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Ix. Evidence

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trol could thus be achieved and maintained with a minimal amount of friction between the EPA and the states.

KATHERINE LEE BISHOP

IX. EVIDENCE

Voiceprints Admissible as a Sole Means of Identification

Scientific evidence has become a useful tool in criminal trials,¹ but an increase in new methods and techniques has necessitated a reconsideration of the viability of such evidence. The admission of scientific evidence poses three dangers to insuring criminal justice.² First, because scientific evidence has an aura of certainty, a jury may accord it undue weight.³ Second, because scientific evidence is generally beyond the comprehension of lay people, it might confuse or mislead a jury to the point of totally rejecting the evidence.⁴ Third, the scientific evidence offered through expert testimony may be insufficiently removed from the knowledge of the average juror,⁵ and the expert may not be properly qualified in a particular field to assist the jury in its search for truth.⁶

of the Clean Air Amendments. Congress plainly intended the federal statute and regulations promulgated thereunder to take precedence over state laws and regulations. By enabling the Administrator to insert his own regulations in a state plan, it provided him with the needed authority to substitute appropriate provisions for inappropriate ones. Thereafter, as legal components of the state plan, the Administrator's regulations may be both federally and locally enforced; violations thereof are violations of a state plan. § 1857c-8(a)(1); see §§ 1857c-7(d)(1), 1857c-9(b).

Civ. No. 74-1013 at 282.

¹ For example, both ballistics evidence and fingerprint identifications have received wide judicial approval. See, e.g., A. MOENSSSENS, R. MOSES & E. INAU, *SCIENTIFIC EVIDENCE IN CRIMINAL CASES* 147, 327 (1973) [hereinafter cited as MOENSSSENS].

² See, e.g., C. McCORMICK, *LAW OF EVIDENCE*, § 203 (2d ed. 1972) [hereinafter cited as McCORMICK]. See generally MOENSSSENS *supra* note 1; J. RICHARDSON, *MODERN SCIENTIFIC EVIDENCE* (2d ed. 1974); Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 1 (1970).

³ McCORMICK, *supra* note 2, § 202 at 485.

⁴ McCORMICK, *supra* note 2, § 202 at 487. See also Note, *Evolving Method of Scientific Proof*, 13 N.Y.L.F. 677, 684-86 (1967).

⁵ McCORMICK, *supra* note 2, § 13 at 29. See also *Fineberg v. United States*, 393 F.2d 417 (9th Cir. 1968).

⁶ McCORMICK, *supra* note 2, § 13 at 30. See also *Fineberg v. United States*, 393

The test developed to protect against the dangers of scientific evidence in criminal trials was announced in *Frye v. United States*:⁷ scientific evidence will be admissible when it has achieved general acceptance by the relevant scientific community.⁸ One scientific technique which has recently received extensive judicial treatment, and has prompted a reconsideration of the *Frye* test, is voice spectrographic analysis — “voiceprints.”⁹ This process involves the use of electronic “pictures” of a voice to identify the speaker. While the admissibility of voiceprints has received varied treatment by the courts,¹⁰ the Fourth Circuit Court of Appeals recently took a particu-

F.2d 417 (9th Cir. 1968).

⁷ 293 F. 1013 (D.C. Cir. 1923).

⁸ In sustaining the rejection of polygraph evidence, the court in *Frye* stated: Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id. at 1014. Compare McCORMICK, *supra* note 2, § 203 at 491. State courts also have followed the *Frye* rule. See, e.g., *People v. Alston*, 79 Misc.2d 1077, 362 N.Y.S.2d 356 (Sup. Ct. 1974).

⁹ The term “voiceprint” is a misnomer, since it implies a status of reliability comparable to that of fingerprints. *United States v. Baller*, 519 F.2d 463, 465 n.1 (4th Cir. 1975). The voiceprint technique involves an electronic device (sound spectrograph) which records responses to several components of speech, thus producing a “picture” of the voice called a voice spectrogram. Based on the theory that each individual uniquely produces certain basic sounds, an expert observer can identify a speaker by comparing his voice spectrogram with that of an “unknown” speaker while aurally comparing the voices. In this manner, the examiner can determine whether the “known” and “unknown” speakers are the same person. For a discussion of voice spectrographic analysis, see Kamine, *The Voiceprint Technique: Its Structure and Reliability*, 6 SAN DIEGO L. REV. 213 (1969). See also Kersta, *Speaker Recognition and Identification by Voiceprints*, 40 CONN. B.J. 586 (1966); Comment, *The Evidentiary Value of Spectrographic Voice Identification*, 63 J. CRIM. C. & P.S. 343, 343-48 (1972). The two primary proponents of voice spectrographic analysis are Lawrence G. Kersta, an electrical engineer and physicist, and Dr. Oscar I. Tosi, a speech and phonetic professor Michigan State University. See, Hennessey & Romig, *A Review of Experiments Involving Voiceprint Identification*, 16 J. FOR. SCI. 183 (1971); Kamine, *The Voiceprint Technique*, *supra*; Comment, *The Evidentiary Value of Spectrographic Voice Identification*, *supra*; Comment, *Voiceprints: The End of the Yellow Brick Road*, 8 U.S.F.L. REV. 702 (1974).

¹⁰ For cases admitting voiceprint identifications, see *United States v. Baller*, 519 F.2d 463 (4th Cir. 1975); *United States v. Franks*, 511 F.2d 25 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Sample*, 378 F. Supp. 44 (E.D. Pa. 1974); *United States v. Wright*, 17 U.S.C.M.A. 183, 37 C.M.R. 477 (1967); *Hodo v. Superior Court*,

larly liberal approach to the admissibility of spectrographic analysis and the application of the *Frye* test.

In *United States v. Baller*,¹¹ the Fourth Circuit upheld the admissibility of voice spectrographic identification. The defendant, Baller, made a series of telephoned bomb threats to a West Virginia coal mine. Authorities at the mine recorded and traced these calls to Baller. Subsequent to his arrest, the police obtained exemplars of Baller's voice, which were sent for spectrographic analysis with the recorded bomb threats to Lt. Ernest Nash, an expert voiceprint examiner. At the trial, Lt. Nash provided expert testimony which linked Baller's voice with three of the bomb threats.¹²

On appeal, Baller claimed that Lt. Nash's testimony should not have been admitted because the technique upon which it was based failed to satisfy the *Frye* test.¹³ In upholding admission of Nash's testimony, the Fourth Circuit applied a liberal test¹⁴ instead of the *Frye* test. The court's test presents difficulties regarding its application to the admissibility of voice spectrographic analysis as a means of identification.

The court's reliance on prior judicial treatment of voiceprint identification¹⁵ ignored several significant aspects of those decisions. The

30 Cal. App. 3d 778, 106 Cal. Rptr. 547 (1973); *United States v. Brown*, 13 Crim. L. Rptr. 2203 (D.C. Super. Ct. 1973); *Alea v. State*, 265 So. 2d 96 (Fla. App. 1972); *Worley v. State*, 263 So. 2d 613 (Fla. App. 1972); *Commonwealth v. Vitello*, ___ Mass. ___, 327 N.E.2d 819 (1975); *Commonwealth v. Lykus*, ___ Mass. ___, 327 N.E.2d 671 (1975); *State ex rel. Trimble v. Hedman*, 291 Minn. 442, 192 N.W.2d 432 (1971). For cases not admitting voiceprints, see, *United States v. Addison*, 498 F.2d 741 (D.C. Cir 1974), *aff'g on other grounds sub nom.*, *United States v. Raymond*, 337 F. Supp. 641 (D.D.C. 1972); *People v. Law*, 40 Cal. App. 3d 75, 114 Cal. Rptr. 708 (1974); *People v. King*, 266 Cal. 2d 437, 72 Cal. Rptr. 478 (1968); *People v. Chapter*, 13 Crim. L. Rptr. 2479 (Super. Ct., Marin Cty., 1973); *State v. Cary*, 49 N.J. 343, 230 A.2d 384 (1967), *on remand*, 99 N.J. Super. 323, 239 A.2d 680 (1968), *remanded*, 54 N.J. 256, 250 A.2d 15 (1969), *aff'd*, 56 N.J. 16, 264 A.2d 209 (1970).

¹¹ 519 F.2d 463 (4th Cir. 1975).

¹² *Id.* at 464.

¹³ *Id.*

¹⁴ *Id.* at 466.

¹⁵ The court noted that "most" pre-1971 cases excluded voiceprint evidence because the technique had not been generally accepted as reliable by the relevant scientific community. *Id.* at 465. See *People v. King*, 266 Cal. App. 2d 437, 72 Cal. Rptr. 478 (1968); *State v. Cary*, 56 N.J. 16, 264 A.2d 209 (1970). In both *King* and *Cary*, the courts held that testimony by Kersta in support of the voiceprint technique was insufficient in light of the overwhelming negative expert testimony, including that of Dr. Tosi. Both courts found that the technique lacked general acceptance by the relevant scientific community. However, in *United States v. Wright*, 17 U.S.C.M.A. 183, 37 C.M.R. 447 (1967), where voiceprint identifications were admitted, the Court of Military Appeals held that since the voice tapes were actually before the trial court for

court disregarded the purposes for which other courts have admitted voiceprint identifications. Most cases upholding admissibility allowed the evidence only for corroboration of aural identifications, not as conclusive evidence of a defendant's identity.¹⁶ Although the *Baller* court briefly discussed aurally-made identifications,¹⁷ it based identification of the appellant directly upon the results of the spectro-

aural comparison, admission of Kersta's testimony was permitted. The court considered any shortcomings in Kersta's qualifications and the technique's reliability insignificant. A vigorous dissent argued persuasively that the court had not applied *Frye* and that the evidence was "absolutely devoid of proof of any general acceptance of mechanical and electronic voice identification devices by the scientific community." 17 U.S.C.M.A. 182, 193 (Ferguson, J., dissenting).

The Fourth Circuit also stressed that two other circuit courts had divided on the voiceprint issue and that a "majority of state courts" had held such identifications admissible. 519 F.2d at 465-466. In conjunction with these state appellate court decisions, the court remarked that New Jersey, which previously excluded such evidence, now favors admissibility, in an apparent reference to *State v. Andretta*, 61 N.J. 544, 296 A.2d 644 (1972). The court's reading of that case, as evidenced by this broad assertion of admissibility, strains its credibility. The New Jersey court did not hold voiceprints admissible, but merely deferred consideration of the technique until the trial court had resolved the issue.

¹⁶ See *United States v. Sample*, 378 F. Supp. 44 (E.D. Pa. 1974) (corroborative of other witnesses' aural identifications and the court's own aural comparison of the defendant's voice with tapes of the unknown speaker); *Alea v. State* 265 So. 2d 96 (Fla. App. 1972) ("As in *Worley v. State* . . . there was other substantial evidence to identify appellant as the perpetrator of the crime." *Id.* at 98); *Worley v. State*, 263 So. 2d 613 (Fla. App. 1972); *Commonwealth v. Vitello*, ___ Mass. ___, 327 N.E.2d 819 (1975); *Commonwealth v. Lykus*, ___ Mass. ___, 327 N.E.2d 671 (1975) (6 of 8 witnesses had made aural identifications of defendant from taped telephone calls); *State ex rel. Trimble v. Hedman*, 291 Minn. 442, 192 N.W.2d 432 (1971). In *Worley*, police, after receiving two telephoned bomb threats, apprehended appellant near the phone booth from which the calls had been made. Subsequently, appellant's fingerprints were found in the booth and the officer receiving the calls aurally identified the appellant's voice. In reviewing the voiceprint technique, the court applied a test less strict than *Frye*. See *McCORMICK*, *supra* note 2, § 203 at 491, and text accompanying notes 33-36 *infra*. The court held that:

[T]he evidence against the defendant was already ample to sustain his conviction, even without the use of voiceprints. Therefore, this decision must be limited by [its] facts. We hold voiceprints were properly admitted to corroborate defendant's identification by other means.

263 So.2d at 614 (emphasis added). The court declined to consider the issue of admissibility of voiceprints as a sole means of identification since that issue was not before the court. *Id.*

The admissibility of aural identifications is undisputed because of its similarity to eye-witness identifications. See, e.g., *State ex rel. Trimble v. Hedman*, 192 N.W.2d at 435.

¹⁷ 519 F.2d at 466-67.

graphic analysis.¹⁸ The Fourth Circuit also ignored the procedural context of two cases upon which it relied.¹⁹ Each case was an administrative proceeding rather than a criminal trial. Both courts noted that the standard of proof under these circumstances was lower than that in a criminal trial and, therefore, voiceprints could be admitted for corroborative purposes without prejudice.²⁰

The court's perfunctory analysis of the prior judicial history of the voiceprint issue led to a more liberal test than that in *Frye*. The court achieved this result by admitting the scientific evidence on the same basis as expert testimony and permitting its weight to be attacked before the jury.²¹ Although the comparison of scientific evidence to expert testimony for testing admissibility has gained support,²² the Fourth Circuit's failure to recognize certain factors in such a comparison weakened its own rationale in upholding the admissibility of the voiceprints.

Because any scientific opinion has an aura of certainty, a jury may accord it "undue weight."²³ Therefore, the judge must initially determine whether the evidence deserves such weight before permitting the jury to consider the evidence. The Fourth Circuit, however, noted that absolute certainty was not a prerequisite to admissibility.²⁴ Al-

¹⁸ *Id.* at 464-65, 467. Two courts warned against the use of voiceprints absent any other means of establishing identity. See *Worley v. State*, 263 So. 2d 613, 614-15 (Fla. App. 1972); *Commonwealth v. Lykus*, ____ Mass. ____, 327 N.E.2d 671, 679 (1975).

¹⁹ *United States v. Sample*, 378 F. Supp. 44 (E.D. Pa. 1974); *State ex rel. Trimble v. Hedman*, 291 Minn. 442, 192 N.W.2d 432 (1971).

²⁰ In *Sample*, the district court considered the government's motion for the revocation of parole. Noting that such a proceeding required a standard of proof lower than that for a criminal trial, the court held the voiceprint technique sufficiently reliable for purposes of that particular proceeding and only for corroborative purposes. In *Trimble*, the Minnesota Supreme Court held voiceprints admissible for purposes of justifying issuance of a search and arrest warrant. In *dicta*, the court noted that voiceprints would probably be admissible *only to corroborate* aural identifications.

²¹ The Fourth Circuit stated that "the admissibility of spectrographic identification turns primarily on whether [the theory of invariant speech] has been sufficiently proved to allow a jury to give the evidence whatever weight it sees fit." 519 F.2d at 465. Some courts have held that "sufficiently proved" is something less than "general acceptance." See, e.g., *Coppolino v. State*, 223 So. 2d 68 (Fla. App. 1968). One commentator has argued that the standard for admissibility should be "reasonable reliability." Boyce, *Judicial Recognition of Scientific Evidence in Criminal Cases*, 8 UTAH L. REV. 313 (1962).

²² See, e.g., *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973). See generally, MOENSSENS, *supra* note 1; Note, *Evolving Methods of Scientific Proof*, 13 N.Y.L.F. 677 (1967).

²³ 519 F.2d at 466. See *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973); Luchetti, *The Voiceprint Technique: How Reliable is Reliable?*, 63 ILL. B.J. 229 (1975).

²⁴ 519 F.2d at 466.

though cases admitting the voiceprint for corroborative purposes only²⁵ have acknowledged this lower standard, the implication in each decision is that the admission of voiceprints as a sole means of identification requires a higher standard of reliability.²⁶ The Fourth Circuit's test, unlike the *Frye* standard, fails to guarantee the presence of this higher level of reliability achieved by requiring that the scientific technique gain the general acceptance of experts in the field to which it relates. Moreover, scientific evidence is, by its very nature and requisite expertise, difficult to rebut. Therefore, the *Baller* court reasoned that a proper procedure must exist for insuring adequate rebuttal of any proffered scientific evidence. While adequacy of rebuttal under *Baller* depends on counsel's competence in introducing such evidence,²⁷ the *Frye* test objectively insures this adequacy by requiring that the scientific community must accept the technique before it is admissible.²⁸ Despite these two dangers, the Fourth Circuit held that voiceprint evidence should be admitted on the same basis as other expert testimony.²⁹

Additionally, the Fourth Circuit overlooked the requirements for the admissibility of expert testimony. A basic prerequisite to the introduction of expert testimony is a demonstration that any "process used as an intermediate [to determine an ultimate fact] is trustworthy and reliable."³⁰ This insures that the trial judge will determine

²⁵ See text accompanying notes 15-18 *supra*.

²⁶ See, e.g., *Worley v. State*, 263 So. 2d 613, 614-15 (Fla. App. 1972); *Commonwealth v. Lykus*, ___ Mass. ___, 327 N.E.2d 671, 679 (1975); *State ex rel. Trimble v. Hedman*, 291 Minn. 442, 192 N.W.2d 432, 434 (1971).

²⁷ 519 F.2d at 466. Such an approach is very subjective because the procedure contemplates merely providing a pool of experts with no initial determination of the technique's reliability.

²⁸ See Comment, *The Voiceprint Dilemma: Should Voices Be Seen and Not Heard?*, 35 Md. L. Rev. 267, 276, 290-91 (1975).

²⁹ 519 F.2d at 466. The court cited *United States v. Stifel*, 433 F.2d 431 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971). In *Stifel*, the Sixth Circuit purported to apply *Frye* in admitting neutron activation analysis, but then noted that admission of the evidence was for the discretion of the judge, after which the jury could weigh the quality of the evidence. 433 F.2d at 433-439. The court appeared to relax the *Frye* test while purporting to apply it.

³⁰ MOENSSSENS, *supra* note 1, at 3. Voice spectography is just such an "intermediate." See McCORMICK, *supra* note 2, § 13 at 31. A second prerequisite is that the fact to be inferred from the testimony must be beyond the experience of the juror. See, e.g., *Fineberg v. United States*, 393 F.2d 417, 421 (9th Cir. 1968). See generally MOENSSSENS, *supra* note 1. The final prerequisite is that the knowledge possessed by the testifying expert must be sufficiently extensive and specialized such that his opinion will probably aid the jurors in their search for truth. 393 F.2d at 421. Both Dr. Tosi and Lt. Nash have qualified as experts in the post-1971 cases.

the reliability of the scientific technique upon which the offered expert testimony is based before submitting it to the jury. The test utilized in *Baller*, however, overlooked this requirement. The Fourth Circuit held that the jury should be permitted to determine the weight of the voiceprint testimony. However, the scientific evidence upon which that testimony is based must be reliable. Such a determination must be made by the judge before placing the evidence before the jury.³¹ Thus, the *Baller* court ignored the expert testimony admissibility requirement, and its similarity to the *Frye* standard, and held that the trial judge did not abuse his discretion by permitting the jury to consider the reliability of the voiceprint technique because he "adequately guarded against dangers inherent in the use of newly discovered scientific tests."³²

The Fourth Circuit noted the extensive *voir dire* examination of the voiceprint technique as supporting the judge's action.³³ However, the court failed to make the in-depth analysis which characterized prior judicial evaluations of the technique's reliability.³⁴ Despite the absence of any new evidence as to the technique's reliability, the court concluded that evidential misuse of the voiceprint technique was prevented by the availability of experts to rebut the principle underlying the technique.³⁵ Such an observation, however, does not resolve the necessary judicial determination of the technique's reliability. Significantly, only two experts in the field of voiceprint identification have testified in unequivocal support of the technique's reliability.³⁶ Relying on that testimony, the Fourth Circuit concluded that

³¹ See Comment, *Voiceprints — The Admissibility Question: What Evidentiary Standard Should Apply?*, 19 St. Louis U.L. Rev. 509, 527-528 (1975).

³² 519 F.2d at 466. For discussion of the court's perception of the dangers inherent in the use of new scientific tests, see text accompanying notes 23-28 *supra*.

³³ 519 F.2d at 466.

³⁴ See, e.g., *People v. Law*, 40 Cal. App. 3d 75, 114 Cal. Rptr. 708 (1974); *Commonwealth v. Lykus*, ___ Mass. ___, 327 N.E.2d 671 (1975). One commentator has noted a "snowball effect" among the jurisdictions which have considered the voiceprint issue. Jones, *Evidence Vel Non: The Non Sense of Voiceprint Identification*, 62 Ky. L.J. 301, 302 (1974).

³⁵ *But see United States v. Addison*, 498 F.2d 741, 743-44 (D.C. Cir. 1974). See also Comment, *The Voiceprint Dilemma: Should Voices Be Seen and Not Heard?*, 35 Md. L. Rev. 267, 290-91 (1975).

³⁶ Dr. Tosi and Kersta are the two experts who have given unequivocal supportive testimony. See note 9 *supra*. Another expert, Dr. Ladefoged, has given only qualified support to the technique's reliability. See *United States v. Addison*, 498 F.2d 741 (D.C. Cir. 1974), *aff'g on other grounds sub nom.*, *United States v. Raymond*, 337 F. Supp. 641 (D.D.C. 1972). Lt. Nash has qualified merely as an expert examiner of voice spectrograms, although he has been questioned for support of the technique's admis-

the technique's reliability had been sufficiently demonstrated to permit its consideration by the jury.

Furthermore, the *Baller* court concluded that the trial judge's jury instructions adequately protected against the dangers inherent in scientific evidence. The instruction which permitted the jury to disregard Lt. Nash's opinion if it determined that the voiceprint technique was not sufficiently reliable, accurate, and dependable,³⁷ allowed the jury to make a decision which the judge should have made. Such an instruction ignored the prerequisites for introducing expert testimony³⁸ and the dangers in initially exposing the jury to scientific evidence.³⁹ Moreover, the instruction that permitted the jury to disregard Lt. Nash's testimony if it ascertained that the reasons supporting the testimony were unsound or of doubtful reliability⁴⁰ also allowed the judge to abdicate his responsibility of determining the trustworthiness and reliability of the process used.⁴¹ Based on these instructions, the court found that determination of the voiceprint technique's reliability and soundness could be safely left to the jury.⁴²

sion. The use of Kersta as an expert on the technique's reliability is questionable. See *People v. King*, 266 Cal. App. 2d 437, 72 Cal. Rptr. 478 (1968); Note, *Voiceprint Identifications*, 61 GEO. L.J. 703, 724 (1973).

³⁷ 519 F.2d at 467.

³⁸ The scientific technique upon which the expert testimony is based must be reliable. See text accompanying notes 30-32 *supra*. There is doubt whether the technique is reliable. See Jones, *Evidence Vel Non: The Non Sense of Voiceprint Identification*, 62 Ky. L.J. 301, 316 (1974).

³⁹ The dangers inherent in scientific evidence are the aura of certainty surrounding such evidence, its tendency to confuse or mislead the jury, and the possibility of the testifying expert having insufficient qualifications. See text accompanying notes 2-6 *supra*. The judge had a duty to determine that the reliability of the technique was sufficient to permit a jury to accord it the "undue weight" which scientific evidence carries. To consider the determination of reliability a factual question violates that duty. See text accompanying notes 30-32 *supra*.

⁴⁰ 519 F.2d at 467.

⁴¹ See text accompanying note 30 *supra*. Establishing the reliability required to prove the "soundness" of the theory of invariant speech necessitates general acceptance by the relevant scientific community, which is a determination to be made initially by the judge. A determination of reliability or "soundness" means that the technique has been empirically tested by a number of scientists within the relevant scientific community. If a sufficient number of scientists have had a very high degree of positive results to the test, then the technique will be deemed reliable. Such a determination is merely an application of the *Frye* test. See, e.g., Comment, *Voiceprints — The Admissibility Question: What Evidentiary Standard Should Apply?*, 19 St. Louis U.L. Rev. 509, 526 (1975).

⁴² A basic prerequisite for admitting expert testimony is that the offered testimony must be beyond the experience and knowledge of the average juror. See text accompanying note 30 *supra*. The court strained its credulity in expecting the jury to weigh the

The test used by the *Baller* court failed to protect adequately against the dangers of admitting voiceprints. Under this test, the issue of the voiceprint technique's reliability was placed before the jury before utilizing the voiceprint results as the sole determinant of Baller's identity. Since the courts which have considered the introduction of voiceprint identifications have admitted the evidence for corroborative purposes only,⁴³ the propriety of placing the reliability issue before the jury is questionable when voiceprints are used for direct identification.

The admissibility test formulated by the *Baller* court does not obviate the necessity for an initial ascertainment of the scientific technique's reliability. Such a determination is especially necessary in the case of voiceprint identifications because of the doubt remaining within the scientific community concerning the reliability of identifications based upon spectrographic analysis.⁴⁴ Moreover, even those courts that have admitted voiceprint identification testimony for corroborative purposes only have indicated that admission of voiceprints as a sole means of identification should be subject to a higher standard of reliability.⁴⁵ This higher standard increases the necessity for initial judicial determination of the technique's reliability. The Fourth Circuit, however, permitted a jury determination of the reliability of the technique and therefore the weight of the evidence. Since the voiceprints were the sole means of identifying Baller, the court failed to assume fully the responsibility imposed by either the *Frye* test or the expert testimony test which it utilized.

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expert's testimony and determine the reliability of a technique about which they were ignorant.

⁴³ See text accompanying notes 16-17 *supra*. But see *United States v. Franks*, 511 F.2d 25 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975); *Hodo v. Superior Court*, 30 Cal. App. 3d 778, 106 Cal. Rptr. 547 (1973).

⁴⁴ Dr. Tosi noted that continuing research is most desirable, that the technique has never achieved 100% reliability, that he has always stressed the restrictions on the technique and the standards that must be maintained, and that ultimately, the technique's reliability depends upon the examiner. See Tosi, *Voice Identification*, in *SCIENTIFIC AND EXPERT EVIDENCE IN CRIMINAL ADVOCACY* 241, 267 (Cederbaums & Arnold, eds. 1975). See also, Thomas, *Voiceprint — Myth or Miracle*, in *SCIENTIFIC AND EXPERT EVIDENCE IN CRIMINAL ADVOCACY* 273, 328 (Cederbaums & Arnold, eds. 1975); Jones, *Evidence Vel Non: The Non Sense of Voiceprint Identification*, 62 Ky. L.J. 301, 316 (1974); Comment, *The Voiceprint Dilemma: Should Voices Be Seen and Not Heard?*, 35 Md. L. Rev. 267, 276 (1975).

⁴⁵ See note 16 *supra*.