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## The Duty to Investigate and the Availability of Expert Witnesses

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# The Duty to Investigate and the Availability of Expert Witnesses

## **Erratum**

Law; Criminal Law; Evidence; Courts; Judges

# THE DUTY TO INVESTIGATE AND THE AVAILABILITY OF EXPERT WITNESSES

*Stephen A. Saltzburg\**

## INTRODUCTION

The Advisory Committee on the Federal Rules of Evidence has before it a possible addition to the Federal Rules of Evidence, Rule 707, which reads as follows:

Rule 707. Testimony by Forensic Expert Witnesses. If a witness is testifying on the basis of a forensic examination [conducted to determine whether an evidentiary sample is similar or identical to a source sample], [or: “testifying to a forensic identification”] the proponent must prove the following in addition to satisfying the requirements of Rule 702:

- (a) the witness’s method is repeatable, reproducible, and accurate—as shown by empirical studies conducted under conditions appropriate to its intended use;
- (b) the witness is capable of applying the method reliably and actually did so; and
- (c) the witness accurately states the probative value of [the meaning of] any similarity or match between the samples.<sup>1</sup>

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\* Wallace and Beverley Woodbury University Professor, The George Washington University Law School. This Article was prepared for the *Symposium on Forensic Expert Testimony, Daubert, and Rule 702*, held on October 27, 2017, at Boston College School of Law. The Symposium took place under the sponsorship of the Judicial Conference Advisory Committee on Evidence Rules. For an overview of the Symposium, see Daniel J. Capra, *Foreword: Symposium on Forensic Expert Testimony, Daubert, and Rule 702*, 86 *FORDHAM L. REV.* 1459 (2018).

1. Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, Symposium on Forensic Expert Testimony, *Daubert and Rule 702* (Oct. 1, 2017), in *ADVISORY COMMITTEE ON RULES OF EVIDENCE OCTOBER 2017 AGENDA BOOK* 371, 381 (2017) (alterations in original) (proposing a new rule, Federal Rule of Evidence 707), [http://www.uscourts.gov/sites/default/files/a3\\_0.pdf](http://www.uscourts.gov/sites/default/files/a3_0.pdf) [<https://perma.cc/VJ5T-RAG3>]. An alternative is to amend Rule 702 by adding a section (b) to read:

(b) Forensic Expert Witnesses. If a witness is testifying on the basis of a forensic examination [conducted to determine whether an evidentiary sample is similar or identical to a source sample] [or: “testifying to a forensic identification”], the proponent must prove the following in addition to satisfying the requirements of Rule 702(a):

- (1) the witness’s method is repeatable, reproducible, and accurate—as shown by empirical studies conducted under conditions appropriate to its intended use;
- (2) the witness is capable of applying the method reliably and actually did so; and

The apparent goals of this new rule are to increase the reliability of forensic testimony and, particularly in criminal cases where there is less discovery than in civil cases,<sup>2</sup> to provide criminal defendants with more information with which to challenge the admissibility and the reliability of the government's expert testimony.

Whether the proposed rule is likely to accomplish these goals is not altogether clear. Any answer requires an analysis of what is necessary for defense counsel in criminal cases to be adequately prepared to meet the government's case. In deciding what is necessary, it is important to focus on the duty of defense counsel to investigate a case and the necessary tools defense counsel must have available to conduct an adequate investigation.

To assess the likelihood that the proposed rule will assure better representation for criminal defendants, this Article proceeds as follows: Part I provides a general review of the effective assistance of counsel standard. Next, Part II focuses on the specific duty of defense counsel to investigate. Part III then examines the constitutional right of indigent criminal defendants to have expert assistance at government expense. Part IV proceeds to examine proposed Rule 707 and argues that it will not accomplish its purpose unless criminal defendants and their counsel have access to expert resources that match those relied upon by the government. Finally, Part V concludes by asking an overarching question that every judge and indigent defense lawyer ought to ask: Can defense counsel have a fair opportunity to investigate, appropriately assess, and challenge forensic evidence and testimony without the assistance of expert testimony?

### I. THE EFFECTIVE ASSISTANCE OF COUNSEL STANDARD

In cases addressing ineffective assistance of counsel claims, the U.S. Supreme Court has clearly established that a defense lawyer has a duty to investigate as part of adequate pretrial practice. In *Strickland v. Washington*,<sup>3</sup> Justice Sandra Day O'Connor wrote for the Court that a defendant who is entitled to be represented by counsel—retained or appointed—has a right to a lawyer who is not only physically present at a trial but also provides effective assistance:

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional

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(3) the witness accurately states the probative value of [the meaning of] any similarity or match between the samples.

*Id.* at 380 (providing proposed amendments to Rule 702). The substance is the same, and for simplicity purposes, the focus here will be on proposed Rule 707.

2. The focus here is on indigent criminal defendants. Civil litigants can already depose experts and presumably test the criteria set forth in proposed Rule 707 whether or not the Rule is adopted and criminal defendants who have sufficient resources can retain their own experts. They do not depend on the willingness of courts to appoint defense experts at the government's expense.

3. 466 U.S. 668 (1984).

command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel."<sup>4</sup>

Justice O'Connor observed that the Court previously had held that the "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."<sup>5</sup> She recognized that "[c]ounsel . . . can also deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance.'"<sup>6</sup> Further, Justice O'Connor noted that "[t]he Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases—that is, those presenting claims of 'actual ineffectiveness.'"<sup>7</sup>

Justice O'Connor recognized that federal circuit courts had concluded that "the proper standard for attorney performance is that of reasonably effective assistance,"<sup>8</sup> and she embraced that standard and described some of the basic duties of effective lawyers, which include a duty of loyalty, "the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution,"<sup>9</sup> and "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."<sup>10</sup> In addition, Justice O'Connor identified a duty to investigate:

As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.<sup>11</sup>

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4. *Id.* at 685–86 (citations omitted) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938)).

5. *Id.* at 686.

6. *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)).

7. *Id.*

8. *Id.* at 687 (recognizing that all federal courts of appeals have adopted the standard).

9. *Id.* at 688.

10. *Id.*

11. *Id.* at 690–91.

## II. THE DUTY TO INVESTIGATE GENERALLY

The Supreme Court has taken the duty to investigate seriously, at least in capital cases. In *Rompilla v. Beard*,<sup>12</sup> for example, the Court appeared to come close to saying that defense counsel has an obligation to engage in a detailed review of the case file for every conviction that the prosecution will seek to introduce at the penalty phase of a capital proceeding. Rompilla's counsel prepared for the capital phase of the case but failed to review the case file of a prior criminal trial in which Rompilla was convicted of a violent crime, despite the fact that defense counsel had notice that the prosecution intended to rely on the prior conviction.<sup>13</sup> That case file happened to have information concerning Rompilla's horrific childhood, mental illness, and alcoholism, all of which would have been relevant to mitigation.<sup>14</sup> Most of this information was found in a single place, a transfer petition prepared by the Department of Corrections after Rompilla had been convicted.<sup>15</sup> Without this evidence, defense counsel's mitigation case consisted of five of Rompilla's family members saying they believed that he was innocent and a good man and asking the jury for mercy and Rompilla's son testifying that he loved his father and would visit him in prison.<sup>16</sup>

Justice David Souter, writing for the Court, concluded that even though defense counsel had done some investigation by interviewing family members and reviewing reports by three mental health experts who gave opinions at the guilt phase, "the lawyers were deficient in failing to examine the court file on Rompilla's prior . . . conviction."<sup>17</sup> Justice Souter explained:

There is an obvious reason that the failure to examine Rompilla's prior conviction file fell below the level of reasonable performance. Counsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law. Counsel further knew that the Commonwealth would attempt to establish this history by proving Rompilla's prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in that earlier trial. . . . It is also undisputed that the prior conviction file was a public document, readily available for the asking at the very courthouse where Rompilla was to be tried.<sup>18</sup>

Justice Souter stated that, although the Court was not establishing a per se rule that defense counsel must always review case files of all of a defendant's prior convictions, it was unreasonable for counsel not to review the file "despite knowing that the prosecution intended to introduce Rompilla's prior

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12. 545 U.S. 374 (2005).

13. *Id.* at 382.

14. *Id.* at 378, 393.

15. *Id.* at 406 (Kennedy, J., dissenting).

16. *Id.* at 378 (majority opinion).

17. *Id.* at 383.

18. *Id.* at 383–84.

conviction not merely by entering a notice of conviction into evidence but by quoting damaging testimony of the rape victim in that case.”<sup>19</sup>

In another decision, *Hinton v. Alabama*,<sup>20</sup> the Court held a lawyer’s performance to be inadequate for failure to do an adequate investigation. Hinton was charged with two murders, convicted, and sentenced to death.<sup>21</sup> At trial, the prosecutor relied almost exclusively on ballistics evidence to tie the defendant’s gun to bullets used in the murders.<sup>22</sup> Defense counsel (and the trial judge) mistakenly believed that the defense was only entitled to \$500 per case (or \$1000 in total given that there were two homicide charges) to hire a defense expert.<sup>23</sup> The defense could only find one expert who would testify for \$1000, and the prosecutor’s cross-examination of the expert was effective in casting doubt on his opinion that the bullets were not fired from Hinton’s gun.<sup>24</sup>

Both defense counsel and the trial judge were wrong about the limit on state-provided funds, since the law had changed to permit the defense to seek sufficient funds to hire an adequate expert.<sup>25</sup> The state courts agreed with Hinton that defense counsel failed the first prong of the *Strickland* test by being unfamiliar with, and wrong about, the law, and the Supreme Court agreed with the state courts, concluding that:

Hinton’s attorney knew that he needed more funding to present an effective defense, yet he failed to make even the cursory investigation of the state statute providing for defense funding for indigent defendants. . . . An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.<sup>26</sup>

Lower courts have taken the duty to investigate seriously. In *Frierson v. Woodford*,<sup>27</sup> for example, Frierson sought habeas corpus relief from a death sentence imposed by a state court after he was found guilty of first degree murder and other offenses. The Ninth Circuit overturned Frierson’s sentence because his defense counsel failed to investigate and offer mitigation

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19. *Id.* at 389.

20. 134 S. Ct. 1081 (2014) (per curiam).

21. *Id.* at 1083, 1086.

22. *Id.* at 1083–84.

23. *Id.* at 1084.

24. *Id.* at 1085.

25. *Id.*

26. *Id.* at 1088–89. The state courts had held that Hinton failed to show prejudice because the three experts who testified for the defendant during habeas proceedings testified to the same conclusion as the defense expert at trial. *Id.* at 1086–87. The Supreme Court held that the state courts used the wrong analysis because the jury might not have believed the defense expert at trial and that:

if there is a reasonable probability that Hinton’s attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton’s guilt had the attorney known that the statutory funding limit had been lifted, then Hinton was prejudiced by his lawyer’s deficient performance and is entitled to a new trial.

*Id.* at 1089–90.

27. 463 F.3d 982 (9th Cir. 2006).

evidence at the penalty phase of the case.<sup>28</sup> The Ninth Circuit explained the duty to investigate as follows:

Counsel has a duty to conduct a reasonable investigation so that he can make an informed decision about how best to represent his client. Thus, counsel may render ineffective assistance “where he neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so.” We have held that a failure to investigate and present, at the penalty phase of a capital trial, evidence of organic brain damage or other mental impairments, drug abuse, and a dysfunctional family or social environment may constitute ineffective assistance of counsel.

The imperative to cast a wide net for all relevant mitigating evidence is heightened at a capital sentencing hearing because “[t]he Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy.” Although counsel’s duty to seek out evidence of mitigation is not limitless, the Supreme Court has recognized that the failure to pursue avenues of readily available information—such as school records, juvenile court and probation reports, and hospital records—may constitute deficient performance.<sup>29</sup>

In *Foster v. Lockhart*,<sup>30</sup> the Court affirmed the grant of habeas corpus relief to a state court defendant convicted of rape and summarized its holding:

Although we prefer not to repeat the graphic testimony at Foster’s trial and evidentiary hearing, the explicit details of the rape victim’s story and Foster’s impotency show the failure of Foster’s trial attorney to investigate, develop, and present the strong defense of Foster’s impotency amounted to ineffective assistance of counsel.<sup>31</sup>

Foster and his sister told trial defense counsel that his impotency made it extremely unlikely, if not impossible, for Foster to have committed the rape as described by the victim.<sup>32</sup> Defense counsel did not investigate the impotency and instead relied on an alibi defense.<sup>33</sup> The Eighth Circuit found that the failure to investigate was unreasonable because “[r]easonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories” and “[a]n attorney must make a reasonable investigation in preparing a case or make a reasonable decision not to conduct a particular investigation.”<sup>34</sup>

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28. *Id.* at 992–93.

29. *Id.* at 989 (alteration in original) (citations omitted) (first quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994); then quoting *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999)).

30. 9 F.3d 722 (8th Cir. 1993).

31. *Id.* at 724.

32. *Id.* at 725.

33. *Id.*

34. *Id.* at 726.



## III. INVESTIGATION AND FORENSIC EVIDENCE

Failure to do an adequate investigation into facts and witnesses is obviously the fault of the lawyer. As we saw in *Rompilla*, defense counsel had the ability to examine the file in *Rompilla*'s previous rape and assault case and to discover the facts revealed by that file.<sup>35</sup> In *Frierson*, defense counsel could have sought to interview family members and anyone else whom *Frierson* identified as potentially having mitigation evidence.<sup>36</sup> And, in *Foster*, the defendant had former girlfriends who were available to be interviewed and who would have corroborated *Foster*'s claims regarding his inability to perform sexually.<sup>37</sup> In these cases, there is little reason to believe that a competent lawyer would have lacked the skills necessary to do the investigation that the courts found wanting.

A question arises, however, when a defendant is indigent and cannot afford to hire a lawyer: Who will investigate the reliability of forensic evidence provided by an expert for the prosecution whose expertise is unlikely to be within the ken of most defense counsel? The logical answer is an expert retained by the defense. But how likely is it that the court will appoint an expert to assist the defense? The answer in most cases, and in many jurisdictions, is very unlikely.<sup>38</sup>

In *Ake v. Oklahoma*,<sup>39</sup> the Supreme Court held that an indigent defendant is entitled as a matter of constitutional right to an appointed expert in some cases, including *Ake*'s.<sup>40</sup> The state charged *Ake* with murdering a couple and wounding their two children.<sup>41</sup> *Ake* was hospitalized after initially being found incompetent to stand trial.<sup>42</sup> Subsequently, he responded sufficiently

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35. See generally *Rompilla v. Beard*, 545 U.S. 374 (2005).

36. *Frierson v. Woodford*, 463 F.3d 982, 989 (9th Cir. 2006).

37. *Foster*, 9 F.3d at 725–26.

38. See STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 853–54 (9th ed. 2010); see also 1 CRIMINAL PRACTICE MANUAL § 10:9 (2010 ed. Supp. 2017); David A. Harris, *Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent*, 68 N.C. L. REV. 763, 764 (1990). Some states do better than others at providing expert assistance for indigent defendants. See Carlton Bailey, *Ake v. Oklahoma and An Indigent Defendant's 'Right' to an Expert Witness: A Promise Denied or Imagined?*, 10 WM. & MARY BILL RTS. J. 401, 456–457 & n.535 (2002); Andrew Monaghan Higgins, Note, *Virginia's Interpretation of Ake v. Oklahoma: A Hollow Right*, 23 WASH. & LEE J.C.R. & SOC. JUST. 491, 494 (2017); Aimee Kumer, Comment, *Reconsidering Ake v. Oklahoma: What Ancillary Defense Services Must States Provide to Indigent Defendants Represented by Private or Pro Bono Counsel?*, 18 TEMP. POL. & C.R.L. REV. 783, 795–98 (2009). The most recent study of indigent defense in federal courts under the Criminal Justice Act, 18 U.S.C. § 3006A (2012), is the 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act. See AD HOC COMM., 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT (2017). The report notes that a survey of “panel” attorneys (appointed by federal courts to represent indigents) indicates that 60 percent of these attorneys use expert services in just one out of ten cases while only 12 percent use these services in more than half of their cases. *Id.* at XIX. The report also reveals tremendous disparities among federal districts in the use of experts. *Id.* at 149–56.

39. 470 U.S. 68 (1985).

40. *Id.* at 84–87.

41. *Id.* at 70.

42. *Id.* at 71.

well to medication that he was declared fit to stand trial.<sup>43</sup> At the guilt stage of the capital proceeding, he raised an insanity defense.<sup>44</sup> Defense counsel called and questioned each psychiatrist who had examined Ake while he was hospitalized.<sup>45</sup> But each doctor indicated on cross-examination that he had not diagnosed Ake's mental state at the time of the offense.<sup>46</sup> The jury convicted.<sup>47</sup> During the sentencing stage, no new evidence was presented.<sup>48</sup>

Justice Thurgood Marshall's opinion for the Court reasoned that Ake should have had a psychiatrist appointed to assist his defense at both stages:

We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.<sup>49</sup>

Justice Marshall also addressed the concept of fundamental fairness in an adversary system:

Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.<sup>50</sup>

The Court borrowed a procedural due process test used in civil cases to balance the defendant's need for help against the burden on the state of providing help. It found (1) a strong "private interest" in life and liberty, and the importance of avoiding an unjust conviction, (2) no governmental interest in prevailing at trial if the result "is to cast a pall on the accuracy of the verdict obtained,"<sup>51</sup> and (3) a great value in providing expert assistance to a defendant when his sanity at the time of the offense is to be a significant factor at trial and when the government presents psychiatric evidence concerning future dangerousness in a capital sentencing proceeding.<sup>52</sup>

Justice Marshall described what psychiatrists can do in a case in which sanity is a disputed issue:

[P]sychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They

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43. *Id.* at 71–72.

44. *Id.* at 72.

45. *Id.*

46. *Id.*

47. *Id.* at 73.

48. *Id.*

49. *Id.* at 79.

50. *Id.* at 77.

51. *Id.* at 78.

52. *Id.* at 78–83.

know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers.<sup>53</sup>

Justice Marshall's reasoning, while confined to psychiatrists, explains what experts in other fields can readily do to aid a defense when forensic evidence might be disputed.

It did not take long for the Court to establish that an indigent defendant's right to an appointed expert under *Ake* is not automatic and only exists when, without an expert, the defendant will be deprived of a fair opportunity to present his defense. In *Caldwell v. Mississippi*,<sup>54</sup> Caldwell shot and killed the owner of a small grocery store in the course of robbing it and was convicted of capital murder and sentenced to death.<sup>55</sup> Justice Marshall again wrote for the Court as it invalidated the death sentence because the sentencing jury was led to believe by the prosecutor's closing argument that responsibility for determining the appropriateness of a death sentence was not a decision for the jury but for the appellate court that would review the case.<sup>56</sup> In a footnote, Justice Marshall wrote:

Petitioner also raises a challenge to his conviction, arguing that there was constitutional infirmity in the trial court's refusal to appoint various experts and investigators to assist him. Mississippi law provides a mechanism for state appointment of expert assistance, and in this case the State did provide expert psychiatric assistance to Caldwell at state expense. But petitioner also requested appointment of a criminal investigator, a fingerprint expert, and a ballistics expert, and those requests were denied. The State Supreme Court affirmed the denials because the requests were accompanied by no showing as to their reasonableness. For example, the defendant's request for a ballistics expert included little more than "the general statement that the requested expert 'would be of great necessarius witness.'" Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision. We therefore have no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type here sought.<sup>57</sup>

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53. *Id.* at 80.

54. 472 U.S. 320 (1985).

55. *Id.* at 324.

56. *Id.* at 341.

57. *Id.* at 323 n.1 (citations omitted) (quoting *Caldwell v. State*, 443 So. 2d 806, 812 (Miss. 1983)). In *Caldwell*, the Mississippi Supreme Court cited a case decided two years after *Ake* for the following proposition: "Neither the United States Constitution nor the Mississippi Constitution requires that the nation or state furnish an indigent defendant with the assistance of a psychiatrist. *The only assistance that they require is the assistance of legal counsel.*" *Caldwell*, 443 So. 2d at 812 (quoting *Phillips v. State*, 197 So. 2d 241, 244 (Miss. 1967)), *rev'd*, 472 U.S. 320. The Mississippi Supreme Court continued:

In the case of *Bullock v. State*, 391 So. 2d 601 (Miss. 1980), this Court went further to say that the failure to outline specific costs and in specific terms the purposes and value of such requested expert rendered the trial court's refusal to authorize such expenditure non reversible. In the instant case Caldwell's motion simply included the general statement that the requested expert "would be of necessarius witness." It did not estimate the cost of such expert nor the specific value. Therefore, the trial

In *McWilliams v. Dunn*,<sup>58</sup> the Supreme Court returned to *Ake* in another capital case. Alabama charged the indigent McWilliams with rape and murder.<sup>59</sup> The trial court appointed counsel who requested a psychiatric evaluation of McWilliams.<sup>60</sup> The court granted the motion and the State convened a panel of doctors (a three-member “Lunacy Commission”), which concluded that McWilliams was competent to stand trial and had not been suffering from mental illness at the time of the alleged offense.<sup>61</sup> After a jury convicted McWilliams of capital murder, his counsel sought neurological and neuropsychological testing prior to McWilliams’s sentencing hearing.<sup>62</sup> Dr. Goff examined McWilliams and filed a report two days before the hearing in which he concluded that, although McWilliams appeared to have some genuine neuropsychological problems, it was likely that he was exaggerating his symptoms.<sup>63</sup> Defense counsel also received updated records from the Lunacy Commission’s evaluation and previously subpoenaed mental health records from the Alabama Department of Corrections.<sup>64</sup> Defense counsel requested a continuance in order to evaluate all the new material and asked for the assistance of someone with expertise in psychological matters to review the findings.<sup>65</sup> The trial court denied defense counsel’s requests and sentenced McWilliams to death.<sup>66</sup>

Justice Breyer, writing for five members of the Court, observed that the Constitution, as interpreted in *Ake*, required the state to provide McWilliams with more expert assistance than he actually received.<sup>67</sup> He concluded that the examination provided by the state through Dr. Goff was no substitute because “*Ake* does not require just an examination. Rather, it requires the State to provide the defense with access to ‘a competent psychiatrist who will conduct an appropriate [1] *examination* and assist in [2] *evaluation*, [3] *preparation*, and [4] *presentation* of the defense.’”<sup>68</sup>

Justice Breyer was willing to assume that Dr. Goff satisfied the examination requirement of *Ake* but found that neither he nor any other expert (1) helped the defense to evaluate Goff’s report or McWilliams’s extensive medical records, (2) helped to translate these data into a legal strategy, (3) helped the defense to prepare and present arguments addressing an explanation for McWilliams’s purported malingering, (4) helped the defense

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court’s failure to provide the requested expert witness or investigator did not constitute reversible error.

*Id.*

58. 137 S. Ct. 1790 (2017).

59. *Id.* at 1794.

60. *Id.*

61. *Id.* at 1794–95.

62. *Id.* at 1795.

63. *Id.* at 1795–96.

64. *Id.* at 1796.

65. *Id.* at 1796–97.

66. *Id.* at 1797.

67. *Id.* at 1798 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)).

68. *Id.* at 1800 (quoting *Ake*, 470 U.S. at 83).

to prepare direct or cross-examination of any witnesses, or (5) testified for the defense at the judicial sentencing hearing.<sup>69</sup>

McWilliams had argued that *Ake* “clearly established that a State must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert available to both parties.”<sup>70</sup> Justice Breyer did not decide whether McWilliams was correct but noted that “[a]s a practical matter, the simplest way for a State to meet this standard may be to provide a qualified expert retained specifically for the defense team.”<sup>71</sup>

#### IV. THE NEED FOR EXPERT HELP FOR THE LAWYER

In *Rompilla*, the Court faulted defense counsel and found ineffective assistance where defense counsel, knowing that the prosecution would rely upon a prior conviction, failed to examine the file relating to the case.<sup>72</sup> The Court reasonably assumed that a lawyer who examines a court file is generally capable of reading the documents in the file and ascertaining the factual evidence that the prosecution could choose to use in a sentencing hearing.<sup>73</sup> By contrast, in *Ake* and *McWilliams*, the Court reasonably concluded that when a defendant’s mental state and sanity are at issue, defense counsel cannot be expected to master psychiatric evidence that an expert might rely upon. This raises the question whether a defense lawyer, in any case in which the government relies upon forensic expert testimony, is in a position to properly evaluate the various factors that must be considered when the forensic expert testimony is proffered at trial. If one considers what Justice Marshall wrote in *Ake* and tweaks it slightly, it seems apropos to all forensic experts. Forensic experts “gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions”<sup>74</sup> about the significance of those facts to the issues in a case. They know the probative questions to ask of the opposing party’s experts and how to interpret their answers.

Similarly, a slight tweaking of Justice Breyer’s observation in *McWilliams* seems to extend its applicability not only to mental health experts but to all forensic experts: “*Ake* does not require just an examination. Rather, it requires the State to provide the defense with access to ‘a competent [forensic expert] who will conduct an appropriate [1] *examination* and assist in [2] *evaluation*, [3] *preparation*, and [4] *presentation* of the defense.’”<sup>75</sup>

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69. *Id.*

70. *Id.* at 1799. The Court granted certiorari to decide whether this was correct, but Justice Breyer concluded that “that does not bind [the Court] to issue a sweeping ruling when a narrow one will do.” *Id.* at 1800.

71. *Id.*

72. *Rompilla v. Beard*, 545 U.S. 374, 382 (2005).

73. *Id.*

74. *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985).

75. *McWilliams*, 137 S. Ct. at 1800 (quoting *Ake*, 470 U.S. at 83).

The reality is that many judges are reluctant to appoint defense counsel for indigent defendants absent some showing of exceptional need. So why is it that some federal judges, as well as their state counterparts, are unwilling to appoint defense experts at the government's expense whenever the government is relying on forensic evidence other than psychiatric testimony? Can it really be that judges think that psychiatric evidence is the only forensic evidence that is beyond the ken of defense counsel? Or do they think psychiatric testimony is that much more complicated than other forensic evidence? These explanations are unlikely. More probably, reluctance to appoint defense experts is rooted in cost to the government and inertia; that is, a history of not routinely providing defense experts at the request of defense counsel.<sup>76</sup>

Prosecutors frequently rely upon forensic evidence, and science has an ever-increasing role to play in criminal trials.<sup>77</sup> As a result, it is important that defense counsel be prepared to address such evidence and have the tools to do so, whether the defense is insanity or any other defense that involves a challenge to the reliability of forensic evidence. Proposed Rule 707 provides an opportunity to examine specifically what defense counsel needs and why the proposed rule itself cannot guarantee fairness. Under the proposed rule, the proponent of forensic evidence must prove three things in addition to satisfying Rule 702:

- (a) the witness's method is repeatable, reproducible, and accurate—as shown by empirical studies conducted under conditions appropriate to its intended use;
- (b) the witness is capable of applying the method reliably and actually did so; and
- (c) the witness accurately states the probative value of [the meaning of] any similarity or match between the samples.<sup>78</sup>

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76. An epidemic of wrongful convictions associated with forensic evidence is proof that without expert assistance, defense lawyers may provide inadequate representation in a large number of cases. See, e.g., Jess Bidgood, *Chemist's Misconduct Is Likely to Void 20,000 Massachusetts Drug Cases*, N.Y. TIMES (Apr. 18, 2017), <https://nyti.ms/2oTeW7a> [<https://perma.cc/7D56-5V6X>]. The decision was made to dismiss more than 8000 cases. See Tom Jackman, *Massachusetts Prosecutors to Throw Out 8,000 Convictions in Second Drug Lab Scandal*, WASH. POST (Dec. 28, 2017), <https://www.washingtonpost.com/news/true-crime/wp/2017/12/28/massachusetts-prosecutors-to-throw-out-8000-convictions-in-second-drug-lab-scandal> [<https://perma.cc/5PN6-K4XC>].

77. See generally Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305 (2004). Giannelli concludes as follows:

In 1985, the *Ake* Court could not have anticipated how the advent of DNA evidence would revolutionize forensic science or how [*Daubert*] would alter the judicial approach to scientific evidence. It could not have foreseen the scientific fraud cases or the expanded use of social science and modus operandi experts. All of these developments have increased the need for defense experts.

*Id.* at 1418; see also *Developments in the Law—Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1559 (1995).

78. Memorandum from Daniel J. Capra, *supra* note 1, at 381.

Suppose defense counsel, having received notice that the government intends to rely on forensic ballistics evidence and other forensic testimony, stands before a federal district court judge after filing a motion for appointment of one or more defense experts.<sup>79</sup> The following is a hypothetical colloquy focused on the request for a ballistics expert that, while imagined, reflects the reality in many courts.

COURT: Counsel, you have a motion pending for appointment of a ballistics expert. Has the government supplied you with a report of its expert? And, if so, why do you need an expert?

DEFENSE COUNSEL: We have the government expert's report, your Honor, but we have no way of knowing whether the expert is actually qualified, by training or experience, to testify as required pursuant to Rule 702, or whether the other requirements of that Rule are satisfied.

COURT: Have you any reason to question his expertise?

DEFENSE COUNSEL: I have no reason to question his expertise or to accept that it is sufficient.

COURT: Is there anything specific about the expert that gives you a problem?

DEFENSE COUNSEL: No, I have nothing specific because I am not qualified to know whether or not he is qualified.

COURT: Any other reason you need a defense expert?

DEFENSE COUNSEL: Yes. The Advisory Committee on the Federal Rules of Evidence is considering a proposed Rule 707 and, while it is not yet the law, it seems to me that it sets forth what any proponent of expert testimony should have to prove.

COURT: So, let's focus on the requirements in that proposed rule. What comes first?

DEFENSE COUNSEL: The proponent must show that "the witness's method is repeatable, reproducible, and accurate—as shown by empirical studies conducted under conditions appropriate to its intended use."<sup>80</sup>

COURT: Does the report do that?

DEFENSE COUNSEL: It purports to.

COURT: So what's the problem?

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79. Justice Marshall's footnote in *Caldwell* dismissed Caldwell's claim that he should have had experts appointed for the defense in these words:

[Caldwell] requested appointment of a criminal investigator, a fingerprint expert, and a ballistics expert, and those requests were denied. The State Supreme Court affirmed the denials because the requests were accompanied by no showing as to their reasonableness. . . . Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision.

*Caldwell v. Mississippi*, 472 U.S. 320, 320 n.1 (1985). Justice Marshall did not mention whether the prosecution relied on fingerprint and ballistics experts, and, if they did, why Caldwell did not need expert assistance to deal with their testimony. *See id.*

80. *See* Memorandum from Daniel J. Capra, *supra* note 1, at 381.

DEFENSE COUNSEL: I have no expertise in ballistics and am ill equipped to assess whether the studies that the expert relies on are reliable, or whether based on those studies the expert's method is repeatable, reproducible, and accurate.

COURT: But the expert says they are reliable and that his method is satisfactory.

DEFENSE COUNSEL: Lay witnesses come to court all the time and purport to have reliable testimony. As a lay person myself, I am competent to examine them and point out deficiencies. I am not competent in a scientific area in which I completely lack expertise.

COURT: Okay. But, at the moment you cannot point to anything specific in the expert's report that alarms you?

DEFENSE COUNSEL: True, but I don't know whether I should be alarmed.

COURT: What else is required by proposed Rule 707?

DEFENSE COUNSEL: The proponent must show that "the witness is capable of applying the method reliably and actually did so."<sup>81</sup>

COURT: What does the report say about that?

DEFENSE COUNSEL: It says that the author is capable of applying the method reliably and did so.

COURT: So what is the problem?

DEFENSE COUNSEL: As I said earlier, I have no way of knowing whether the expert is qualified in ballistics generally, and I certainly have no way of being sure that he applied the method reliably.

COURT: But at the moment it is fair to say that there is nothing in the report that you can point to that suggests the expert is not being honest?

DEFENSE COUNSEL: I can't point to anything specific. But this expert works for the government, which means he has an obvious bias, and makes me wonder whether he has applied his method reliably. It is not that I think the expert is not being honest. I don't know whether or not he is. But, assuming he is being honest, honest experts can be wrong, sometimes very wrong, and I have no way to test the application of the method he described.

COURT: Here's your answer. You can impeach him for bias and cross-examine him about both his method and how he applied it. Anything else in proposed Rule 707?

DEFENSE COUNSEL: The proponent must show that "the witness accurately states the probative value of [the meaning of] any similarity or match between the samples."<sup>82</sup>

COURT: Did the expert do that?

DEFENSE COUNSEL: The report says that he did.

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81. *Id.*

82. *Id.*



COURT: And do you have any reason to challenge that?

DEFENSE COUNSEL: I have neither reason to challenge it nor reason to accept it. The problem is I lack sufficient training and experience to deal with the forensics.

COURT: Well, this court has been dealing with forensic testimony for a long time without appointing defense experts, and defense lawyers like you have proven capable of cross-examining those experts. So, I am not inclined to appoint a ballistics expert absent a showing of exceptional need, and there is none before me. If I accept your arguments, I would have to appoint an expert for the defense in every case to correspond to each forensic expert relied upon by the government, and this court has never done that.

Every point that defense counsel makes in the above colloquy could in fact be made, as the court in the colloquy suggests, to each forensic expert relied upon by the government in every criminal case. Appointing defense experts at government expense would undoubtedly add to the expense of processing criminal cases. But the bottom-line question is whether defense counsel can meet the duty to investigate fully without expert assistance, and it is difficult to see how that can be done.

Do state trial judges and federal district judges who deny the appointment of experts have reason to worry that any conviction will be reversed for abuse of discretion? Thus far, appellate courts seem to give great deference to the judgment of trial judges.<sup>83</sup> It is therefore unlikely that a trial court will be reversed for declining to appoint a defense expert when the defendant has failed to make a showing of some exceptional need.

A defendant who fails on direct appeal is generally out of luck because in noncapital postconviction proceedings,<sup>84</sup> the defendant will be unable to demonstrate one of the prongs necessary to establish ineffective assistance of

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83. See, e.g., *United States v. Rodriguez-Lara*, 421 F.3d 932, 939 (9th Cir. 2005) (“A district court’s denial of a request for public funds to hire an expert is reviewed for abuse of discretion.”); accord *United States v. Benitez*, 809 F.3d 243, 247 (5th Cir. 2015).

84. Fortunately, in capital cases courts somehow have been able to appoint counsel or find lawyers to volunteer to represent individuals sentenced to death, even though the Supreme Court (without a majority opinion) refused to hold in *Murray v. Giarratano*, 492 U.S. 1 (1989), that state courts are constitutionally required to appoint counsel for indigents seeking to attack death sentences in state collateral proceedings. Justice Kennedy, concurring in the judgment, wrote that “[t]he complexity of our jurisprudence in this area, moreover, makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.” *Murray*, 492 U.S. at 14 (Kennedy, J., concurring). He also noted that

[w]hile Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia’s prison system is staffed with institutional lawyers to assist in preparing petitions for post-conviction relief.

*Id.* at 14–15. It is not clear that lawyers will continue to be available to all persons convicted of capital offenses who seek habeas corpus review. The 2017 Report on the Criminal Justice Act observed that the director of the American Bar Association’s Death Penalty Representation Project told the ad hoc committee that it is “enormously time consuming and difficult” to recruit law firms in capital cases. See AD HOC COMM., *supra* note 38, at 202.

counsel. The defendant might be able to make a showing that counsel failed to provide competent representation by being unable to adequately investigate the government's expert testimony. But, even with respect to the first prong of an ineffectiveness claim, the challenge would be to show that defense counsel's performance was outside the mainstream of what is expected of defense counsel, and, because courts routinely deny appointment of defense experts, it would seem that the defendant would have great difficulty in showing that counsel's failure to have an expert was atypical and amounted to a less-than-competent effort.

Even if a court were to find that the inability to adequately investigate and challenge government expert testimony amounted to an incompetent effort, it is virtually certain that the defendant would be unable to prove prejudice. To prove prejudice, the defendant would need to have the benefit of expert testimony. Otherwise, there would be no way to show that had there been a court-appointed defense expert at trial, the trial would have unfolded differently. Since the defendant is not even entitled to appointed counsel in a postconviction attack on a conviction,<sup>85</sup> there is little chance that the indigent defendant will have the assistance of an expert.

#### V. THE OVERARCHING QUESTION

The overarching question for defense counsel and judges is this: Can defense counsel have a fair opportunity to investigate, appropriately assess, and challenge forensic testimony without the assistance of expert testimony? Justice Breyer hit the nail on the head in *McWilliams* when he described the contribution a defense expert in psychiatry might make: the expert "will conduct an appropriate [1] *examination* and assist in [2] *evaluation*, [3] *preparation*, and [4] *presentation* of the defense."<sup>86</sup> There is no a priori reason to believe that this is less the case when non-mental-health forensic evidence is presented.

It seems logical, then, that competent defense lawyers would always consult their own experts in preparing to confront government experts. Wealthy defendants can retain their own experts. Federal defenders have resources that enable them to retain experts. But counsel appointed under the Criminal Justice Act<sup>87</sup> and by many state courts generally need judicial approval to obtain funds for expert testimony. There is yet no standard that requires appointment of experts simply because defense counsel claims a lack of expertise in the subject matter of forensic testimony.

Proposed Rule 707 is useful in stating the factors that prosecutors, defense counsel, and all trial judges should focus on when forensic testimony is going to be presented by the government in a criminal case.<sup>88</sup> If the prosecutor is the proponent of expert testimony, the prosecutor can focus the expert on

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85. *See generally* *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

86. *McWilliams v. Dunn*, 137 S. Ct. 1790, 1800 (2017) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)).

87. 18 U.S.C. § 3006A (2012).

88. *See supra* Introduction.

these factors and make the case that they are satisfied. Unless the court appoints an expert for the defense, defense counsel will have no basis to assess the testimony provided by the prosecution's expert, and the court itself generally is in no position to identify *sua sponte* any defects in the forensic testimony. The court could appoint an expert pursuant to Federal Rule of Evidence 706.<sup>89</sup> If the court were inclined to use public funds for this purpose, however, there is good reason to believe that those funds would be better spent by providing the defense with the expert so that the factors under proposed Rule 707 could be assessed in an adversarial setting.

The vast majority of federal and state criminal cases are disposed of by plea,<sup>90</sup> which suggests that because only the infrequent case goes to trial, motions to appoint expert witnesses for indigent defendants could be limited to those cases. But, there are cases in which prosecutors rely upon forensic evidence while plea bargaining. If a defendant's decision whether to take a plea or risk a trial depends to any significant extent on the importance of the forensic evidence, is a defense counsel in any better position than at a trial to evaluate that evidence without the help of an expert? The law is clear that defense counsel must provide competent advice at the plea stage as well as provide competent representation at trial.<sup>91</sup> It would be wrong, then, to conclude that counsel for indigent defendants will not seek appointment of defense experts prior to trial while plea bargaining is underway, and equally wrong to conclude that they have a lesser need for expert assistance than lawyers who go to trial.

Proposed Rule 707 would, if enacted, apply only in federal courts. But the issues that it identifies surrounding forensic testimony should be equally applicable in state courts, whether or not states have a similar or identical rule. Each of the concerns raised in this Article about the competency of defense counsel applies in every trial court and for all plea bargains, whether a case proceeds in state or federal court. Thus, every factor set forth in the proposed rule is something that any court with a rule akin to Federal Rule of Evidence 702 should already consider in determining whether an expert is qualified, has testimony that would assist the trier of fact in understanding a

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89. FED. R. EVID. 706(a) ("Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.")

90. From 2008 through 2012, the federal cases disposed of by trial decreased each year to a low of 3 percent in 2012. U.S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2012), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/FigureC\\_0.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/FigureC_0.pdf) [<https://perma.cc/5EGT-Q4D4>]. From 2012 through 2016, the cases disposed of by trial declined each year to a low of 2.7 percent in 2016. U.S. SENTENCING COMM'N, 2016 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2016), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/FigureC.pdf> [<https://perma.cc/HLS3-LFRN>]. State court plea rates might be slightly lower but the overall estimate of cases disposed of by plea in the United States is approximately 95 percent. *See Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

91. *See Missouri v. Frye*, 566 U.S. 134, 138 (2012); *see also Lafler v. Cooper*, 566 U.S. 156, 174–75 (2012).

fact in dispute,<sup>92</sup> testifies based on reliable methodology,<sup>93</sup> has sufficient facts or data, and applies the reliable methodology in a reliable way to those facts and data.<sup>94</sup>

The final question is then whether proposed Rule 707 will, if adopted, serve as an important step in assuring that only reliable forensic testimony is admitted in federal district courts and, if admitted, is properly assessed and weighed by trial juries. The proposed rule might give district judges additional guidance on what to demand from forensic witnesses. But, without experts available to assist defense counsel in dealing with forensic testimony, proposed Rule 707 is unlikely to do the work that the drafters believe needs to be done.

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92. The language in proposed Rule 707 that “the witness is capable of applying the method reliably and actually did so” focuses on both the qualifications of the witness and the reliable application of methodology, which are already required by Rule 702. *Compare* Memorandum from Daniel J. Capra, *supra* note 1, at 381 (providing text of proposed Rule 707), *with* FED. R. EVID. 702.

93. The language in proposed Rule 707 that “the witness’s method is repeatable, reproducible, and accurate—as shown by empirical studies conducted under conditions appropriate to its intended use” seems to focus on the reliable methodology required by Rule 702. *Compare* Memorandum from Daniel J. Capra, *supra* note 1, at 381 (providing text of proposed Rule 707), *with* FED. R. EVID. 702.

94. The language in proposed Rule 707 that “the witness accurately states the probative value of [the meaning of] any similarity or match between the samples” appears to require reliable application of the methodology, which is required by Rule 702. *Compare* Memorandum from Daniel J. Capra, *supra* note 1, at 381 (providing text of proposed Rule 707), *with* FED. R. EVID. 702.