Chapter 10

Criminal Profiling as Expert Evidence?
An International Case Law Perspective

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Summary
This chapter will focus on international case law concerning criminal profiling and the legal framework of (novel) evidence admission. Various cases from US, Canadian, Australian, UK, and German courts will be considered to show how they legally evaluate criminal profiles offered as evidence or, in the case of Switzerland, how such profiles would presumably be treated. It is argued that criminal profiling is currently with good reason failing the legal tests for admissible expert evidence and that judges should therefore not admit criminal profiles, not even as circumstantial evidence.

INTRODUCTION

In today’s rapidly changing and constantly evolving society, scientific, technical, and many other advances are being made at an historically unprecedented pace. Forensic science has burgeoned, and courts have become increasingly reliant on expert evidence. New techniques have often ensured the conviction of the guilty and the acquittal of the innocent and cast light on crimes, the truth of which might otherwise have remained undiscovered. However,
even well-qualified experts are not infallible, and their proposed evidence will sometimes reflect the fact that their field of expertise is fraught with considerable flaws. The courts must therefore exercise constant vigilance to ensure that they are not unwittingly misled.

Criminal profiling represents a method for identifying general but distinguishing personal characteristics and psychological personality traits of a yet unknown perpetrator from prior victim-offender interactions, crime scene analysis, geographical analysis, physical evidence, and victimology in an ongoing or closed investigation to help law enforcement direct their investigation and allocate their resources efficiently (1), which has also been termed “what to why to who” (2, pp. 865,866). It is used to reveal information regarding the unknown offender’s age, sex, race, educational level, marital status, intelligence, arrest history, military history, family background, social status and interests, socioeconomic level, residence in relation to the place of the crime (in geographical profiling), personality characteristics, and description of vehicle, and/or regarding interview tactics and techniques (2, p. 866). It is to be sharply distinguished from unacceptable racial profiling (3; 4; 5, p. 118).

The historical roots of criminal profiling in the United States and Europe have been discussed elsewhere (1). Many European countries have now developed their own approaches to criminal profiling and established specialized academic research institutions and trained police units (1,6), for example, the German Bundeskriminalamt (7,8), implementing the first quality standards in 2003 (9,10), as well as Austria (11), Scandinavia (12), and the United Kingdom (13). Switzerland has only recently adopted ViCLAS, the computerized Violent Crime Linkage Analysis System, and is now training its own case analysis specialists (1,14,15).

Despite the significant number of perplexing issues proponents of criminal profiling are facing, often prosecutors have been introducing profilers and profiles in court as evidence, mostly in North America (16–19; 20, p. 191), but also in Canada, Australia, the United Kingdom, and Germany. Of course, the legislature, judges, and legal scholars have always dealt with emerging areas of science and other fields of knowledge, some of them ground-breakingly useful and legally admissible like DNA analysis, others (internationally) inadmissible “junk science” like the “testimony” of psychics or astrologers and therefore are constantly challenged to determine whether new techniques, scientific or not, meet established standards for admission of evidence or whether the standards themselves might need adaptation. So far, surprisingly few commentators have touched on the legal aspects of criminal profiling as expert evidence.
Criminal Profiling as Expert Evidence? A Sample of International Case Law

The United States of America

Expert Evidence Admissibility: Supreme Court Standards and Federal Rules of Evidence

Criminal profiles are mostly introduced in criminal court by the state in the form of expert evidence (21). Judges who have to determine admissibility are then confronted with the difficult task of dealing with profiles based on a fluid conglomerate of major and minor theoretical and practical bodies of knowledge, which are complex and not yet homogenous, and with measuring it against the applicable legal standards. Judges face an enormous responsibility deciding on admissibility, as their decision to admit or exclude profile evidence may ultimately significantly influence the outcome of a particular case and set a precedent for other courts when they are required to deal with the same new field (22).

Although expert evidence in general existed well before 1923 and judges apparently had until then just inquired about the expert’s qualifications (“[a]s is well known, the ancient view of all expert testimony was that the expert’s mere opinion was to be accepted or rejected wholly on the reputation and qualifications of the witness,” 23, p. 489), and whether the offered knowledge was beyond the common juror’s range of knowledge (23), that year’s Supreme Court case of Frye v. United States (24) set new rules on the admissibility of (scientific) expert evidence in general. The defendant, who was accused of second-degree murder, attempted to introduce as evidence the results of a “systolic blood pressure deception test,” a precursor to the polygraph test, to determine his innocence. It was held by the US Supreme Court on appeal from the Supreme Court of the District of Columbia that if a piece of offered evidence was rooted in a new or developing field of science, it shall not be admissible until the relevant scientific community has accepted it as reliable:

When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question related are admissible in evidence…Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in its twilight zone the evidentiary force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. (24, p. 1014)
The court reasoned that the systolic blood pressure deception test had not yet gained “such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made” (24, p. 1014).

This general acceptance test has faced ongoing criticism, for example, regarding the imposition of a factual waiting period while new theories and techniques gain acceptance or for being too liberal because of the variable definition of the breadth of a scientific field (25) and because this was a very lenient standard, as experts could be found who would testify that a theory was “generally accepted” (26, p. 224). Furthermore, the enactment of the Federal Rules of Evidence in 1976 (and adopted state Rules of Evidence; 21, p. 255) led to a slow decline of the Frye test standard especially in federal courts (27).

The Federal Rules of Evidence of 1976, in Article VII (governing the admissibility of expert and opinion testimony), Rule 702, amended and effective since December 1, 2000 (28), did not perpetuate the strictures of the Frye test (29):

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

A trilogy of Supreme Court decisions, Daubert v. Merrell Dow Pharmaceuticals, Inc. (30), General Electric Co. v. Joiner (31), and Kumho Tire Co. v. Carmichael (32), (re)defining the legal rules governing evidence admissibility, had led to the amendment of Rule 702 in 2000 (27). In Daubert, the claimants suffered from limb reduction birth defects and sued Merrel Dow, the manufacturer of a morning sickness drug their mothers had taken, and claimed that the drug had caused their birth defects. First, the court held that the “general acceptance” test of Frye was superseded by the Federal Rules of Evidence of 1976, which had also been enacted to lower legal barriers for expert testimony (30, p. 594), and thus general acceptance in the scientific community was not necessarily a precondition to the admissibility of scientific evidence under the Federal Rules of Evidence. Second, the court concluded that Rule 702 placed appropriate limits on the admissibility of evidence that was purportedly scientifically based by assigning to the trial judge the task of ensuring that an expert’s testimony both rested on a reliable scientific foundation and was relevant to the task at hand. This entailed a preliminary assessment of whether
the reasoning or methodology underlying the testimony was scientifically valid and of whether that reasoning or methodology could be properly applied to the facts in issue. Noting that the inquiry was a flexible one, the Supreme Court then outlined several factors that judges may consider when evaluating whether the underlying reasoning or methodology was scientifically valid:

1. whether the expert’s theory or technique is falsifiable and has been tested (30, p. 2796),
2. the reliability of a procedure and its potential rate of error (30, pp. 2796, 2797),
3. whether the theory or technique has been subjected to peer review (30, p. 2797) and whether the results have been published (30, p. 2797), and
4. in partial accord with the Frye test, whether the expert’s methods and reasoning enjoy general acceptance in the relevant scientific community (30, p. 2796).

These four factors were not enumerated as an exhaustive list, and it was then largely left to case law to clarify the proper application of the Daubert criteria (26, p. 226). The federal and many state courts today are committed to this flexible and nuanced but also more uncertain approach (27). Although Frye demanded the court to acquiesce to the opinion of a relevant scientific community, Daubert requires the judges to make their own independent inquiry, for example, considering peer review, publications, and general acceptance in the scientific community (33). However, the now deceased Chief Justice Rehnquist, concurring in part and dissenting in part, expressed doubts about its practicality; he was, for example, “at a loss to know what is meant when it is said that the scientific status of a theory is its ‘falsifiability’” (30, p. 599). It is therefore not surprising that in a recent survey of 400 state trial court judges regarding their attitudes toward the Daubert criteria, 91% seemed to understand the criteria of peer review/publication and general acceptance, but only 6% had a clear understanding of falsifiability and 4% of error rates (34). This survey did not measure how well the gatekeeping obligation was handled and whether federal judges understood the concepts any better. It is also questionable how jurors can assess the reliability of expert testimony (27, pp. 152, 153). Furthermore, according to Dahir et al. (35), it appears that the influence of Daubert on judicial admissibility decisions was not very significant and that judges have been relying on criteria and habits of analysis familiar to them (e.g., the general acceptance standard, relevance, qualifications, and credibility of the expert). This led the authors “to conclude that one reason that psychology is still considered part of the ‘soft sciences’ is that judges seldom hold the discipline to the same rigorous methodological standards as the ‘hard sciences’. Until this is done, Daubert’s impact on the admissibility of psychological syndrome and profile evidence will remain negligible” (35, p. 78).
In *General Electric Co. v. Joiner* (31), the US Supreme Court clarified in 1997 the review process not addressed in Daubert: the abuse of discretion—the standard ordinarily applicable to review of evidentiary rulings—was the proper standard by which to review a district court’s decision to admit or exclude expert scientific evidence. In addition, it held that nothing in either Daubert or the Federal Rules of Evidence required a district court to admit opinion evidence that was connected to existing data only by the ipse dixit of the expert (31, p. 146).

Then, in *Kumho Tire Co. v. Carmichael* in 1999 (32), the Supreme Court was required to decide how the Daubert ruling applied to the testimony of experts who were not scientists. The court stated that the Daubert “gatekeeping” obligation applied to all expert testimony and that Rule 702 did not distinguish between “scientific,” “technical,” and “other specialized” knowledge, so that “Daubert’s general principles apply to the expert matters described in Rule 702” (32, p. 149). “And where such testimony’s factual basis, data, principles, methods, or their applications are called sufficiently into question...the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of [the relevant] discipline” (32, p. 149). Therefore, whether an expert based his/her testimony on professional studies or personal experience, he/she had to employ the same level of intellectual rigor in the courtroom that characterized the practice of an expert in the relevant field (32, p. 152; 36, pp. 178,186). The court had also stated that a trial court may consider one or several of the more specific factors that Daubert mentioned when doing so would help determine that testimony’s reliability (32, p. 150). But it also reminded the gatekeepers that the Daubert test of reliability was “flexible,” and Daubert’s list of specific factors neither necessarily nor exclusively applied to all experts in every case; rather, the law granted a district court the same broad latitude in deciding how to determine reliability as with respect to its ultimate reliability determination. With this, it has been noted, the US Supreme Court has provided the lower federal courts with only a sketchy set of sailing directions (37, p. 45).

Criminal profiling could be considered an area of “specialized knowledge,” although it has been argued that “[c]riminal psychological profiles can be deemed quasi-scientific because they are created through a scientific process” (21, p. 263), because it—if at all—employs social science theories (its categorization being debated; 21, p. 262; 38, p. 755) rather than criminological theories (that are falling under scientific evidence; 21, p. 262). Either way, such testimony in the form of expert opinions must be reliable and relevant and may—depending on the particular circumstances of the particular case at issue—fulfill Daubert’s criteria of testability, peer review, error rates, and general acceptance in a Daubert court (32, p. 150).
U.S. CASE LAW: OVERVIEW

Most attempts to use criminal profiling techniques in (state) courts (primarily in criminal cases) have involved expert testimony regarding behavior consistency, character evidence (21, p. 259; 39, pp. 106,107: FBI arsonist profile admitted by the trial court but ruled inadmissible character evidence by the Georgia Court of Appeals because the defendant had not placed his character at issue), the assessment of crimes, establishing an essential element in capital murder (e.g., that the killing was committed for sexual gratification; 40), uniqueness analysis, assessing dangerousness, linkage analysis, or support for a search warrant and have mostly been ruled inadmissible. This has also been noted by the UK Court of Appeal in December 2000: “[s]o far as is known, there have been seventeen occasions in the United States when criminal trial judges have admitted evidence of psychological profiling: in each case the decision has been overturned on appeal” (41, n. 25).

Criminal profiles used by the police to identify characteristics of people that should be subject to further investigation have always been inadmissible in court proceedings to prove guilt (42, p. 1084), being “too sweeping and over inclusive, and hence potentially misleading to juries and unfairly prejudicial to defendants” (43;44, p. 151). It was also noted that “evidence intended to address guilt by likening a defendant to a profile or stereotype of those likely to commit the crime in question has great potential for introducing bias and error. Most such evidence is certain to have prejudicial impact, yet will more often than not lack probative value” (44, p. 152). Criminal profiles are also regularly viewed as unreliable, with reliability being the sine qua non of expert testimony (40, p. 1150; 45,46).

FBI profilers, largely unsuccessful in giving profiling testimony, have begun introducing linkage analysis in a growing number of cases. Linkage analysis can be defined as “the comparison of two or more crimes for common characteristics of a unique or distinctive nature that permits a trained investigator to conclude that the same perpetrator committed the crimes” (47, p. 998). The underlying methodology, however, draws more or less on the same theoretical and practical knowledge, experience and intuition as criminal profiling, and the development of the linkage analysis approach to crime analysis had its origins in the same serial crime studies undertaken by the Behavioral Science Unit of the FBI. However, the insofar specialized FBI agents usually stress that linkage analysis is not the same as profiling testimony (e.g., Robert Hazelwood; 48). Nevertheless, although sometimes allowed by lower courts, such testimony has also mostly been excluded (49, pp. 113,114; 50).
There has even been a case (51) where a fictitious FBI profile played a role in interviewing a suspected killer, apparently to ensure that he was focused on the polygraph examination and the incident in question. The Supreme Court of Connecticut concluded that the false reference to the profile had not been designed to elicit an admission and had not coerced the defendant’s subsequent statements, and affirmed the conviction. Such improper uses should, however, not be considered by the state when trying hard at the same time to advance the credibility of the profiling process and its acceptance in court.

Although there are now many court decisions dealing with (authentic) criminal profiling evidence, the scope of this chapter allows only to address a few of them, illustrating different uses of profiles.

**U.S. Case Law: Examples**

*State v. Haynes and State v. Roquemore*

One case that well illustrates the many pitfalls of profiling testimony is *State v. Haynes* (52). Richard Haynes was convicted of murder by the Common Pleas Court in Ohio. On appeal, the assignment of error concerning the admission of the testimony of Robert Walter (a prison psychologist) as an expert in criminal profiling was evaluated. Walter had testified to the distinction between a homophobic murder and an anger-retaliatory murder. The state argued that this testimony showed that the crime was not a homophobic murder done out of panic after an unsolicited homosexual encounter but rather an anger-retaliatory killing committed purposely after a cooling off period (52, n. 5). Following Evidence Rule 402, stating that all relevant evidence was admissible, except as otherwise provided, the court of appeals addressed the reasons for exclusion of this testimony. It held that neither the scientific reliability nor the general acceptance of the theories proposed by the criminal profilist had been established and that the prejudicial effect of the testimony far outweighed its probative value. His testimony conflicted with Ohio Evidence Rule 702, although Walter had testified in three other murder trials before, including *People v. Drake* (53), regarding a pathological condition and the specific profile of “piquerism,” as well as Evidence Rule 704 (stating, *inter alia*, that “[o]pinion testimony on an ultimate issue is admissible if it assists the trier of the fact, otherwise it is not admissible”) and Evid R. 403 (“[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury”).

In Walter’s testimony, he had identified types of perpetrators and argued that the appellant’s version of the killing and his subsequent actions were typical of an anger-retaliatory murder and in great length and detail described
the traits and characteristics of such a type of murderer and found that the appellant’s actions and motivations matched that profile. The court reasoned that admissibility of similar testimony, for example, on the battered woman syndrome, had already been rejected in other cases (54, p. 521), partly out of a belief that such testimony would tend to stereotype a defendant, causing the jury to become prejudiced (52, n. 13), so that a jury would “decide the facts based on typical, and not the actual, facts” (54, p. 521). The court also mentioned that character evidence was inadmissible unless the defendant had first introduced evidence of his own good character according to Evidence Rule 404(A)(1), which he had not. Because Walter’s testimony on the anger-retaliatory profile had been laden with references to personality and character traits of the accused that matched the profile of a deliberate killer, the court excluded his testimony on these grounds as well.

Furthermore, Walter had testified on cross-examination that he had based his opinion on police reports, the autopsy report, and conversations with the prosecutor and the police. Only the autopsy report was admitted into evidence. Pursuant to Evidence Rule 703 (providing that an expert cannot base his/her opinion on hearsay but must rely on his/her own personal knowledge of facts and data submitted as evidence in the case), the court ruled that conversations with the police for example were clearly hearsay. Admission of expert opinion testimony based in part on medical reports and medical histories not admitted into evidence and not prepared by the witness had also been held to be prejudicial error in other cases; the court applied this reasoning to police reports as well (52, n. 17). The admission of Walter’s testimony by the trial court was once again considered erroneous.

Finally, the error of admission was ruled prejudicial and not harmless beyond a reasonable doubt, as it was possible that the evidence complained of might have contributed to Haynes’ conviction. On review of the record, putting aside Walter’s expert testimony, the remaining evidence did not constitute overwhelming independent evidence of guilt. The court reversed his conviction for murder and remanded the cause for a new trial. Therefore, in this case, it was especially important to be cautious in admitting questionable evidence because it could have had a significant impact on the outcome of the trial, absent other compelling evidence against the defendant.

Five years later, in *State v. Roquemore* (49), the same expert was admitted by the trial court as an expert in criminal profiling. In this case, he testified that the crime scene was “disorganized” and went on to describe the crime as anger-retaliatory in nature. The defense appealed Roquemore’s conviction on the grounds that the trial court had committed reversible error and had deprived Roquemore of due process of law by permitting introduction of inadmissible
opinion testimony by a criminal profilist. The Ohio Court of Appeals ruled (again) that there was a distinct possibility of stereotyping the defendant and that Walter’s opinion had consisted of generalities and stereotypes rather than specific facts, which could prejudice a jury. The testimony also did not pass the hurdles of character evidence and reliability and the court reversed the conviction.

_in Commonwealth v. DiStefano (55)_

In _Commonwealth v. DiStefano (55)_ , a murder case, the Commonwealth of Pennsylvania tried to introduce the testimony of FBI agent Robert Hazelwood and prison psychologist Richard Walter as experts in the fields of violent crime behavior, crime scene analysis, violent crime assessment, and murder. The defendant argued that both men were criminal profilers and that their opinions were not predicated on a sufficiently established methodology that was generally accepted, that the testimony was predicated on speculation and probability, that it was too prejudicial, and that it invaded the jury’s province. Crime scene and linkage analysis were viewed by the defendant’s lawyers as similar to profiling testimony, like “a different suit on the same animal”: “It’s a distinction without a difference” (55,56). The Court of Common Pleas of Lackawanna County found that Hazelwood, having worked 16 years in the Behavioral Science Unit, was only allowed to testify about his analysis of the crime scenes, and his opinions and conclusions related to the physical evidence (or lack thereof) of the crime scenes, as long as his report and opinions did not seek to profile (55). The court noted,

What the Commonwealth seeks to establish through using Hazelwood’s testimony is that the defendant exhibited the characteristics and behaviors of how a murderer may act. Not only is the testimony profiling, but it is also speculative and expressed in terms of probabilities. This court finds that the Commonwealth has failed under Frye . . . to establish that profiling testimony has gained general acceptance in the scientific community to form the basis of Hazelwood’s expert testimony. Furthermore, Hazelwood’s report and related testimony evidences little probative value and is extremely prejudicial to the defendant. Such testimony is akin to an expert eyewitness account that the defendant committed the murder. This court will not allow such an account. (56, p. 3)

The court prohibited the attempt to discuss

. . . the establishment of a link between assessed behavioral traits of a murderer, specific characteristics and behavior of the defendant and direct or indirect assertions of the defendant’s guilt. . . . This court will not allow Mr. Hazelwood to expand into profiling or areas of probabilities. We remain mindful that an opinion
Couched in terms of probabilities and/or possibilities is to be excluded as lacking the requisite certainty to be admissible as an expert witness. (56, p. 3)

Walter’s testimony was ruled inadmissible for similar reasons (55, p. 18).


William Stevens was convicted in the Criminal Court for Davidson County (TN) of two counts of first-degree premeditated murder of his wife and his mother-in-law, as well as especially aggravated robbery (50). He was sentenced to death; he appealed the judgment and raised the issue whether it had been error to limit the testimony of crime scene expert Gregg McCrary (50, n. 2). The Court of Criminal Appeals of Tennessee affirmed the trial court’s decision after undertaking an extensive analysis of McCrary’s testimony.

McCrary had been retained by the defense to conduct a crime scene analysis in which he examined the evidence at the crime scene to determine the likely motive for the crime. He had requested that he not be given any information regarding the suspect, and he had stressed that he was not engaging in criminal profiling. McCrary described the crime scene as a “disorganized sexual homicide” and elaborated on this theme, comparing it with a contract murder crime scene (50, n. 44). He was asked whether a potential accuracy rate had been established, and he reported that the FBI had conducted one survey and determined that its agents were 75–80% accurate on crime scene analysis and profiling. He further explained that this type of analysis was not a hard science “where you can do controlled experiments and come up with ratios” (50, n. 44) but that the increased demand for such services exemplified its effectiveness. He therefore argued the proof of validation and reliability in the process was that the method was accepted and used and the demand was far greater than the resources to provide it.

The testimony offered was not based on scientific theory and methodology but on nonscientific “specialized knowledge,” that is, the expert’s experience. After hearing this offer of proof, the trial court had disallowed the foregoing testimony, determining that it dealt with the “behavior aspect of an offender and not the crime scene” (50, n. 46, 47). It had commented that although McCrary was thought to be a “tremendous asset” in law enforcement, his testimony regarding the behavioral aspects of suspects and motive did not comply with Tennessee Rule of Evidence 702 (being more stringent than its federal counterpart in that it requires the expert testimony to “substantially assist the trier of fact,” whereas the federal rule requires only that the testimony “assist the trier of fact,” which indicates that the probative force of the testimony must be stronger), “because there is no trustworthiness or reliability” and it was too speculative:
Although this type of sophisticated speculation is undoubtedly very helpful to criminal investigators, it is not sufficiently reliable to provide the basis for an expert opinion in a criminal trial. Likewise, although not technically considered “profiling”, McCrary’s attempt to analyze the “behavior of the offender based on all the forensic evidence” does not pass muster. Despite agreeing that human behavior is very complex and that there can be multiple motives for a homicide, McCrary intended to express an expert opinion that the killer in this case had not been hired to commit the murders but, instead, had committed a sexually motivated crime triggered by an upsetting event. This Court does not doubt McCrary’s assertion that his opinion is based upon years of research and experience. For that reason, the Court agrees that the opinion is not based entirely on speculation. However, the Court is not convinced that this type of analysis has been subjected to adequate objective testing, or that it is based upon longstanding, reliable, scientific principles. Consequently, after considering the proffered testimony, the relevant authorities, and the arguments of counsel, the Court again concludes that this portion of McCrary’s testimony would not have “substantially assisted the trier of fact.” (50, n. 49)

During the jury-out hearing, McCrary himself conceded that, to his knowledge, no court in the United States had ever admitted expert testimony that relied on criminal profiling. However, the trial court permitted McCrary to testify generally about the crime scene, staging, and the possibility that there were two offenders.

Before the Court of Criminal Appeals of Tennessee, the defendant argued that the trial court had erred by requiring that McCrary’s testimony be “based upon longstanding, reliable, scientific principles” because the testimony was “specialized,” rather than “scientific,” and he argued that the trial court had misconstrued the nature of McCrary’s testimony in finding it inadmissible. The court stated that opinion testimony by expert witnesses was governed by Tennessee Rules of Evidence 702 and 703 (the latter stating “the court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness”; there is no such restriction on expert testimony under the federal rule). In determining the reliability of expert “scientific” or “specialized” evidence, the court considered the following factors: (a) whether the scientific evidence had been tested, (b) whether the evidence had been subjected to peer review or publication, (c) whether a potential rate of error was known, (d) whether, as formerly required by Frye, the evidence was generally accepted in the scientific community, and (e) whether the expert’s research in the field had been conducted independent of litigation (50, n. 52; 57, p. 266). Therefore, no matter what type of evidence was at issue, the evidence had to be derived from “relevant . . . methods, processes, and data, and not [based] upon an expert’s mere speculation” (57, p. 265). According to McCrary, the system of analysis he had used in analyzing this crime scene was
not a “hard science,” but was based on methods, processes, and data developed by the FBI for the investigation of violent crime. Insofar, the court did not follow the defendant’s argument that the trial court had applied an incorrect legal standard.

Stevens next argued that the trial court had misconstrued the nature of McCrary’s testimony and that McCrary was prepared to testify about characteristics of a crime scene and what those characteristics indicated, which were matters not within the common understanding of the jury (50, n. 54). He asserted that the testimony would have substantially assisted the jury in understanding the crime scene. In support of his argument, the defendant relied on two cases from other jurisdictions in which similar testimony was permitted (40, n. 4–13; 58). In Simmons, the Alabama Court of Criminal Appeals had considered the defendant’s challenge to the testimony of Thomas Neer, an agent for the FBI, who worked in their profiling and behavioral assessment unit (40, n. 5). His analysis of the crime scene had indicated that the homicide offense at issue was sexually motivated and that the person who had committed the offense had done so for sexual gratification. The Alabama court had distinguished Agent Neer’s testimony from “profile” testimony, which it found to be of little probative value and extremely prejudicial to the defendant; it stated that there was “an enormous difference in testimony identifying a person who bears certain characteristics as being more likely to have committed the offense and in testimony that the physical evidence of a crime indicates certain characteristics about the offense” (40). After listing Neer’s extensive experience in the field of crime scene analysis, the court had “recognized that through interviews, case studies, and research a person may acquire superior knowledge concerning characteristics of an offense” (40, n. 10). It then determined that there had been adequate evidence presented to establish the reliability of crime scene analysis and victimology as fields of “specialized knowledge” and that the jury would be “greatly assisted by a professional analysis of the crime scene in comparison to other murder cases” (40, n. 10,11). However, the case involved the use of criminal investigative analysis, not true profiling (59). Similarly, in Meeks (58), the United States Court of Military Appeals had held that the testimony of FBI Agent Judson Ray was admissible in the defendant’s trial for a double homicide. Agent Ray was permitted to testify that in his “professional opinion, . . . the person that was responsible went there with sex and killing on his mind” (59, n. 66). In finding the testimony admissible, the court determined that Agent Ray had extensive experience and training in the field of crime scene analysis: “This showing of expertise can hardly be considered speculation” (59, n. 68). The court had also noted that a homicide and its crime scene were not matters likely to be within the knowledge of an average court-martial member...
and that Agent Ray’s testimony would assist those members in understanding the evidence (59, n. 68, 69).

Although the Court of Criminal Appeals of Tennessee found these cases instructive, it noted that the evidence in both cases was admitted under rules of expert testimony identical to the federal rule, not the Tennessee rule, in that the rule required only that the evidence “assist the trier of fact” (40, n. 6). The probative force of the testimony had to be stronger before it was admissible in Tennessee (40, n. 57; 57, p. 264). Moreover, the court argued that other courts had found similar testimony to be inadmissible under the less stringent standard of evidence that will “assist the trier of fact” (49, pp. 112–115; 60, pp. 784, 785). The court next analyzed the Lowe case, where the Ohio Court of Appeals had found the proposed testimony of FBI Agent John Douglas to be inadmissible (60, p. 785). Agent Douglas, who had been an FBI agent for 20 years, also had extensive experience in crime scene analysis (60, p. 784); he had been prepared to testify that, based on his review of the crime scene materials, he believed that the motivation for the homicide in question was sexual. After reviewing the proposed testimony, the court had found that it was not sufficiently reliable to be admissible, stating “[w]hile we in no way trivialize the importance of Douglas’s work in the field of crime detection and criminal apprehension, we do not find that there was sufficient evidence of reliability adduced to demonstrate the relevancy of the testimony or to qualify Douglas as an expert witness” (60, p. 785).

Applying Tennessee’s more stringent requirement that expert testimony “substantially assist the trier of fact,” the Court of Criminal Appeals of Tennessee ruled that McCrary’s testimony was not reliable enough in the instant case to substantially assist the trier of fact in understanding the evidence or in determining a fact in issue. It stated that Tennessee courts had always been hesitant to admit expert testimony dealing with behavioral characteristics of offenders or victims to prove that a certain crime did or did not occur as alleged and went on to cite several precedents (61, pp. 561, 562). The court also believed that contrary to the defendant’s assertions, McCrary was attempting to do more than merely explain the characteristics of a crime scene. His testimony had offered an opinion on the psychological motives of the perpetrator, based solely on the evidence left at the crime scene: McCrary had been prepared to testify that he could determine the motive of the perpetrator by comparing the crime scene with “typical” crime scenes in which the motivation was a sexual assault brought about by a precipitating stressor. Thus, his testimony was attempting to show that a crime did or did not occur as alleged based on the manner in which a person behaved. Moreover, the court mentioned that McCrary himself had testified that an internal FBI study had determined the
accuracy rate of crime scene analysis and criminal profiling to be 75–80% accurate (50, n. 62). Considering all this, the court concluded that the trial court had not abused its discretion by determining that the proposed expert testimony was not reliable enough to substantially assist the trier of fact.

Finally, the defendant also asserted that the trial court’s exclusion of McCrary’s testimony effectively prevented him from putting on a defense. A defendant’s right to present a defense, which includes the right to present witnesses favorable to the defense, is guaranteed by the Sixth Amendment to the US Constitution and the Due Process Clause of the Fourteenth Amendment to the US Constitution. “In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence” (62, p. 302); “[h]owever, these procedural and evidentiary rules of exclusion ‘may not be applied mechanistically to defeat the ends of justice’ ” (63, p. 432). In the instant case, the court noted that generally, the analysis should consider whether (a) the excluded evidence was critical to the defense, (b) the evidence bore sufficient indicia of reliability, and (c) the interest supporting exclusion of the evidence was substantially important (63, pp. 433,434). It then concluded that the defendant was not denied the right to present such a defense: McCrary’s testimony was not the “linchpin of the defendant’s case” (50, n. 64), and although the admission of the testimony would have obviously strengthened the defendant’s theory of the case (that a named third party had committed the murders because he had been sexually infatuated with one victim rather than because the defendant had hired him to do it), it was not essential to the defense. The jury could also have drawn this conclusion themselves from the facts of the crime scene, and, as already determined, the expert testimony did not bear sufficient indicia of reliability to substantially assist the trier of fact. The court mentioned that

while the type of crime scene analysis performed by Mr. McCrary is undoubtedly an asset to criminal investigations, it is only seventy-five to eighty percent accurate according to an internal FBI study. Considering the importance a jury places on expert testimony and the need to place only reliable evidence before a jury so as to ensure accurate fact-finding, this testimony was properly excluded. (50, n. 22)

Therefore, no reversible error on the part of the trial court was found (50, n. 1114); additionally, the defendant’s convictions and his sentences of death were affirmed. This case also shows that basically the same reliability standards apply when a profile or behavioral analysis is used for the defense to create reasonable doubt.
Regarding the *State v. Simmons* case discussed in Stevens (60), p. 217, Donald Cochran, assistant US attorney in Alabama, noted that it “is only fair that prosecutors be allowed to present testimony by someone qualified to explain how such criminals think. Because of the status of the FBI’s Profiling and Behavioral Assessment Unit as the only organization in the world that specializes in the investigation of bizarre and brutal crimes, testimony by members of the unit will always be powerful evidence. So long as such testimony meets the requirements set out in Rule 702 regarding the propriety of expert testimony in general, use of such testimony appears to be a reasonable and fair resolution to an unusual situation” (50, n. 89). He also mentioned that criminal investigative analysis must be distinguished from “profiling”. Criminal investigative analysis on the one hand involved a detailed review of all aspects of a particular crime, which may have been committed by either a known or an unknown offender. “Profiling on the other hand, is an analysis of a crime or series of crimes committed by an unknown offender which results in a detailed description of the type of person who would have done such a crime or series of crimes. This ‘profile’ of the unknown offender is designed to be used by investigators to assist in catching the offender. As the offender in this case was already known, the case involved the use of Criminal Investigative Analysis, not true ‘profiling’” (50, n. 139; 60).

*State v. Fortin I and II*

These well-known capital murder and death penalty cases have kept New Jersey courts busy for at least 5 years so far, the latest judgment being that of the Supreme Court of New Jersey (47,64,65). Steven Fortin was charged with killing a woman in a savage sexual assault. The state offered evidence to show similarities between an incident in which the defendant had sexually assaulted and strangled a state trooper in Maine and the sexual assault and murder of Ms. Padilla for which he was charged in New Jersey. The prosecution introduced Robert Hazelwood, a well-known retired FBI agent and expert in violent sexual crimes, to catalogue the similarities between the crimes committed against Trooper Gardner and Padilla. The purpose of Hazelwood’s testimony was to show that the manner in which the two crimes were committed was so unique that only one person could have committed both crimes (64, p. 591). That Fortin had sexually assaulted Trooper Gardner was not disputed. At trial, Hazelwood focused on motive, *modus operandi*, and signs of ritual, finding unique similarities between the two crimes on all three grounds. He concluded that both crimes were motivated by anger and that he had not seen the same combination of ritualistic behaviors in his work over the course of his 30-year career. The trial court ruled admissible pursuant to New Jersey Rule of
Evidence 404(b) the other-crime evidence of Fortin’s sexual assault of Trooper Gardner (64, pp. 523,524). The Appellate Division affirmed the 404(b) ruling but concluded that Hazelwood’s analysis was not sufficiently reliable to be admitted as expert testimony and concluded that Hazelwood could testify as “an expert in criminal investigative techniques” but could not “testify on the ultimate issue of whether the person that assaulted Trooper Gardner [was] the same person that murdered Melissa Padilla” (64, pp. 528,529).

The New Jersey Supreme Court then held that the expert testimony of Hazelwood concerning linkage analysis lacked sufficient scientific reliability to establish that the same perpetrator committed the Maine and the New Jersey crimes (64, p. 513). It also found that it was a field in which only Hazelwood and a few of his close associates were involved; as such, there were no peers to test his theories and no way in which to duplicate his results. As possible other means by which to test the validity of Hazelwood’s conclusions, the court required prior disclosure of a reliable database as an essential qualifier to ensure the validity of Hazelwood’s testimony (64, p. 518): “If there is such a database of cases, the witness’s premise can be fairly tested and the use of the testimony invokes none of the concerns that we have expressed about the improper use of expert testimony” (64, p. 518). Under this prerequisite, Hazelwood was allowed to testify on his proposed modus operandi/signature and uniqueness analysis as well as the state of mind of the perpetrator but not on whoever committed the Maine assault also committed the Padilla homicide (linkage analysis). Justice Long, concurring in part and dissenting in part, stated that linkage analysis

is an excellent tool for law enforcement when investigating crimes. . . . An investigator’s tool cannot properly be elevated to a level of scientific reliability on par with DNA testing. Linkage analysis is, essentially, an application of a veteran investigator’s opinion as to the perpetrator of a specific crime. A court cannot properly cloak an officer’s testimony as to the identity of a criminal with an aura of science. This would unfairly prejudice a defendant and would allow an expert to testify to the ultimate issue of a case based upon a theory with dubious evidentiary reliability. (66, p. 1350)

The defense then requested a comprehensive listing of the 4000 cases referred to in Hazelwood’s testimony and any database he had relied on in forming his opinion. The state responded that Hazelwood did not have such a list and that no database or scientific studies were reviewed in forming his opinion. Relying on Fortin I, the defendant contended before the New Jersey Supreme Court that Hazelwood had not produced a database of cases from which he made his comparisons and derived his conclusions, as ordered by the Supreme Court of New Jersey as a precondition to his testimony (47). Accordingly, the defendant argued that the trial court should not have permitted
Hazelwood to testify in light of his failure to comply with this court’s discovery order and that he was denied, in essence, his constitutional right to confront Hazelwood on the terms required by this court and, therefore, his right to a fair trial.

The Supreme Court did not accept the state’s claim that Hazelwood had provided a “reliable database” by reference to his expert report, his resume, his publications, and his pretrial testimony:

We cannot agree with the trial court that Hazelwood’s reference to his experience, training, and education was a substitute for a “database of cases” or that the failure to provide such case information only went to the weight to be given to his opinion, rather than its admissibility. Hazelwood’s testimony, although presented as the application of criminal investigative techniques, was couched in the aura of science, more particularly, behavioral science. (47, pp. 586, 587)

The basis for the production of a database had been New Jersey Rule of Evidence 705, stating “The expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.” Fortin I had unmistakably required prior disclosure of a reliable database to ensure the validity of Hazelwood’s testimony and to allay the Supreme Court’s concerns about its improper use (64, 162 N.J., p. 533, 745 A.2d, p. 518). The Supreme Court therefore held:

Surely if thousands of murder cases and hundreds of tests performed on bodily fluids can be tabulated in a database, the basic information for a database in this case can be compiled as well. Hazelwood’s database should have consisted of violent sexual assault cases that he had investigated, studied, or analyzed during his professional career, and the peculiar modus operandi and ritualistic characteristics of those crimes. Such a database would have provided some basis for verifying the frequency of sexual assaults in which perpetrators bite the faces or breasts of their victims, or manually strangle them, or engage in high risk attacks, to name but a few of the characteristics Hazelwood found distinctive in this case. If Hazelwood was correct about the unique combination of characteristics that the Gardner and Padilla assaults had in common, the database would have strengthened and validated his conclusions. The jury also was entitled to know if there were any flaws in his analysis. We do not suggest that the database had to be comprised of all of the cases investigated, studied, or analyzed by Hazelwood, or even a majority of them. We understand that it might be overly burdensome or impossible to construct such a record if he were not keeping such records on a running basis and if he truly were denied access to the records by other law enforcement authorities. Hazelwood, however, holds himself out as an expert in this field and presumably has kept records for the purpose of conducting research, publishing articles and books, and presenting lectures. We
believe that if he had the will to do so, he could provide some credible database for submission to the trial court. The database, at a minimum, must permit an acceptable basis for comparison. We are not prepared on the present record to say what number of cases would constitute a sufficient database. That determination we leave to the trial court. (47, p. 590)

The New Jersey Supreme Court overturned Fortin’s death sentence and conviction because Hazelwood should not have been permitted to testify on violent sexual crimes without producing the required, reliable database of violent sexual assault cases. Indeed, it may be argued that earlier decisions dealing with the issue of linkage analysis have been somewhat superficial in their consideration of the issues (67–69). The Fortin case analyzed the reliability issue more closely and also provided some pointers as to how to argue reliability.

**People v. Schmidt**

An unusual case, as it concerns a profile regarding an apprehended offender, is *People v. Schmidt* (70), decided by the Court of Appeal of California, Sixth Appellate District. The appellant had originally been committed to the California Youth Authority (CYA) in October 1989 after the juvenile court sustained a petition that had charged him with sodomy and first-degree murder of a 3-year-old girl in 1988. After two appeals, a reduced charge of second-degree murder was sustained. He had been committed to the CYA ever since. He could have been released when he turned 25 in 1997, but the appellant’s commitment was extended for 2 years by trial court order. His release was then scheduled for February 1999. Schmidt requested a jury trial on the issue whether he was presently dangerous to the public and should be recommitted for 2 more years. The prosecutor filed a motion to have Michael Prodan, a criminal investigative profiler, and a police officer trained in investigating crimes scenes and behavioral sciences, who had interviewed many criminals as well as spoken with people who work with sexual sadists, to testify about the “profile of the person who committed the crime based upon an analysis of the crime scene” and “provide information regarding the profile of a sexual sadist and pedophile” (70, p. 91). Prodan, who had never met Schmidt, would also establish that sexual sadists remained dangerous to the community, that the person who committed the appellant’s crime was a sexual sadist, and that such persons were dangerous (70, p. 92).

Prodan was accepted by the court as “an expert in the area of behavioral science analysis and criminal profiling” (70, p. 26). He reviewed the materials surrounding the appellant’s crime and gave testimony regarding the appellant being a sexual sadist (70, pp. 26,27). He testified that the person who committed
the 1988 crime had used the child’s suffering and death as part of sexual arousal, saying he believed that the perpetrator had masturbated over the dead victim and that the perpetrator had engaged in sophisticated criminal behavior called “staging” and that the defendant’s youth at the time of the crime made the defendant more dangerous. He stated that once a person acted in a sexually sadistic manner, the chances for treatment were “very small, if not nil” and that sexual sadists did not change (70, p. 108). The court ruled the evidence admissible on the issue of public danger.

Schmidt appealed this decision and contended that the criminal profile evidence was irrelevant and that Prodan was not qualified as an expert to offer opinions regarding the mental state of perpetrators (70, p. 93). Even assuming that the trial court should have excluded Prodan’s criminal profile testimony, the appellate court concluded that it did not prejudice appellant: two psychologists had also testified that the appellant was a sexual sadist, and seven other professionals had testified that the appellant remained a danger to the public. In light of all other evidence, the appellate court believed that there was no reasonable probability that the jury would have reached a different verdict had Prodan’s testimony been excluded (70, p. 94). In light of this conclusion, the court did not need to discuss whether the appellant’s trial counsel should have objected to Prodan’s testimony as based on an untested scientific technique. The order committing appellant to the CYA was affirmed (70, p. 98).

It is interesting to note that in his dissenting opinion, Judge Rushing (70, p. 107) stated that the trial court had erred in admitting profile or crime scene analyst evidence. The prosecutor had stated that Prodan would say nothing about the defendant and had conceded that Prodan could not make mental health comments because he was not qualified to do that. However, these areas were still covered by Prodan’s testimony. According to Judge Rushing, the expertise of Prodan was not relevant to the issues being tried, as the identity of the perpetrator was not in question. Whether Prodan as a criminal profiler would classify the 1988 crime as “sexually sadistic” under profiling guidelines was not relevant. And even if it were considered marginally relevant, the evidence would still be inadmissible because it was more prejudicial than probative. Prodan’s aura of expertise, the graphic nature of his testimony, and the extreme negativity of his conclusions about the defendant’s mental state and current dangerousness were extremely damaging to the defendant (70, p. 109), because essentially Prodan had said the defendant was an incurable sexual sadist, forever dangerous to the community. Therefore, it seemed reasonably probable to Judge Rushing that a different result would have occurred absent these errors. For these reasons, he would have reversed the order committing defendant to the Youth Authority.
Haakanson v. State of Alaska

In this case, the defendant sought review of the judgment of the Superior Court of the State of Alaska, which convicted him on 10 counts of a 14-count indictment for sexual abuse of a minor in the first degree, sexual assault of a minor in the first degree, and sexual abuse of a minor in the second degree. The Court of Appeals of Alaska (71) had to decide whether the prosecution was allowed to introduce a profile to show that the defendant was (more) likely to have committed an offense because the defendant fitted within that profile.

Several jurisdictions have addressed the related issue of a “battering parent” or “child batterer” profile before and have held that evidence of such profiles was inadmissible character evidence, unless the defense has first raised the issue (72, p. 138: prosecution may not introduce character evidence of a defendant to show the defendant has the characteristics of a typical battering parent; 73, p. 18: state may not introduce evidence of a battering parent syndrome unless the defense had first raised the issue; 74, pp. 63,64: prosecution may not introduce evidence of a “battering parent” syndrome or show that the character of the defendant fitted the profile of a “battering parent”). The weight of authority clearly suggested that Rule 404(a) prohibited the profile testimony to be introduced at trial, unless the defense had raised the character issue first. In addition, a jury could place undue emphasis on sex offender profile testimony. Alaska Evidence Rule 403 provided for excluding relevant evidence if its probative value was outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The state did not show that the probative value outweighed the inherent prejudicial effect of the profile evidence. Therefore, it was held that the trial court had erred in allowing the expert to testify regarding the characteristics of a typical child sexual abuser because such profile testimony was inadmissible (74, n. 19). The defendant’s conviction was reversed and remanded for a new trial.

This case also shows that the unwarranted implication of guilt is particularly prejudicial where, as here, the expert testimony establishes a (general) profile of the typical perpetrator which carries with it the implied opinion that the defendant is the sort of person who would engage in the alleged act and therefore was guilty in the instant case. By contrast, when the finder of the fact is asked to infer that a victim fits a profile, this does not directly cast the accused in a menacing and prejudicial light, therefore such testimony may fare better (113).

Idaho v. Parkinson

In State v. Parkinson, decided by the Court of Appeals of Idaho (75), the defendant challenged the decision of the District Court of the Seventh Judicial
District, having convicted him of sexual abuse of a child under 16 years of age. Parkinson complained that the trial court had erred when it excluded sex offender profile testimony offered through Marcel Chappuis, a psychologist, and Peter Welsh, a former FBI agent with experience in the development of sex offender profiles for use by law enforcement personnel. The district court had concluded that (a) the profile evidence was offered to bolster Parkinson’s credibility and was thus impermissible because veracity was not a “fact in issue” subject to expert opinion; (b) the evidence at issue would not “assist the trier of fact to understand the evidence”; and (c) the expert opinion evidence would constitute a direct comment on the guilt or innocence of Parkinson and replace, rather than aid, the jury’s function. An adequate foundation had also not been shown for either Chappuis or Welsh to render opinions that Parkinson did not fit the profile of a sex offender (75, p. 651).

The court of appeals noted, as had the district court, that the introduction of expert testimony regarding whether a defendant fitted an alleged “sexual offender profile” was almost universally rejected in other jurisdictions (45, 46; 76–88). Various reasons were given for the rejection of this type of evidence, including that it had not gained general acceptance in the scientific community, that it invaded the province of the jury and unfairly prejudiced the defendant, and that it would not assist the trier of fact to understand the evidence or to determine a fact in issue. The court also observed that the literature discussing the many methods of psychological assessment used to evaluate sex offenders indicated that there was no psychological test or combination of tests that could determine whether a person engaged or would engage in deviant sexual activity (89, pp. 143, 144; 90). The court saw no error for the trial court “to exclude from evidence testimony dealing with a scientific theory for which an adequate foundation has not been laid” (75, p. 652). According to Idaho Rule of Evidence 702 and Daubert, it then reviewed the relevant criteria and suggested six additional factors for admitting expert evidence, including (a) the presence of safeguards in the technique, (b) analogy to other scientific techniques whose results were admissible, (c) the nature and breadth of inferences drawn, (d) the extent to which the basic data were verifiable by the court and jury (e) the availability of other experts to test and evaluate the technique, and (f) the probative significance of the evidence in the circumstances of the case (75, p. 34; 90).

The court went on to address the offer of testimony by Chappuis. In his opinion, Parkinson did not fit the psychological profile of sex offenders. Although he had based his opinion on the results of an evaluation format that included the Minnesota Multiphasic Psychological Inventory, he had not described the personality or psychological characteristics that made up the
profile, the methodology by which the profile was derived, stated whether or how the technique had been tested, described the profile’s level of accuracy in distinguishing between offenders and nonoffenders, or stated whether the profile and the assessment technique utilized had attracted widespread acceptance within the psychological community. Although the court did not hold that evidence on each one of these points was essential to an adequate foundation for evidence of this type, the absence of evidence on any of these considerations prevented a conclusion that the proffered testimony would “assist the trier of fact to understand the evidence or to determine a fact in issue” as required for admission under Idaho Rule of Evidence 702.

Welsh’s proffered testimony suffered from similar defects in foundation. He had acknowledged that the FBI sex offender profile, which he had utilized, had been developed for use by law enforcement officials and that its application was more of an art than a science. He did not identify the components of the profile or explain how it was developed other than noting that its development involved interviews with convicted sex offenders. Welsh neither stated whether or how the resulting profile had been tested for accuracy nor identified the technique’s error rate. Although he testified that the profile was widely used in the law enforcement community, it was not apparent whether that use was primarily for devising profiles of perpetrators of unsolved crimes or for the purpose for which it was offered in this case, that is, to determine whether an accused identified by the alleged victim did in fact commit the crime. In short, Welsh’s testimony did not provide information from which it could reasonably be ascertained that the profile technique was trustworthy, that it was based on valid scientific principles, or that it could properly be applied in the manner advocated by Parkinson. Accordingly, the court found no error in the trial court’s exclusion of evidence offered by Parkinson regarding sex offender profiles, and the judgment of conviction was affirmed (75).

Kohler v. Englade

While investigating the deaths of several women in the Baton Rouge area, a law enforcement task force had received two anonymous tips that Mr. Kohler, the subsequent suspect, was a person who should be further investigated. He refused to submit to a DNA test. The detective then obtained a warrant and collected a saliva sample. The search warrant was based on the plaintiff fitting an FBI profile suggesting, among other things, that the killer would have (a) a job that required physical strength, (b) a criminal record, and (c) tight finances. Kohler had been convicted of a burglary, he was unemployed, and he had previously worked as a welder for a company located in the area where a
victim’s personal property had been found. Although those factors could apply to many people, in conjunction with other information, it had caused officers to focus on Kohler. The detectives had, however, omitted important information, for example, that the suspect had been pardoned for his conviction. In the following civil action and summary judgment (91), the plaintiff and suspect sued the city, a police chief, a detective, and a sheriff, alleging that his right of privacy, the security of his person, and the Fourth and Fourteenth Amendment of the US Constitution had been violated. The U.S. District Court for the Middle District of Louisiana ruled that the warrant was nevertheless properly issued but cautioned that

it is important to note the mere fact the plaintiff met certain elements of an FBI profile would not suffice to establish probable cause for obtaining a warrant. This is especially true when the profile was so broad and vague that it cast a net of suspicion over thousands of citizens. Nevertheless, considering [the detectives] conducted an additional investigation and used the profile only as a single factor, the Court finds there was sufficient probable cause. (91, pp. 756,757)

Even if the warrant had contained the omitted material, factors other than the profile were still viewed as sufficient to support a finding of probable cause. The U.S. District Court for the Middle District of Louisiana denied the individual’s motion for a new trial and/or an amended judgment on April 15, 2005 (91, p. 758).

Similarly, other courts have stated that the fact that a suspect met a profile was not probable cause in itself (92, p. 1036) but that a profile and other available information taken together provided enough material to constitute probable cause (21, p. 251; 93, p. 923; see also State v. Pennell, where a criminal profile was admitted to support probable cause for a search; 94). It should be noted, however, that the evidence needed to obtain a search warrant need not be based on evidence admissibility standards at trial (95, pp. 171–173; 96, pp. 804,805; for other cases, see 21, p. 252).

**Canadian Cases**

Crime scene reconstruction and analysis results (e.g., opinion evidence explaining the significance of blood spatters or a pathologist’s opinion about the cause of death of the victim) as expert opinion evidence usually meet (as in the United States) the legal requirements for admissibility. However, several attempts to introduce criminal profiling evidence, for example, regarding motivation and guilt or identity of the perpetrator, have not been successful.
R. v. Mohan

A practicing pediatrician was charged with four counts of sexual assault on four female patients during medical examinations conducted in his office (97). The defendant’s counsel sought to introduce a psychiatrist’s testimony that the typical offender in the cases in question would exhibit certain abnormal, pedophiliac characteristics, which the accused did not possess; therefore, he did not fit the psychological profile of the putative perpetrator. Mohan set out the following criteria for the admissibility of expert evidence: (a) relevance, (b) necessity in assisting the trier of fact, (c) the absence of any exclusionary rule, and (d) a properly qualified expert. The Supreme Court of Canada stated that there was no material in the record to support a finding that the profile of a pedophile or psychopath has been standardized to the extent that it could be said that it matched the suggested profile of the offender depicted in the charges. (97, para. 38)

The expert’s group profiles were not seen as sufficiently reliable to be considered helpful. In the absence of these indicia of reliability, it could not be said that the evidence would be necessary in the sense of usefully clarifying matter otherwise unaccessible, or that any value it may have had would not be outweighed by its potential for misleading or diverting the jury (97, para. 46). The decision of a trial court not to allow profiling evidence was upheld.

R. v. J.-L.J.

Six years later, in 2000, the Supreme Court of Canada considered criminal profiling evidence again (98). As in Mohan, the accused sought to adduce the evidence of a psychiatrist who was of the opinion that the perpetrator would have a highly distinct personality disorder, the particular traits of which the accused did not exhibit. This expert opinion was held to be insufficiently reliable to warrant admission; the court emphasized that a profile must be to some degree “standardized” if it was to be at all useful for the purpose of demonstrating the distinctiveness of the perpetrator. In addition, it had to be ensured that the profile of distinctive features was not put together on an ad hoc basis for the purpose of a particular case (98, para. 44).

R. v. Ranger

The present key case regarding criminal profiling in Canada is R. v. Ranger (99). The Ontario Court of Appeal had to review an appeal by Rohan Ranger, who was convicted of first-degree murder and manslaughter of two teenaged sisters, stabbed in their homes. Detective Inspector Kathryn Limes, manager of the Behavioral Sciences Section of the Ontario Provincial Police,
which provides the police with specialized support services including criminal profiling, was contacted by the police after the suspect had been arrested and charged with the murders of the Ottey sisters. She formed the opinion that the perpetrator had staged a break-in at the Ottey home, that he had staged the scene to divert suspicion from himself, and that he had a particular interest in one of the sisters. At trial, the Crown sought the Detective Inspector as an expert witness regarding crime scene staging to elicit her opinion that the crime scene in this case had been altered to look like a break-in. The Crown submitted that this evidence was relevant to identity because a staged crime scene was circumstantial evidence that the crime was committed by someone who wanted to divert suspicion from himself as a likely suspect, which in this case would be Ranger.

The court held that “opinion evidence is needed in this case in the sense that it will likely provide information that is outside the experience and knowledge of the jury. The factual issue of whether a break and entry is authentic or staged is not likely to be a subject within the common knowledge of the jurors” (99, para. 29). She was also qualified enough as an expert in this particular area. Her testimony, however, was not confined to the opinion that the crime scene was staged. It included an opinion about the motivation of the perpetrator for staging the scene and a description of the most likely suspect as someone who had a particular interest in one sister.

The appellant argued that the trial judge had erred in admitting “unscientific criminal profiling analysis as expert opinion evidence” (99, para. 4), as it did not meet the reliability or necessity criteria for admissibility of expert evidence set out in R. v. Mohan (97). In Mohan, it was held that

> [t]he party seeking to introduce expert opinion evidence must meet four criteria: relevance, necessity, the absence of any other exclusionary rule, and a properly qualified expert. Even where these requirements are met, the evidence may be rejected if its prejudicial effect on the conduct of the trial outweighs its probative value…The first two criteria and the assessment of whether the probative value outweighs the prejudicial effect also include an inquiry into the reliability of the proposed evidence. (97, para. 48)

The Court of Appeal distinguished between the expert witness’s opinion that the crime scene appeared staged (“crime scene evidence”) and her various opinions on the motivations and characteristics of the likely perpetrator as a person associated with the victims (“criminal profiling,” 99, para. 53). Regarding crime scene evidence, the court found that it was open to the trial judge to find that it was necessary to admit some form of expert opinion on this issue, as he or she was in a better position to determine whether the subject matter was one that may come within the normal experience of a jury or whether
they were likely to come to a wrong conclusion without expert assistance on
the issue of whether the crime scene was staged. On its face, this evidence met
the four criteria set out in Mohan. However, the manner in which the crime
scene evidence was packaged for the jury (99, para. 66) exemplified a real
danger that the evidence may have distorted the fact-finding process. The court
reminded the parties that Mohan had stated, “Dressed up in scientific language
which the jury does not easily understand and submitted through a witness of
impressive antecedents, this evidence is apt to be accepted by the jury as being
virtually infallible and as having more weight than it deserves” (99, para. 19).
In the instant case, the risk of creating prejudice to the accused far outweighed
any probative value (99, para. 67).

The court then evaluated the criminal profiling evidence, which it aptly
defined as “the analysis of a crime scene and other details about a crime, in
conjunction with the analyst’s understanding of cases of a similar nature, for the
purpose of inferring the motivation for the offence and producing a description
of the type of person likely to be responsible for its commission” (99, para.
68). The Court compared this case with R. v. Guilfoyle (41) (see p. 236), where
an English court had made a comment that was apposite to the evidence in
question on the appeal: “[Defense counsel] accepted that, if evidence of this
kind were admissible in relation to the deceased, there could be no difference
in principle in relation to evidence psychologically profiling a defendant. In
our judgment, the roads of enquiry thus opened up would be unending and of
little or not help to a jury” (41, para. 68). For the Ontario Court of Appeal,
the Detective Inspector’s opinions about the perpetrator’s likely motivation for
staging the crime scene and his characteristics as a person associated with the
victims and having a particular interest in one sister constituted evidence of
criminal profiling (99, para. 82). It noted that it was improper for the trial
judge to allow such evidence, because criminal profiling

is a novel field of scientific [] evidence, the reliability of which was not demon-
strated at trial. To the contrary, it would appear from her limited testimony
about the available verification of opinions in her field of work that her opinions
amounted to no more than educated guesses. (99, para. 82)

As such, the evidence also approached the ultimate issue, was highly
prejudicial, and therefore held inadmissible. The court further ruled that the trial
judge had erred in limiting defense counsel’s ability to cross-examine the expert
on the fact that her “profiling analysis” was completed on the basis of a known
suspect in consultation with the Crown and the police, and the prominence
that the trial judge gave to the Detective Inspector also had heightened the
prejudice. Because it could not be said that the failure to properly circumscribe
the expert opinion evidence on this issue occasioned no harm, the court gave effect to this ground of appeal (99, para. 89).

R. v. Clark

In the most recent case dealing with criminal profiling, Joel Alexander Clark was convicted for first-degree murder of two elderly victims found stabbed to death in their apartment (100). He denied the killings and only admitted to stealing a credit card, which he had then used to purchase items. He had also had bloodstains on his clothes, and DNA testing had confirmed it was the victims’ blood. The trial judge admitted expert evidence of crime scene reconstruction.

The Ontario Court of Appeal then ruled that an expert in crime scene analysis could offer opinion evidence about what had occurred at the crime scene and how the crime was committed. Evidence that the crime scene had been staged (purposefully altered prior to the arrival of the police) was viewed as a subset of this expertise (100, para. 75). However, criminal profiling evidence to explain why the crime was committed and who likely committed it was ruled generally inadmissible. The expert’s evidence that the person responsible for the deaths would likely be someone who knew the victims was also held inadmissible, because it spoke to the motivation and characteristics of the likely perpetrator, which had fit comfortably with the accused (100, para. 87). The court concluded, however, that the impugned evidence occasioned little if any harm to the appellant and that the verdict would necessarily have been the same had it been withheld from the jury: the case against the appellant was seen as overwhelming and “he would surely be convicted again if retried” (100, para. 134). The verdicts rendered by the jury “would have been the same had the jury not been exposed to the small amount of impermissible criminal profiling evidence” (100, para. 139). The appeal was dismissed (100, para. 140).

After reviewing these Canadian cases, educated guesses regarding criminal profiling, exceeding the “what” question of admissible crime scene analysis including staging and concerning the “why” and “who” questions, have, not surprisingly, not been admitted as evidence under the guise of expert opinion; such testimony can hardly ever be reliable enough and subjected to the kind of rigorous scrutiny and review that is a legal prerequisite to its admissibility.

English Case Law

Most profilers in Britain are psychiatrists or psychologists, and although they are increasingly involved in criminal investigations before trial, they have so far had little potential or opportunity for taking part in pre-trial, trial, or
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sentencing (18). According to one study, of 90 studied cases that went to court, profiling was an issue in just six cases and only two profilers actually reached the courtroom (18). Profilers, as opposed to (other) forensic psychologists, who are often involved in trial, are not viewed as delivering expert evidence, much less evidence that could establish guilt or innocence of a defendant (18). It has been observed that profiling has “never been admissible in the British legal system as expert evidence, because of definitional problems and disagreements about the scientific knowledge base” (101). Two published decisions have so far dealt directly with criminal profiling: R. v. Stagg (102) and R. v. Guilfoyle (41), both ruling profiles inadmissible.

R. v. Stagg

In R. v. Stagg (102), the police had used an undercover operation to gather information about Colin Stagg, who was a suspect in the killing of Rachel Nickell. His correspondence with a policewoman had revealed that he shared a supposed rare sexual deviancy with the killer of Nickell and that his psychological profile conformed insofar with the psychological profile that had been prepared of the killer. The Central Criminal Court refused to admit such evidence, calling the investigation a misconceived and deceptive operation that, otherwise, would have an adverse effect on the fairness of the proceedings. The profiling evidence offered by the prosecution was also rejected, and Justice Ognall made general damning statements about the use of profiling as evidence:

The notion that a psychological profile is in any circumstances admissible in proof of identity is to my mind redolent with considerable danger: first because of the rule against evidence going solely to propensity; second because the suggested analogy between this case and the authorities on so-called similar fact evidence is prima facie highly questionable, and third because of the question of whether this is truly described as expert evidence at all. (102, p. 28C)

Nevertheless, it has been argued that the admissibility of profiling evidence still remains open for the courts to decide (16), because R. v. Stagg was a decision of a Crown Court, not an appellate court, which made for a limited binding precedent, because the evidence against Stagg was rejected “on grounds unrelated to the admissibility of the profile: that the investigation was conducted in such a manner as to render the evidence unreliable” (16, p. 209), and furthermore, because Justice Ognall’s statements were mere obiter dicta, therefore not binding (16, pp. 209, 210).

Ormerod pointed out numerous reasons for a court to reject profiling evidence (16, pp. 212–242): the profiling process depends somewhat on intuition (16, p. 212), and profiling is often irrelevant to the facts in issue (e.g.,
if a criminal psychologist testifies that the defendant will probably have certain characteristics) and will distract the trier of fact by creating side issues, it may be unreliable, unfair, too prejudicial, or privileged (16, p. 215); in addition, a whole profile, based on probabilities, could never be “a fact,” that is “true,” and a part of a profile, if, for example, 90% of rapes were intraracial, would at least lead to reliability questions (16, p. 216). Furthermore, even if parts of a profile passed the relevancy hurdle, the judge must still be satisfied that the evidence has relevance and that the probative force will be sufficient to outweigh any prejudicial effect it might have on the jury (16, p. 219). Also, if trying to determine guilt, the profile would have to “identify factors that are specific to those who commit the type of crime in question and are not shared by the rest of the population” (16, p. 221; 103, p. 139). Finally, a court could still exclude the evidence under its general discretion (16, p. 236), if the admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it under section 78 of the Police and Criminal Evidence Act (16, p. 237), that is, because of how the evidence was obtained, as in the Stagg case, for example, where an undercover police operation required the exclusion of this evidence.

**R. v. Guilfoyle**

The accused in this case was charged with the murder of his wife and sought to admit fresh evidence before the Court of Appeal from Professor David Canter, a psychologist, who had conducted a “psychological autopsy” of the deceased. Based on his examination of some of the evidence, including the deceased’s diary and post-mortem reports, the psychologist had formed the opinion that the victim had taken her own life. The Court of Appeal ruled that Canter’s opinion was inadmissible as a matter of law for numerous reasons, including that there was no identifiable way to test the reliability of his testimony:

In our judgment, although Professor Canter is clearly an expert in his field, the evidence… was not expert evidence of a kind properly to be placed before the court for a number of reasons. First, although this alone would not necessarily be fatal to the admissibility of his evidence, he had never previously embarked on the task which he set himself in this case. Secondly, his reports identify no criteria by reference to which the court could test the quality of his opinions… there is no data base comparing real and questionable suicides and there is no substantial body of academic writing approving his methodology… [The] use of psychological profiling as an aid to police investigation is one thing, but its use as a means of proof in court is another… the present academic status of psychological autopsies is not, in our judgment, such as to permit them to be admitted as a basis for expert opinion before a jury. (41, n. 25)
However, the Court of Appeal may have left a door open for admitting such evidence in saying that “...the present academic status... is not... such as to permit them to be admitted as a basis for expert opinion” (41, p. 25).

**Australian Case Law**

Criminal profiling has had equally few successes as an “area of expertise” in Australia (104). For example, the Supreme Court of the Australian Capital Territory found in an arson and murder case (105) that the “suggestion that a person who is not qualified as a psychiatrist or psychologist [a ‘behavioral consultant’ who had studied profiling in the U.S.] may express an expert opinion as to the personality, character and likely future behavior of a man he has never met” was one which the judge had not previously encountered in a court of law (105, para. 21). “Opinions of this kind” (visual observations of a crime scene, identifying signs of premeditation and planning, deduction that the crime was the produce of an outburst of rage, and tentative conclusions to the type of person likely to have committed it) may enable the police to identify the most likely range of suspects and to sharpen the focus of their enquiries accordingly. However, the fact that profiling may sometimes prove to be a valid investigative tool does not justify a conclusion that its exponents may leap majestically over the limitations of modern psychology and psychiatry and give expert evidence as to the personality and conduct of a particular person. I doubt that even the most eminent psychiatrist or psychologist would attempt to venture a professional opinion as to the underlying personality of a person whom he or she had neither met nor seen interviewed, even if informed of what had been found at a particular crime scene and invited to infer that the person had been the offender... even well qualified experts are not infallible... Hence, courts must exercise constant vigilance to ensure that they are not unwittingly misled. Amongst the many factors which may lead an expert witness into error is a malady which, if encountered in a new car salesperson, might be described as gross product enthusiasm. (105, para. 21–23)

Accordingly, Judge Crispin ordered that the suspect, Steven Hillier, be admitted to bail, but imposed strict conditions including requirements that any contact with his children occur only in the presence of officers of the Department of Family Services (105, para. 28).

The subsequent history of this case includes the decision of the Supreme Court of the Australian Capital Territory in 2004 (106) and the Supreme Court of the Australian Capital Territory Court of Appeal’s in 2005 (107). Hillier’s appeal was allowed, and the conviction and the sentence were set aside. The Court of Appeal ruled that DNA evidence against Hillier was not strong enough
and that there were reasonable grounds to suggest another person was involved in the murder.

**German Case Law**

Few cases have been made public where criminal profiling has played a role in court. For example, the criminal court (Landgericht) Nuernberg-Fuerth (108,109) decided that it had no reasonable doubt that the scientific conclusion of the expert, Dr Thomas Mueller, a prominent FBI-trained Austrian policeman-turned psychologist (110), who had testified that the offender was an retaliatory rapist and the crime a mixed sexual homicide, was correct. Mueller had linked one case of a yet unsolved murder of a prostitute to other cases of prostitute rapes, which Roland K., the defendant, had confessed to earlier. The court was also impressed that the expert had found the defendant’s motive just based on the account of the victim (he had never met K.). The court, apparently having just enough circumstantial evidence, followed the expert’s view, convicted Roland K. of the rapes and the murder, and sentenced him to 10 years in prison, the highest sentence under juvenile criminal law in Germany. The defense had unsuccessfully tried arguing that the methods of the expert were questionable and that profiling was not science but comparable with parapsychology or astrology. The court did not examine whether the testimony given by the expert was scientifically sound or otherwise reliable. Apparently, his qualifications and experience were enough, because the Landgericht stated that there were no doubts regarding the correctness of his “scientific conclusion” (108, p. 73), which is almost reminiscent of the pre-Frye era in the United States. It may have blinded the Landgericht to some degree that a very prominent and publicized figure had offered seemingly convincing testimony regarding a novel “science.” The Supreme Court of Germany (Bundesgerichtshof) upheld the decision, finding no “obvious error” in the judgment (111).

On May 18, 2000, Mueller was called as an expert in another murder case by the Landgericht, Berlin (112). He testified that the murder of a 9-year-old girl was a mixed sexual homicide according to the Crime Classification Manual of the FBI and that the murderer had to have known the apartment complex in which the murder was committed, so that the offender must have been someone living there at some point prior to the crime, which had been the case. The defendant was acquitted, however, because the Landgericht was not convinced that these characteristics could not fit another person. The presiding judge added in an interview that the crime scene analysis did not help the court determine whether the defendant had been correctly accused, and he would not allow such testimony in the future (112). It should be noted that Mueller had adopted
the FBI approach, having been schooled there, which is being used less and less in Germany and which differs from the approach of the Bundeskriminalamt in methodology and quality (112). In another case (113), in 2003, the Amtsgericht Bremerhaven also did not admit profiling as expert evidence; that judgment is, however, neither publicly available nor yet final.

In the case of Oliver B., the Landgericht Dortmund (114) mentioned the use of a criminal profile by a German forensic psychologist in the sexual assault and subsequent murder of 18-year-old Nina T. The psychologist had written a criminal profile of the offender and had made a victimology assessment of the 18-year-old victim during the investigation. On trial, he was allowed to testify regarding his victimology assessment and said that he thought it impossible that the victim had been capable of spontaneous sexual encounters, let alone with a stranger. Although this testimony was not based on his profile of the offender and is insofar unusual, it is one of the very few cases that a criminal profile or victimology assessment has even been heard in court or mentioned in the final written decision.

There does not seem to be a consensus yet regarding admitting profiling evidence in German courts; in the (almost nonexistent) literature, however, it has been voiced that linkage analysis and profiling could be admissible in German courts, as long as experts declared that their opinions were not based on scientific and tested methods (115, p. 246; for a more cautious approach, see 109, pp. 300,301). It should be kept in mind that this would, however, as in other countries, lead to probably insurmountable reliability and probative value issues. In future cases, it must therefore at least be clearly determined whether the (German) profiling approach is based on reliable methodology, especially regarding if a case is lacking other hard or even circumstantial evidence to decide on (1).

**Swiss Case Law**

No case has been published yet where criminal profiling has been introduced in a court of law. The prosecution or defense may propose to the judge(s) to include or acquire profile evidence, and for example, the defense may object to it (116, p. 275, or the defense may also submit a “private” expert’s testimony, 116, p. 312). However, to determine its scope and to evaluate such written or oral testimony remains in the realm of the judge’s discretion: “L’expert propose, le magistrat dispose” (116, pp. 308,310,313; 117, p. 149); in the case of a private expert, so is the decision whether to consider it at all (116, p. 315). Any expert would need to be sufficiently qualified, and his or her methods would need to be reliable and tested to be taken into account. For lack of
experienced experts and reliable methodology as well as probative value, it seems highly unlikely that a profile could even serve as circumstantial evidence, no matter that there is no “numerus clausus” of evidence types (116, p. 276; 117, p. 149). If a Swiss court adopted a comparative approach to determine admissibility, it is even harder to imagine that a judge or panel of judges would consider criminal profiling at all (116, pp. 278, 308), considering how little success profiling has had in foreign countries’ decisions. Even if the underlying methodology of criminal profiling was accepted as reliable (which was discussed e.g. for modus operandi analysis, 116, p. 278; but see generally 116, p. 314), a “classic” criminal profile still only presents general characteristics fitting more than one individual, which appears similar to a police drawing of an unknown perpetrator following witness statements that looks similar to the later accused person, which is also not used as evidence because it could depict other people with similar appearance as well.

A profile should therefore stay a (cautiously used) tool for law enforcement to allocate investigative resources efficiently and to help narrow the search for the right perpetrator and find necessary and acceptable evidence to build a case. One has to keep in mind that unless enough accepted and time-tested evidence (e.g., DNA evidence, fingerprints, a voluntary confession) is available to the court, it would have to acquit the defendant, as he or she can only be convicted if proven guilty beyond a reasonable doubt (in dubio pro reo principle; 118, p. 58). The conviction of an innocent person (or the acquittal of a guilty person due to an unfair trial) cannot be an option or a risk to take, especially when someone is charged with a grave crime.

**Conclusions**

Current popular culture ascribes to profilers a level of knowledge and objectivity that demands acceptance of their opinions. Experts with impressive credentials are used to elevate possible inferences to the level of scientific truth. Measuring criminal profiling against current legal admissibility standards, however, is quite another matter. Although some authors still argue that “[j]udicial use of criminal psychological profiling has a poor track record as a result of misunderstanding, misuse, and misapplication, and, thus, such testimony will usually not be admitted at trial” (21, p. 249), others believe that an expert witness might be given a legitimate role in a trial but only “on the shortest and most carefully constructed judicial leash” (see 65, p. 285, for suggestions) and it has also been stated that it seems more likely that profiling should be used with caution with its merits and applications based on a far stronger empirical basis (119) or that profiling should not be used at all.
in court (1). Although one should generally avoid unnecessarily and prema-
turely foreclosing the use of novel expert testimony, the cautious statements are
certainly being backed up by the overwhelming majority of US precedent and
international (published) case law. Even with a more flexible legal approach as
applied in the United States in Kumho (65), the research and experience limits
seem overwhelming so far.

After reviewing two dozen cases, present profiling techniques are regularly
and with good reason failing expert evidence admissibility standards. This is
mostly due to their heterogeneous and fluid theoretical body of knowledge, in-
terlaced with hardly testable individual experience and intuition, resulting in poor
reliability and probative value. Furthermore, on the legal side, such evidence needs
to navigate its way “through practically all of the most difficult rules of the law
of evidence” (16, p. 242), no matter which country’s courts are called on. In this
context, one has to keep in mind that even regarding DNA analysis, some authors
and practitioners have raised doubts when the analysis was “only” 99.89% accurate
(117, p. 149), a percentile that profiling can probably never achieve in the first
place. But even if profiles were accepted as reliable and valid, and if the defendant
fit all characteristics, they could still not prove that the single individual in question
was the correctly identified offender. Profiles do not individualize, but they gener-
alize about the potential offender and his or her characteristics. Some authors have
also voiced concern that criminal profiling carries the “danger of creating new,
apparently scientifically-reinforced, stereotypes, hence criminalising sections of
the population” (5, p. 118). Consequently, testimony regarding the issue of guilt
has never been allowed, and rightly so, because if (it could be proven that) just
one other person fit the profile as well, the margin of error already amounts to
an unacceptable 50%. This is one reason why profilers have been retained by
defense attorneys. However, the same legal standards apply to both sides, which is
why at present such evidence offerings have been ruled inadmissible on the same
grounds. As a caveat, it should also be noted that counting on profiling evidence
can yield dire consequences for clients “and could even lead to a new area of
legal malpractice claims” (26, p. 239). In this context, it has been justly stated
that “experts have an affirmative ethical duty to refuse to give testimony that
would not reasonably be expected to pass Daubert/Kumho scrutiny” (26, p. 238).
In the absence of a confession and other hard and conclusive evidence (in which
case a profile would not be needed in the first place), it is in addition virtually
impossible to determine whether the profile is correct; an acquittal would also not
necessarily mean that the defendant, fitting most parts of the profile, had been
wrongly accused (21, pp. 264,265). The determination of a potential error rate
remains one of the biggest challenges, especially in view of a lack of unification
due to a theoretically fragmented field and its challenges in application (17).
Nevertheless, it has still been argued that a profile meets three of the four factors in Daubert, and “courts should view the evidence generated in a profile as sufficiently reliable because the underlying principles can be tested, the procedure and basis for a profile’s conclusion is subject to peer review, and standards for control of the profiling technique’s operation exist” (21, p. 265). Therefore, profiles should be admissible expert evidence in criminal trials and “courts should welcome the benefits of criminal psychological profiles” (21, p. 266). The supposed benefits would, as most profiles have been introduced by the state, be arguably mostly on the side of the prosecution. This should be kept in mind especially in the United States, where the death penalty is still legal in many states, but in other countries as well, because

the need for a high degree of scientific acceptance, and particularly reliability, is vital when a criminal case is involved where the individual’s freedom or, in fact, his life may be at stake. (120, p. 333)

In cases where the available evidence is not optimal and the jury or judge need to rely on circumstantial evidence, the temptation may be great to admit a fitting criminal profile into evidence, but until this technique is reliable, tested, and accepted in the scientific or relevant knowledge community and is able to provide legally accurate and meaningful probabilities, if that day ever comes, it is to be excluded as expert evidence to ensure the defendant’s right to a fair trial. Lastly, there have been cases in the United States that held profiling information to be sufficient to be a part of upholding the validity of an affidavit used to obtain a search warrant (96, pp. 804,805); however, even if not the same legal standard of evidence admissibility is applied here, probable cause still needs to be just that to curtail the constitutional rights of an individual suspect. The limits of the method therefore must continue to set the limits of its reach.

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