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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of	)	Petition No. R-10-0035
	)	
ARIZONA RULES OF EVIDENCE, ARIZONA RULES OF CRIMINAL PROCEDURE	)	COMMENT OF THE PIMA COUNTY ATTORNEY RE THE PETITION TO CHANGE RULE 702 OF THE ARIZONA RULES OF EVIDENCE
	)	
	)	
	)	
_____	)	

BARBARA LAWALL, the Pima County Attorney, hereby opposes the proposed change to Rule 702, Arizona Rules of Evidence.

DATED this 20th day of May, 2011.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

s/Barbara LaWall

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PRELIMINARY STATEMENT

¶1 Along with other prosecutors throughout Arizona, the Office of the Pima County Attorney is dedicated to protecting public safety by holding criminal offenders accountable while simultaneously upholding their constitutional rights and those of their victims. Our ethical responsibility to do justice frequently depends on forensic and behavioral-science evidence, as much to exculpate the innocent as to assist in convicting the guilty. Changing Rule 702 of the Arizona Rules of Evidence would seriously undermine our ability to see that justice is done in criminal cases.

¶2 In its present form, Rule 702 permits the use of fingerprint, ballistics, DNA, and other forensic evidence, both by the State and the defense, without unnecessary litigation. The current rule also permits the State to introduce behavioral science evidence concerning victims of rape and child sexual abuse. Moreover, it allows defense attorneys to present evidence of their clients' psychological characteristics.

¶3 Adopting federal Rule 702 would throw all of the above into question and would not be sound policy for Arizona. I respectfully request that this Court adopt Option A of the Committee's proposal and thus preserve a Rule that will continue to serve the people of Arizona well.

ARGUMENT

¶4 Adopting the federal version of Rule 702 (even incompletely, as suggested in the Committee's Option C) would change Arizona into a jurisdiction that follows *Daubert v. Merrell Dow Pharmaceuticals*[1] and its progeny. Such a change would combine the certainty of increased litigation with uncertainty of outcomes in individual cases. Neither result is desirable, and amending the rule is unnecessary.

1. No change is needed. The Arizona criminal justice system has functioned well using Arizona Rule 702 and the principles of *Frye* and *Logerquist.*

¶5 The legal rules governing admissibility of scientific evidence are currently well-settled. Prosecutors, defense attorneys, and courts have long applied the principles of *Frye v. United States*[2] without difficulty to advances in forensic science, from the earliest fingerprint evidence to the latest DNA methodology. Together, Arizona Rule 702 and the progeny of *Frye* have produced decades' worth of settled law governing the admissibility of expert testimony in areas of the "hard" forensic sciences.[3] For example, since the 1921 opinion in *Moon v. State*,[4] fingerprint evidence has been found to be scientifically reliable. And, more than a

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1. 509 U.S. 579 (1993).
2. 293 F. 1013 (D.C. Cir. 1923).
3. *See State ex rel. Romley v. Fields*, 201 Ariz. 321, 35 P.3d 82 (App. 2001).
4. 22 Ariz. 418, 198 P.2d 288 (1921).

decade ago, *Logerquist v. McVey*[5] established standards for the admissibility of psychological, psychiatric, and other behavioral testimony in criminal cases.

¶6 The existing rules benefit our state. For example, the ability under *Logerquist* to admit evidence of known behavioral characteristics of victims of child sexual abuse and rape has been critical to holding violent offenders accountable in Arizona.[6] Because federal prosecutors try significantly fewer rape and child abuse cases than do state court prosecutors, federal Rule 702 and *Daubert* may have less negative impact in the federal system. But in Arizona superior courts, the adverse effects would be great. Almost every child sexual abuse case involves issues of delayed disclosure, "script memory," and recantation. Losing the ability to educate juries about these important issues would seriously impair our ability to convict those who commit sexual offenses against children and adults.

¶7 As another example, sex offenders may be subject to involuntary civil commitment proceedings under Arizona's Sexually Violent Persons Act, A.R.S. §§ 36-3701 through 36-3717. The psychological testimony needed by both parties in those cases may be admitted pursuant to the principles outlined in *Logerquist*.[7] Also under existing law, courts in narcotics cases can admit important behavioral-

5. 196 Ariz. 470, 1 P.3d 113 (2000).
6. *See State v. Curry*, 187 Ariz. 623, 905 P.2d 1133 (App. 1996).
7. *Fields*, 201 Ariz. at 328, ¶ 23, 35 P.3d at 89.

science evidence to establish certain known behavior patterns and practices of drug dealers. In other words, existing Rule 702 and established case law interpreting the rule allow jurors to hear important, relevant evidence that aids them in fulfilling their constitutional role as jurors. Adopting the *Daubert* standard would mean that body of well-settled case law will fall by the wayside.

¶8 There is no evidence that *Frye* and *Logerquist* are inadequate tools for determining the admissibility of expert testimony in criminal cases in this state. Some supporters of this rule change argue the need to keep a mass of "junk science" out of our courtrooms. Yet we know of no evidence ever being admitted in the courts of this state under *Frye* that could fairly be so characterized. Our experience with *Logerquist* is similar. Proponents of the rule change appear to imply that, under our current Rule 702, courts have no role to play in determining the admissibility of expert testimony, as though "junk science" were routinely admitted in criminal cases. That is not the case in Arizona.

¶9 Under our current Rules of Evidence, trial courts have both the ability and the obligation to decide the admissibility of expert testimony. Rules 402 and 403 require a court to find, among other things, relevancy and the absence of undue prejudice. Arizona Rules 701 and 702 require a court to determine that the expert is someone who is properly qualified and whose testimony would be helpful

to the trier of fact. In our experience, Arizona courts do not misapply or abuse the existing Arizona Rules of Evidence to admit "junk science" in criminal cases.

2. If adopted, federal Rule 702 would not be applied uniformly, leading to disparate results for defendants and victims.

¶10 The 2000 Comment to federal Rule 702 discusses a number of factors that a court may use in "assessing the reliability of scientific expert testimony." According to the Comment, *Daubert* itself "emphasized" that these factors are neither exclusive nor dispositive on the question of admissibility. Furthermore, it recognizes other courts' holdings that not all the specific *Daubert* factors could apply to every type of expert testimony. The Comment and the cases it cites indicate that the *Daubert* factors are to be applied in a flexible and permissive manner. Such flexibility, in contrast to our currently established law, will create uncertainty and unpredictability, thereby inviting litigation, guaranteeing delay, and producing disparate results.

¶11 First, it is clear that litigation over experts will mushroom if the Rule is changed. The criminal defense bar has signaled that it supports the change in order to keep jurors from hearing forensic evidence that inculpates defendants. Thus, defense attorneys would undoubtedly file numerous challenges regarding issues that have heretofore been clearly settled.

¶12 This prediction is borne out by our experiences with A.R.S. § 12-2203, the Arizona legislature's recent, unconstitutional attempt to codify the holding of *Daubert*.[8] Shortly after the statute took effect in July 2010, there ensued a veritable flood of motions seeking to preclude well-accepted types of expert testimony on such topics as DNA, HGN (horizontal gaze nystagmus) testing, DRE (drug recognition experts), GCMS (gas chromatography–mass spectrometry), ballistics, fingerprints, and behavioral science in drug cases and child sexual abuse cases. These motions resulted in numerous and extensive court hearings that took scientists out of their laboratories and kept cases from getting to trial. This will surely happen again if Rule 702 is changed.

¶13 A search of federal criminal cases reveals no fewer than 44 published opinions that have resulted from challenges to the admissibility of fingerprint identification testimony since the adoption of *Daubert*. (*See* Appendix.) This number is significant, given that there are so many fewer criminal cases in the federal system than there are in state courts. And there is no reason to believe such litigation would cease after the first months or even years of a new Rule 702. Indeed, across the nation, *Daubert* challenges continue to be made to basic forensic

8. *See Lear v. Fields*, 226 Ariz. 226, 233, ¶ 22, 245 P.3d 911, 918 (App. 2011) (§ 12-2203 would effectively supplant rules of evidence, thus invading supreme court's rule-making authority).

evidence, such as ballistics.[9]

¶14 For the foreseeable future in Arizona if Rule 702 is changed, every criminal case in which the State seeks to admit any expert testimony, regardless of the witness's field of expertise, will now require a hearing to determine which of the *Daubert* factors is applicable to the proposed testimony. There is a limited pool of forensic scientists and qualified psychologists and psychiatrists who testify as experts in criminal matters and in proceedings for the commitment of sexually violent persons. Requiring so many additional admissibility hearings will cause significant delays in processing these cases, as prosecutors, defense attorneys, and the courts compete for the time, expertise, and availability of the same pool of witnesses.

¶15 Second, the new standard will increase unpredictability and allow for widely different results in similar cases. Because each judge is the "gatekeeper" for the evidence in her courtroom under *Daubert*, each judge can apply any or all of the *Daubert* factors to admit or exclude evidence in any manner she sees fit. The decision to admit or exclude expert testimony rests entirely within the discretion of each individual judge. Two judges in adjacent courtrooms could make different decisions concerning the same evidence, depending on which factors each judge applies and how he or she applies them.

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9. *See Commonwealth v. Heang*, 942 N.E.2d 927 (Mass. 2011).

¶16 For example, a judge who refuses to admit fingerprint evidence in a burglary case essentially stops that prosecution if, as often happens, that is the only evidence of the identity of the burglar. Because appellate courts review a trial court's ruling for an abuse of discretion under *Daubert*,[10] in contrast to de novo review under *Frye*,[11] there is no meaningful way the State could obtain relief in such a case. Hence, in Courtroom 1 a burglar would walk free, while in Courtroom 2, where the fingerprint evidence was admitted, the burglar would not.

¶17 With no means to ensure uniformity and only limited review of the broad discretion invested in trial courts, disparate rulings on the admissibility of evidence would surely ensue, producing widely variable results and impairing our efforts to hold the guilty accountable, protect the rights of victims, and promote the safety of our communities. Again, this argument is not based on speculation but on our experience with how Pima County judges applied § 12-2203 to the admissibility of behavioral testimony in child sexual abuse cases. At least two judges ruled on *Daubert*-style challenges to the proposed testimony of an expert witness. One judge held the expert's testimony was not the type contemplated by the statute and admitted her testimony. Another judge ruled that her testimony would be precluded under the provisions of the statute.

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10. *See General Electric Co. v. Joiner*, 522 U.S. 136, 141-43 (1997).
11. *State v. Bible*, 175 Ariz. 549, 578, 858 P.2d 1152, 1181 (1993).

¶18 In short, adopting federal Rule 702 in Arizona would not promote uniformity but would, instead, undermine it.

3. Our current Rule 702 does not lead to wrongful convictions.

¶19 Some proponents of the rule change argue that *Daubert* is needed to prevent "wrongful convictions." This argument is based, in part, on a perception that the current state of forensic science is unreliable. The argument is purportedly supported by a 2009 report of the National Academy of Sciences, *Strengthening Forensic Science in the United States, A Path Forward*, which states: "Recent advances [in forensic science] also have revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people."[12]

¶20 Peter Neufeld of the Innocence Project appeared before the NAS Committee that drafted the report. On September 20, 2007, Neufeld presented the results of a study authored by University of Virginia professor Brandon Garrett on the Innocence Project's "200 exonerations." According to Mr. Neufeld and Professor Garrett, 57% of those "exonerations" were attributable to a category of factors they entitled unreliable or limited science.

12. *Strengthening Forensic Science in the United States, A Path Forward*, National Academy of Science, Executive Summary (2009).

¶21 There are serious flaws with this oft-repeated characterization. First, there is a problem with the category itself. There is a vast difference between the use of scientific methods that were state-of-the-art at the time of conviction, on the one hand, and scientific analysis that was badly done or overstated in its probative value, on the other. In all fairness to the scientific community, these categories should have been individualized to give a more accurate picture of what was truly "faulty" forensic evidence. Second, this categorization ignores other causes, such as poor lawyering, that may have contributed to those convictions. Third, the Innocence Project has failed to publicize aspects of those "exonerations" in which the same, allegedly faulty forensic science actually exculpated defendants who had been convicted nonetheless.

¶22 A more realistic (but much less heralded) analysis of those same 200 cases has been conducted by two scientists, John M. Collins and Jay Jarvis. First published in November 2008, the results of their analysis concluded that the percentage cited by the Innocence Project and Professor Garrett was vastly overstated.[13] When other contributing factors, such as attorney misconduct or ineffective assistance, were taken into account, what the authors described as

13. John M. Collins & Jay Jarvis, *The Wrongful Conviction of Forensic Science*, Forensic Science Policy & Management: An International Journal, 1:17-31 (2009). A free pre-publication version of this article is available at http://www.crimelabreport.com/library/pdf/2008-07,WCFS.pdf (last visited 5/12/2011).

"forensic malpractice, either accidental or intentional," occurred in fewer than 11% of those "exonerations." Collins and Jarvis found that an even higher portion, 18%, of those 200 "wrongfully convicted" were defendants in cases in which the same types of forensic evidence had been presented at trial and, in fact, had favored the defendant.

¶23 One example from our own state has been held up as the epitome of "faulty forensics" – the case of Ray Krone. What is frequently overlooked, however, is that a respected forensic odontologist retained in the case had concluded that Krone was not the source of the bite marks on the murder victim's body. Additionally, other forensic evidence, including fingerprints and footprint impressions, had also excluded Krone as the contributor. Whether, or in what fashion, Krone's jury heard this evidence is unknown to those of us in the Pima County Attorney's Office. But it is clear that "faulty forensics" were not to blame for the miscarriage of justice done to Krone.

¶24 It is for this reason that the legitimate, ongoing, nationwide concern over wrongful convictions should not bear on the decision whether to adopt federal Rule 702 in Arizona. Intentional or accidental misconduct by scientists, by technical or experiential witnesses, or by practitioners, can occur in a *Daubert* jurisdiction just as it can in one that retains *Frye*.

¶25 In fact, Arizona's criminal justice system is already fully able to keep dubious evidence out of court. Arizona's Rules of Criminal Procedure, which mandate disclosure of reports, bench notes, and pretrial interviews of experts, greatly diminish the types of "forensic malpractice" to which the NAS report refers. Additionally, our courts are rightly generous with funds for defendants to hire their own forensic experts, a shortcoming the NAS noted exists in some other jurisdictions. Another shortcoming the NAS observed elsewhere was the lack of trained forensic scientists and accredited crime labs. But Arizona has trained scientists and accredited crime labs. These resources, coupled with appropriate presentation of the evidence and vigorous cross-examination of the witnesses, ensure that Arizona juries already are well-equipped to ably assess the reliability and credibility of forensic evidence.

CONCLUSION

¶26 There are compelling reasons to keep Arizona's Rule 702 unchanged. Most importantly, the current rule works well. Our courts are not overrun with "junk science." Moreover, when appropriate, Arizona juries are able to hear important, relevant evidence that helps them to fulfill their constitutional role in criminal cases.

¶27 Next, adopting federal Rule 702 would cause more problems than it would purportedly fix. The time of courts, attorneys, and experts would be

occupied with numerous *Daubert* hearings, as previously accepted areas of expert testimony would be subjected to repeated challenges and evidentiary hearings. There is also the very real danger of widely divergent outcomes in similar cases. The wholesale overthrow of our accepted case law would result in these flexible new standards being interpreted differently by many different judicial "gatekeepers." This would, in turn, would produce disparate results for similarly situated criminal defendants and their victims. With abuse of discretion as the standard of review, there would be little avenue to seek redress for evidence erroneously excluded or admitted in individual criminal cases. There would be justice for some, but not for all.

¶28 With trained forensic scientists and accredited laboratories in this state, and with *Frye* and *Logerquist* already available to guide competent practitioners and courts, Arizona's criminal justice system is in good hands. Changing Rule 702 to transport Arizona into the *Daubert* universe is not necessary to ensure the system's integrity. Nor is it advisable, most particularly for Arizona victims of rape and child sexual abuse.

¶29 For these reasons, I urge you to reject the Petition to conform Arizona Rule 702 to the federal rule.

RESPECTFULLY SUBMITTED this 20th day of May, 2011.

s/Barbara LaWall
BARBARA LAWALL
PIMA COUNTY ATTORNEY

CERTIFICATE OF SERVICE

I certify that, on the 20th day of May, 2011, the original of the foregoing document was electronically filed in Word format and PDF format with:

Clerk of the Court
Arizona Supreme Court
1501 West Washington St.
Phoenix, AZ 85007

One copy was mailed to:

Mark W. Armstrong, Esq.
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1501 West Washington St., Suite 445
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s/Barbara LaWall
BARBARA LAWALL
Pima County Attorney

APPENDIX

Fingerprint Case Summary Chart

Case/crime	*Daubert* Hearing? (yes/no)	*Ruling on Admissibility of Fingerprint Evidence (Admitted/excluded)*
US v. Crisp, 324 F.3d 261, 266-69, 207-71 (4th Cir. 2003) (*cert denied* 540 U.S. 888 (2003) (armed robbery)	No	**Admitted** (court analyzed methodology in framework of *Daubert* factors and denied challenge to fingerprint evidence; recognized it to be a long time "generally accepted" form of expert evidence; the methodology includes requisite standards that control the technique's operation; defense can raise weaknesses on cross-examination)
US v. Rogers, 26 Fed.Appx. 171, 173, 2001 WL 1635494 (C.A.4 (N.C.)) (false claim to Treasury Dep't)	No	**Admitted** (denied *Daubert* challenge to fingerprint methodology; fingerprint analysis testimony is subject to vigorous cross-examination. "**Many courts have refused to hold an evidentiary hearing for an inquiry into the reliability of fingerprint analysis.**" (*Havvard, Sherwood, Reaux, Joseph*)).
US v. Dulaney, 48 Fed.Appx. 66 (4th Cir. 2002) (robbery)	No	**Admitted** (denied *Daubert* challenge to admissibility of Government's fingerprint expert; methodology satisfies *Daubert* factors; relies on *Havvard* and *Llera Plaza II*)
US v Campbell, 88Fed.Appx. 580 (4th Cir. 2004)	No	**ADMITTED** (added June 20, 2008) (Following *Crisp*, affirmed district court's admission of fingerprint evidence under *Daubert*)
US v. Gary, 85 Fed.Appx. 908, 909 (4th Cir. 2004) (armed robbery)	No	**Admitted** (denied *Daubert* challenge; followed *Crisp*—methodology of latent fingerprint examination has ably withstood the test of time and is reliable
US v. Vargas, 471 F.3d 255, 265-66 (1st Cir. 2006) (Possession of fraudulent identification)	No	**Admitted** (denied *Daubert* challenge)

US v. Stevens, 2007 WL 756401 (C.A. 2 (N.Y.) (March 2007) (bank robbery)	No	**Admitted** (not an abuse of discretion to refuse to conduct *Daubert* hearing on fingerprint evidence; *Daubert* hearing is not required in ordinary cases where the reliability of an expert's methods is properly taken for anted)
US v. Mitchell, 365 F.3d 215, 244 (3rd Cir. 2004) (robbery, fingerprints on getaway car)	Yes	**Admitted** (Includes detailed *Daubert* analysis of methodology of latent fingerprint identification. "As long as an expert's scientific testimony rests upon 'good grounds, based on what is known,' it should be tested by the adversary process-competing expert testimony and active cross-examination-rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies.")
US v. Byrd, 208 Fed. Appx. 145 (3rd Cir. 2006) (Dec.2006) (bank fraud—latents found on checks)	Yes	**Admitted** (applied *Mitchell/Daubert* to admit latent fingerprint identification methodology; defense could challenge evidence through cross-examination)
US v. Faines, 216 Fed.Appx. 227, 230 (3rd Cir. 2007) (armed robbery)	No	**Admitted** (Disallowed as irrelevant proposed defense "expert" testimony as to validity of latent fingerprint methodology; court properly excluded proposed testimony of defense "expert" Lyn Haber)
U.S. v. Turner, 201 Fed.Appx. 270 C.A.5 (Miss.),2006. October 03, 2006	NO	**Admitted (added 6/17/08)** (Government's witness possessed sufficient qualifications to be considered an expert in fingerprint examination and that his testimony was reliable and relevant. The district court did not abuse its discretion in allowing the testimony.)
US v. Hernandez-Rodarte, 2005 WL 1489083 (C.A.5 (Tex.)) (illegal reentry)	No	**Admitted** (Admitting government expert's testimony as to identification of latent fingerprint where "Government presented evidence to show that [examiner] was an expert in the area of fingerprint analysis and that his testimony was reliable and relevant to the issue of the defendant's true identity [thus satisfying] the objective of *Daubert* to ensure the reliability and relevance of the expert testimony."
US v. Stone, 218 Fed. App. 425 (6th Cir. 2007) (Narcotics Trafficking)	No	**Admitted** (In relying on a forensics technician's training and experience to certify her as an expert, the district court acted well within its boundaries of discretion under FRE 702.)

US v. Harvvard, 260 F.3d 597, 600, 601 (7th Cir. 2001) (firearm possession after felony conviction)	Yes	**Admitted** (Finding that latent fingerprint methodology satisfied *Daubert* standard's "flexible" factors used for various types of expert testimony in determining the reliability of the proffered testimony. Despite absence of unified objective standard for measuring adequacy of fragmentary latent fingerprint for purposes of identification, latent fingerprint identification satisfied the standards of reliability for admissible expert testimony under *Daubert*; Methods of latent print identification could be and had been tested in adversarial system, results were subject to peer review, and the probability for error was exceptionally low; Noting as well that courts have properly declined to conduct a pretrial *Daubert* hearing on the admissibility of fingerprint evidence.)
US v. George, 363 F.3d 666, 672 (7th Cir. 2004) (counterfeit checks)	No separate hearing	**Admitted** (re-examined and re-affirmed holding in *Havvard* that methodology was generally accepted; latent fingerprint analysis satisfied *Daubert*; that methodology has low rate of error and could be objectively tested "was more than sufficient ground to find it admissible under the *Daubert* test")
US v. Glover, 479 F.3d 511 (7th Cir. 2007) (possession heroin, firearm)	No	**Admitted** (Rule 702 procedures were followed correctly and it was proper to admit testimony of fingerprint technician to testify in dual role as technician and as expert to explain absence of prints on firearm)
US v. Collins, 340 F.3d 672 (8th Cir. 2003) (drug case)	No	**Admitted** (followed *Havvard*—methodology of latent fingerprint identification is generally accepted and satisfies *Daubert*. Not error to decline to conduct a *Daubert* hearing prior to admitting fingerprint evidence)
US v. Spotted Elk, 548 F.3d 641, 663 (8th Cir. 2008) (Drug Trafficking)	No	**Admitted** (followed *Collins*, fingerprint analysis is generally accepted, "A *Daubert* hearing is not required when the record already establishes that such testimony is admissible. When the court is satisfied with an expert's credentials it does not abuse its authority when admitting the testimony without a preliminary hearing).
US v. Hernandez, 299 F.3d 984 (8th Cir. 2002) (drug case)	No	**Admitted** (cited *Llera Plaza* II —latent fingerprint methodology satisfies *Daubert's* flexible factors for expert testimony)
US v. Collins, 340 F.3d 672 (8th Cir. 2003) (drug case)	No	**Admitted** (followed *Havvard*—methodology of latent fingerprint identification is generally accepted and satisfies *Daubert*. Not error to decline to conduct a *Daubert* hearing prior to admitting fingerprint evidence)

US v. Janis, 387 F.3d 682, 689-90 (8th Cir. 2004) (possession of firearm by convicted felon)	No	**Admitted** (affirming that fingerprint evidence is generally accepted in expert community and courts, satisfies *Daubert*; follows 4th Cir. in *Crisp)*
United States v. Kenyon, 481 F.3d 1054 ,1061(8th Cir. 2007)	No	**Admitted** A *Daubert* hearing is not required where the record already establishes that the testimony is admissible. When a district court is satisfied with an expert's education, training, and experience, and the expert's testimony is reasonably based on that education, training, and experience, the court does not abuse its discretion by admitting the testimony without a preliminary hearing.
US v. Xian Long Yao, 302 Fed. Appx. 586, 588 (9th Cir. 2008) (Illegal Reentry)	No	**Admitted** (District Court could admit testimony of fingerprint comparison expert as it had heard sufficient evidence of expert's qualifications and experiebce)
US v. Sherwood, 98 F.3d 402, 408 (9th Cir. 1996) (firearm, money laundering)	No	**Admitted** (fingerprint identification testimony satisfies *Daubert's* flexible factors; fingerprint evidence is generally accepted and has been subjected to peer review and publication)
US v. Malveaux, 2000 WL 125917 at 1 (C.A.9 (Cal.)) (bank robbery)	No	**Admitted** (government evidence of latent print identification satisfied *Daubert*; defense challenge to validity of fingerprint comparison is a question of weight and credibility that properly belongs to the jury)
U.S. v. Baines --- F.3d ----, 2009 WL 2139117 (10th Cir.2009) **(Decided July 20, 2009)** (controlled substances)	YES	**Admitted** (Single thumb print) Precisely the same Daubert challenges presented by Rose are addressed in detail. Agent Meagher was the government expert. Evidence of print ID pursuant to ACE-V methodology was found to be relevant and reliable and to meet the requirements of Fed.R.Evid. 702. Addressing the core of defendant's argument, that fingerprint analysis rests substantially on the subjective interpretations of the examiner. The judge said that this argument went to the weight of the evidence, not its admissibility, and she quoted *Daubert's* observation that "[v]igorous 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." *Daubert,* 509 U.S. at 596.
US v. Navarro-Fletes, 2002 WL 31420123 at 733 (C.A. 9 (Wash.)) (illegal reentry)	No	**Admitted** (latent fingerprint identification methodology satisfies *Daubert*; "relevant community" for *Daubert* purposes includes FBI examiners; *Daubert* is to be applied flexibly to technical and specialized knowledge)

US v. Ambriz-Vasquez, 34 Fed.Appx. 356 (9th cir. 2002) (illegal reentry)	No	**Admitted** (citing *Sherwood*—latent fingerprint methodology satisfied *Daubert*; no hearing required; courts may admit fingerprint evidence without performing *Daubert* hearings; requiring courts to conduct *Daubert* hearings whenever defendants object to fingerprint evidence is a particularly onerous interpretation of their gatekeeping function under *Daubert* and assumes that courts cannot take judicial notice of the general acceptance of fingerprinting analysis)
US v. Rojas-Torres, 2003 WL 21378613 (C.A. 9 (Wash.)) (illegal reentry	Yes	**Admitted** (affirming district court's finding that latent fingerprint evidence satisfied *Daubert*)
US v. Turner, 285 F.3d 909 (10th Cir. 2002) (armed robbery)	No	**Admitted** (affirmed district court's denial of request for *Daubert* hearing and finding that latent fingerprint evidence has always been upheld as reliable and appropriate; challenges to identification or process can be raised on cross-examination; whether to hold *Daubert* hearing is discretionary with the court)
U.S. v. Douglas 489 F.3d 1117 (11th Cir. 2007)	Yes	ADMITTED (district court did not abuse its discretion in admitting fingerprint examiner's opinions. Witness testified to his extensive experience and training in fingerprint analysis, including experience regarding the durability of fingerprints on different surfaces and in different environmental conditions and analysis of fingerprint smudging pressure. With regard to expert's opinions, witness presented sufficient information for the district court to conclude that the methodology by which he reached these opinions was reliable and reasoned).
US v. Abreu, 406 F.3d 1304, 1307 (11th Cir. 2005) (possession w/intent to distribute marijuana)	No	**Admitted** (11th Cir. finds latent fingerprint evidence satisfies *Daubert*; follows 4th , 7th, 8th and 9th Circuits in finding that find fingerprint evidence is proven and reliable; courts have flexibility to give more weight to "general acceptance" factor of *Daubert*)

US v. Salim, 189 F.Supp.2d 93, 100-01 (S.D.N.Y. 2002) (attempted escape from correctional facility)	No	**Admitted** (finding it to be "*without question*" that latent fingerprint analysis has enjoyed a long history of acceptance as a scientifically sound technique for identification and has routinely been admitted as such for the purposes of criminal trials; "This Court finds that the methodology undertaken by the Government's expert ...meets the *Daubert* standard for reliability as the generally - accepted technique for testing fingerprints and that fingerprint comparison has been subjected to peer review and publication. Methodology undertaken by government's latent fingerprint expert satisfies *Daubert* standard for reliability as generally-accepted technique for testing fingerprints." "...Mere fact that an expert utilizes his or her expertise and training to determine whether there is enough agreement of the various print ridge formations to be able to individualize and ultimately, to "match" a print, does not constitute an absence of standards to render the technique unreliable. Rather, the methods of comparison are in fact testable such that both parties can subject prints to verification. The appropriate attack of an expert's "match" opinion is in rigorous cross-examination and the presentation of other experts to challenge the findings, not the whole-sale preclusion of a reliable methodology.")
US v. Frias, 2003 WL 296740, *modified in part* 2003 WL 352502 (S.D.N.Y.)	No	**Admitted** (Defendant was not entitled to pre-trial *Daubert* evidentiary hearing to determine admissibility of expert testimony on issue of fingerprint identification, where testimony was based upon well-established scientific principles; noting that numerous circuit and district courts have permitted fingerprint examiners to state their opinions and conclusions; numerous defendants have challenged the reliability of fingerprint evidence, but courts have universally rejected these challenges; cross-examination remains available to defendant)
US v. Mahone, 2008 WL 504012 at 3-4 (D.Me.) (attempted bank robbery— **footwear impressions evidence**)	Yes	**Admitted** (finding ACE-V methodology used to identify latent fingerprints and footwear impressions is reliable and satisfies *Daubert*, citing *Mitchell)*;
US v. Cooper, 91 F.Supp.2d 79, 82 (D.D.C. 2000) (racketeer offenses) (fingerprint, ballistics, and medical evidence)	No	**Admitted** (*Daubert* hearing on latent print methodology properly **denied**-because not required by *Daubert* or *Kumho* when the challenged evidence does not involve any new scientific theory and the jury should decide the pertinent questions of whether the expert properly applied the established scientific principle to the facts; FRE 104(c) required evidentiary hearings on admissibility of evidence when the interests of justice require; would be time-consuming to conduct pre-trial hearing)

US v. Joseph, 2001 WL 515213 (E.D. La. 2001)	No	**Admitted** (*Daubert* hearing on latent print methodology properly **denied**; finding that fingerprint evidence is a reliable science and defendant did not show that the relevant scientific community does not generally accept the technique; cross-examination is available to defendant reveal any weaknesses)
US v. Llera Plaza, 188 F.Supp.2d 549 (E.D. Pa. 2002) (drug conspiracy and murder) (*Llera Plaza II*)	Yes	**Admitted** (FBI Examiner Steven Meagher is among government experts) (Extensive *Daubert* analysis; judge's reconsideration concluded: ACE-V methodology is a "technical discipline," for purposes of admitting evidence of similarities between latent fingerprints and exemplars that satisfies *Daubert;* "Though conclusion of examiner is by nature subjective, there are many situations in which an expert's manifestly subjective opinion, based on "one's personal knowledge, ability and experience" is regarded as admissible evidence in an American courtroom" Court found that the ACE-V process employed by New Scotland Yard is essentially indistinguishable from the FBI's ACE-V process, and that "ACE-V regime that is sufficiently reliable for an English court is, I conclude, a regime whose reliability should, subject to a similar measure of trial court oversight, be regarded by the federal courts of the United States as satisfying the requirements of Rule 702 as the Supreme Court has explicated that rule in *Daubert* and *Kumho Tire*.")
Li v. Phillips, 358 F.Supp.2d 135 (E.D.N.Y. 2005) (burglary)	No	**Admitted** (fingerprint analysis has long been accepted in the scientific community and is regularly admitted into evidence in NY criminal proceedings; there was nothing novel about the methods used to collect and analyze the evidence; the deficiencies in procedure that defendant raised were relevant to credibility and not admissibility under *Frye*; defendant has recourse through cross-examination)
US v. Reaux, 2001 WL 883221 at 1 (E.D.La.) (armed robbery)	No	**Admitted** (**denied** request for *Daubert* hearing; latent fingerprint identification methodology satisfies *Daubert*)
US v. Nadurath, 2002 WL 1000929 (N.D.Tex.)	No	**Admitted** (**denied** request for *Daubert* hearing; latent fingerprint identification evidence satisfies *Daubert*)

State v. Armstrong 920 So.2d 769 Fla.App. 3 Dist.,2006.		For over a hundred years, fingerprint comparison has been accepted as reliable by every court in the nation and in many courts abroad for the purpose of identification. In Florida, fingerprint evidence has been admissible in criminal prosecutions since at least 1930. *See Martin v. State*, 100 Fla. 16, 129 So. 112, 116 (1930)("Experience of recent years has shown that one of the most effective means of identifying and apprehending burglars, robbers, and thieves is through bureaus of identification by using the photograph and finger print. This method should be encouraged so long as its application does not result in a miscarriage of justice or violate fundamental rules of evidence."). To date, there have been no reported instances in which the prints from any two fingers or from two individuals have been found to be the same. Of late, a spate of challenges to the reliability of fingerprint identification has been brought, primarily in the federal courts, premised on the same "informed hypothesis" advanced here. Each has been rejected. *See, e.g., United States v. Abreu*, 406 F.3d 1304, 1307 (11th Cir.2005)(agreeing with the decisions of other federal circuits and holding latent fingerprint evidence reliable); *United States v. Mitchell*, 365 F.3d 215, 246 (3d Cir.2004)(holding latent fingerprint identification evidence reliable and thus admissible under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) [FN4]); *United States v. Janis*, 387 F.3d 682, 690 (8th Cir.2004)(finding fingerprint evidence to be reliable); *United States v. Crisp*, 324 F.3d 261, 269-270 (4th Cir.2003)(holding fingerprint analysis to be reliable identification evidence); *United States v. Havvard*, 260 F.3d 597, 601-02 (7th Cir.2001) (finding fingerprint identification to be reliable); *United States v. Sherwood*, 98 F.3d 402, 408 (9th Cir.1996)(holding that the trial court did not commit actual error in admitting fingerprint evidence).
US v. Cromer, 2006 WL 1430210 (W.D. Mich.) May 2006	No	**Admitted** (No *Daubert* hearing; court follows *Mitchell*, admits evidence and denies motion to exclude latent fingerprint testimony contending that the "methodology behind finger print identification is not scientifically reliable and therefore does not pass muster under the standards established by the Supreme Court in *Daubert* and required by Rule 702; Court had presided over multiple trials where fingerprint evidence has been introduced based on the qualifications of the witness and testimony evidencing the reliability and scientific credibility of that evidence)
US v. Jones, 2007 WL 4404679 at 5 (E.D. Tenn.) December 2007	No	**Admitted** (denied motion for *Daubert* hearing; proposed expert testimony as to ability to recover latent prints from firearm satisfied *Daubert*; nothing unusual or complex about the proffered latent fingerprint expert testimony; defendant has opportunity to cross-examine)

People v. Hyatt, 2001 WL 1750613 (NY)	Yes (Frye hearing)	**Admitted** **Excluded proposed testimony of Rose defense "expert" Simon Cole as "junk science"** (defense expert Cole not to be a scientist; is historian and social scientist; not qualified to give testimony on fingerprint comparison, court takes judicial notice that fingerprint identification has long been recognized and accepted by courts in US; testimony concerning its use is always admissible provided the proffered witness is qualified as an expert in the field)
US v. Cline, 188 F.Supp.2d 1287, 1294 (D.Kan. 2002) ; *Affirmed by* *U.S. v. Cline*, 349 F.3d 1276 (10th Cir. 2003). (drug trafficking)	No	**Admitted** (denying defendant's motion to exclude fingerprint evidence under *Daubert;* hearing unnecessary since the reliability of methodology of latent fingerprint examination could be properly taken for granted; court satisfied that general fingerprint identification analysis clears the threshold of reliability under FRE 702 after considering all relevant factors, including those from *Daubert;* shortcomings of ACE-V are more prudently treated as matters going to the weight of the evidence; Relied on *Havvard, Rogers, Reaux, Joseph, Martinez-Cintron* ; Criticism of fingerprint evidence and irritation with the conclusiveness of fingerprint examiners' opinions does not justify being overly pessimistic of methodology; experts of all kinds tie observations to conclusions through the use of "general truths derived from ... specialized experience" ... whether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory; " idea that fingerprint comparison is not sufficiently "scientific" cannot be the basis for exclusion under *Daubert)*
U.S. v. Jones 2008 WL 336748 (E.D.Tenn.,2008) February 05, 2008	**NO**	**ADMITTED (added June 17, 2008)** (Daubert hearing is unnecessary because the record contains sufficient evidence to determine the reliability and qualifications of fingerprint expert and the basis for their opinion).
NH v. Langill, 945 A.2d 1 (NH 2008), 2008 WL 899256 (theft/burglary) **May 2008**	Yes	**Admitted** **Reversing lower court decision relied upon by Rose in MD** (reverses state trial court which erred in excluding latent fingerprint identification; follows 8th Circuit—whether ACE-V fingerprint methodology was not applied reliably affects weight of evidence, not admissibility; "In the evidentiary context, however, the term "reliable" does not mandate correctness; it signifies a much lower standard, to wit, trustworthiness.... The overall purpose of Rule 702 ...is simply to ensure that a fact-finder is presented with reliable and relevant evidence, not flawless evidence.")