



Vermont Legislative Research Service

<http://www.uvm.edu/~vlrs/>

This report provides information on the admissibility of Drug Recognition Expert (DRE) testimony in the United States. The Los Angeles Police Department created the first DRE program in 1979; the program has since expanded to all fifty states.¹ To become certified as a DRE, a police officer must complete seventy-two hours of training and pass twelve practice examinations.² DREs use a twelve-step protocol to assess if an individual is impaired.³ Courts at the federal and state level use two main standards to determine the admissibility of DRE testimony in court, pN4.5 ((o)-4.2 (u)-6.1 ne)3 (s)4.-9 (o)-4.1 oxuo ExBb syp and Canada," *Canadian Society of Forensic Science Journal*, 1 (2009),75-79.

⁷ The International Association of Chiefs of Police, "Drug Recognition Experts."

This standard comes from the case, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).²⁵ Under the Frye standard, courts accept testimony if experts in the field generally accept the methods that were used in obtaining the evidence.²⁶ The newer standard that courts in more states widely accept is the Daubert Standard, which incorporates the Frye Standard within its criteria, but adds four more standards of review.²⁷

This standard comes from the case, *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993).²⁸ This standard created five factors that DREs need to satisfy in order for their evidence to be admissible:

1. whether the theory or technique in question can be and has been tested;
2. whether it has been subjected to peer review and publication;
3. its known or potential error rate;
4. the existence and maintenance of standards controlling its operation; and
5. whether it has attracted widespread acceptance within a relevant scientific community²⁹

All Federal courts use the Daubert Standard.³⁰ State courts use either the Daubert Standard or its predecessor, the Frye Standard, or in some cases a variation of one of the two standards.³¹

This section of the report examines examples of the admissibility of DRE evidence in three states: Nevada, Washington, and Maine. Nevada's standard is unique in that it uses a variation of the two standards discussed above.³² Washington was one of the first two states to legalize marijuana, and its use of the Frye Standard may provide lessons for other states considering marijuana legalization.³³ Finally, this report examines the standard used by Maine because it is similar in land size and population to Vermont.

²⁵ Ryan, "Daubert Standard."

²⁶ Ryan, "Daubert Standard."

²⁷ Ryan, "Daubert Standard."

²⁸ Ryan, "Daubert Standard."

²⁹ Ryan, "Daubert Standard."

³⁰ Ryan, "Daubert Standard."

³¹ Ryan, "Daubert Standard."

³² Ryan, "Daubert Standard."

³³ National Conference of State Legislatures, "Marijuana Overview," Accessed February 25, 2019.

<http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.

DRE Accuracy by Specific Drug Use:

	Cannabis	Stimulants	Depressants	Narcotics
Sensitivity	79.0%	92.6%	56.8%	85.

Furthermore, skeptics of the DRE protocol claim that a test of subjective nature should not be acceptable as scientific evidence.⁶⁹ The 12th step of the DRE protocol requires law enforcement to support the findings of the examination with a toxicology report (toxicology reports cannot be the sole measurement of impairment because in cases with marijuana, suspects may have high quantities of THC in their system without exhibiting symptoms of impairment).⁷⁰ As stated previously, the accuracy of the DRE protocol ranges from 83.5 percent to 94.8 percent and the findings are always supported by a toxicology report.⁷¹ In *Williams v. State* (1998)⁷² the Court of Appeals for Florida, the court stated, "the general portion of the DRE protocol is nothing more than objective observations and simple tests which are easily performed and commonly understood."⁷³ Therefore, the current state of knowledge supports the claims that the DRE protocol is an objective process that is considered scientific in its execution.

Every state has incorporated a version of DRE protocol, and judges at both the state and Federal level have considered it admissible evidence. Despite skepticism in some parts of the academic and political communities, state courts claim that every part of the DRE process is admissible under *Daubert*, *Frye*, or a modified version of either standard.