No. 14-CV-1350

DISTRICT OF COLUMBIA COURT OF APPEALS

MOTOROLA, INC., et al.,

Applicants/Petitioners,

v.

MICHAEL PATRICK MURRAY, et al.,
Respondents.

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* BUSINESS AND MEDICAL COALITION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

CORPORATE DISCLOSURE

Pursuant to Rule 28(a)(2)(b) of the Rules of the District of Columbia Court of Appeals, *Amici* state that none of the members of the *Amici* Business and Medical Coalition have a parent corporation or subsidiary corporation and that no publically held corporation owns 10% or more of its stock.

I. STATEMENT OF INTEREST

Amici Curiae the Chamber of Commerce of the United States of America, the Medical Society of the District of Columbia, the American Medical Association, the Business Roundtable, the National Association of Manufacturers, Pharmaceutical Research and Manufacturers of America (PhRMA), the Association of Corporate Counsel ("ACC"), the National Federation of Independent Business Small Business Legal Center, and the International Association of Defense Counsel (collectively "*Amici*") submit this brief urging this Court to join the overwhelming majority of States that have adopted the reliability and relevance requirements set forth in Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993), and its progeny, as the governing rule for admissibility of expert testimony in the District of Columbia.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country, including the District of Columbia.

The Medical Society of the District of Columbia is a society of over 2,800 physicians, mostly from the District of Columbia and surrounding counties. The American Medical Association (AMA) is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all American physicians, residents and medical students are represented in the AMA's policy-making process. AMA members practice and reside in all States and in the District of Columbia. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. The AMA and the Medical Society of the District of Columbia join this brief on their own behalves

and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each State, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

The Business Roundtable is an association of chief executive officers of leading U.S. companies working to promote sound public policy and a thriving U.S. economy.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in Washington, D.C. and all 50 States.

The Pharmaceutical Research and Manufacturers of America (PhRMA) represents the country's leading innovative biopharmaceutical research companies, which are devoted to discovering and developing medicines that enable patients to live longer, healthier, and more productive lives.

The Association of Corporate Counsel ("ACC") represents the perspective of in-house lawyers who advise corporate clients on the full range of legal issues that arise in the course of day-to-day business. ACC has over 37,000 individual members who are in-house lawyers employed by more than 10,000 organizations in more than 85 countries.

The National Federation of Independent Business Small Business Legal Center is the nation's leading small business association, representing members in Washington, D.C. and all 50 state capitals.

The International Association of Defense Counsel is an organization of corporate and insurance attorneys whose practice is concentrated on the defense of civil lawsuits. Since 1920,

the IADC has been dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system.

Amici and their members have a significant interest in the standards governing the admissibility of expert testimony in the District. The District of Columbia is one of a vanishingly small number of jurisdictions that continues to follow a 1923 federal circuit court opinion on admissibility criteria for expert testimony. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).[1] The antiquated *Frye* approach inhibits the ability of courts in the District of Columbia to serve as gatekeepers against the admission of scientifically unreliable expert testimony and, thus, places D.C. businesses and healthcare professionals at a significant disadvantage in comparison to those in the vast majority of other States that have adopted *Daubert*.

As this court has noted, "[i]n the past three decades, the use of expert witnesses has skyrocketed" causing "[s]ome commentators [to] claim that the American Judicial hearing is becoming a trial by expert."[2] Purported expert testimony often is the necessary linchpin for tort claims seeking sizable monetary damages. Under *Daubert*, however, businesses and healthcare practitioners have greater assurance that such claims can proceed only if grounded in reliable scientific evidence. Without such protection, however, business owners and physicians face greater pressure to settle unmeritorious cases backed by scientifically dubious but seductive theories that might appeal to a lay jury.[3] This calculus is particularly daunting for small

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[1] *See* Combined Application, Ex. C.

[2] *Girardot v. United States*, 92 A.3d 1107, 1114 (D.C. 2014) (citation omitted).

[3] *See* Margaret A. Berger, *The Admissibility of Expert Testimony*, in Federal Judicial Center, Reference Manual on Scientific Evidence 19 (3d ed. 2011) ("[A]n inability by the defendant to exclude plaintiffs' experts undoubtedly affects the willingness of the defendant to negotiate a settlement.")

businesses, for which the costs of defending a questionable lawsuit through trial can be ruinous. And for physicians, the risk from scientifically-unfounded medical malpractice claims leads to excessively high insurance premiums and pressure to practice defensive medicine that increases the costs of providing healthcare to District residents without any corresponding health benefit.

II. ARGUMENT

Amici fully support the arguments presented in the Petitioners' Opening Brief in support of this court's adoption of Federal Rule of Evidence 702 and *Daubert* as the evidentiary standard for the admission of expert testimony. As *Amici* explained in their earlier brief urging the court to accept review of this case, the *Daubert* framework fits well with this court's prior pronouncements on the judicial role in policing the admissibility of expert testimony,[4] and it is far better suited for the assessment of expert testimony in modern litigation than the antiquated *Frye* Rule.

Amici write separately to explain how the gatekeeping function set forth in Rule 702 and *Daubert* fits within the broader context of D.C. courts' well-established role as gatekeepers against the admission of all types of unreliable evidence. As Judge Fisher recently noted, "[o]ne undoubtedly legitimate interest of evidentiary rules is to exclude unreliable evidence." *McCorkle v. United States*, 100 A.3d 116, 126 (D.C. 2014) (Fisher, J. concurring) (citing *United States v. Scheffer*, 523 U.S. 303, 309 (1998) (providing as examples Rules 702, 802, and 902)). The *Daubert* rule against admission of unreliable expert testimony is itself premised upon three

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[4] *See* Business Coalition *Amici Curiae* Brief in Support of Combined Application at 7-8 (filed Oct. 24, 2014); *see also e.g. In re Melton*, 597 A.2d 892, 903 (D.C. 1991) (trial courts should "function as the gatekeepers for expert testimony," and "may not abdicate [their] independent responsibilities to decide if the bases [for expert testimony] meet minimum standards of reliability as a condition of admissibility") (citation omitted).

general evidentiary protections against unreliable evidence that are each firmly entrenched in D.C. law. First, courts are required to preliminarily assess the admissibility of evidence, even where such assessment turns on questions of fact. Second, courts must be particularly wary of evidence that is not based upon firsthand knowledge because such evidence lacks a basic safeguard of reliability. Third, courts should apply additional reliability screens on certain types of evidence that may have an especially powerful impact on a jury.

Each of these principles is routinely applied in D.C. courts in connection with a variety of evidentiary rules, including rules governing hearsay, percipient witness testimony, the content of writings and recordings, the identification of criminal suspects, and demonstrative evidence. As such, the adoption of *Daubert* would not mark a break from the District's traditional evidentiary rules but, to the contrary, would subject expert testimony to the same type of judicial scrutiny that has long been applied to other evidence that raises similar reliability concerns.

A. *Daubert* Is Consistent With D.C. Law Regarding A Court's Obligation To Make Preliminary Admissibility Determinations.

The trial court's gatekeeping role under *Daubert* is founded upon Federal Rule of Evidence 104(a),[5] which sets forth the procedure that courts in District of Columbia courts generally follow as well in addressing the admissibility of evidence.[6] Rule 104(a) states that "[t]he court *must* decide any preliminary question about whether a witness is qualified, a

[5] *Daubert*, 509 U.S. at 592-93.

[6] *See Jenkins v. United States*, 80 A.3d 978, 991 (D.C. 2013) (explaining that Rule 104(a) "accurately states the rule of evidence we generally follow"); *Roberson v. United States*, 961 A.2d 1092, 1096 & n.11 (D.C. 2008) (applying Rule 104(a)); *Butler v. United States*, 481 A.2d 431, 439 (D.C. 1984) (same); *see also, e.g., Foreman v. United States*, 792 A.2d 1043, 1052 (D.C. 2002) ("the judge must make a [threshold] determination" whether a statement is admissible as an adoptive admission).

privilege exists, or evidence is admissible."[7] Pursuant to Rule 104(a), a court may not avoid its obligation to make admissibility determinations because such determinations involve questions of fact. Rather, "to the extent that these inquiries are factual, the judge acts as the trier of fact." FED. R. EVID. 104 advisory committee's notes.

This court has required trial courts to make preliminary admissibility determinations based upon an assessment of expert witness qualifications for over a century.[8] Moreover, this court has rejected the argument that D.C. courts may not conduct a factual analysis as part of a preliminary admissibility determination. "We agree with the majority of jurisdictions that there is 'nothing exceptional about a court deciding a question such as corroboration or trustworthiness without the jury[.]'" *Fowler v. United States*, 31 A.3d 88, 92 (D.C. 2011).[9] As the court has explained, Rule 104(a) "is the better approach because a 'rule that puts the admissibility [determination] in the hands of the jury does not avoid the danger that the jury might [decide] on the basis of [the evidence] without first dealing with the admissibility question.... As a result, such [evidence] should be evaluated by the trained legal mind of the trial judge." *Butler*, 481 A.2d at 439. This reasoning, offered in the context of the admissibility of co-conspirator statements, mirrors that of federal courts in discussing their gatekeeping responsibility under

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[7] FRE 104 (emphasis added). Rule 104(a) was amended in 2011 as part of a restyling to make the rules more easily understood. *See* FED. R. EVID. 104 advisory committee's notes. Prior to the 2011 Amendment, the Rule stated that "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence *shall be* determined by the court." *See Daubert*, 509 U.S. at 592 n.10.

[8] *See Washington Ry. & Elec. Co. v. Clark*, 46 App. D.C. 88, 98-99 (D.C. Cir. 1917) ("Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial ...") (citing *Lansburgh v. Wimsatt*, 7 App. D.C. 271 (1895)).

[9] *See also Devonshire v. United States*, 691 A.2d 165, 169 (D.C. 1997) (courts use the preponderance of the evidence standard for admissibility determinations that hinge on preliminary determinations of fact).

Daubert. "Although making determinations of reliability may present a court with the difficult task of ruling on matters that are outside of its field of expertise, this is 'less objectionable than dumping a barrage of scientific evidence on a jury, who would likely be less equipped than the judge to make reliability and relevance determinations.'" *Rider v. Sandoz Pharm. Corp.*, 295 F.3d 1194, 1197 (11th Cir. 2002) (quoting *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999)).

The court's gatekeeping role under *Daubert* accordingly fits squarely within this court's existing approach to general admissibility decisions.

B. *Daubert* Is Consistent With D.C. Evidentiary Rules Imposing A Reliability Standard On Non-Primary Evidence.

Just as *Daubert* serves to screen unreliable expert evidence, a wide variety of existing D.C. evidentiary rules protect juries from other sources of unreliable evidence that, like expert evidence, is based on inferences from primary data. The *Daubert* approach is rooted in the recognition that expert testimony presents additional reliability concerns over the testimony provided by ordinary witnesses. Experts are permitted "wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert*, 509 U.S. at 592.[10] In addition, experts may rely upon evidence that is not even admissible in court.[11] Moreover, by its very nature, expert testimony addresses questions that are beyond the ken of the average lay juror. Indeed, expert testimony may not even be presented if jurors are "just as competent as the

[10] *See also Presley v. Commercial Moving & Rigging, Inc.*, 25 A.3d 873, 893 (D.C. 2011) ("[E]xperts may testify on the basis not only of personal observation and evidence admitted at trial, but also other sources relied upon in their fields or specialties.") (internal quotations omitted).

[11] *See Presley*, 25 A.3d at 893 ("In forming an opinion, an expert may rely on facts or data that are not admissible, including hearsay").

expert to consider and weigh the evidence and draw the necessary conclusions."[12] Accordingly, the normal methods by which jurors assess the reliability of percipient fact witness testimony and other lay evidence are not available with expert testimony. For these reasons, *Daubert* requires courts to take a more active role to ensure that the expert's opinion has "a reliable basis in the knowledge and experience of his discipline." *Daubert*, 509 U.S. at 591.

These reliability concerns under *Daubert* comport with those underlying a wide variety of evidentiary rules in the District of Columbia that likewise protect juries from unreliable evidence based upon inferences from primary data.[13] For example, D.C.'s evidentiary rules addressing the admissibility of hearsay and lay testimony, the 'best evidence' rule, and rules regarding the admissibility of eyewitness identification of criminal suspects are similarly premised upon this court's recognition that courts have an obligation to shield juries from unreliable evidence.

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[12] *Minor v. United States*, 57 A.3d 406, 415 (2012).

[13] As a leading *Daubert* scholar, Professor Edward J. Imwinkelried, has noted, '[t]he common law norm is that a proponent should present the trier of fact with primary data – a witness on the stand either reciting factual, sense impressions or quoting directly from a document [he prepared]. Whenever the proponent contemplates deviating from that norm, the proponent must demonstrate both the necessity for the deviation and the reliability of the testimony proffered in lieu of primary data." Edward J. Imwinkelried, *The Next Step After Daubert: Developing A Similarly Epistemiological Approach to Ensuring the Reliability of Non-Scientific Expert Testimony*, 15 Cardozo Law Rev. 2271, 2282 (1994) (noting the additional reliability burdens placed upon proponents of hearsay testimony or secondary evidence of a writing's contents); *see also Daubert*, 509 U.S. at 590 n.9 (defining reliability standard for expert testimony by reference to evidentiary rules governing hearsay)

1. D.C.'s Evidentiary Rules Impose A Reliability Standard For The Admission of Hearsay.

As with expert testimony, hearsay requires jurors to assess primary data – an out-of-court statement – through the prism of a secondary source, be it a document or a sponsoring witness. D.C. courts generally exclude hearsay because "[a] person's out-of-court statement is not always reliable evidence, since it can be informed by bias, or misperception, or it can be an outright lie." *Holmes v. United States*, 92 A.3d 328, 330 (D.C. 2014). "The rule of evidence which renders hearsay inadmissible is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact." *Laumer v. United States*, 409 A.2d 190, 194 (D.C. 1979) (citation omitted).

Hearsay may be admitted, however, if it falls within one of the exceptions to the hearsay rule. These exceptions – much like the standards imposed on expert testimony under *Daubert* – provide conditions whereby courts will admit hearsay statements because "they exhibit certain indicia of reliability." *Mason v. United States*, 53 A.3d 1084, 1098 (D.C. 2012). "[W]here the circumstances surrounding the out-of-court statement satisfy a requisite level of reliability and trustworthiness, the testimony is admitted despite the fact that it otherwise falls within the definition of hearsay." *Morris v. United States*, 389 A.2d 1346, 1350 (D.C. 1978).[14]

Although some hearsay exceptions, such as the business records exception, may present a court with a fairly mechanical admissibility decision, other exceptions require the court to conduct reliability inquiries that can be as fact-intensive as any inquiry under *Daubert*. For

[14] *See Laumer*, 409 A.2d at 199 (court looks to "certain indicia of reliability" to determine whether to recognize an exception to hearsay); *see also, e.g.. Kigori v. United States*, 55 A.3d 643, 653 (D.C. 2012) ("Dying declarations are admitted as an exception to the hearsay rule because they have historically been presumed reliable."); *Pryor v. United States*, 503 A.2d. 678, 682 (D.C. 1986) (a "business record is admissible even if its maker testifies, for it is the record that is the most reliable evidence of what was heard").

example, in determining whether to admit statements against penal interest, a D.C. court is required to undertake a three-step inquiry to ascertain (1) whether the declarant, in fact, made the statement; (2) whether the declarant is unavailable; and (3) whether corroborating circumstances clearly indicate the trustworthiness of the statement.[15] In looking for sufficient evidence of trustworthiness, the court may consider such factors as the time of the declaration, to whom the declaration was made, the existence and quality of corroborating evidence, and the degree to which the statement is against the declarant's penal interest.[16] Likewise, the admissibility determination for the excited or spontaneous utterance hearsay exception involves a three-prong test, under which a court must consider (1) the nature of the startling event which caused the nervous excitement or physical shock in the declarant, (2) the passage of time between the statement and the startling event, and (3) whether the circumstances in their totality suggest spontaneity and sincerity of the statement.[17]

2. D.C. Courts Impose A Reliability Standard on Lay Testimony Through The Requirement of Personal Knowledge.

D.C. courts also ensure the reliability of non-expert evidence through the requirement that fact witnesses have personal knowledge of the events about which they testify. D.C. has adopted Federal Rule of Evidence 602, under which "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of

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[15] *Laumer*, 409 A.2d at 199.

[16] *Id.* at 199-203.

[17] *Welch v. United States*, 689 A.2d 1, 4 (D.C. 1996) (affirming trial court's admission of statement following "a two day pre-trial hearing … during which extensive testimony was taken regarding whether [the declarant's] statements qualified for the excited utterance exception"); *see also, e.g.*, *Foreman* 792 A.2d 1052 (before admitting hearsay statement as an adopted admission "the judge must make a preliminary determination, whether a jury could reasonably conclude that the defendant unambiguously adopted another person's incriminating statement") (internal quotation marks omitted).

the matter."[18] The basis for this exclusionary rule is that "if it appears that the witness has no personal knowledge of the facts and the questions posed do not disclose them, he [or she] could have no reliable opinion on the subject and is incompetent to testify thereon." *Hummer v. Levin*, 673 A.2d 631, 639 (D.C. 1996) (citations omitted).[19]

This court historically relied upon the requirement of personal knowledge to exclude expert testimony on reliability grounds. For example, in *Harvey's Inc. v. A.C. Elec. Co.*, 207 A.2d 660, 662 (D.C. 1965), the court affirmed the exclusion of expert testimony regarding the alleged negligent installation of an electrical system because the expert had not inspected the electrical system until about a year and a half after a power failure. Likewise, in *Monacelli v. Monacelli*, 296 A.2d 445, 448 (D.C. 1972), the court affirmed the exclusion of a psychiatrist who had never met the children to whose mental state he was proffered to opine. That this personal knowledge check on experts has waned with the more modern view of expert testimony only highlights the need for an independent reliability standard for expert witnesses.

3. D.C. Courts Impose A Reliability Standard Through The Best Evidence Rule.

D.C. courts impose another reliability screen on non-primary evidence through the best evidence rule. "The best evidence rule requires that when the contents of a writing are to be proved the original must be produced unless its absence is satisfactorily explained." *Abulqasim*

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[18] *O'Neil v. Bergan*, 452 A.2d 337 (1982) (quoting FRE 602); *see also Ginyard v. United States*, 816 A.2d 21, 41 (D.C. 2003) (applying Rule 602); *Smith v. United States*, 583 A.2d 975, 983-84 (D.C. 1990) (same).

[19] *See also Ohio Valley Const. Co., Inc. v. Dew*, 354 A.2d 518, 523 (D.C. 1976) ("Firsthand knowledge of material facts is one of the most reliable bases for testimony ...").

v. Mahmoud, 49 A.3d 828, 837 (D.C. 2012). Secondary evidence of the contents of the writing is only admissible on proof that the original is lost. *Id.*[20]

Once again, this evidentiary rule reflects the court's concern about admitting non-primary evidence because it may be unreliable. "The elementary wisdom of the best evidence rule rests on the fact that [the recording itself] is a more reliable, complete, and accurate source of information as to its contents and meaning than anyone's description of it." *Fox v. Ginsburg*, 785 A.2d 660, 663 (D.C. 2001) (citation omitted).[21]

4. D.C. Courts Impose A Reliability Screen On Evidence of Criminal Identifications.

Criminal proceedings provide yet another illustration of judicial gatekeeping against potentially-unreliable, non-primary evidence through the admissibility rules governing suspect identification testimony. Here again, the proponent of evidence is seeking to present the jury with a second level accounting by a witness of relevant primary data (the identification of the suspect). And here again, D.C. courts must conduct a preliminary reliability assessment before such non-primary evidence may be admitted.

In D.C. the admissibility of eyewitness identification is determined through a two-part test. First, "the trial court must determine whether the procedures are so impermissibly suggestive that they give rise to a very substantial likelihood of irreparable misidentification." *Greenwood v. United States*, 659 A.2d 825, 827-28 (D.C. 1995). Second, "[i]f the trial court finds undue suggestivity, it must then determine whether the identification was nonetheless

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[20] *See also Gassaway v. Gassaway*, 489 A.2d 1073, 1075 n.4 (D.C. 1985) (D.C. best evidence rule corresponds with FRE 1002).

[21] *See also* 2 McCormick On Evid. § 243.1 (7th ed., database updated March 2013) ("The purpose [of the best evidence rule] is to secure the most reliable information as to the contents of documents, when those terms are disputed.").

reliable."[22] *Id.* In determining whether the identification is sufficiently reliable, the court considers the following five factors: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witnesses degree of attention, (3) the accuracy of his prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation." *Black v. United States*, 755 A.2d 1005, 1008 (D.C. 2000). Unless the court is persuaded, based upon its factual assessment of these factors, that the identification is reliable, it may not be admitted at trial.

C. *Daubert* Is Consistent With D.C. Evidentiary Rules Subjecting Particularly Powerful Evidence To Additional Reliability Scrutiny.

Just as *Daubert* based the need for judicial scrutiny of expert testimony in part on the danger that a jury could give such testimony undue weight, this court has urged trial courts in the District of Columbia to screen myriad types of evidence that may have an overly powerful effect on jurors.

The Supreme Court explained that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty evaluating it." *Daubert*, 509 U.S. at 595. As another court subsequently warned, "expert testimony may be assigned talismanic significance in the eyes of lay jurors[.]" *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2005). "Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than lay witnesses." *Daubert*, 509 U.S. at 595.

This court has raised similar concerns. The court has noted that "[b]ecause expert or scientific testimony possesses an aura of special reliability and trustworthiness, the proffer of such testimony must be carefully scrutinized." *Girardot* 92 A.3d 1114 (quoting *IBN-Tamas v.*

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[22] *Id.*

United States, 407 U.S. 626, 632 (D.C. 1979)).[23] Indeed, these concerns have led this court to urge trial courts to be particularly vigilant in scrutinizing expert proffers, though trial courts have not, as yet, been given the necessary authority to screen out unreliable testimony: "In conducting its scrutiny of the proffer, the trial court must take no shortcuts; it must exercise its discretion with reference to *all* the necessary criteria; otherwise, the very reason for our deference to the trial court's ruling – *i.e.*, the trial court's opportunity to observe, hear, or otherwise evaluate the witness will be compromised." *Burgess v. United States*, 953 A.2d 1055, 1062 (D.C. 2008) (internal quotation marks and alterations omitted).

This court has applied similar reasoning in imposing heightened reliability screens to other types of evidence under D.C. law. For example, "[i]t is generally acknowledged that demonstrative evidence when validly and carefully used has a particularly powerful effect on the finder of fact." *Taylor v. United States*, 661 A.2d 636, 643 (D.C. 1995). "Because of the persuasive power of such evidence, however, courts are obligated to make a thorough foundational inquiry into its reliability before allowing its admission." *Id.* That is because, "[i]f not reliable, demonstrative evidence 'may serve but to mislead, confuse, divert or otherwise prejudice the purposes of the trial.'" *Id.*[24]

Likewise, in the criminal law context, the court has imposed reliability screens on certain types of evidence that might unduly sway jurors to either convict or acquit the defendant. Thus,

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[23] *See also Smith v. United States*, 389 A.2d 1356, 1359 (D.C. 1978) ("Because of the authoritative quality which surrounds expert opinion, courts must reject testimony which might be given undue deference by jurors and which could thereby usurp the truthseeking function of the jury.").

[24] *See also Taylor v. United States* (*Taylor II*), 759 A.2d 604, 608 (D.C. 2000) (same); *see also Hallums v. United States*, 841 A.2d 1270, 1285 (D.C. 2004) (J, dissenting) ("An out-of-court identification of the defendant as the perpetrator of a crime can be powerful evidence with a jury, highlighting the importance of ensuring the statement's reliability" before it may be admitted).

"in a joint conspiracy trial where the government relies on a theory of vicarious liability, statements [incriminating to the defendant] may not be introduced under the statements of party opponent exception to the rule against hearsay – or any other hearsay exception *that is not reliability-based* – unless they are admissible as coconspirators' statements in furtherance of the conspiracy[.]" *Akins v. United States*, 679 A.2d 1017, 1031 (D.C. 1996) (emphasis added). And on the flip side, "[e]vidence that someone other than the accused has committed the crime for which the accused is charged may be presented [only] when there are sufficient indicia that the evidence is reliable." *Burgess v. United States*, 786 A.2d 561, 575 (D.C. 2001).

III. CONCLUSION

The *Daubert* standard for admissibility of expert testimony comports with this court's traditional approach to admissibility for a wide variety of evidence that raises similar reliability concerns. For the foregoing reasons, *Amici* respectfully urge that the court find in favor of the Petitioners.

Respectfully submitted,

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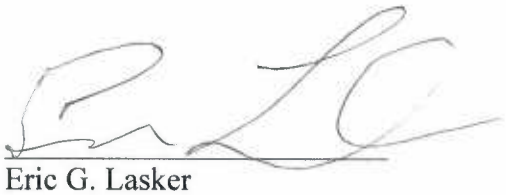

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