THE NEED FOR A *SHARPE* APPELLATE RECORD: WHY A CLEAR AND COMPLETE RECORD ON EXPERT QUALIFICATIONS IS MORE IMPORTANT THAN EVER

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ABSTRACT

In 2019, the Alaska Supreme Court overruled the twenty-year-old precedent established in State v. Coon *that limited appellate review of trial courts' rulings on the validity and admissibility of scientific evidence in a* Daubert *context. In* State v. Sharpe*, the court rejected the abuse of discretion standard, instead applying a more stringent de novo review in evaluating the trial courts' determinations about the reliability of the scientific theory or technique underlying an expert's testimony.* Sharpe *arose from three consolidated cases, all of which included evidence from the identical type of polygraph test admitted or excluded based on a single evidentiary hearing on the validity of the polygraph test. These conflicting and arbitrary outcomes demonstrated the real capacity for inconsistencies that appellate courts would not have been able to correct for under the old abuse of discretion standard, highlighting the very concerns raised by the dissent in* Coon*. Now, under this more stringent appellate standard, it is all the more important for practitioners to develop comprehensive records surrounding scientific evidence. In developing these trial records, practitioners should look to the supreme court's analysis in* Sharpe *for guidance on some of the most important factors appellate courts will likely rely on in their review.*

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I. INTRODUCTION

In *State v. Sharpe*,[1] the Alaska Supreme Court considered the appeal of three consolidated criminal cases in which defendants—Thomas Alexander, Jyzyk Sharpe, and Jeffery Holt—sought to introduce comparison question technique (CPT) polygraph examinations into evidence.[2] The same expert conducted the CPT examination for each defendant.[3] For each case, the superior court relied on the single, two-day evidentiary hearing from Alexander's case regarding the admissibility of his polygraph examination under the *Daubert/Coon*-standard.[4] Based on the record from this evidentiary hearing, the court admitted the polygraph examination in two cases and denied admission in the third.[5] When all three cases were appealed, the court of appeals urged the supreme court to re-examine the standard of review under *Daubert/Coon* because application of the standard required affirmation of the superior court evidentiary rulings in all three cases, despite the inherent contradiction in affirming all three.[6] The supreme court held that *Daubert/Coon* determinations of whether the underlying scientific theory or technique is scientifically valid should be subject to de novo review by the appellate court.[7] In overturning the *Coon* abuse of discretion standard for *Daubert* determinations, the supreme court acknowledged one of its greatest concerns in *Coon* regarding the setting of an abuse of discretion standard: the appellate record.[8]

This Comment addresses the practical impact of *State v. Sharpe* for practitioners. The new standard of review for *Daubert*-style determinations requires that trial-level practitioners ensure the record on

1. 435 P.3d 887 (Alaska 2019).
2. *Id.* at 889–91.
3. *Id.* at 889.
4. *Id.* at 890. The *Daubert/Coon* standard refers to two cases: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); and *State v. Coon*, 974 P.2d 386 (Alaska 1999). In *Daubert*, the Supreme Court articulated five non-exclusive factors to be used in determining the admissibility of an expert witness's scientific testimony. 509 U.S. at 593–95. The Alaska Supreme Court adopted the *Daubert* standard in *Coon*. 974 P.2d at 402.
5. *Sharpe*, 435 P.3d at 889.
6. *Id.* at 891–92.
7. *Id.* at 900.
8. *See id.* at 899 ("We do not take these concerns lightly: the record on appeal is limited to the testimony and exhibits in the superior court's case file, so there is a non-negligible risk that reviewing the validity of scientific evidence de novo could lead us or the court of appeals to decide a case involving the admissibility of scientific evidence based on incomplete information.").

appeal is as complete as practicably possible, as the record is now subject to a more searching review by the appellate court.[9] Part II details the case histories of both *State v. Sharpe* and its predecessor, *State v. Coon*. Part III discusses the important practical impact of *State v. Sharpe* for trial-level practitioners and notes key aspects of the record that will likely be reviewed by appellate courts.

II. CASE DESCRIPTIONS

The supreme court first considered the standard of review for scientific evidence admitted under *Daubert* in Alaska state courts in *State v. Coon*.[10] In *Coon*, the defendant, George Coon, was found guilty of making terroristic telephone calls.[11] In securing the conviction, the State retained a voice analysis expert to complete a voice spectrographic analysis of the calls.[12] The expert compared the voice on the answering machine with voice exemplars provided by Coon.[13] On appeal, the supreme court in *Coon* faced the issue of whether to adopt the recently-decided *Daubert* standard or to retain the previous requirements under *Frye v. United States*[14] for the admission of scientific evidence through experts.[15] Ultimately, the supreme court adopted the *Daubert* test, rejecting *Frye* as inconsistent with the Alaska Rules of Evidence.[16] Further, the court applied an abuse of discretion standard for reviewing *Daubert* rulings, stating that "[s]uch rulings are best left to the discretion of the trial court."[17]

The lone dissenter in *Coon*, Justice Fabe, concurred in part with the judgement, agreeing with the majority's adoption of the *Daubert* standard for scientific evidence.[18] Justice Fabe further agreed that abuse of discretion was the correct standard of review with respect to "the relevance of scientific evidence to particular cases," but believed the court adopted the incorrect standard of review for the "validity of such techniques . . . because the question of a technique's scientific validity is a legal issue that normally does not depend on case-sensitive factual determinations."[19] Further, she warned that the abuse of discretion

9. *See infra* Part III.
10. 974 P.2d 386 (Alaska 1999).
11. *Id.* at 388.
12. *Id.*
13. *Id.*
14. 293 F. 1013 (D.C. Cir. 1923).
15. *Coon*, 974 P.2d at 389.
16. *Id.* at 395.
17. *Id.* at 399.
18. *Id.* at 403 (Fabe, J., concurring in part and dissenting in part).
19. *Id.*

standard would cause inconsistencies in the admission of scientific evidence that appellate courts would be unable to resolve.[20] The majority disagreed with this critique, countering that a de novo standard would not "adequately take account of the reality of the judicial process and the variable state of science."[21] The majority was particularly concerned that the record on appeal would not contain adequate and relevant data regarding the scientific method at issue.[22]

In *Sharpe*, the supreme court revisited the *Coon* standard of review for the admissibility of scientific evidence under *Daubert*.[23] *Sharpe* addressed the three cases, consolidated on appeal, in which the defendants—Thomas Alexander, Jyzyk Sharpe, and Jeffery Holt—all sought to admit a comparison question technique polygraph examination into evidence.[24] The superior court held a two-day evidentiary hearing on the admissibility of Alexander's polygraph examination, determining that the evidence met the *Daubert*/*Coon* requirements for scientific validity.[25] Subsequently, in Sharpe's case, the State moved to exclude his polygraph examination.[26] The superior court did not hold a new evidentiary hearing on Sharpe's evidence.[27] Instead, the court relied on the record established in Alexander's evidentiary hearing.[28] The court then admitted the polygraph examination on the basis of the same reasoning in *Alexander*.[29] A third superior court judge examined the same record and order from Alexander's evidentiary hearing to determine the admissibility of Holt's polygraph examination.[30] On review of the same record from *State v. Alexander*,[31] the court in *State v. Holt*[32] determined the evidence was not sufficiently reliable to be admitted and excluded it.[33] Parties filed appeals in all three cases.[34]

The court of appeals affirmed the superior court holding in all three

20. *Id.* at 404. ("Application of an abuse of discretion standard of review to the validity of scientific technique w[ould] most likely lead to inconsistent treatment of similarly situated claims.").
21. *Id.* at 399 (majority opinion).
22. *See id.* (citing State v. Alberico, 861 P.2d 192 (N.M. 1993)) (noting the New Mexico Supreme Court's rejection of de novo review of scientific validity with the same concerns).
23. State v. Sharpe, 435 P.3d 887, 887 (Alaska 2019).
24. *Id.* at 889–91.
25. *Id.* at 890.
26. *Id.*
27. *Id.* at 891.
28. *Id.*
29. *Id.*
30. *Id.*
31. State v. Alexander, No. 3AN-09-11088 CR (Alaska Super. Ct. 2015).
32. State v. Holt, No. 3HO-11-515CR (Alaska Super. Ct. 2014).
33. *Sharpe*, 435 P.3d at 891.
34. *Id.* at 891–92.

cases, finding that there was no abuse of discretion under the *Coon* standard but urging the supreme court to reconsider the standard of review established in *Coon*. Specifically, the court of appeals underscored that the deferential standard meant the reviewing court could not correct discrepancies where reasonable persons can and do differ on evaluating the validity of scientific evidence.[35]

On review, the supreme court consolidated *Alexander*, *Sharpe*, and *Holt*.[36] The court considered whether to revisit the abuse of discretion standard established in *Coon*, as urged by the court of appeals.[37] It held that the prior standard of review understated the potential for inconsistent rulings on the admissibility of scientific evidence to a level that undermined the integrity of the court.[38] Noting that Justice Fabe's dissent in *Coon* correctly identified that the abuse of discretion standard would likely lead to inconsistent application in similar situations, the court further found that a number of commentators had proposed a similar standard to Justice Fabe's critiques.[39] While all federal circuits have adopted the abuse of discretion standard, several state courts have adopted a "stricter" standard of review.[40]

In overruling the *Coon* standard, the supreme court reasoned the posture of these three cases, which relied on the same evidentiary hearing and exact same record but arrived at different determinations of admissibility, precisely demonstrated the inconsistency foreseen by Justice Fabe.[41] The court found it had been too dismissive in *Coon* of the potential for inconsistent rulings and the impact those rulings would have on the integrity of the judicial process.[42] In overruling *Coon*, the court imposed a new hybrid standard: appellate courts must apply a clear error standard to preliminary factual determinations but exercise de novo review when evaluating whether the underlying scientific theories or techniques are scientifically valid under *Daubert*.[43] This independent judgment is to be based on "the evidence presented and the scientific literature available," subject to de novo review.[44]

35. *Id.*
36. *Id.* at 892. The State and Defendants Shape and Alexander filed cross-petitions to the supreme court. *Id.* The court of appeals severed and certified the polygraph question in *Holt*, as the supreme court had already granted review in the other two cases. *Id.* The supreme court accepted certification and consolidated all three cases. *Id.*
37. *Id.* at 893.
38. *Id.* at 898.
39. *Id.* at 896.
40. *Id.* at 897.
41. *Id.* at 898.
42. *Id.*
43. *Id.* at 889–90.
44. *Id.* at 900.

III. ANALYSIS

The supreme court's ruling in *State v. Sharpe* will have an important practical impact for trial-level practitioners who seek to introduce testimony from experts that must meet *Daubert*-style criteria. Specifically, the shift to de novo review will require practitioners to ensure the record on appeal is as complete as practically possible.[45] Under the old abuse of discretion standard, the state of the record was not as important because the appellate court conducted a less searching analysis.[46] The de novo review standard, however, obligates the appellate court to conduct a complete, independent review of the evidence in the record.[47] Given the more intensive nature of this new standard, a comprehensive record is even more important now than when an abuse of discretion standard applied.

In initially settling on the abuse of discretion standard, the court in *Coon* emphasized the need for a clear and complete record on appeal under a de novo standard.[48] Specifically, the court expressed concern that the record on appeal cannot be guaranteed to contain all the relevant, recent data.[49] Further, appellate courts might not always have access to adequate scientific literature when exercising independent review.[50] In rejecting the *Coon* abuse of discretion standard, the court in *Sharpe* acknowledged the same concerns.[51] However, the supreme court did not find the issue dispositive in *Sharpe* because the trial courts are also limited to ruling based on information in the record and because appellate courts would have additional time to review literature independently to mitigate a poor record.[52] Thus, a poor record on appeal is still an issue, just one that appellate courts can overcome.

45. *Id.* at 889.

46. Under abuse of discretion, the court will only overturn the trial court's decision if it was arbitrary, unreasonable, or absurd. ALASKA COURT SYS., SELF-HELP SERVICES: APPEALS (2018), http://www.courts.alaska.gov/shc/appeals/appellantsopeningbrief.htm#15.

47. *Id.*

48. *See* State v. Coon, 974 P.2d 386, 399 (Alaska 1999) (citing State v. Alberico, 861 P.2d 192, 169–70 (N.M. 1993)) (noting the New Mexico Supreme Court's rejection of de novo review of *Daubert* qualifications because the assumption a clear record on appeal exists is unrealistic).

49. *See id.* (adopting the reasoning of the New Mexico Supreme Court).

50. *See id.* (adopting the reasoning of the New Mexico Supreme Court regarding the risks associated with de novo appellate review of admissions of scientific evidence where the record lacks adequate scientific literature).

51. State v. Sharpe, 435 P.3d 889, 899 (Alaska 2019) ("[T]here is a non-negligible risk that reviewing the validity of scientific evidence de novo could lead us or the court of appeals to decide a case involving the admissibility of scientific evidence based on incomplete information.").

52. *Id.*

As a result, it is important that trial attorneys create a strong record for potential appeals. The supreme court's analysis in *Sharpe* can serve as a guide for practitioners in creating such a record.[53] The court's analysis suggests appellate review will focus on the following key aspects of a record. First is the experts' testimony, even when the testimony simply cited to other studies.[54] It is as important as ever to ensure the clarity of the experts' testimony at trial. As the court in *Coon* cautioned, the variance in experts' presentation skills can impact courts' understanding of the validity of a technique and therefore their decision on whether to admit evidence as valid.[55]

Second is the review of academic literature independent of the literature mentioned by experts or entered into evidence.[56] This review of outside literature suggests that trial courts should be willing to review additional academic material, at least if it is presented by the parties, given that trial-level decisions must be made in a short timeframe.[57] At a minimum, practitioners should be aware of the full field of literature and take measures to respond to literature that counters their position given that appellate courts may review it, even if opposing counsel does not introduce it. The peer review factor is the one exception to this willingness to review outside literature.[58] As a result, practitioners must be careful to introduce any instances of peer review of the method about which they seek to have an expert testify, although given that this is not grounded in any specific reasoning, this may be subject to later change.

Finally, the court considered "[o]ther relevant factors," including the "danger of a hidden litigation motive" factor in parts of the record that indicated potential witness bias.[59] Practitioners need not do anything more than prepare for cross examination of their expert as usual, since witness bias is a common ground for cross examination.[60] That said, the

53. *Id.* at 902–08.

54. The supreme court reviewed the experts' testimony for every *Daubert* factor. *Id.* at 902–08, 907 nn.147–50.

55. *See Coon*, 974 P.2d at 399 (quoting language from the New Mexico Supreme Court's decision concerning variances in proof of validity of scientific techniques based on different presentations of such proof).

56. The supreme court reviewed independent academic literature for every *Daubert* factor except for peer review. *Sharpe*, 435 P.3d at 902–08.

57. The supreme court's ruling suggests appellate courts should review outside literature when conducting de novo review. Since de novo review is simply a new review of the trial court's decision, trial courts should likewise be able to review outside literature.

58. *Sharpe*, 435 P.3d at 904 (only mentioning studies cited by the expert). The peer review factor examines whether the scientific technique has been examined in peer review studies. *Id.*

59. *Id.* at 908.

60. 31A AM. JUR. 2D *Expert and Opinion Evidence* § 59 (2020).

supreme court's analysis suggests citing numerous studies by one's own expert can be a double-edged sword. Typically, the fact that a proposed expert has conducted studies in the area supports her qualification as an expert.[61] Here, however, the supreme court considered the same fact to be further evidence of the expert's potential bias.[62]

IV. CONCLUSION

State v. Sharpe provides important guidance to trial-level practitioners on preserving a comprehensive record in preparation for a more rigorous appellate standard of review. *Sharpe*'s shift to de novo review means that appellate courts will now conduct a more intensive review of the record when examining expert qualifications that must meet a *Daubert*-style test. Dating back to *Coon*, the supreme court has expressed concern about the need for a clear and complete record on appeal. Helpfully, the supreme court's de novo review in *Sharpe* provides guidance on how to establish such a comprehensive record. First, expert testimony is always critical to the *Daubert* analysis. Second, the appellate courts will review outside academic literature so trial-level practitioners should be prepared to potentially introduce helpful literature beyond what was relied upon by their expert and should be prepared to counter adverse academic literature, even if it is not raised before the trial court by the opposing party. Finally, the de novo review standard amplifies the traditional importance of preparing experts for direct and cross examinations; direct examinations need to be clearer so that appellate courts can later understand the expert's importance, and cross examinations can bring out independent factors the appellate courts may consider in deciding whether an expert meets the *Daubert*-style requirements. Ultimately, by developing these factors considered by the supreme court in *Sharpe*, trial-level practitioners can preserve a comprehensive record ready to withstand a more rigorous standard of review in a post-*Coon* appeal.

61. *See id.* § 40 (2020) (stating expert qualification is based on experts having superior knowledge of the subject matter to the general public).

62. *Sharpe*, 435 P.3d at 908.