arthur Haggerty.⁸¹ Plaintiff alleged tort violations arising from the fatal shooting of her husband by defendants.⁸² Plaintiff sought to admit, among other things, the report and testimony of pathologist Dr. Charles Wetli.⁸³ Wetli would testify as to his expert opinion that, based on the bullets' trajectory in the deceased's body, the deceased was bent over with his back to the officers when he was shot, supporting an inference that the deceased was trying to escape from the conflict.⁸⁴ Defendants, relying on *Daubert*, moved to strike Wetli's report and to preclude Wetli from testifying.⁸⁵

Defendants assert that Wetli's opinion is unreliable because Wetli fails to identify or explain how the bullets' trajectories lead Wetli to his conclusion about the position of the deceased when he was shot.⁸⁶ Defendants argue further that Wetli fails to identify any

⁸¹ *Cruz v. Kagan*, No. 09-CV-11793 at *1 (D. Mass. June 22, 2011) (order on motion to strike expert reports).

⁸² Defendants' Motion to Strike the Reports of Charles V. Wetli and Reginald F. Allard at 1, *Cruz*, No. 09-CV-11793.

⁸³ *Id.*

⁸⁴ Plaintiff's Opposition to Defendants' Motion to Strike Disclosures of Charles V. Wetli, M.D. and Reginald F. Allard at 3, *Cruz*, No. 09-CV-11793.

⁸⁵ Defendants' Motion, *supra* note 82, at 1.

⁸⁶ *Id.* at 3.

principle or method used to derive his opinion, and he fails to explain generally how a bullet's trajectory could indicate the body's position before the bullet entered.⁸⁷

Defendants contend that without this information, the court "cannot assess whether Wetli's methodology, or his application of it, is scientifically sound."⁸⁸

As defendants rightly point out, Wetli's three-page report lacks any identification of his methodology.⁸⁹ The substantive portion of the report is as follows:

The pathway of the projectile is therefore back-to-front and upward, indicating he was bent forward at the waist when he sustained this wound The second gunshot wound was to the left side of the back The pathway was from left-to-right, upward, and back-to-front. Since both the shooting officer and Mr. Cruz were standing on a level surface, the projectile pathway through the body of Mr. Cruz would occur if the shooting officer was standing slightly to the left of Mr. Cruz who would have been bent over at the waist and facing away from the shooting officer. Also, the wound pathway could occur if the shooting officer was directly behind Mr. Cruz with Mr. Cruz bent over and then extending his right arm (e.g., if reaching for a door handle) thereby turning towards his left.⁹⁰

The report does nothing more than state the trajectory of the bullets, followed immediately by Wetli's conclusion that the deceased was bent at the waist with his back to the officers when he was shot.⁹¹

In plaintiff's reply memorandum, plaintiff asserts that defendants did not meet their burden to exclude evidence based solely on the disclosures.⁹² Nonetheless, plaintiff

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Report of Charles V. Wetli, M.D., *Cruz*, 2011 WL 4966891 (No. 09-CV-11793).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Plaintiff's Opposition, *supra* note 84, at 2.

asserts that Wetli's report is admissible expert testimony under Rule 702.⁹³ However, plaintiff's sole argument in support of Wetli's report and testimony is troubling:

[B]ased on the relative position of Officer Kagan to Lamont Cruz; his knowledge that both were standing on level ground; [Wetli's] knowledge of the facts; his knowledge of physics; his knowledge of the likely trajectory of the projectile; and his knowledge of the human anatomy, that the only conclusion to be reached is that Lamont Cruz was forward facing and bent over when Officer Kagan shot him in the back.⁹⁴

Plaintiff's assertions add nothing to bolster Wetli's report. Moreover, a quick search of Wetli in an expert witness database reveals that Wetli has "minimal or no training in physics, mathematics, crime scene reconstruction and accident reconstruction."⁹⁵

Nonetheless, the court denied defendants' motion to preclude Wetli's expert testimony. The court state, "I do not understand defendants to challenge [Wetli's] qualifications, but rather the adequacy of his report and the methodology on which he relies."⁹⁶ The first problem here is that the court takes Wetli's qualifications for granted, whereas Rule 702 requires the court to ensure that a proffered expert witness is qualified.⁹⁷ In *Monteiro*, the court explicitly stated: "Fed. R. Evid. 702 requires the judge to ensure that the proposed expert witness is qualified by knowledge, skill, experience, training, or education."⁹⁸ Thus, the court in *Cruz* clearly ignores this requirement under Rule 702.

⁹³ *Id.* at 6.

⁹⁴ *Id.* at 3.

⁹⁵ *Hindman v. City of Pasadena*, WL 4227277, No. BC369577 (Cal. Ct. App. 2010).

⁹⁶ *Cruz*, No. 09-CV-11793 at *1.

⁹⁷ *See Monteiro*, 407 F. Supp. 2d at 373.

⁹⁸ *Id.* (internal quotations omitted).

In addition, the court notes that wound ballistics “is a reasonably accepted forensic science with a published peer-reviewed methodology.”⁹⁹ On this basis the court denies the motion to preclude Wetli’s expert testimony. The glaring problem here is that the court is applying the pre-*Daubert* rule that existed under *Frye* by looking only at the existence of peer-reviewed literature in the field. Moreover, the court does not even question whether Wetli used any peer-reviewed methodology in drawing his conclusions. In short, the court asks none of the questions required by *Daubert* and required by Rule 702 to prevent the admission of unreliable testimony.

IV. Conclusion

The *Cruz* court is a prime example of the underutilization of the judge’s gatekeeper role, while the *Monteiro* court is an excellent example of how proper use of the gatekeeper role can ensure that only reliable expert testimony makes its way into the courtroom. The consequence of the exclusion of expert testimony in *Monteiro* is that if the government produces proper documentation and peer review and is able to admit the firearm examiner’s testimony, then the defendant will have the information necessary to retest the examiner’s methodology and to challenge the examiner’s results during cross-examination. In contrast, the consequence of admission in *Cruz* is that the defendants are burdened with cross-examining an expert witness whose conclusions lack any objective scientific basis and whose methodology is untestable because it is either indiscernible or non-existent. Furthermore, defendant’s cross-examination of Wetli is likely to cause juror

⁹⁹ *Cruz*, No. 09-CV-11793 at *3.

confusion, which will lead them to discount the testimonies, whether valid or invalid, of the other expert witnesses.¹⁰⁰

The problem of hired guns like Dr. Wetli is evident through behavioral and empirical research. This problem was recognized in both *Daubert* and *Kumho Tire*. The problem is especially pervasive in the criminal system, with hired guns such as Dr. Grigson testifying consistently based on junk science, resulting in capital sentences. Safeguards such as the right to produce an opposing expert witness and to cross-examine an expert witness are inadequate. The most effective safeguard against unethical and unreliable expert testimony is the judicial gatekeeper, but this safeguard only works if it is properly utilized.

¹⁰⁰ See *supra* text accompanying notes 22-35.