

## Expert Testimony in North Carolina Criminal Trials in a Post-*Howerton* World

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### I. Setting the Standard for Expert Testimony under *Howerton*

For the past several years, controversy existed in North Carolina as to the standard for determining the admission of expert testimony.<sup>2</sup> The North Carolina Supreme Court recently put this controversy to rest in *Howerton v. Arai Helmet, Ltd.*<sup>3</sup> In *Howerton*, the court flatly rejected the gatekeeping test adopted by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>4</sup> Instead, the court reiterated its previous three part test: “(1) Is the expert’s proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert’s testimony relevant?”<sup>5</sup>

With respect to the first factor, admissibility is favored when precedent has accepted its admission, and disfavored when such methods have previously been found to be inherently unreliable.<sup>6</sup> “Where, however, the trial court is without precedential guidance or faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques,” the trial court must look to other “‘indices of reliability’ to determine whether the expert’s proffered scientific or technical method of proof is sufficiently

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<sup>2</sup> N.C. GEN. STAT. § 8C-1 Rule 702 (2004).

<sup>3</sup> 597 S.E.2d 674, 687 (N.C. 2004).

<sup>4</sup> 509 U.S. 579 (1993).

<sup>5</sup> *Howerton*, 597 S.E.2d at 686, (citing *State v. Goode*, 461 S.E.2d 631, 639–41 (N.C. 1995)).

<sup>6</sup> *See id.* at 459–60.

reliable[.]”<sup>7</sup> Such indices include “the expert’s use of established techniques, the expert’s professional background in the field, the use of visual aids before the jury so that the jury is not asked to ‘sacrifice its independence by accepting [the] scientific hypotheses on faith,’ and independent research conducted by the expert.”<sup>8</sup>

This list, however, is not exhaustive. Thus, while the trial court must make a preliminary foundational inquiry into the basic methodological adequacy of an area of expert testimony,

[t]his assessment does not, however, go so far as to require the expert’s testimony be proven conclusively reliable or indisputably valid before it can be admitted into evidence. In this regard, we emphasize the fundamental distinction between the admissibility of evidence and its weight, the latter of which is a matter traditionally reserved for the jury.<sup>9</sup>

“Therefore, once the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert’s opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert’s conclusions go to the weight of the testimony rather than its admissibility.”<sup>10</sup> The court noted that “vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”<sup>11</sup> Finally, the court noted that expert testimony, like any testimony, must be excluded under N.C. Gen. Stat. § 8C-1, Rule 403 “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”<sup>12</sup>

<sup>7</sup> *Id.* at 687 (quoting *State v. Pennington*, 393 S.E.2d 487, 453 (N.C.1990)).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (citing *Queen City Coach Co. v. Lee*, 11 S.E.2d 341, 343 (N.C. 1940)).

<sup>10</sup> *Id.* at 688 (citing *State v. Barnes*, 430 S.E.2d 223, 231 (N.C. 1993), *cert. denied*, 510 U.S. 496 (1992)).

<sup>11</sup> *Howerton*, 597 S.E.2d at 688 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 596, 125 (1993)).

<sup>12</sup> *Id.* at 689.

## II. Subsequent Application of *Howerton*

Despite its recent pronouncement, *Howerton* has already generated appellate decisions concerning the admission of expert testimony. In *State v. Taylor*,<sup>13</sup> the North Carolina Court of Appeals applied *Howerton* to expert testimony concerning estimation of defendant's blood alcohol level using retrograde extrapolation analysis. The majority of the court found expert testimony based on this method had previously been accepted, but noted the defendant had specifically challenged the *use* of the average elimination rate as opposed to the defendant's actual elimination rate in the calculation.<sup>14</sup> The majority then considered whether use of the average elimination rate was sufficiently reliable. The court reasoned that because the defendant did not challenge the testifying expert's qualifications or the general relevance of the testimony, the defendant had conceded the result was sufficiently reliable to be considered by the jury under the first step in *State v. Goode*.<sup>15</sup> In reaching this conclusion, the court took pains to note the expert testified that the elimination rate used in the calculations was an average elimination rate and not the defendant's actual elimination rate, and that individuals with prior experience with alcohol would have a higher elimination rate.<sup>16</sup>

Judge Tyson concurred in the result, but argued the prior discussion of the use of the average elimination rate was mere dicta because a proper objection was not made at trial, and that admission of such evidence in *Taylor* was erroneous.<sup>17</sup> Judge Tyson reasoned that the North Carolina Supreme Court had previously rejected the use of statistical averages to predict how a specific action occurred or how an individual may have reacted or responded in a specific case where there are a large number of variables that could affect the measurement.<sup>18</sup> Because the expert

<sup>13</sup> 600 S.E.2d 483 (N.C. Ct. App. 2004).

<sup>14</sup> *Id.* at 488 (citing *State v. Catoe*, 336 S.E.2d 691 (N.C. Ct. App. 1985), *disc. review denied*, 344 S.E.2d 1 (N.C. 1986)).

<sup>15</sup> *See id.* (citing *State v. Goode*, 461 S.E.2d 631 (N.C. 1995)).

<sup>16</sup> *See id.* at 487–88.

<sup>17</sup> *Id.* at 490 (citing *State v. Taylor*, 600 S.E.2d 483 (N.C. 2004)).<sup>o</sup>

<sup>18</sup> *Id.* (citing *Hughes v. Vestal*, 142 S.E.2d 361, 365 (N.C. 1965)) (noting that in this case the variables admitted to by the testifying expert included gender,

improperly relied upon the average elimination rate to form his opinion as to the defendant's blood alcohol level at the time of the accident, the evidence was "hearsay, purely circumstantial, and irrelevant to [the] defendant's alcohol elimination rate and blood alcohol concentration at the time of the accident."<sup>19</sup> He went on to state that admission of such hearsay testimony denied the defendant the right to confront and cross-examine the source of the hearsay declarations.<sup>20</sup> Despite his conclusion that the average elimination rate was improperly admitted, Judge Tyson found the error to be harmless in light of other evidence of defendant's guilt, and therefore voted to affirm the defendant's conviction.<sup>21</sup>

In *State v. Morgan*,<sup>22</sup> the North Carolina Supreme Court addressed the limited issue of the qualifications of an expert in blood stain pattern interpretation. The court concluded that the testifying agent's failure to write or lecture on the topic or take any college level courses on the topic did not disqualify him as an expert, given his completion of two training sessions on bloodstain pattern interpretation, analysis of blood stain patterns in dozens of cases, previous acceptance as an expert in the area, and testimony at trial, including the use of visual aids and distinguishing the differences between blood spatter and transfer stains.<sup>23</sup>

The first post-*Howerton* case to address the admissibility of a new scientific method involved the identification of glass fragments.<sup>24</sup> First, the court noted that the trial court heard extensive *voir dire* testimony as to the methods the proffered witness used to support the finding that the physical properties of the standard and unknown sample from the defendant's shoe were similar, and supporting the conclusion that the witness "[could] not rule out that the particle did not come from that source [the broken window]."<sup>25</sup> Second, the trial court properly determined that the

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height, weight, age, elapsed time since eating, recent consumption of alcohol, type of alcohol consumed, and the person's prior experience with alcohol).

<sup>19</sup> *State v. Taylor*, 600 S.E.2d 483 at 491.

<sup>20</sup> *Id.* at 492.

<sup>21</sup> *Id.*

<sup>22</sup> 604 S.E.2d 886 (N.C. 2004).

<sup>23</sup> *Id.* at 904. c

<sup>24</sup> *State v. McVay*, 606 S.E.2d 145 (N.C. Ct. App. 2004).

<sup>25</sup> *Id.* at 148.

investigator qualified as an expert.<sup>26</sup> Finally, the court noted that the relevance of the expert testimony was not questioned.<sup>27</sup>

In sum, post-*Howerton* cases, especially *Taylor*, have put great weight on the jury sorting through the nuances of expert testimony in novel areas even when there is no battle of the experts to sharpen the issues.

### III. The Impact of Differences in Criminal and Civil Procedure on the Application of *Howerton*

With the notable exception for the testimony of mental health experts, the State or North Carolina is generally the proponent of expert testimony in criminal proceedings. As a result, the criminal defendant is generally in the same position as the civil defendant in attempting to suppress the introduction of expert testimony at trial or countering such testimony if it is admitted. However, the tools available to the criminal defendant are different than those available in civil cases, resulting in a different means for attacking such testimony. In addition, the incentive for attacking expert testimony is often different in criminal and civil proceedings. In civil proceedings, expert testimony may be essential to prove an element of the case. Therefore any motion to suppress such testimony may be dispositive. This was the case in *Howerton*, where the action was a product liability claim alleging the plaintiff's injuries arose from negligent design, manufacture and promotion of the defendant's motorcycle helmet.<sup>28</sup> The expert testimony at issue attempted to establish a causal link between the alleged negligent conduct and plaintiff's injury.<sup>29</sup> The trial court's decision to exclude the testimony of the three experts resulted in dismissal of the action upon defendant's motion for summary judgment.<sup>30</sup>

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<sup>26</sup> *Id.* (citing *Howerton*, 597 S.E.2d 674, 688 (N.C. 2004); *State v. Goodwin*, 357 S.E.2d 639, 641 (N.C. 1987)); N.C. GEN. STAT. § 8C-1 Rule 702 (2004).

<sup>27</sup> See *McVay*, 606 S.E.2d at 149.

<sup>28</sup> See *Howerton*, 597 S.E.2d at 678.

<sup>29</sup> *Id.*

<sup>30</sup> See *id.* at 683.

In contrast, expert testimony in criminal cases often is but one piece of evidence considered by the jury in evaluating the guilt or innocence of the defendant.<sup>31</sup> Suppression of expert testimony therefore rarely scuttles a criminal prosecution. As a result, the criminal defendant generally has little incentive to seek to suppress expert testimony by way of pretrial motions, relying instead on *in limine* or *voir dire* motions to suppress such testimony. Even if a motion to suppress is filed pretrial, the trial court may in its discretion elect to hear the motion during trial.<sup>32</sup> The trial court will undoubtedly do this in situations where the relevancy of the evidence may be unclear until further evidence is presented at trial. In addition, as a practical matter such motions may be delayed until trial because the expert witness may have to be subpoenaed to travel from another place to testify, and it is more convenient and less costly to make one trip instead of two.

Even if the criminal defendant is in the position to challenge expert testimony at trial, he or she may elect not to do so for strategic reasons. For example, a defendant may choose not to challenge expert testimony on DNA profiling in a rape case where the defendant has raised the defense of consent. However, a more fundamental reason may exist for not attacking the testimony. Once trial has commenced, both the civil and the criminal defendants face a dilemma concerning presentation of expert testimony to counter the State's or plaintiff's expert. Any

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<sup>31</sup> See, e.g., *State v. Taylor*, 600 S.E.2d 483, 485–86 (N.C. Ct. App. 2004) (in trial for habitual impaired driving, evidence in addition to that presented by the expert concerning blood alcohol levels tended to show defendant was driving on the wrong side of the road, hit another vehicle, was slumped over the wheel while driving, had a strong odor or alcohol about him, needed assistance in exiting his vehicle, was barely able to write a legible statement, failed the walk and turn and sway tests as well as two other tests, and blew 0.05 on the breathalyzer test); *State v. McVay*, 606 S.E.2d 145, 146 (N.C. Ct. App. 2004) (in trial for felonious breaking and entering, resisting or obstructing an officer, and attaining the status of habitual felon, evidence in addition to that presented by a glass shard analyst tended to place defendant at a nearby convenience store shortly before the crime, to have placed him at the school at the time a loud crash was heard by a witness who saw him running from the school, and to have been near the broken window and running from the police, and was later found in a nearby gully).

<sup>32</sup> N.C. GEN. STAT. § 15A-952(f) (2004).

substantive evidence presented by the defendant, even during the opposing party's case in chief, constitutes presentation of evidence. When the defendant presents evidence, he or she loses certain substantive rights, including the right to last argument,<sup>33</sup> the right to seek dismissal based upon insufficiency of the evidence at the close of all the evidence,<sup>34</sup> and the right to challenge on appeal the sufficiency of the evidence to support a conviction.<sup>35</sup> Even a challenge to the conclusions of an expert witness by calling to his or her attention a learned treatise established as reliable authority is admission of substantive evidence under an exception to the hearsay rule.<sup>36</sup>

The defendant may, of course, present expert testimony during *voir dire* in an effort to prevent the admission of such testimony by the State without presenting evidence at trial, thereby preserving these substantive rights. However, *Howerton* generally favors admission of such testimony, leaving the matter for the jury to consider after the issue is refined by cross-examination and presentation of contrary evidence. This leaves the criminal defendant with attempting to attack expert testimony solely on cross-examination in order to protect various substantive rights. As a result, the criminal trial record may lack the clarification of issues often present in civil trial proceedings concerning expert testimony. Given that the standard for admission of expert testimony is abuse of discretion,<sup>37</sup> North Carolina appellate courts will generally affirm admission of such testimony at trial. The trial court also has broad discretion to determine the relevancy of such testimony under N.C. Gen. Stat. § 8C-1, Rule 401,<sup>38</sup> and whether

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<sup>33</sup> *State v. Skipper*, 446 S.E.2d 252, 268 (N.C. 1994), *cert. denied*, 513 U.S. 1134 (1995); *see also* Rule 10 of the General Rules of Practice for the Superior and District Courts.

<sup>34</sup> N.C. GEN. STAT. § 15-173 (2004); N.C. R. APP. P. 10(b)(3) (2004); *State v. Vanhoy*, 471 S.E.2d 404, 407 (N.C. 1996), *overruled on other grounds*; *State v. Gaines*, 483 S.E.2d 396 (N.C. 1996), *cert. denied*, 522 U.S. 900 (1997).

<sup>35</sup> N.C. GEN. STAT. § 15-173 (2004); N.C. R. APP. P. 10(b)(3) (2004); *Vanhoy*, 471 S.E.2d at 407.

<sup>36</sup> N.C. GEN. STAT. §8C-1, Rule 803(18) (2004).

<sup>37</sup> *See State v. Davis*, 542 S.E.2d 236, 241 (N.C. Ct. App. 2001), *disc. rev. denied*, 547 S.E.2d 818 (N.C. 2001).

<sup>38</sup> *See State v. Goode*, 461 S.E.2d 631, 641 (N.C. 1995).

its probative value outweighs its prejudicial effect under N.C. Gen. Stat. § 8C-1, Rule 403.<sup>39</sup>

Even when the criminal defendant intends to introduce expert testimony at trial, the expert faces numerous procedural hurdles that do not exist in civil proceedings. For example, in civil proceedings, liberal discovery rules allow the civil defendant to depose the plaintiff,<sup>40</sup> require answers to interrogatories,<sup>41</sup> request admissions,<sup>42</sup> obtain relevant documents including medical records,<sup>43</sup> and may even require the plaintiff to submit to a compulsory physical or mental examination.<sup>44</sup> The civil defendant can also discover the facts and opinions held by expert witnesses who may testify for the plaintiff.<sup>45</sup> The purpose of this rule is to provide counsel for a party with sufficient information to cross-examine and rebut the testimony of an expert witness at trial.<sup>46</sup> Civil discovery as to an expert opinion occurs in two stages. First, the opposing party is asked to respond to interrogatories identifying each expert witness he or she intends to call at trial, the subject matter on which each expert is expected to testify, and the substance of the facts and opinions to be offered and a summary of the grounds for each opinion.<sup>47</sup> The second stage is initiated by motion pursuant to statute.<sup>48</sup> Under this provision the court may order further discovery through other means, usually by deposition.<sup>49</sup>

In contrast, the criminal defendant does not have the right to compel any witness to submit to an interview before trial.<sup>50</sup> However, the criminal defendant's access to a witness cannot be

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<sup>39</sup> State v. Mackey, 535 S.E.2d 555, 559 (N.C. 2000).

<sup>40</sup> N.C. GEN. STAT. § 1A-1, Rule 30(a) (2004).

<sup>41</sup> *Id.*, Rule 33(a).

<sup>42</sup> *Id.*, Rule 36(a).

<sup>43</sup> *Id.*, Rule 34(a).

<sup>44</sup> *Id.*, Rule 35(a).

<sup>45</sup> *Id.*, Rule 26(b)(4); Green v. Maness, 316 S.E.2d 911, 915-16 (N.C. Ct. App. 1984), *cert. denied*, 323 S.E.2d 922 (N.C. 1984).

<sup>46</sup> N.C. GEN. STAT. § 1A-1, Rule 26, Comment (2004).

<sup>47</sup> Green, 316 S.E.2d at 915-16.

<sup>48</sup> N.C. GEN. STAT. § 1A-1, Rule 26(b)(4) (2004).

<sup>49</sup> *Id.*

<sup>50</sup> State v. Phillips, 399 S.E.2d 293, 301 (N.C. 1991), *cert denied*, 501 U.S. 1208 (1991).



impaired by the State.<sup>51</sup> In addition, the right to take depositions in criminal cases is limited by statute to preserving the testimony of a person who is infirm, incapacitated, or a nonresident of North Carolina.<sup>52</sup> Likewise, the criminal defendant cannot compel the victim or a witness to submit to a psychological examination.<sup>53</sup> However, if a witness or victim refuses to voluntarily submit to a psychological examination, the trial court may grant relief including appointment of an expert to assist in interpretation of tests that have been performed, exclusion of such tests or evidence relating to the person's condition from trial, and dismissal if failure to submit to such tests impairs the defendant's right to present a defense.<sup>54</sup> Finally, the trial court does not have the power to require a physical examination of an alleged victim or witness.<sup>55</sup>

Absent the ability to collect evidence on his own behalf, the criminal defendant is often forced to rely upon discovery statutes to obtain the necessary information. However, even statutory discovery rights are often more limited in a criminal as opposed to a civil proceeding. For example, in the case of misdemeanor charges where the original jurisdiction lies in district court there is no statutory right of discovery before trial.<sup>56</sup> In criminal proceedings originating in superior court, which has original

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<sup>51</sup> *State v. Pinch*, 292 S.E.2d 203, 214–15 (N.C. 1982), *cert. denied*, 459 U.S. 1189 (1983), *overruled on other grounds*; *State v. Rouse*, 451 S.E.2d 543 (N.C. 1994).

<sup>52</sup> N.C. GEN. STAT. § 8-74 (2004); *State v. Barfield*, 322, 259 S.E.2d 510, 525–26 (N.C. 1979), *cert. denied* 448 U.S. 907 (1980), *overruled on other grounds*; *State v. Johnson*, 344 S.E.2d 775 (N.C. 1986).

<sup>53</sup> *State v. Horn*, 446 S.E.2d 52, 53 (N.C. 1994).

<sup>54</sup> *Id.* at 54.

<sup>55</sup> *State v. Hewett*, 376 S.E.2d 467, 471–72 (N.C. Ct. App. 1989) (examination of victim allowed only with consent of victim or victim's guardian); *State v. Tucker*, 407 S.E.2d 805, 812 (N.C. 1991) (holding defendant not entitled to nontestimonial identification order to obtain hair sample of another possible suspect where statute does not authorize defendant to obtain such an order).

<sup>56</sup> N.C. GEN. STAT. § 15A-902(c) (2004) (statutory motion for discovery must be heard in superior court); N.C. GEN. STAT. § 7A-271(a) (2004) (limiting the authority of superior courts to have original jurisdiction over misdemeanors to enumerated cases); N.C. GEN. STAT. § 7A-272 (a) (2004) (district court has jurisdiction to hear all other misdemeanors).

jurisdiction for most felony charges,<sup>57</sup> the State, upon motion of the defendant, must give notice of any expert witness it reasonably expects to call as a witness at trial.<sup>58</sup> The expert witness must prepare and furnish to the defendant a report of the results of any examination or tests, including the expert's opinion and underlying basis for that opinion.<sup>59</sup> The expert must also provide his or her curriculum vitae.<sup>60</sup>

In addition to statutory discovery rights, the criminal defendant has the constitutional right to obtain certain evidence from the State under the Fifth Amendment right of Due Process and the Sixth Amendment right to effective assistance of counsel.<sup>61</sup> This constitutional right includes access to evidence that would tend to discredit the caliber of a police investigation,<sup>62</sup> which arguably includes any laboratory reports tending to discredit the findings in a given case. Such material must be made available, even if the defendant does not make a request,<sup>63</sup> and must be disclosed even if it is unknown to the defendant.<sup>64</sup> This material arguably includes evidence that would discredit expert testimony. The defendant therefore is entitled to review the tests performed or procedures utilized by the experts to reach their conclusions.<sup>65</sup> The defendant is also entitled to laboratory protocol documents, reports documenting "false positive" findings in the laboratory results, and the credentials of the persons who performed the tests.<sup>66</sup> The defendant is not, however, entitled to have the State provide results of published empirical findings supporting the expert opinion, citations to articles or chapters in learned treatises supporting the

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<sup>57</sup> N.C. GEN. STAT. § 7A-271(a) (2004) (superior court has original jurisdiction over all criminal actions not assigned to the district court); N.C. GEN. STAT. § 7A-272(c) (2004) (district court has jurisdiction to accept plea of guilty to class H or I felonies in certain cases).

<sup>58</sup> N.C. GEN. STAT. § 15A-903(a)(2) (2004).

<sup>59</sup> N.C. GEN. STAT. § 15A-903(a)(3) (2004).

<sup>60</sup> *Id.*

<sup>61</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>62</sup> *Kyles v. Whitley*, 514 U.S. 419 (1995).

<sup>63</sup> *Id.*; *United States v. Bagley*, 473 U.S. 667 (1985).

<sup>64</sup> *United States v. Agurs*, 427 U.S. 97 (1976).

<sup>65</sup> *State v. Cunningham*, 423 S.E.2d 802 (N.C. Ct. App. 1992).

<sup>66</sup> *State v. Dunn*, 571 S.E.2d 650 (N.C. Ct. App. 2002), *disc. review denied*, 578 S.E.2d 314 (N.C. 2003).

opinion, quality control information, or accreditation of the laboratory.<sup>67</sup>

North Carolina's criminal discovery statute provides for reciprocal discovery of defendant's expert witness testimony by requiring notice of intent to call expert witnesses.<sup>68</sup> The State also has the right to review in advance the results of physical or mental examinations or tests the defense intends to introduce at trial.<sup>69</sup> Reciprocal discovery, however, is limited to expert testimony the defendant intends to introduce at trial.<sup>70</sup> The defendant must also file notice of intent to offer certain defenses at trial, including alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, and voluntary intoxication, many of which would require the testimony of an expert witness to establish at trial.<sup>71</sup>

Even when the defendant does obtain discovery, failure to comply with procedural requirements may prevent the defendant from being able to cross-examine certain expert witnesses testifying for the State.<sup>72</sup> Some question has arisen whether such statutes will satisfy the Confrontation Clause requirements addressed in *Crawford v. Washington*.<sup>73</sup> In *Crawford*, the Court held that the State may only introduce testimonial statements of witnesses who are not subject to cross-examination when the declarant is unavailable and the defendant has not had a prior

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<sup>67</sup> State v. Fair, 596 S.E.2d 871 (N.C. Ct. App. 2004).

<sup>68</sup> N.C. GEN. STAT. § 905(c)(2) (2004).

<sup>69</sup> N.C. GEN. STAT. § 15A-905(a) (2004).

<sup>70</sup> *Dunn*, 571 S.E.2d at 650.

<sup>71</sup> N.C. GEN. STAT. § 15A-905(c) (2004); N.C. GEN. STAT. §§ 15A- 959 (2004).

<sup>72</sup> See, e.g., N.C. GEN. STAT. § 90-95(g) (2004) (allowing the state to submit a report of a chemical analysis of a controlled substance in lieu of calling the analyst as a witness if certain conditions are met, namely filing a timely notice of intent to do so and if the defendant fails to object); N.C. GEN. STAT. § 90-95(g1) (2004) (similar provisions for establishing chain of custody); N.C. GEN. STAT. § 8-58.20 (2004) (same for forensic DNA analysis); N.C. GEN. STAT. § 20-139.1(e1) (2004) (providing for the use of an affidavit in District Court without further authentication for testimony concerning the alcohol concentration or concentration of other impairing substances in criminal proceedings for various implied consent crimes, such as driving while impaired).

<sup>73</sup> 541 U.S. 36 (2004).

opportunity for cross-examination. The Court, however, limited this holding to testimony that is admitted for the truth of the matter asserted.<sup>74</sup> Under traditional rules of evidence, evidence introduced for impeachment, corroboration, or as the basis for an expert opinion is not introduced for the truth of the matter asserted. The Confrontation Clause therefore arguably does not apply to any statements the expert may rely upon in making his or her conclusions, even when such statements are testimonial in nature.<sup>75</sup>

Even if such statements are testimonial and subject to the requirements of *Crawford*, the question then becomes whether the right of confrontation can be waived. It is well established that procedural limits can be placed on the exercise of constitutional rights and that failure to follow those requirements constitutes waiver.<sup>76</sup> Because these statutes allow admission of expert testimony by affidavit or other means when proper notice is given of the intent to do so and when there is no objection, the statutes are in effect a procedural limit on when a constitutional right may be asserted.

If the criminal defendant has a need for the assistance of an independent expert, one must be appointed when failure to do so deprives him or her of a fair opportunity to present a defense, thereby violating due process.<sup>77</sup> North Carolina also provides a statutory basis for appointment of experts to indigent criminal defendants.<sup>78</sup> This right applies to any expert,<sup>79</sup> and at any stage of

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<sup>74</sup> *Id.* at 56.

<sup>75</sup> See *United States v. Stone*, 222 F.R.D. 334 (E.D. Tenn. 2004) (holding that even if the statements relied upon by the expert were testimonial, the statements may be used to form the expert opinion; further, if such statements were elicited on cross examination, it would not be for hearsay purposes, but for evaluating the opinion offered by the expert on direct examination).

<sup>76</sup> See, e.g., N.C. GEN. STAT. § 15A-975 (2004) (requiring pretrial motion to suppress certain evidence obtained in violation of defendant's constitutional rights); N.C. GEN. STAT. § 15A-952(b)(2) (2004) (placing limitations on motions to dismiss a grand jury indictment under N.C. GEN. STAT. § 15A-955(1) based upon a challenge to the composition of the grand jury array).

<sup>77</sup> *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

<sup>78</sup> N.C. GEN. STAT. § 7A-450(b) (2004).

<sup>79</sup> *State v. Ballard*, 428 S.E.2d 178, 179-80 (N.C. 1993), *cert. denied*, 510 U.S. 984 (1993).

the criminal proceeding.<sup>80</sup> However, the indigent criminal defendant does not have a constitutional right to the expert of his or her own choosing.<sup>81</sup>

In North Carolina, a criminal defendant is entitled to an appointed expert upon a showing that (1) the defendant is indigent, and (2) failure to appoint an expert will deprive the defendant of a fair trial or there is a reasonable likelihood an expert will materially assist the defendant in the preparation of his or her case.<sup>82</sup> This does not require the defendant make a showing as to what he or she intends to prove at trial.<sup>83</sup> The constitutional and statutory right to an appointed expert is relatively limited due to the materiality requirement. When an expert is sought to explain evidence or tests used, the defense counsel as a practical matter may discuss the evidence such as the results of a test with the expert witness for the State, such as a DNA analyst.<sup>84</sup> Further, even when funds for an expert can be obtained, it may be difficult to actually find an expert willing to testify on behalf of the criminal defendant, especially in such areas as child sexual abuse.

#### IV. Impact of *Howerton* on Expert Testimony in Child Sexual Abuse Cases

In many criminal cases, the expert is called upon to present evidence tending to link the defendant to the crime scene using evidence such as DNA profiling, fingerprint analysis, gunshot residue analysis, and the like. In other cases, the expert might

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<sup>80</sup> *State v. Moore*, 364 S.E.2d 648 (1988) (right to expert to assist in pretrial motion to suppress evidence).

<sup>81</sup> *Ake*, 470 U.S. at 83; *State v. Campbell*, 460 S.E.2d 144, 150–51 (N.C. 1995) (failure of expert to give desired opinion does not render the expert ineffective).

<sup>82</sup> *Moore*, 364 S.E.2d at 652.

<sup>83</sup> *State v. Parks*, 417 S.E.2d 467, 472 (N.C. 1992) (defendant is entitled to expert when there is a reasonable likelihood that an expert will materially assist in the preparation of the case; *Moore*, 364 S.E.2d at 654 (no need to make a showing to discredit the expert's witness before defendant may obtain an expert)).

<sup>84</sup> However, where the appointment of an expert is necessary to allow the defendant to prepare his or her case in secret, such a request should be made *ex parte* and would obviously preclude asking general questions of experts for the State. See *Ballard*, 428 S.E.2d at 179–80.

testify as to the nature of an item alleged to be part of the criminal act, such as handwriting analysis in the case of forgery or the identity of a substance seized during a search as a controlled substance. In some criminal cases, the expert is called upon to testify that certain physical evidence or behavior is consistent with the commission of a crime. For example, an expert may testify that the results of a culposcopic examination are consistent with a finding that a child has recently been sexually active, even though such testimony cannot identify the person who sexually abused the child. In other cases, an expert may testify that a child exhibits symptoms or behaviors consistent with sexual abuse.

North Carolina courts have long recognized the prejudicial nature of such testimony, especially when it tends to bolster the credibility of the witness, and considerable case law has developed in the area of expert testimony in child sexual abuse cases. For example, a medical expert's testimony as to sexual abuse must be based upon expertise, and not common sense.<sup>85</sup> Likewise, an expert's opinion that a child has been abused cannot be based solely on the child's statement she had been sexually abused without actual physical evidence of abuse.<sup>86</sup> On the other hand, an expert may testify as to the symptoms and characteristics of sexually abused children when such testimony will assist the jury in understanding the behavior patterns of sexually abused children.<sup>87</sup> The expert also may testify that a particular child's symptoms are consistent with those of sexual or physical abuse victims, but only to aid the jury in assessing the complainant's

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<sup>85</sup> State v. Trent, 359 S.E.2d 463, 465–66 (N.C. 1987) (holding that the State laid inadequate foundation for expert testimony concerning opinion as to whether victim has been sexually abused when the examination was performed four years after the alleged abuse; the examination allowed the expert to testify only as to the victim being sexually active, not to sexual abuse; the expert was in no better position than the jury to evaluate victim's history alleging sexual abuse by the defendant); State v. Couser, 594 S.E.2d 420, 422–23 (N.C. Ct. App. 2004) (holding that the expert's admission on cross-examination that the abrasions she observed on the introitus were not diagnostic nor specific to sexual abuse meant the expert had insufficient physical evidence to support testimony about her diagnosis and opinion that the victim was probably sexually abused).

<sup>86</sup> State v. Grover, 543 S.E.2d 179, 183–84 (N.C. Ct. App. 2001), *aff'd*, 553, S.E.2d 679 (N.C. 2001); State v. Stancil, 559 S.E.2d 788, 789 (N.C. 2002).

<sup>87</sup> State v. Kennedy, 357 S.E.2d 359, 366 (N.C. 1987).

credibility.<sup>88</sup> However, testimony about syndromes such as rape trauma syndrome or post traumatic stress disorder should be treated with caution through proper limiting instructions because such a diagnosis has a therapeutic and not a fact-finding purpose and the jury may place too much weight on such testimony without making this distinction.<sup>89</sup> In addition, rape is but one possible cause of post-traumatic stress disorder.<sup>90</sup> Such testimony is allowed to corroborate other evidence that abuse occurred and to explain certain characteristics, such as delay in reporting the alleged abuse.<sup>91</sup> On the other hand, when the expert has directly examined the victim and taken steps to confirm the victim's story, the expert may testify as to the evidence of abuse, but cannot testify as to the conclusion the victim was sexually abused by the defendant.<sup>92</sup>

Will these limits on such expert testimony continue under *Howerton*? In some cases, expert testimony will continue to be excluded because the proponent has failed to lay a proper foundation. However, *Taylor* indicates that in a post-*Howerton* world it will be up to the jury to sort out confounding factors which might provide alternate explanations for a given finding or symptom. Therefore, evidence of rape trauma syndrome or post-traumatic stress will likely be admissible in more cases. Likewise, testimony that certain physical signs are consistent with sexual abuse or with other possible causes will probably be admissible under N.C. Gen. Stat. § 8C-1, Rule 702. As a result, more expert testimony will come before the jury in such cases.

*Howerton* will also put pressure on the courts to relax the requirements as to the type of facts or data that an expert may

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<sup>88</sup> *Id.*

<sup>89</sup> *State v. Hall*, 412 S.E.2d 883, 889 (N.C. 1992), *citing with approval* *People v. Bledsoe*, 681 P.2d 291, 300 (Cal. 1984) (noting that because their role is therapeutic, rape counselors seldom challenge inconsistencies in their clients' stories or independently investigate the facts).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*; *see also* *State v. Jackson*, 358 S.E.2d 679 (N.C. 1987) (expert's testimony determining likelihood defendant was the father based solely on expert's assumptions about the case concerning defendant's access to the victim, as opposed to scientific evidence for making the assumption held inadmissible).

<sup>92</sup> *State v. Figured*, 446 S.E.2d 838, 843 (N.C. Ct. App. 1994).

reasonably rely upon when making his or her conclusion under N.C. Gen. Stat. § 8C-1, Rule 703. After all, if the jury must evaluate the reliability of an opinion, why can the jury not also evaluate reliability of the data upon which the conclusion is based? For example, in *State v. McCall*,<sup>93</sup> an expert who never examined the alleged child victim and did not even hear the in-court testimony of the child or any other witness was allowed to testify as to whether the behavior of the child was consistent with the behavior of a child that had been sexually abused in response to hypothetical questions.<sup>94</sup> The admission of such testimony was upheld under N.C. Gen. Stat. § 8C-1, Rule 703.<sup>95</sup>

*McCall* represents a typical criminal case where the defendant presented no evidence. Challenges to expert testimony therefore occurred only in a *voir dire* and on cross-examination. On direct examination, an expert testified that she had reviewed a copy of the child's statements to the police, a copy of the Department of Social Service record, and the results of the child's interview by the Pediatric Resource Center.<sup>96</sup> She was also given a summary of the child's in-court testimony by the district attorney.<sup>97</sup> The expert then testified about the characteristics and behavior of sexually abused children.<sup>98</sup> On cross-examination the expert testified that the observed behavior could also be triggered by other trauma.<sup>99</sup> The court upheld admission of the testimony, noting that an expert is in a better position to determine if certain behavior is consistent or inconsistent with individuals who have been sexually abused.<sup>100</sup> Further, the expert's testimony "could help the jury understand the behavior patterns of sexually abused children, and assist in assessing the credibility of the victim."<sup>101</sup>

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<sup>93</sup> 589 S.E.2d 896 (N.C. Ct. App. 2004).

<sup>94</sup> *Id.* at 900.

<sup>95</sup> *Id.* at 901.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*, citing *State v. Isenberg*, 557 S.E.2d 568, 572 (N.C. Ct. App. 2001), *disc. review denied*, 561 S.E.2d 268 (N.C. 2002).

<sup>101</sup> *Id.* (quoting *State v. Kennedy*, 357 S.E.2d 359, 366 (N.C. 1987)).



In cases such as *State v. Figured*,<sup>102</sup> the testifying expert had personally examined the victim. Case law also allows an expert to base his or her conclusion on inherently reliable information, and testify as to that information, even if such evidence is not otherwise admissible.<sup>103</sup> In *McCall*, the expert relied on testimony that was essentially testimonial in nature and obtained with an eye towards litigation. Had the issue been raised, the question in *McCall* was not whether an expert can make a conclusion based upon reliable information, but whether the expert used reliable information to reach her conclusion in this case. *Howerton* does not address this issue, which arises under Rule 703 instead of 702. However, if a trial court is to liberally construe Rule 702 for the admission of expert testimony, it stands to reason that the basis for such testimony should also be liberally construed, leaving to the jury the issue of whether the data or information is sufficiently reliable.

## V. Conclusion

*Howerton* will liberalize the admission of evidence in criminal trials in North Carolina. However, our rules of criminal procedure are not equipped to deal with this expanded role of the jury in evaluating expert testimony. As a result, the evaluation of expert testimony will increasingly turn on its relevance under N.C. Gen. Stat. § 8C-1, Rule 401, and its prejudicial effect under N.C. Gen. Stat. § 8C-1, Rule 403.

One reason problems arise with the admission of expert testimony is that one rule is being used to fit all types of expert testimony. Some opinions are more subject to evaluation using scientific principles than are other opinions. For example, if there is a question as to whether a given substance is cocaine, the defendant may have the substance retested by an independent laboratory. In contrast, two experts may disagree about the causal link between the design of a helmet and a given injury, and the agreement basically cannot be subject to independent laboratory analysis.

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<sup>102</sup> 446 S.E.2d 838.

<sup>103</sup> *State v. Wade*, 251 S.E.2d 407, 412 (N.C. 1979).

Courts should consider developing two different standards for admission of scientific testimony based upon the type of opinion that is being proffered. Under this analysis, expert testimony based upon specific tests would be evaluated under the more relaxed standards of *Howerton*. In contrast, opinions that require speculation and inference without laboratory analysis would be subject to the gatekeeping analysis of *Daubert*. Most expert testimony in criminal cases would fall under the more liberal standards of *Howerton*. However, testimony such as that of a child sexual abuse expert, which calls for a greater degree of speculation, would be evaluated under the more stringent *Daubert* standard. The development of two standards of review would provide a threshold inquiry into the scientific basis for an opinion in such cases without having to potentially remove the issue from the jury on the ground of relevancy or prejudice. Development of two standards of review would also address the concern that the *Howerton* standard may be too liberal in some cases, and the *Daubert* standard too stringent in other cases. The best approach may be to use both standards, depending upon the nature of the proffered evidence.