

BOARD OF CONTRIBUTORS Higher standard proposed for Florida

Elevating scientific evidence standards improves justice

Commentary by William Shepherd

The criminal justice area is one in which there is no room for error. The law has set its highest standard of proof for matters concerning our citizens' liberty. This high standard protects us all.



Shepherd

Sadly, with the DNA reviews and exoneration over the last decade, we have learned that we have not always met the high standard we have set for ourselves. The work of the national Innocence Commission, and our own Florida Innocence Commission, has helped all of us focus on ways we can do better.

One concrete way we can do better is by elevating the scientific evidence that is presented in court to Florida's juries. An elevation of the scientific standard from Frye to Daubert will enhance the tested evidence that sometimes forms the basis of criminal cases. The Florida Legislature is considering this important issue in Senate Bill 378 sponsored by Sen. Garrett Richter, R-Naples, and House Bill 243 sponsored by Rep. Larry Metz, R-Yalaha.

Frye too often allows expert testimony that is the product of pure opinion by an expert. While this might

sound appealing, it is the slippery slope to junk science.

Daubert on the other hand allows the court to serve as gatekeeper to ensure the testimony is based on sufficient facts or data, is the product of reliable principles and methods, and that the witness has applied those principles and methods reliably to the facts. This Daubert standard is applied in all federal courts and the majority of state courts around the country.

The enhanced admissibility standard will improve the overall system and impact the government and the defendant equally. A flawed prosecution expert, whose testimony is based on Frye science, will be excluded to protect a defendant from wrongful incarceration. Likewise, a guilty defendant will not be able to rely on scientific trickery to win an unwarranted acquittal. We should do everything we can to prevent having to apologize to a former inmate for years spent in prison for a crime he did not commit and at the same time strive to prevent having to explain to a grieving mother why her daughter's killer was walked out the courtroom door by a junk-science defense.

There has been a question raised

EVIDENCE

about the potential cost of elevating the caliber of scientific testimony. That concern is unwarranted. The bulk of criminal expert testimony is repeat testimony about the lab results related to narcotics, the ballistics tests related to gun crimes, and the fingerprint or DNA testing related to identity. All of these

tests are current Daubert-approved tests that are used by the DEA, ATF and FBI in federal courts throughout our state every day. Once the states' courts confirm those

Daubert-tested results used in federal courts, those issues will be settled law just as they are settled in those same types of cases now under Frye.

The benefit to the Florida justice system comes not in the repeat matters that make up the bulk of the criminal practice, but in the complex cases that require more sophisticated expert testimony to explain. In some cases, that testimony comes in the form of psychological expert testimony and in other cases it comes in the form of accounting or financial experts. It is in these novel areas of prosecution and

defense that the Daubert standard will add its value.

When the federal court system moved to a Daubert standard in 1993, there was uncertainty on the impact of the courts. As a federal law clerk at the time the new standard was first being litigated, I can assure you that there were concerns in the federal courthouse about the new work that the Daubert standard would generate. That concern proved unwarranted. Federal litigators, including the Department of Justice and the criminal defense bar, adapted to the standard and now operate in a Daubert world. Assistant state attorneys who work on cooperative cases with their federal counterparts currently work in a Daubert evidence world as well.

Every professional who works in the field of criminal justice wants to take advantage of the tools available to improve the system. One of those key tools is the Daubert evidence standard. In the ongoing debate over Daubert in civil litigation, do not ignore its real value: Improved justice when liberty is the issue.

William Shepherd is a partner with Holland & Knight in West Palm Beach. He is a member of the firm's white-collar defense team and represents individuals and corporations in state and federal investigations and grand jury investigations. He is the former statewide prosecutor and serves as chair-elect of the American Bar Association's Criminal Justice Section.

LEGISLATIVE BRIEFS

PROPERTY TAX CUT PROPOSAL DIES IN HOUSE COMMITTEE

A ballot proposal that would further slash local property taxes for Florida homeowners is dead after a tie vote in a House committee.

Opponents say the proposed state constitutional amendment (HJR 1289) would shift the tax burden to businesses and other non-homestead properties.

They also argued Tuesday that it amounted to the Legislature "bullying" local governments.

Supporters say the proposed "super exemption" would help cure inequities among homeowners created by the existing Save

Our Homes amendment. One advocate noted it would be a step toward eliminating property tax and replacing it with a sales tax increase.

Voters still will get a chance to cut property taxes through another proposal lawmakers already have placed on the November ballot.

Amendment 4 includes a smaller super exemption for homeowners and relief for non-homestead properties. **(The Associated Press)**

EDUCATION BUDGET INCLUDES RISE IN TUITION, \$400M CUT

The Senate boosted college tuition by 3 percent and doled out a one-time, \$400 million cut to state universities as part of the allocations that began trickling out of the

Senate on Tuesday.

Tuition for work force education would also increase by 3 percent. Universities would be allowed to increase tuition by 15 percent under the state's differential tuition policy, but while that hike is assumed in the Senate's budget, it isn't mandatory.

The \$400 million cut to general revenue is a one-time reduction in nonrecurring revenue that would likely be restored next year, according to Higher Education Budget Subcommittee Chair Evelyn Lynn, R-Ormond Beach. **(News Service of Florida)**

LAWMAKER LOBBIES FOR NEW UNIVERSITY TO BE ONLINE ONLY

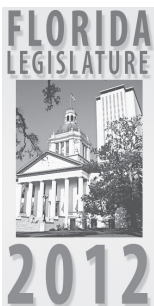
If Florida is going to open a 12th state university, it ought to be one that's focused entirely on delivering online courses, Rep.

Will Weatherford said Tuesday.

In a radio interview, Weatherford, R-Wesley Chapel, who is in line to be the next House speaker, said he was asking the state university system Board of Governors to study the issue. With more and more students studying online, it makes sense financially to create a virtual university, Weatherford said.

"You don't have to build dorms, you don't have to build a football stadium," he said, noting that more and more college and university students now are non-traditional students who don't live on campus and aren't caught up in the traditional campus-based student lifestyle.

Last year, about half the state's college students took at least one online class. **(News Service of Florida)**



Circuit, District, Appellate MEDIATOR

(new photo, same guy)



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FROM PAGE A3

EVENTS

Dade County Bar Association Real Property Committee:

"Tips on buying debt and judgments," with Lisa B. Markofsky and Stuart T. Kapp, both of Proskauer Rose, noon, Bankers Club, One Biscayne Tower, 14th floor, Miami. Cost: \$35 members, \$45 nonmembers, \$50 at door. Email info@dadecountybar.org.

Broward County Women Lawyers Association:

Family Law Case update with Magistrate Barbara Beilly, noon, The Riverside Hotel, 620 E. Las Olas Blvd., Fort Lauderdale. Cost: \$35 members, \$40 nonmembers, \$30 judiciary. Email: rsvp@bcwla.com.

Feb. 9

Florida Association for Women Lawyers, South Palm Beach County chapter: Luncheon with presentation by Penny Morey on business

tips for your legal practice, 11:45 a.m., Seasons 52, 2300 NW Executive Center Drive, Boca Raton. Call (561) 732-7600 or go to www.sinatrallegal.com.

Broward County Hispanic Bar Association:

Luncheon with Broward Chief Circuit Judge Peter Weinstein, 11:45 a.m., The Tower Club, 100 SE Third Ave., Fort Lauderdale. Cost: \$20 members and judges, \$25 nonmembers. Email carmen@cuetoslaw.com.

Dade County Bar Association Probate & Guardianship Committee:

Appraisals of personal property and their effect on probate, guardianship and tax proceedings with Marjorie J. Carr, noon, Lawson Thomas Courthouse Center, 175 NW First Ave., Miami. Cost: \$10 members, \$20 nonmembers. Call (305) 371-2220.

Dade County Bar Association Young Lawyers Section:

Lunch with the judges with 3rd DCA Judges Vance E. Salter, Frank A. Shepherd and Richard J. Suarez, noon, The Bankers Club, One

Biscayne Tower, 14th floor, Miami. Cost: \$35 members only. Call (305) 371-2220.

South Florida chapter of the Association of Legal Administrators: Broward Group lunch meeting and roundtable discussion, noon, Timpano's, 450 E. Las Olas Blvd., Fort Lauderdale. Cost: \$25 members, \$30 nonmembers. Email: jpawloski@ftl-law.com.

The Federal Bar, South Florida chapter:

31st annual judicial reception, 5:30 p.m., Hyatt Regency, 400 SE Second Ave., Miami. Cost: \$50 nongovernment lawyers, \$25 public sector/public interest lawyers and academics. Email federal-bar.southflorida@gmail.com.

Palm Beach County Bar Association, Young Lawyers Section:

Florida Panthers vs. Los Angeles Kings, 7:30 p.m., Bank Atlantic Center, One Panther Parkway, Surnise. Cost: \$50, includes chartered bus. Email jwyda@schwarzberglaw.com.