Closing the Door on *Daubert*

MICHAEL D. CICCHINI*

Prosecutors, not defendants, employ the vast majority of expert witnesses at criminal trials. However, the stringent Daubert *standard of admissibility was supposed to curtail such testimony. But while* Daubert *has posed a near-insurmountable barrier for defendants, it has had no effect whatsoever on prosecutors. To build upon the findings of earlier studies, this Article analyzes all appellate cases in a single jurisdiction during a recent five-year span. In 52 cases there were 115* Daubert *decisions across all three levels of the court system, and the state's record was 111-4 (or 113-2, depending on how a defense victory is defined). Further, courts allowed several categories of expert evidence for the state—e.g., child interview best practices, commonality evidence, and firearms evidence—but excluded that same evidence for the defense, despite the superior credentials of defense experts. Given the gross disparity in outcomes and, more importantly, the courts' disingenuous reasoning used to obtain those outcomes, the defense bar needs to shift gears. The data is now more than sufficient to argue, at least with regard to defense experts, that* Daubert *is an unconstitutional barrier to a defendant's right to call witnesses and to present a complete defense. The time has come to close the door on* Daubert.

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* Criminal Defense Lawyer, Cicchini Law Office LLC, Kenosha, Wisconsin. J.D., *summa cum laude*, Marquette University Law School (1999); C.P.A., University of Illinois Board of Examiners (1997); M.B.A., Marquette University Graduate School (1994); B.S., University of Wisconsin—Parkside (1990). Visit www.CicchiniLaw.com for more information.

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INTRODUCTION[1]

When Wisconsin switched from the mere "relevance" standard to the much more stringent *Daubert* "reliability" standard of admissibility for expert testimony, the change was supposed to benefit defendants.[2] After all, it was prosecutors, not defendants, who employed the vast majority of expert witnesses; therefore, at least in theory, this change to *Daubert* was supposed to greatly curtail prosecutorial pseudo-experts.[3]

Nonetheless, we defense lawyers predicted that *Daubert* would do nothing to protect our clients from the state's experts, but would impose a high hurdle when we attempted to call our own experts. To test the accuracy of those cynical views, I previously analyzed the first decade of *Daubert* decisions in Wisconsin, identifying 68 appellate-level cases comprised of 134 decisions across the state's three levels of court: trial courts, appellate courts, and the state supreme court.[4] The defense bar's dire prediction that *Daubert* would offer no benefit, and instead would make matters worse, was prescient: prosecutors amassed an undefeated 134–0 record in court decisions during the first decade of *Daubert*.[5] I also went inside the numbers and studied the details of the cases to expose the specific tactics and ploys the judiciary used in ruling for the state.[6]

In this Article, I expand my original work by analyzing the next five-plus years of *Daubert* cases.[7] In this newest multi-year sample, prosecutors have amassed a 111-4 record, or a 113-2 record depending on how one defines a defense win.[8] When combining the studies for a total of fifteen years of *Daubert*

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1. Because this study is an expansion of my first study, the above-the-line portion of this Introduction is, in substance and sometimes word-for-word, reproduced from the Introduction in the first study. *See* Michael D. Cicchini, *The* Daubert *Double Standard*, 2021 MICH. ST. L. REV. 705, 706-08 (2021).

2. *See infra* Part I.

3. *See infra* Part I.

4. *See infra* Part I.

5. *See infra* Part I.

6. *See infra* Part I.

7. *See infra* Part II.

8. *See infra* Part II.

in Wisconsin, the results are gruesome. Even though *Daubert* was supposed to make it more difficult to call expert witnesses, and even though the state calls the vast majority of experts, the state has amassed a 245-4 record, or a 247-2 record depending on how one defines a defense win.[9]

Part I of this Article introduces the *Daubert* standard. Part II discusses both my methodology and findings in this study, including the details of the types of cases in the sample, the nature of the legal challenges, the parties calling the experts, the nature of the expert testimony itself, and of course the breakdown of wins and losses at each level of the court system.

Given that a 111-4 (or 113-2) record, by itself, is not conclusive evidence of pro-state judicial bias, Part III of this Article analyzes the *substance* of the cases. I discuss how four categories of expert testimony were found admissible for the state but not for the defense; how the courts continued to use the same tactics and ploys identified in my first study; and how the courts have developed a new trick to serve the prosecutors' interests. Despite this overwhelming evidence of pro-state bias, Part IV nonetheless explains the limitations inherent in the case study method used in this Article.

Finally, Part V discusses an argument for defense counsel to deploy at the trial- and appellate-court levels—at least with regard to *defense* experts. More specifically, in order to defeat *Daubert,* defense counsel should consider focusing *not* on *Daubert* as a rule of evidence, but on the superiority of the defendant's constitutional rights to call witnesses and to present a complete defense.

I. MEET DAUBERT

My introduction to *Daubert* came in my own criminal defense practice in Wisconsin. Before 2011, the admissibility of expert testimony was governed by the simple "relevancy" standard.[10] The result was that whenever the state *or* the defendant wanted to call an expert, the odds were overwhelming that the court would allow the witness to testify.[11] But then, in 2011, Wisconsin adopted the *Daubert* standard of admissibility.[12] *In theory*, given that prosecutors use experts far more often than defendants,[13] the more stringent *Daubert* "reliability" test was supposed to be "the meaningful standard that was lacking in criminal cases

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9. *See infra* Part II.

10. *See* WIS. STAT. § 904.01 (2010–11) ("'Relevant evidence' means evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.") (emphasis added).

11. *See* Cicchini, *supra* note 1, at 710.

12. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993). For the so-called *Daubert* trilogy of cases, see generally Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (outlining the history and application of *Daubert* analysis).

13. *See* Deirdre Dwyer, *(Why) Are Civil and Criminal Expert Evidence Different?*, 43 TULSA L. REV. 381, 391 (2007) ("[E]xpert evidence in criminal litigation is almost exclusively the preserve of the state.").

and . . . it would serve to protect innocent defendants."[14] My state's current, codified version of *Daubert* is as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the proponent demonstrates to the court that it is more likely than not that the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness's opinion reflects a reliable application of the principles and methods to the facts of the case.[15]

Not only was the defense bar skeptical that this shift from relevance to reliability would actually benefit the defense,[16] there was also a wealth of data at that time, from other state and federal courts, which demonstrated the exact opposite.

For example, in a 2000 study of appellate cases in which "the government challenged the exclusion of *its* experts," the government had an appellate-court record of 61-6.[17] Conversely, in cases in which defendants claimed "that *their* expert was improperly excluded," the government racked up a 44-10 record on appeal; and only one of those defense "victories" was actually remanded for a new trial.[18] That makes the government's overall record 105-16, or 114-7, depending on how a victory is defined.

Similarly, a 2002 study of appellate cases and the actual trial court decisions underlying those appeals, found that "[a]t the trial court level, prosecution experts were admitted 95.8% (n=497) of the time, and [defense] experts were admitted only 7.8% (n=13) of the total number of times they were offered."[19]

In 2021, about a decade after Wisconsin adopted the *Daubert* standard, I published a comprehensive study of all of the state's *Daubert* cases.[20] The

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14. Peter J. Neufeld, *The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform*, 95 AM. J. PUB. HEALTH SUPP. 107, 109 (2005).

15. WIS. STAT. § 907.02 (2023–24). The above language also incorporates some very minor textual changes enacted via 2025 WIS. ACT 92 (eff. Mar. 7, 2026), at https://docs.legis.wisconsin.gov/2025/related/acts/92.

16. *See* Cicchini, *supra* note 1, at 712–14.

17. Jim Hilbert, *The Disappointing History of Science in the Courtroom: Frye, Daubert, and the Ongoing Crisis of "Junk Science" in Criminal Trials*, 71 OKLA. L. REV. 759, 802–03 (emphasis added) (citing D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 105 (2000)).

18. *Id.* at 803 (emphasis added).

19. Edward J. Imwinkelried, *Defense Attacks on Prosecution Scientific Evidence: The Standard for Defense Rebuttal Evidence is Already Lower than the Standard for Prosecution Evidence*, 93 TEMP. L. REV. 55, 64-65 (quoting Groscup et al., *The Effects of* Daubert *on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCH., PUB. POL'Y, & L. 339, 346 (2002)).

20. *See* Cicchini, *supra* note 1.

numbers from the first decade of *Daubert* were staggering. Instead of the 114-7 win record for the government in the 2000 study, or the nearly 96 percent win rate for the government in the 2002 study, I found the following:

> In total, then, the sixty-eight cases involved sixty-four trial court decisions, sixty-eight intermediate appellate court decisions, and two [Supreme Court of Wisconsin] decisions for a grand total of 134 decisions on *Daubert* issues. Amazingly, regardless of the type of case, the nature of the expert testimony, the party calling the expert, and the procedural posture of the case, the prosecutor won every single *Daubert* issue at every level of the state court system.[21]

Acknowledging that the state's 134-0 record, in and of itself, was not conclusive proof of pro-state judicial bias, I then went "inside the numbers"; I dove into the details of the 134 decisions (in the 68 cases) to identify eight different judicial ploys which, indeed, were blatantly pro-state and served to produce the state's towering, undefeated record.[22] In this Article, I will extend that study to provide a combined, fifteen-year window of Wisconsin's *Daubert* cases. Based on my findings, I conclude that it is long past time to close the door on *Daubert*.

II. KEEPING SCORE: STATE 111, DEFENSE 4

For this study, I searched for all state cases that reached the Wisconsin court of appeals and included either "Daubert" or "907.02," the statute codifying the *Daubert* standard. I searched for cases published or issued between October 11, 2020, and May 15, 2026.[23] This five year-plus span was selected because I initially collected the data on May 15, 2026 (the end point for this study), and my previous study captured cases published or issued through October 11, 2020 (the starting point for this study).

In analyzing the search results, I excluded all cases that were civil in nature, with the exception of the sole first-offense drunk driving case (OWI) and the three termination of parental rights cases (TPR), as these cases closely resemble criminal cases in many ways. (Second-and-subsequent OWI offenses *are* criminal charges, and there was one such case in this study as well.[24]) I also excluded summary disposition cases of all kinds; these typically consist of a defendant losing at trial and the defendant's appellate counsel filing a "no merit report" with the appellate court.[25]

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21. *Id.* at 721 (internal footnotes omitted).

22. *Id.* at 722–41.

23. The vast majority of cases in this study are unpublished, and the vast majority of those are per curiam decisions. I therefore use the words "published or issued" with regard to the relevant date of each case. *See* WIS. STAT. § 809.23 (3) (2023–24) (discussing unpublished and per curiam designations).

24. *See* WIS. STAT. § 346.65 (2023–24).

25. *See, e.g.*, State v. Fischer, No. 2020AP1048-CRNM, 2022 WL 17826669, at *1 (Wis. Ct. App., Dec. 21, 2022).

I also excluded all criminal cases in which "Daubert" or "907.02" appeared in the text, but which didn't decide an expert-related issue at any level of the court system. For example, when attempting to determine the effective date for the change in a different law, one case analogized to the effective date when the legislature changed section 907.02.[26] Similarly, another case cited *Daubert* in the context of a newly-discovered-evidence appeal, and simply concluded that the evidence was not newly discovered, but instead *should have* been raised in the form of a *Daubert* challenge in the trial court.[27] All such cases were also excluded from this study.

After excluding all non-OWI and non-TPR civil cases, all summary disposition cases, and all criminal cases in which "Daubert" or "907.02" was mentioned but no expert-related issue was actually decided, I was left with 52 cases as the population of cases for this study.[28] Two of the cases also had a substantive decision by the Supreme Court of Wisconsin (SCOW); each such case was counted only once (but with multiple decisions). These 52 cases spanned a variety of case types, as follows:

Types of cases	No. Cases	Pct.
Sex-related (all types)	20	38.5%
Homicide (all types)	14	26.9%
Controlled substances	4	7.7%
TPR	3	5.8%
Burglary	2	3.8%
Child abuse	2	3.8%
Domestic violence related	2	3.8%
Human trafficking	2	3.8%
OWI	2	3.8%
Battery (non-domestic)	1	1.9%
	52	100%

As far as litigation posture, defendants made claims of (a) judicial error, i.e., the trial judge erred in denying the defendant's request to present an expert or erred in denying the defendant's motion to exclude the state's expert, or (b) ineffective assistance of counsel (IAC), i.e., defense counsel erred in attempting (or by failing to attempt) to present an expert or erred in challenging (or by failing to challenge) the state's expert.

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26. *See* State v. Johnson, 951 N.W.2d 616, 628 (Wis. Ct. App. 2020).

27. *See* State v. Kuchinskas, 968 N.W.2d 868, 2021 Wisc. App. LEXIS, 988 (Wis. Ct. App. Nov. 2, 2021) (per curiam) (unpublished table decision).

28. A spreadsheet which includes additional detail for each case—e.g., the type of criminal charge and the nature of the legal challenge (judicial error or ineffective assistance of counsel)—is on file with the author.

Nature of challenge	No. Cases	Pct.
Judicial error	34	65.4%
IAC	17	32.7%
Both (due to multiple experts)	1	1.9%
	52	100%

The common view among Wisconsin defense lawyers, based on personal experience and anecdotal accounts, is that prosecutors have government-employed experts readily available and, therefore, use expert witnesses far more often than defense lawyers. This view is consistent with the existing *Daubert* literature.[29] The numbers in this study confirm that view as well.

Party calling the expert	No. Cases	Pct.
State (prosecutor)	37	71.2%
Defense	14	26.9%
Both (due to multiple experts)	1	1.9%
	52	100%

As far as the type of expert testimony, the most popular by far was commonality evidence, some forms of which are also called syndrome evidence.[30] For example, the prosecutor may call a witness, such as a police detective or a victim's advocate, to testify that the manner in which the complaining witness reacted to, or reported, a particular crime is common.[31] The state uses commonality evidence to explain-away anything about its case that would cause a juror to doubt the defendant's guilt.[32] According to state-employed commonality experts, every aspect of the state's case currently before the jury is, in their experience, "common"; nothing is ever "uncommon." This chameleon-like malleability is at the very heart of the evidence itself.[33]

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29. *See* Dwyer, *supra* note 13, at 391 (2007) ("[E]xpert evidence in criminal litigation is almost exclusively the preserve of the state."); Paul C. Giannelli, *The Supreme Court's "Criminal"* Daubert *Cases*, 33 SETON HALL L. REV. 1071, 1072 (2003) ("Instead of worrying about the 'hired gun' phenomenon as in civil litigation, the criminal defense lawyer often lacks money for any 'gun.'") (footnotes omitted).

30. *See* Janet C. Hoeffel, *The Gender Gap: Revealing Inequities in the Admission of Social Science Evidence in Criminal Cases*, 24 U. ARK. LITTLE ROCK L. REV. 41, 41 (2001) (discussing "Battered Woman Syndrome and Rape Trauma Syndrome evidence").

31. *See id.* at 50–51 (The prosecutor uses Battered Woman Syndrome, for example, "ostensibly to show that the victim acted consistently with a battered woman, but undeniably having the effect of showing the defendant to have acted consistently with a batterer.").

32. *See* Cicchini, *supra* note 1, at 709–10.

33. *See* Hoeffel, *supra* note 30, at 49 (With regard to battered woman syndrome, "Professor David Faigman and Amy Wright have observed that Walker's own studies do

In the cases in this study, the state attempted to use commonality evidence ten times, and it succeeded every single time; conversely, the defense attempted to use such evidence only twice and was denied both times.[34] This double standard is nothing new; it was detected at least a quarter century ago, and typically works to the detriment of the young African-American males who constitute a disproportionate percentage of criminal defendants that are susceptible to this evidence.[35]

The popularity of commonality experts notwithstanding, the range of expertise at issue in the cases is wide. There are more experts (58) than cases (52) because two of the cases each involved three experts, and two of the cases each involved two experts, resulting in a total of six more experts than cases.[36]

Nature of expert testimony	No. Experts	Pct.
Commonality evidence (all types)	12	20.7%
Consciousness, memory, perception	6	10.3%
Cell phone data	4	6.9%
Child interview best practices	4	6.9%
Firearms evidence	4	6.9%
Blood evidence (including BAC)	3	5.2%
Victim truthfulness	3	5.2%
Cadaver dog evidence	2	3.4%
Conditions of return - TPR cases	2	3.4%
Drug identification	2	3.4%
Self defense	2	3.4%
All others combined (1 of each kind)	14	24.1%
	58	100%

While there are 52 different cases and 58 different experts at issue, there were far more judicial decisions. To begin, the trial judge had to make a decision, or there would be nothing to appeal. There were, therefore, 58 trial court decisions—one for each expert. For example, before trial, one party may file a notice of expert testimony and the other party would move to exclude the evidence, thus requiring the trial judge to rule. As another example, after conviction, the defendant's appellate counsel may file a post-conviction motion

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not show what they purport to show. For example, while Walker claims a three-phase cycle, only about thirty-eight percent of the women studied actually experienced all three phases.").

34. *See supra* Part III.B. A spreadsheet with details of all cases is also on file with the author.

35. *See* Hoeffel, *supra* note 30, at 41 ("In marked ignorance or disregard of the dictates of the Sixth Amendment . . . courts routinely reach out to deny the average criminal defendant—typically male and African-American—the right to present the same quality of evidence admitted" for the state).

36. A spreadsheet with details of each case is on file with the author.

arguing that the defendant's trial lawyer was ineffective for *not* attempting to call an expert, also requiring the trial judge to rule.

All cases necessarily reached an appellate court or the databases wouldn't have produced them, as Wisconsin does not otherwise publish or issue trial court decisions. There were 55 decisions by the court of appeals. There were three fewer such decisions than trial court decisions because, in one case, the appellate court merely certified the issue to SCOW;[37] in a second case, it reversed the conviction for an unrelated reason and therefore did not rule on the *Daubert* issue;[38] and in a third case, it held that the guilty-plea waiver rule prevented it from reviewing the trial court's ruling.[39]

Finally, there were two substantive decisions by SCOW. The grand total, therefore, is 115 decisions encompassing all three levels of the court system: trial courts, intermediate appellate courts, and the high court. The win-loss record is as follows.

Wins at each level of court	State	Defense
Trial court wins	57	1
Appellate court wins	52	3
SCOW wins	2	0
	111	4

Regardless of the type of case, the nature of the expert testimony, the party calling the expert, and the procedural posture of the case, the state amassed an overwhelming 111-4 record against the defense. Adding these results to those of my first study, the state's combined record on *Daubert* rulings now stands at a mind-boggling 245-4.

III. INSIDE THE NUMBERS

The win-loss tally looks dismal for the defense. But the state's impressive 111-4 record is *not*, in and of itself, conclusive proof of a pro-state judicial bias. A deeper analysis is required. But to begin, the record itself actually requires further scrutiny.

A. A Win Is (Not) a Win

The defense's 4-111 record (or 4-245 record when combined with the first study) actually *overstates* the defendant's level of success. One of the four defense wins occurred in *State v. Molde*, which involved a child sex allegation.[40]

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37. *See, e.g.*, State v. Burch, 961 N.W.2d 314, 316 (Wis. 2021).

38. *See, e.g.*, State v. Jarvi, No. 2023AP2136-CR, 2025 Wisc. App. LEXIS 516, at *2 (June 12, 2025) (unpublished table decision).

39. *See, e.g.*, State v. Pierson, No. 2024AP2161-CR, 2026 Wisc. App. LEXIS 318, at *6 (Mar. 24, 2026) (per curiam) (unpublished table decision).

40. 21 N.W.3d 343, 345 (Wis. 2025).

The state's expert testified that only "one percent of all disclosures" by children are false allegations.[41] The appellate court reversed, holding that such expert testimony went too far and constituted improper vouching for the complaining witness.[42] However, that defense victory was short-lived, as SCOW reversed that reversal and reinstated the conviction.[43]

Another defense win occurred in *State v. Mader*, which also involved a child sex allegation.[44] The state's experts testified that more than 99 percent of such allegations are true.[45] The appellate court found that this, too, was improper expert testimony.[46] However, the defendant's victory was not even short-lived; rather, it was illusory. The appellate court found the error to be harmless and upheld the conviction.[47] To remove any doubt, and to clear the way for future prosecutions, the high court in *Molde* (discussed in the previous paragraph) specifically named *Mader* and overruled its underlying finding that such expert testimony was even improper in the first place.[48]

This wipes out half of the defense wins in substance, leaving the defense with only two wins which occurred at the trial- and appellate-court levels of a single case: *State v. Dietzen*.[49] The more accurate defense record, therefore, is 2-113. On a case-outcome basis, the defense's true record is a slightly more dismal 1-57.

In fairness, though, another case had a surprising, pro-defendant twist—but without any meaningful reach and without even a substantive decision. In *State v. Anderson*, the prosecutor won the expert-related rulings at both the trial- and appellate-court levels.[50] The defendant then appealed to SCOW at which time the prosecutor threw in the metaphorical towel despite having dominated the first two rounds of the three-round fight.[51]

Specifically, the prosecutor actually joined the defense in asking to reverse the state's win; however, the prosecutor warned SCOW *not* to address the defendant's actual argument or make any substantive ruling that might bind the state in future cases: "Anderson is entitled to relief . . . the analysis should end here. *Full stop*."[52] The high court dutifully complied with the prosecutor's demand, albeit over a dissenter who wrote: "Today this court fails to perform its

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41. *Id.* at 346.
42. *Id.*
43. *Id.* at 350–51.
44. 993 N.W.2d 761, 766 (Wis. Ct. App. 2023).
45. *Id.* at 767–68.
46. *Id.* at 775–76.
47. *Id.* at 788.
48. *Molde*, 21 N.W.3d at 350. For further discussion of this finding, see infra Part III.D.
49. *See* No. 2023AP1220-CR, 2024 Wisc. App. LEXIS 775 at *23–24 (Sep. 17, 2024) (per curiam) (unpublished table decision).
50. *See* 990 N.W.2d 771, 773–74 (Wis. 2023) (memorandum opinion) (per curiam).
51. *Id.* at 772 ("[T]he State conceded that 'it failed to meet its burden.'").
52. Brief of Plaintiff-Respondent at 6, State v. Anderson, No. 2020AP819-CR (Wis., Dec. 15, 2022) (emphasis added).

obligation to declare the law. Instead, it sidesteps the significant legal questions the parties [originally] brought to us to decide . . ."[53]

Because SCOW's decision was only a few lines, did not substantively address any expert-related issue, and did not include either "907.02" or "Daubert" anywhere in its text, it is not included in this study's population of cases.

B. The Goose and the Gander

Whether the state's record in this study is actually 111-4, 113-2, or 57-1 (when based on case outcomes), it is absolutely dominant. But one possible explanation for the state's near-perfect performance is that prosecutors *might* be routinely introducing well-established, rock-solid scientific evidence, thus rendering all defense challenges frivolous. And on the flip side of the coin, *maybe* defense experts are being excluded because they are charlatans parading around as experts, attempting to sell pseudoscience to jurors. However, upon closer examination, that quickly falls apart as a possible explanation.

When it comes to expert evidence, what's good for the goose is not good for the gander. In other words, within a *single category* of expert testimony, the courts always found a way to allow the prosecutor's evidence and exclude the defendant's evidence. This was true of expert testimony about child interview best practices; commonality evidence; firearms evidence; and human consciousness, memory, and perception.[54] (In the previous study, it was true of blood evidence, child interview best practices, and firearms evidence.[55])

And the disparity in outcomes can't be explained away by the qualifications of the defendants' proffered experts. For example, when the court prevented a defendant from calling an expert on child interview best practices, the would-be witness held a doctorate degree and was a practicing clinical and forensic psychologist.[56] When the courts prevented defendants from calling experts on commonality evidence—the type of expertise the state was allowed to present in *all ten* of its attempts—the defendants' would-be witnesses (a) held a Ph.D. degree and was a criminology professor in one case,[57] and (b) held a doctorate degree and was a psychologist in the other.[58] Similarly, when the court prevented a defendant from calling an expert to discuss the effect of alcohol on "memory and other cognitive functions," the defendant's would-be witness also held a doctorate degree and had researched the issues in question.[59]

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53. *Anderson*, 990 N.W.2d at 771 (Roggensack, J., dissenting).

54. A spreadsheet with details of every case in the study is on file with the author.

55. *See* Cicchini, *supra* note 1, at 723.

56. *See* State v. Castillo, 963 N.W.2d 587, 2021 Wisc. App. LEXIS 315, ⁋ 8 (June 29, 2021) (unpublished table decision).

57. *See* State v. Robbins, 36 N.W.3d 239, 2026 Wisc. App. LEXIS 369, ⁋ 6 (Mar. 31, 2026) (per curiam) (unpublished table decision).

58. *See* State v. Burke, 963 N.W.2d 583, 2021 Wisc. App. LEXIS 287, ⁋⁋ 4, 8 (June 15, 2021) (per curiam) (unpublished table decision).

59. *See* State v. Jarvi, 25 N.W.3d 104, 2025 Wisc. App. LEXIS 516, ⁋⁋ 56–57 (June 12, 2025) (unpublished table decision).

Looking at the state's experts only magnifies the problem. Consider, once again, the category of expertise known as commonality evidence. As indicated above, a defendant was *prevented* from calling a Ph.D. in criminology to testify about the common "reactive behaviors of victims of past gang violence" in support of the defendant's self-defense claim.[60] In contrast, the state was *allowed* to call "a police detective to testify about common responses of sexual assault victims."[61] In so ruling, the trial court made no inquiry whatsoever into the reliability of the detective's testimony, but the appellate court was there to save the day: "Though the [trial] court's reasons for concluding that [the detective's] testimony was admissible could have been more fulsomely stated, we are obliged to look for reasons to sustain its decision . . ."[62] And despite not identifying any such reasons, the appellate court nonetheless upheld the trial court's decision.[63]

In fact, throughout the ten cases in which the state used commonality evidence, prosecutors were allowed to call government-employed *advocates*—rather than credentialed and objective social scientists or at least doctorate-holding professionals—to testify about any alleged commonality the prosecutor could imagine. Perhaps the most startling of these cases was a different police detective who, with no medical training, was allowed to testify for the state "about common behaviors of unconscious persons."[64] If a prosecutor can imagine it, the courts will allow it.

In short, there were four types of expertise that both the state and the defense attempted to present at trial. Regarding those types of expertise, neither the subject matter of the testimony nor the qualifications of the proffered expert were correlated with the courts' ultimate decision to allow or exclude the evidence. Instead, the party offering the evidence, i.e., the state or the defendant, was *perfectly* correlated with the courts' admissibility decision. It was a perfect positive correlation for the state, and a perfect negative correlation for defendants.

C. Same as It Ever Was

In continuing our search for a benign explanation of the state's 111-4 record, a deeper dive into the cases produces more of the same. That is, when the courts gave reasons for their pro-state decisions, they used the same tried-and-true tactics as they did in the first decade of Wisconsin's *Daubert* case law.

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60. *Robbins*, 2026 Wisc. App. LEXIS 369, ⁋ 6.

61. State v. Bailey, 26 N.W.3d 129, 2025 Wisc. App. LEXIS 651, ⁋ 1 (July 23, 2025) (per curiam) (unpublished table decision).

62. *Id.* ⁋ 14.

63. *Id.* ⁋⁋ 13-14. With sleight of hand, the court found that, because the detective was experienced, his testimony was therefore reliable. However, a witness's qualifications—which, in this case, certainly wouldn't rise to the level of expertise for the subject matter of the testimony—and the reliability of the application of specialized knowledge to the facts of a case are *two entirely different things*. *See* WIS. STAT. § 907.02 (2023–24).

64. State v. Diaz, 34 N.W.3d 213, 2026 WL 291009, at ⁋ 22 (Wis. Ct. App. Feb. 4, 2026) (per curiam) (unpublished table decision).

These judicial tactics include labeling the state's proffered testimony as lay testimony, rather than expert testimony, in order to bypass *Daubert* altogether; dispensing with the reliability analysis entirely in order to admit the state's evidence; employing a variety of double standards for the benefit of the state; and using a collection of other disingenuous ploys.[65] Some of the cases discussed earlier have already revealed two of these tactics: dispensing with the reliability analysis entirely and employing a double standard for the benefit of the state.[66]

One additional example of an old trick in this new study will further demonstrate how the courts rule for the state on all things *Daubert*. Recall that expert testimony includes not only "scientific" and "technical" knowledge, but also "other specialized knowledge" that the witness obtained through "experience."[67] And in *State v. Jones*, the state's police detective witness testified about commonalities based on his specialized knowledge obtained through his investigation of actual burglaries.[68]

In response to defense counsel's objection, the trial court permitted the testimony based on the detective's experience.[69] When the defendant appealed, the appellate court found the easiest way to rule against him was to dispense with *Daubert* entirely: it decided that the detective's testimony was not expert testimony at all, but rather "lay opinion testimony," which is not even subject to *Daubert*.[70]

The problem with that judicial tactic is, although it is convenient and efficient, it is nonsensical. The detective's testimony was permitted specifically *because* of "his twenty-six years as a detective," in which "he had investigated several hundred burglaries involving forced entries to buildings"; and based thereon, he testified that the facts of the case before the jury were "very common" in the actual burglary cases he had previously investigated.[71] However, lay opinions *cannot* be based on "specialized knowledge" obtained through "experience, training, or education"[72]—and such specialized knowledge was the very reason the detective was allowed to testify in the first place.[73] In other words, no *lay person* would ever be allowed to opine about the commonalities in forced-entry burglary cases, let alone opine that the defendant's case is consistent therewith. The very idea of that happening is an insult to the rules of evidence.

But in addition to rehashing these old tactics, the courts in this study have also created a new tactic. As discussed in the next section, it is a true testament to the courts' creativity and dedication to their pro-state cause.

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65. *See* Cicchini, *supra* note 1, at 723–41.

66. *See supra* Part III.B.

67. WIS. STAT. § 907.02 (2023–24).

68. 995 N.W.2d 491, 2023 WL 4347773, at ¶ 5 (Wis. Ct. App. July 5, 2023) (per curiam) (unpublished table decision).

69. *Id.* ("The court allowed the testimony 'based upon the experience that we heard.'").

70. *Id.* ¶ 8.

71. *Id.* ¶ 5.

72. WIS. STAT. § 907.01 (2023–24).

73. *Jones*, 995 N.W.2d ¶ 5.

D. Old Dogs, New Trick

The cases in this study have produced a new judicial tactic that was merely in its infancy, yet to fully emerge, in the first decade of *Daubert*. It involves a double standard of sorts, but with a new and interesting twist, thus warranting its own section in this Article. Specifically, courts may exclude the defendant's expert on the grounds that the testimony would violate the so-called *Haseltine* rule, the purpose of which "is to prevent a witness from usurping the jury's role as lie detector in the courtroom."[74]

In *State v. Castillo*, for example, the state's forensic interviewer obtained a recorded statement of a child accusing the defendant of a crime.[75] (These recordings are admissible at trial.)[76] To challenge the evidence, the defendant attempted to call "a clinical and forensic psychologist" to testify that certain forensic "interviewing techniques" can "affect the reliability of a child's statements."[77] The court excluded the testimony, in part because it "would have a tendency to interfere with the jury being the primary determiner of credibility of witnesses in violation of *Haseltine*."[78]

However, when the situation is reversed, courts allow the state's experts to discuss forensic interviewing techniques in order to *bolster* the child-witness's credibility. In *State v. Millighan*, for example, the prosecutor asked the state's forensic interviewer about her methodology that she used to interview the child accuser.[79] The interviewer responded that "it's something that helps me know that the child's retrieving memories and they're not just repeating statements" that they've been told to repeat.[80]

The defense argued that the witness substantively testified that, because of her forensic interview, the child accuser "was retrieving memories," which improperly vouched for the child-witness's credibility, thus violating *Haseltine*.[81] But the court ignored the substance of what had transpired. Without any analysis, it simply reached its predetermined outcome: the state's expert "did not testify to whether the charged crimes occurred, nor did she label [the child's] accusations as truthful or retrieved memories."[82] But when an expert tells the jury that she interviewed the complaining witness in a way designed to "retriev[e] memories," rather than produce "repeat[ed] statements," the expert is, in substance if not

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74. State v. Pringle, 953 N.W.2d 121, 2020 WL 6733506, at ¶ 13 (Wis. Ct. App. Nov. 17, 2020) (unpublished table decision) (internal quotation marks omitted).

75. State v. Castillo, 963 N.W.2d 587, 2021 WL 2659567, at ¶ 8 (Wis. Ct. App. June 29, 2021) (unpublished table decision).

76. *See* WIS. STAT. § 908.08 (2023–24).

77. *Castillo*, 963 N.W.2d ¶ 8.

78. *Id.* ¶ 10.

79. 36 N.W.3d 227, 2026 WL 807223, at ¶ 26 (Wis. Ct. App. Mar. 24, 2026) (unpublished table decision) (per curiam).

80. *Id.*

81. *Id.*

82. *Id.* ¶ 27.

literally, telling the jury that the child's accusation *is* a "retriev[ed] memory" and, therefore, that the "charged crimes occurred."[83]

As contradictory as those two rulings—*Castillo* and *Millighan*—are, they are nothing compared to the state's vouching in other cases. For example, in *State v. Pringle*, the alleged victim and complaining witness had developmental disabilities, and her own personal counselor was allowed to testify, as an expert, as follows: "That's a lesson I learned really early in my career . . . that is one thing about people with developmental disabilities, wherever they are in the spectrum. It's really—they don't—*they lack the sophistication to be cunning and conspire or feign a situation*. . . ."[84]

The state's expert literally testified that the accuser was not capable of lying, thus violating the *Haseltine* rule, the purpose of which "is to prevent a witness from usurping the jury's role as lie detector in the courtroom."[85] The court conceded that the *question* which produced the expert's answer "was improper," as its purpose "was clearly to elicit testimony from [the expert] that, because of [the accuser's] cognitive disabilities, she lacked the sophistication" to falsely accuse the defendant.[86] Nonetheless, in a mind-boggling twist of reality (and of *Haseltine*), the court wrote that "we conclude the effect of [the expert's] testimony was *not* to vouch for [the accuser's] credibility."[87]

In so holding, the court simply ignored that the expert witness had served this particular accuser (Molly) in professional capacities for 25 years;[88] that she was testifying at the trial in which *Molly* was the alleged victim;[89] and that she was responding to the specific question, "What about *Molly's* level of sophistication as it relates to concocting a story or conspiring to present a lie, tell a lie, create some sort of false story?"[90] Despite all of that, the court claimed that the expert merely "testified *generally* that individuals with developmental disabilities lack the sophistication to be cunning and conspire or feign a situation."[91] The court claimed that the jury would *not* have drawn a direct line between Molly's counselor's testimony and Molly—the very person the counselor was asked about and whose credibility the jury was instructed to evaluate.[92]

Perhaps sensing the absurdity of its reasoning, the court added a second justification. The court claimed that the expert's full testimony about the inability of cognitively disabled people to lie included this caveat: "I'm not saying it doesn't happen, but it's *very rare* that it happens."[93] That is, the expert did *not*

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83. *Id.*

84. 953 N.W.2d 121, 2020 WL 6733506, ¶ 6 (Wis. Ct. App. Nov. 17, 2020) (unpublished table decision) (emphasis added).

85. *Id.* ¶ 13 (internal quotation marks omitted).

86. *Id.* ¶ 14.

87. *Id.* (emphasis added).

88. *Id.* ¶ 4.

89. *Id.* ¶ 3.

90. *Id.* ¶ 14 (emphasis added).

91. *Id.* ¶ 15 (emphasis in original).

92. *See* WIS. J.I. CRIM. 300 (1/2023) ("You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.").

93. *Pringle*, 953 N.W.2d ¶ 15 (emphasis added).

say that those with "cognitive disabilities are *categorically unable* to concoct false stories."[94] Therefore, the court held, the expert did not vouch for the witness or otherwise violate *Haseltine*.[95]

The problem, however, is that the jury wasn't there to decide whether cognitively impaired persons are "categorically unable" to lie.[96] And what the expert did, at most, was to leave the door open for the "very rare" possibility of such an event. But calling a thing "very rare" necessarily puts it outside the reach of reasonable doubt; the state's jury instruction on the burden of proof even warns jurors "*not* to search for doubt."[97] And even if the jurors had doubts, the instruction goes to great lengths to warn that they probably are *not* reasonable ones.[98] Surely it would *not* be reasonable to acquit a defendant on the mere possibility that a "very rare" event occurred.

In reality, when a state's expert tells the jury that the complaining witness is cognitively impaired, and that it would be "very rare" for a cognitively impaired person even to be *capable* of lying,[99] the jury is all but duty-bound to convict.

Finally, while that expert testified that false allegations are "very rare," other hired guns of the state have been far more specific. For example, in *State v. Molde*, the state's expert testified that false allegations by children account for only *one percent* of such allegations.[100] Similarly, in *State v. Mader*, the state's experts testified that truthful allegations by children account for more than *99 percent* of such allegations.[101] Such expert testimony is highly problematic, as participants in published studies are willing to find guilt beyond a reasonable doubt when their subjective probability of guilt ranges from a mere *54 percent* to *68 percent*.[102] Given that 99 percent far exceeds even the high end of that empirically-derived scale, surely SCOW would find such testimony to constitute impermissible vouching for the accuser—wouldn't it?

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94. *Id.* ¶ 16. (emphasis added).

95. *Id.*

96. *Id.*

97. WIS. J.I. CRIM. 140 (11/2025) (emphasis added).

98. *See id.* ("A reasonable doubt is *not* a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is *not* a reasonable doubt. A reasonable doubt is *not* a doubt such as may be used to escape the responsibility of a decision.") (emphasis added); Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 144 (1999) ("The weight of the instruction conveys a message to the jurors: The judge would not have presented so many ways in which the juror's doubts can be used improperly if this were not the main problem to avoid.").

99. *Pringle*, 953 N.W.2d ¶ 15.

100. *Molde*, 21 N.W.3d at 346.

101. *Mader*, 993 N.W.2d 761, 774–75 (Wis. Ct. App. 2023) (finding harmless error) (underlying finding of error itself reversed by *Molde*, 21 N.W.3d at 351–52).

102. *See* Lawrence T. White & Michael D. Cicchini, *Is Reasonable Doubt Self-Defining?*, 64 VILL. L. REV. 1, 7–8, 14 (2019) (citing studies where participants equated proof beyond a reasonable doubt with 54 percent probability to 68 percent probability of guilt, and conducting a new study finding that "[w]hen participants believed that more than 65% of the evidence favored the State, 86% of participants (178 of 206) voted guilty" after applying the proof-beyond-a-reasonable-doubt standard).

To the contrary, and as discussed earlier,[103] SCOW has specifically blessed such testimony in order to bolster the state's child-witnesses: "We hold that statistical evidence alone about the prevalence of *false reporting* does not violate the *Haseltine* rule."[104] Interestingly, the court of appeals has also decided a case in which the defendant was prevented from calling an expert on this very topic, i.e., to testify about "research on *false allegations* by children."[105] What was the court's reason for hiding the defendant's evidence from the jury? "Under *Haseltine*, no witness, expert or otherwise, should be permitted to give an opinion that another . . . witness is telling the truth. . . . [W]e agree that the circuit court's concern in this regard was reasonable."[106]

It appears that the goose-and-the-gander problem has emerged once again and in yet another context.

IV. LIMITS OF THE CASE STUDY METHOD[107]

I previously warned that the state's record of 111-4 (or 113-2 or 57-1, depending on how a victory is defined) does not, in and of itself, prove a pro-state bias. However, the analysis in Part III largely eliminated any legitimate explanation for the gross disparity in outcomes. Nonetheless, it is still important to recognize the limitations inherent in this Article's case study method.

Because Wisconsin trial-court decisions are not reported unless appealed, this Article analyzed only those cases that reached an appellate court. In reality, it is possible that the defense is winning some *Daubert* motions at the trial-court level, but the state simply never appeals those decisions.[108] We therefore cannot rule out the possibility that the state's near-100% win rate in cases that reach an appellate court might substantially overstate its actual win rate in all cases with contested *Daubert* issues.

However, I suspect there are not enough unreported defense victories to put a substantial dent in the state's winning percentage. In other words, I doubt the defense is metaphorically "cleaning up" in the trial courts in cases that never reach the appellate courts. There are two reasons that I hold this cynical view.

First, when litigating *Daubert* issues at the trial-court level, the die has already been cast: after fifteen years of *Daubert* decisions, the defense can cite only one case in which any defense expert has ever been allowed to testify, and no cases in which any state's expert has ever been excluded. This leaves little for the

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103. *See supra* Part III.A.

104. *Molde*, 21 N.W.3d at 351–52 (emphasis added) (reinstating the defendant's conviction and specifically citing *Mader* as well).

105. *Burke*, 963 N.W.2d 583 ¶ 1 (emphasis added).

106. *Id.* ¶ 10.

107. Because I conducted this study in the same manner as my first study, the methodological limitations are also the same. Consequently, this section is, in substance and sometimes word-for-word, reproduced from the same section in the first study. *See* Cicchini, *supra* note 1, at 742–44.

108. For example, in *Burke*, 963 N.W.2d 583 ¶ 6, the defendant's expert was allowed to testify regarding a very narrow issue; however, it appears that the prosecutor never opposed the witness's testimony regarding that matter.

defense to work with, and it gives defendants little chance of winning contested issues in the trial courts.

Second, in addition to any cases in which the defense wins a *Daubert* issue in the trial court and the state does not appeal, there are no doubt *volumes* of cases in which the defendant *loses* a *Daubert* issue in trial court and then (a) accepts a plea bargain and therefore waives the *Daubert* issue on appeal;[109] (b) is acquitted at trial and therefore has nothing to appeal; or (c) is convicted at trial but does not appeal or appeals on completely different grounds. Such defense losses on *Daubert* issues will also go unreported because they, too, never reach an appellate court; however, if they were counted, they would dramatically increase the state's win total.

As a final methodological limitation, while it is accurate to claim, regarding this study, that the state won 57 of the 58 cases and that its record at all levels of the court system was 111-4 (if not 113-2), it is important to realize that *appellate* decisions are, at least in theory, affected by the standard of review. It is possible that if the appellate courts had been making their decisions from scratch, they might have reached different conclusions. But appellate courts do not make their decisions from scratch; they apply standards of review which, at least in theory, require them to focus on more narrow issues, e.g., whether the defendant *was prejudiced* by counsel's deficient performance in not calling an expert, or whether the trial court *abused its discretion* in denying the defendant's motion to exclude the state's expert.

Despite these standards, in only one of the state's victories did an appellate court even hint that the trial judge made a less-than-optimal decision. And in that case, the appellate court reversed on different grounds, and only addressed the *Daubert* issue to help the state, i.e., to provide the trial court with guidance on how to exclude the defendant's expert in a way that would withstand future appellate scrutiny.[110] This certainly strikes the objective observer as a tilted playing field, and it is quite contrary to the prosecutor's demand, in other cases, that the court issue decisions that are tailored as narrowly as possible.[111]

In sum, while the case study method of analyzing appellate court decisions is not perfect, it certainly provides an excellent indication of the courts' pro-state tactics at all levels of the court system. And it probably provides an accurate indication of the trial courts' treatment of defendants throughout the state, even in cases that never reach an appellate court.

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109. *See Pierson*, 36 N.W.3d 235, ¶ 1 (holding that the guilty-plea waiver rule prevents the appellate court's review of an adverse expert-related ruling once the defendant enters into a plea deal).

110. *See Jarvi*, 25 N.W.3d, ¶ 60 (reversing for a different reason but still opining that, "while it may have been within the court's discretion to exclude [the defense expert's] testimony for other reasons, we conclude that some of the specific reasons that the court gave for excluding the testimony wholesale [would] not stand up to appellate scrutiny," should the defendant be convicted again after remand and subsequently appeal again).

111. Brief of Plaintiff-Respondent at 6, State v. Anderson, 990 N.W.2d 771 (Wis., Dec. 15, 2022) (No. 2020AP819-CR) (warning the high court that it must simply grant the defendant's requested relief without conducting any substantive analysis of the issue, as such analysis could create bad precedent for the state).

V. LEGAL REFORM

I have previously set forth various arguments for legal reform—both my own ideas and the ideas of others.[112] But it seems that the time for legal reform within, and of, the *Daubert* framework has passed—assuming such a time ever existed in the first place. In short, it is long past time to close the door on *Daubert*.

To demonstrate, and to continue with the Wisconsin database of cases as an example: (a) *Daubert* was implemented to make it more difficult to use expert testimony; (b) the vast majority of criminal cases involve the state's (not the defendants') experts; and yet (c) in the first 15-plus years of *Daubert* appellate cases, the state has won 100% of the cases involving its own experts (and all but one of the cases involving defendants' experts).[113] Given that, the defense bar must now attack *Daubert* itself,[114] and should consider doing so on constitutional grounds—at least with regard to cases in which *the defendant* seeks to introduce expert testimony.

More specifically, *Daubert* is nothing more than a rule of evidence, and rules of evidence must yield to the defendant's constitutional rights to call witnesses and to present a defense. For example, in *Chambers v. Mississippi*, the state-court system had denied the defendant the right to present evidence, and it did so based in part on the rule against hearsay.[115] Specifically, the defendant tried to introduce statements of three witnesses who heard another person confess to the shooting with which the defendant was charged.[116] The rule against hearsay was, at least facially, applicable to both parties and served a valid purpose: "The hearsay rule, which has long been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact."[117]

Despite that, *Chambers* held that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."[118] The defendant's conviction was therefore reversed, as the defense should have been permitted to present its evidence to the jury.[119] And the state would not have been left "defenseless," so to speak, as the witnesses would have been "present in the courtroom" and "under oath"; they "could have been cross-examined by the State" and their "demeanor and responses weighed by the jury."[120] After all, the

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112. *See* Cicchini, *supra* note 1, at 744–750.

113. This combines the records in my first study and in this study. *See id.* at 715–22 and *supra* Part II.

114. For other *Daubert*-related strategies, see Michael D. Cicchini, Daubert *Strategies for the Criminal Defense Bar*, 2021 U. ILL. L. REV. ONLINE 77 (2011).

115. 410 U.S. 284, 284 (1973).

116. *Id.* at 298.

117. *Id.*

118. *Id.* at 302.

119. *Id.* at 303.

120. *Id.* at 301.

right "to call witnesses in one's own behalf" is "among the minimal essentials of a fair trial."[121]

It seems that a defendant seeking to present expert testimony has an even stronger constitutional case than the defendant seeking to introduce hearsay statements in *Chambers*. Both defendants seek to present testimony, and are being prevented from doing so by a rule of evidence.[122] The *Daubert* rule, like the hearsay rule in *Chambers*, is at least facially applicable to both parties, and both rules serve the same purpose: to keep "untrustworthy evidence" from the jury.[123] However, while the rule against hearsay "has long been recognized and respected by virtually every State,"[124] the *Daubert* rule is a recent judicial creation,[125] which took years for the courts to figure out,[126] and which the state legislature only codified a mere fifteen years ago.[127]

And this is where things really start to depart from *Chambers*. While that case held that the "the hearsay rule may not be applied mechanistically,"[128] the *Daubert* rule poses a much more ominous situation. Far from being applied mechanistically in the same way against both parties, the evidence is now overwhelming that *Daubert* is being applied grossly unevenly, and in a pro-state fashion, in violation of defendants' constitutional rights. Once again, under *Daubert*, the state's experts are *always* admitted; a defendant's expert has been admitted only *once* in fifteen years.

Chambers also held that the defendant should have been allowed to present witnesses, as they "could have been cross-examined by the State" and their "demeanor and responses weighed by the jury."[129] And in the *Daubert* context, courts have seized upon this same concept when allowing the state to present its expert witnesses over defendants' objections. For example, in *State v. Durski*, the court allowed the state's expert to testify as the defendant was "free to challenge the accuracy of the expert's assumptions and propose competing scenarios" on cross-examination.[130]

However, that enlightened theme takes a 180-degree turn when the defendant seeks to present expert testimony. As the court admitted in *State v. Murphy*, which upheld the trial court's *exclusion* of the defendant's expert: "It is true as Murphy contends that, instead of exclusion, the more usual means of attacking

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121. *Id.* at 294.

122. *See* WIS. STAT. § 907.02 (2023–24) (the part of the evidence code which codifies the *Daubert* standard).

123. *Chambers*, 410 U.S. at 298.

124. *Id.*

125. *See Daubert*, 509 U.S. at 582.

126. To complete the so-called trilogy of *Daubert* cases, see *General Electric Co. v. Joiner*, 522 U.S. 136 (1977), and the more-frequently cited third leg of the stool, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

127. WIS. STAT. § 907.02; 2011 Act 2 (publication date Jan. 31, 2011).

128. *Chambers*, 410 U.S. at 302.

129. *Id.* at 301.

130. 935 N.W.2d 559, 2019 WL 3949705, ¶ 1 (Wis. Ct. App. Aug. 21, 2019) (unpublished table decision). This case was cited and discussed in my first study. *See* Cicchini, *supra* note 1, at 738.

shaky but admissible experienced-based medical expert testimony is by vigorous cross-examination . . ."[131] What defendant Murphy overlooked, of course, was that "the more usual means" apply only to the state. That is how prosecutors have amassed a 245-4 record (or, arguably, a 247-2 record) after the first fifteen years of *Daubert* in Wisconsin.[132]

By employing a constitutional attack, the defense bar is merely striving to return things to the pre-*Daubert* status quo: a return to the relevancy standard under which every expert presented by the state is allowed to testify, but every expert for the defense must be allowed to testify as well.[133] This would, at least, restore defendants' fundamental rights to call witnesses and to present a defense.

CONCLUSION

Changing the law on expert testimony from a simple "relevancy" test to the more stringent *Daubert* standard of "reliability" was supposed to make it more difficult to call expert witnesses.[134] In theory, this was supposed to benefit criminal defendants, as prosecutors were the ones who called the vast majority of experts at criminal trials.[135] Nonetheless, studies revealed that while *Daubert* posed a nearly insurmountable barrier for defense experts, it did not affect prosecutors' ability to call their own experts.[136]

This Article builds upon the existing literature by studying the most recent five-year span of cases in a single jurisdiction.[137] In 52 cases involving 58 experts, the courts made 115 decisions across all levels of the court system: trial, appellate, and high court.[138] In those decisions, the state compiled a record of 111-4 (or 113-2, depending on how one defines a defense victory).[139] A deeper analysis of these case outcomes reveals and describes the courts' pro-state bias.[140]

More specifically, what was good for the goose was not good for the gander: four categories of expert testimony were admissible for the state but not for the defense, despite the superior qualifications of defense experts.[141] And while the courts deployed their old, tried-and-true tactics to justify their pro-state rulings,[142] they also developed a new trick: defense experts were excluded, ostensibly because such testimony would have violated the anti-vouching rule. Meanwhile,

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131. State v. Murphy, 921 N.W.2d 9, 2018 WL 3954208, ¶ 1 (Wis. Ct. App. Aug. 16, 2018) (unpublished table decision). This case was also cited and discussed in my first study. *See* Cicchini, *supra* note 1, at 738.

132. This combines the state's 134-0 record in my first study and its 111-4 record in this study.

133. *See supra* Part I.

134. *See supra* Part I.

135. *See supra* Part I.

136. *See supra* Part I.

137. *See supra* Part II.

138. *See supra* Part II.

139. *See supra* Part II.

140. *See supra* Part III.

141. *See supra* Part III.B.

142. *See supra* Part III.C.

the state's experts were substantively, if not literally, allowed to vouch for the state's witnesses in multiple cases.[143]

In sum, this study, combined with the previous study on the state's first decade of *Daubert*, reveals that the state's record on contested issues is 245-4 (or 247-2, depending on how one defines a defense win).[144] This, along with other work on both the national and state level, constitutes overwhelming evidence that the time for legal reform *of* and *within* the *Daubert* system has come and gone. It is time to close the door on *Daubert*.[145]

Given the overwhelming evidence that now exists regarding *Daubert*'s application in criminal cases, defense counsel should consider arguing that the *Daubert* evidentiary scheme can no longer be used to exclude defense experts.[146] No rule of evidence, including *Daubert*, may be used to deny defendants their constitutional rights to call witnesses and to present a defense.[147] If the defense can make this case, it would essentially return us to the pre-*Daubert* relevancy standard and return defendants to equal footing with the government.[148]

143. *See supra* Part III.D.
144. *See supra* Part II.
145. *See supra* Part V.
146. *See supra* Part V.
147. *See supra* Part V.
148. *See supra* Part V.