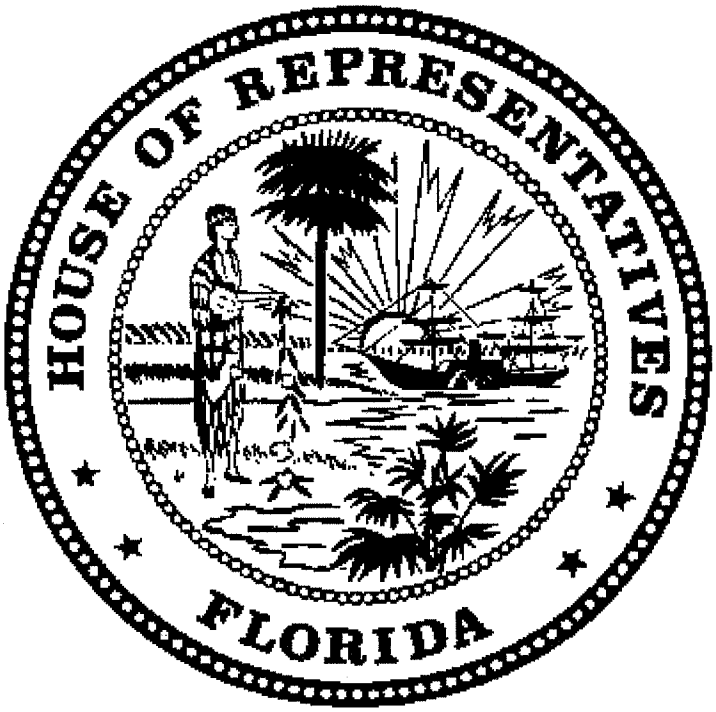


Judiciary Committee

Wednesday, February 1, 2012
8:30AM
404 HOB

Action Packet

Dean Cannon
Speaker

William Snyder
Chair

COMMITTEE MEETING REPORT

Judiciary Committee

2/1/2012 8:30:00AM

Location: 404 HOB

Summary:

Judiciary Committee

Wednesday February 01, 2012 08:30 am

CS/HB 189 Favorable With Committee Substitute — Yeas: 15 Nays: 0
Amendment 749251 Adopted Without Objection

HB 243 Temporarily Deferred

HB 401 Favorable With Committee Substitute — Yeas: 16 Nays: 0
Amendment 566403 Adopted Without Objection

CS/HB 437 Favorable — Yeas: 15 Nays: 1

HB 631 Favorable With Committee Substitute — Yeas: 15 Nays: 0
Amendment 007995 Adopted Without Objection
Amendment 489507 Adopted Without Objection

CS/HB 667 Favorable With Committee Substitute — Yeas: 16 Nays: 0
Amendment 441421 Adopted Without Objection

CS/HB 715 Favorable — Yeas: 15 Nays: 0

CS/HB 1193 Favorable With Committee Substitute — Yeas: 15 Nays: 0
Amendment 954641 Adopted Without Objection

HB 4067 Favorable — Yeas: 14 Nays: 0

HB 4069 Favorable — Yeas: 15 Nays: 0

HB 4081 Favorable — Yeas: 15 Nays: 0

PCB JDC 12-02 Favorable — Yeas: 14 Nays: 0

Committee meeting was reported out: Wednesday, February 01, 2012 10:52:25AM

COMMITTEE MEETING REPORT

Judiciary Committee

2/1/2012 8:30:00AM

Location: 404 HOB

Attendance:

	Present	*Absent*	*Excused*
William Snyder (Chair)	X		
Daphne Campbell	X		
Eric Eisnaugle	X		
Matt Gaetz		X	
Tom Goodson	X		
Bill Hager	X		
Gayle Harrell			X
Shawn Harrison	X		
John Julien	X		
Charles McBurney	X		
Larry Metz	X		
Kathleen Passidomo	X		
Ray Pilon	X		
Ari Porth	X		
Elaine Schwartz	X		
Darren Soto	X		
Richard Steinberg	X		
Michael Weinstein	X		
Totals:	**16**	**1**	**1**

Committee meeting was reported out: Wednesday, February 01, 2012 10:52:25AM

COMMITTEE MEETING REPORT

Judiciary Committee

2/1/2012 8:30:00AM

Location: 404 HOB

CS/HB 189 : Unauthorized Copying of Recordings

[X] *Favorable With Committee Substitute*

	Yea	*Nay*	*No Vote*	*Absentee Yea*	*Absentee Nay*
Daphne Campbell	X				
Eric Eisnaugle	X				
Matt Gaetz			X		
Tom Goodson	X				
Bill Hager	X				
Gayle Harrell			X		
Shawn Harrison	X				
John Julien	X				
Charles McBurney	X				
Larry Metz	X				
Kathleen Passidomo	X				
Ray Pilon	X				
Ari Porth	X				
Elaine Schwartz			X		
Darren Soto	X				
Richard Steinberg	X				
Michael Weinstein	X				
William Snyder (Chair)	X				
	Total Yeas: 15	**Total Nays: 0**			

CS/HB 189 Amendments

Amendment 749251

[X] *Adopted Without Objection*

Appearances:

CS/HB 189
Geller, Paul (General Public) - Proponent
Senior Vice President of External Affairs, Grooveshark
201 SW 2nd Street, #209
Gainesville FL

Committee meeting was reported out: Wednesday, February 01, 2012 10:52:25AM

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	____

favorable
2.1.12

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Young offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Paragraph (c) of subsection (1) of section 775.089, Florida Statutes, is amended to read:

775.089 Restitution.—

(1)

(c) The term "victim" as used in this section and in any provision of law relating to restitution means each person who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode, and also includes the victim's estate if the victim is deceased, ~~and~~ the victim's next of kin if the victim is deceased as a result of the offense, and the victim's trade association if the offense is a violation of s. 540.11(3)(a)3. involving the sale, or possession for purposes of sale, of physical articles and the victim has granted the

trade association written authorization to represent the victim's interests in criminal legal proceedings and to collect restitution on the victim's behalf. The restitution obligation set forth in this paragraph relating to violations of s. 540.11(3)(a)3. applies only to physical articles and does not apply to electronic articles or digital files that are distributed or made available online. As used in this paragraph, the term "trade association" means an organization founded and funded by businesses that operate in a specific industry to protect their collective interests.

Section 2. This act shall take effect October 1, 2012.

T I T L E A M E N D M E N T

Remove the entire title and insert:

An act relating to criminal restitution; amending s. 775.089, F.S.; providing that a crime victim entitled to restitution may include a trade association representing the owner or lawful producer of a recording who sustains a loss as a result of physical piracy; providing a limitation of the restitution obligation to specifically exclude acts of online piracy; defining the term "trade association"; providing an effective date.

COMMITTEE MEETING REPORT

Judiciary Committee

2/1/2012 8:30:00AM

Location: 404 HOB

HB 243 : Expert Testimony

[X] *Temporarily Deferred*

Committee meeting was reported out: Wednesday, February 01, 2012 10:52:25AM

States accepting Daubert	*States moving to Daubert*	*States Maintaining Frye*	*Other*
Alabama	Colorado[2]	California	New Jersey
Alaska	Hawaii[3]	Florida	Rhode Island
Arizona	Idaho[4]	Illinois	Utah
Arkansas	Iowa[5]	Kansas	Virginia
Connecticut	Maine[6]	Maryland	
Delaware	Nevada[7]	Minnesota	
Georgia	South Carolina[8]	New York	
Indiana	Tennessee[9]	North Dakota	
Kentucky		Pennsylvania	
Louisiana		Washington	
Massachusetts			
Michigan			
Mississippi			
Missouri[1]			
Montana			
Nebraska			
New Hampshire			
New Mexico			
North Carolina			
Ohio			
Oklahoma			
Oregon			
South Dakota			
Texas			
Vermont			
West Virginia			
Wisconsin			
Wyoming			

[1] Uses a standard that appears to be more stringent than *Daubert*. *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2003).
[2] Rejects the *Frye* standard as too rigid. Courts may use *Daubert* and make admissibility decisions based upon the totality of the circumstances. *People v. Shreck*, 22 P.3d 68 (Colo. 2001).
[3] Rather than expressly adopting *Daubert*, courts use a standard based upon *Daubert* with additional factors developed through state case law. *State v. Vliet*, 19 P.3d 42 (Haw. 2001).
[4] Rejects *Frye*. The *Daubert* standards of whether the theory can be tested and whether it has been subjected to peer-review and publication have been applied, but the court has not adopted the standard that a theory must be commonly agreed upon or generally accepted. *Weeks v. E. Idaho Health Services*, 153 P.3d 1180 (Idaho 2007).
[5] The application of the *Daubert* factors are encouraged, but not required. *Leaf v. Goodyear Tire & Rubber Co.*, 591 N.W.2d 10 (Iowa 1999).
[6] Has adopted some, but not all, of the *Daubert* factors. Uses the *Daubert* factor of published studies, and cites *Daubert* favorably for the proposition that "science implies a grounding in the methods and procedures of science." *State v. MacDonald*, 718 A.2d 195 (Me. 1998).
[7] Has not officially adopted either *Frye* or *Daubert*, but the state supreme court has found *Daubert* and the federal court decisions are persuasive. *Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008).
[8] Rejects *Frye* and uses parts of *Daubert*, including the publications and the peer review of the technique, prior application of the method and type of evidence involved in the case, the quality control procedures used to ensure reliability, and consistency of the method with recognized scientific laws and procedures. *State v. Jones*, 259 S.E.2d 120 (S.C. 1979).
[9] Has not expressly adopted *Daubert*, but finds the *Daubert* factors persuasive in determining admissibility of new scientific evidence. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997).

THE CRIPPLING COST OF THE OUTDATED FRYE STANDARD ON FLORIDA'S CRIMINAL JUSTICE SYSTEM

Ramirez v. State – a case study
542 So. 2d 352 (Fla. 1989)
651 So. 2d 1164 (Fla. 1995)
810 So. 2d 836 (Fla. 2001)
2011 WL 5869217 (Fla. 2d DCA 2011)

- Will the Daubert expert evidence standard require additional hearings and impose greater costs on our criminal courts than what is now experienced under Frye? - **Absolutely not**
- Nothing could be more expensive than Frye. The **four** decisions in *Ramirez v. State* prove the point.
- Look what happened in *Ramirez* under the Frye expert evidence standard:
    - murder of woman in 1983;
    - case finally concluded November, 2011- **28 years of litigation;**
    - Ramirez convicted in 3 separate trials for murder in 1984, 1991, and 1997;
    - all three convictions were reversed **based on the Frye doctrine**.
- In three separate decisions, the Supreme Court made clear just how costly and burdensome the Frye standard is:
    - the defendant has a **constitutional right to a full evidentiary Frye hearing**, with experts;
    - full evidentiary Frye hearings should be held **before** trial;
    - well after trial, at the time of appeal, the appellate court must reassess the state of sound science at the time of appeal – leading to **further hearings and additional costs**.
- In sum, in a case resolved only a couple of months ago, there were:
    - four trials;
    - four Frye hearings;
    - three reversals due to Frye;
    - millions of dollars spent on the Frye and other trial proceedings;
    - **28 years of litigation.**

- What will happen under the modern Daubert standard? **A much less costly and streamlined process.**
- The only empirical study to date found as follows:
- The Effects of the Daubert Trilogy in Delaware Superior Court
  National Center for State Courts, [2005].
    - "The overall impact of Daubert **has been minimal** compared to what was originally feared when the decision came down from the U.S. Supreme Court. Delaware Superior Court was not affected by excessive or unnecessary cost or delay as a result of Daubert".
    - **"Challenges to expert witness testimony are not a frequent occurrence in either civil or criminal cases in the Delaware Superior Court. The practice of holding Daubert hearings is even less frequent.** Daubert motions appeared most frequently in mature cases ready for trial, and **judges typically rendered a ruling on the expert's deposition and attorneys' briefs".**

542 So.2d 352, 83 A.L.R.4th 651, 14 Fla. L. Weekly 119
(Cite as: 542 So.2d 352)

H

Supreme Court of Florida.
Joseph Jerome RAMIREZ, Appellant,
v.
STATE of Florida, Appellee.

No. 66992.
March 16, 1989.
Rehearing Denied May 26, 1989.

Defendant was convicted in the Circuit Court, Dade County, Morton L. Perry, J., of first-degree murder, armed robbery, and armed burglary. Defendant appealed his conviction of first-degree murder and the sentence of death. The Supreme Court held that admission of testimony positively identifying a particular knife as the murder weapon was not harmless error.

Reversed and remanded.

Ehrlich, C.J., and McDonald, J., dissented.

West Headnotes

[1] Criminal Law 110 ⚿481

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k481 k. Determination of Question of Competency. Most Cited Cases

Criminal Law 110 ⚿1153.12(2)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.12 Opinion Evidence
110k1153.12(2) k. Competency of Witness. Most Cited Cases
(Formerly 110k1153(2))

Determination of witness' qualifications to express expert opinion is peculiarly within discretion of trial judge, whose decision will not be reversed absent clear showing of error.

[2] Criminal Law 110 ⚿388.1

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k388 Experiments and Tests; Scientific and Survey Evidence
110k388.1 k. In General. Most Cited Cases
(Formerly 110k388(1))

Supreme Court will accept new scientific methods of establishing evidentiary facts only after proper predicate has first established reliability of new scientific method.

[3] Criminal Law 110 ⚿486(8)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k482 Examination of Experts
110k486 Basis of Opinion
110k486(8) k. Identification of Persons, Things, or Substances. Most Cited Cases

Criminal Law 110 ⚿1169.9

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.9 k. Opinion Evidence. Most Cited Cases

Tool mark identification expert's positive identification of knife as murder weapon was inadmissible due to absence of scientific predicate from independent evidence to show that specific knife can be identified from marks made on human cartilage, even though knife in question could properly have

been admitted as instrument which could have caused murder victim's wounds; furthermore, admission of identification could not be viewed as harmless error, particularly in view of fact that there was some limited evidence from which jury could infer that defendant did not commit offense.

*352 Michael B. Chavies, Miami, for appellant.

Robert A. Butterworth, Atty. Gen., and Charles M. Fahlbusch, Asst. Atty. Gen., Miami, for appellee.

PER CURIAM.

Joseph Jerome Ramirez appeals his conviction of first-degree murder and sentence of death. We have jurisdiction.[FN*] We reverse both the conviction and the sentence of death.

FN* Art. V, § 3(b)(1), Fla.Const.

The relevant facts are as follows. Early Christmas morning in 1983, the body of a twenty-seven-year-old woman was discovered in the Miami Federal Express building where she worked as a night courier. She had died of multiple stab wounds to her *353 body and blunt trauma to her head. Additional injuries included cuts on her hands and back and one stab wound into her chest cartilage. At the scene, police found blood spatters and pools throughout the dispatch area and break room indicative of a struggle. A bloody paper napkin and bloodstained fragments of a missing sixty-seven-pound telex machine were also discovered. The hot water faucet in the women's restroom was turned on full force. One truck had been tampered with and one of the loading bay doors was unlocked. The desk of an employee who sold jewelry had been opened, and a mail bag containing approximately $430 was missing. A hair was discovered on the victim's hand. Experts compared hair samples taken from Ramirez with that hair and determined that the hair found on the victim's hand did not belong to Ramirez.

The police discovered a bloody fingerprint on a doorjamb near the victim's body. From a photograph of the patent partial left thumbprint, a technician found ten points of similarity. Despite the fact that only approximately ten percent of the fingerprint area was discernible, the technician positively identified the fingerprint as belonging to Ramirez, an employee of an independent janitorial company which serviced the Federal Express offices. Based upon the fingerprint identification, Ramirez was arrested and charged with first-degree murder.

Police investigation established that Ramirez had cleaned the Federal Express office on the afternoon of December 24. A week earlier, on December 17, the victim was unable to locate her keys to the building and had duplicates made. The lost keys were never found. Also, on December 17, Ramirez stayed late to do extra cleaning and special arrangements were made to give a key to the manager of the janitorial service. Federal Express's general policy prohibited giving janitors keys. On December 24, Ramirez mentioned to a Federal Express supervisor that the key he had been given on the 17th did not fit a door which he, as a janitor, would have had no reason to use. On December 24, Ramirez inquired about the amount of revenues coming in and was told by the supervisor that they had a good business. Several people including Ramirez were also working in the area that day when the money was counted and placed in the mail bag.

The girlfriend testified that at approximately 6:00 p.m. on Christmas Eve Ramirez returned to their residence. She stated that Ramirez left at around 9:00 p.m. in her Renault automobile to visit the home of some friends and that he was wearing a navy blue sweater with a fox emblem on the front. He remained at his friends' home until approximately 11:00 p.m. The appellant's girlfriend testified that Ramirez had returned home at some time during the night, but that she had not noted the time. However, when she arose at 5:30 a.m., Ramirez was at home. From the time Ramirez left his friends' home until sometime in the early hours of Christmas Day, his whereabouts were unknown.

When asked to produce the clothing he wore on

Christmas Eve night, Ramirez told police the sweater he had worn was at Alvarez Cleaners, but the police were unable to locate a dry-cleaning establishment of that name. An inquiry of other dry cleaners in the area did not turn up the sweater. On December 28, Ramirez volunteered to the police a sweater he claimed to have worn Christmas Eve. The sweater was devoid of any emblem. Ramirez claimed the fox emblem had fallen off in the wash. When the police arrested Ramirez on December 28, they found a department store sales receipt in his wallet which indicated he had purchased the sweater that day. A store employee remembered selling Ramirez the sweater because she noticed his expensive watch. According to his girlfriend, Ramirez had purchased the watch on December 26. His old watch, found in the bedroom of his residence, appeared to have traces of blood on the band.

In the search of the Renault, police found a knife which Ramirez's girlfriend kept in the car for protection. The girlfriend testified that after Christmas she had found the knife in her kitchen sink and *354 washed it. Her daughter returned the knife to the Renault when Ramirez, while cleaning the car, requested it to cut some string. Traces of some type of blood were detected on the knife, but in insufficient amounts to determine their origin. No blood stains were detected on either Ramirez's sneakers or the pants he purportedly wore on the night of the murder. A police technician, who was qualified as a tool mark expert, testified that the knife found in the trunk of the Renault was the specific knife which produced the victim's chest wound.

A detective called by the state related on cross-examination that Ramirez had confessed to a cellmate. The prosecutor had not intended to use this testimony because he had concluded that no confession had been made. Ramirez objected to the testimony and moved for a mistrial. The trial judge determined the cellmate had lied, gave the jury the curative instruction that Ramirez had not confessed, obtained the jurors' assurances that revelation of the alleged confession would not prejudice them, and then denied the motion for mistrial.

During the defense's case, a doctor testified that he treated a cut on Ramirez's left wrist on January 10, 1984. Ramirez told the doctor he cut his wrist with a sharp object while working as a janitor. On cross-examination, the state presented testimony to establish that Ramirez had asked a friend to bring a thumbtack to the jail prior to January 10, 1984. During cross-examination, the state also introduced two paragraphs from Ramirez's sworn statement from the pretrial motion to suppress hearing for the purpose of impeaching statements made by Ramirez which the doctor related at trial. In his prior sworn statement, Ramirez stated he cut his finger on Christmas Eve while picking up glass at an apartment complex, and that his bloody fingerprint could have been left at the crime scene prior to the murder. Other witnesses, including his girlfriend and the arresting officers, testified that his wrists and fingers were not cut on December 25 or December 28.

The jury found Ramirez guilty of first-degree murder, armed robbery, and armed burglary, and unanimously recommended the death penalty. The trial court, in imposing the death penalty, found four aggravating factors: 1) Ramirez had been previously convicted of a violent felony; 2) the capital felony was committed during a robbery and burglary; 3) the capital felony was committed to avoid arrest; and 4) the crime was especially heinous, atrocious, and cruel. In mitigation, the trial court recognized appellant's close family ties. Prior to imposition of the sentence, the trial court reviewed a ten-year-old presentence investigation report.

Ramirez contends his convictions should be set aside because: 1) the trial court erroneously allowed a ballistics and tool mark expert to conclusively identify the knife as the murder weapon; 2) portions of his sworn statement in the motion to suppress were improperly introduced at trial by the state; 3) the state attorney failed to supply the defense with the name of the cellmate to whom Ramirez allegedly confessed; 4) there was insuffi-

cient circumstantial evidence to support a finding of guilt; and 5) the trial court improperly denied his motion to suppress physical evidence. The first ground is dispositive of this proceeding.

Ramirez argues that the trial court, after qualifying a technician as an expert in tool mark identification, erroneously allowed him to conclusively testify that a knife found in the Renault was the knife that killed the victim. The trial court allowed the expert to state, "The result of my examination made from the microscopic similarity, which I observed from both the cut cartilage and the standard mark, was the stab wound in the victim was caused by this particular knife to the exclusion of all others." The technician explained that he had compared a piece of cut cartilage from the body of the victim to knife impressions, using the knife in question, but had made no comparisons with other knives.

In reviewing the record, we find that no scientific predicate was established from independent evidence to show that a specific*355 knife can be identified from the marks made on cartilage. The only evidence received was the expert's self-serving statement supporting this procedure. The medical examiner testified that this type of knife could have made this type of stab wound. The trial judge expressed concern about this type of evidence when he stated, "For the first time in the history of the Florida courts ... I have permitted into evidence knife prints, which the jury considered in the course of arriving at their verdict."

The state, in support of the expert's qualifications, noted that the technician coauthored a scholarly article which positively identified a knife as the tool that caused a particular stab wound to a piece of human cartilage. The procedure the technician utilized in this case was that discussed in the article. The state argues that simply because this technician had not previously testified in court in a knife identification case, he should not be disqualified as a witness. The state suggests we adopt the reasoning of the Supreme Court of Kansas in *State v. Churchill,* 231 Kan. 408, 646 P.2d 1049 (1982), which approved the admissibility of similar evidence concerning a knife mark in human cartilage.

[1] The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error. *Johnson v. State,* 393 So.2d 1069, 1072 (Fla.1980), *cert. denied,* 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981); *Endress v. State,* 462 So.2d 872, 873 (Fla. 2d DCA 1985); *Seaboard Air Line R.R. Co. v. Lake Region Packing Ass'n,* 211 So.2d 25, 31 (Fla. 4th DCA), *cert. denied,* 221 So.2d 748 (Fla.1968). The qualification of the witness is not, however, the primary issue in this case. Rather, the real issue is the reliability of testing methods which form the basis of the witness's conclusion.

[2][3] This Court, as most other courts, will accept new scientific methods of establishing evidentiary facts only after a proper predicate has first established the reliability of the new scientific method. This point is illustrated by recent decisions of this Court. In *Ramos v. State,* 496 So.2d 121 (Fla.1986), we reversed the appellant's conviction and remanded for a new trial because we found that no proper predicate was presented to establish the reliability of dog scent discrimination lineups. As in the instant case, the only evidence concerning the scent discrimination lineup's reliability was the testimony of the dog handler. We have previously rejected, because of an improper predicate of scientific reliability, hypnotically recalled testimony, *Bundy v. State,* 471 So.2d 9 (Fla.1985), *cert. denied,* 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986), and polygraph tests, *Delap v. State,* 440 So.2d 1242 (Fla.1983), *cert. denied,* 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984). We reject the state's argument that, since the Supreme Court of Kansas in *Churchill* admitted testimony that a particular knife caused the wound, without a predicate of scientific reliability, we should do likewise. Clearly, in the instant case, insufficient evid-

ence exists to establish the requisite predicate for the technician's positive identification of the knife as the murder weapon.

We find the testimony positively identifying this particular knife as the murder weapon inadmissible. The knife itself, however, could have been properly admitted as relevant evidence because it was an instrument which *could* have caused the victim's wounds, based on the medical examiner's testimony and the other evidence linking this knife to Ramirez. Specifically, the knife was regularly kept in Ramirez's girlfriend's Renault which he drove; after Christmas his girlfriend found the knife in her kitchen sink and washed it; the knife had bloodstains on it but in insufficient amounts to determine their origin; and samples of blood consistent with the victim's bloodtype were found on the molding of the Renault's trunk.

Having determined that the knife in question could properly be admitted as the instrument that could have caused the victim's wounds, we now turn to the question of whether the erroneous admission of the testimony of the expert, positively identifying*356 the knife as the weapon that caused the wounds, constitutes harmless error. The principles of harmless error set forth in *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986), require the state to establish "beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *Id.* at 1138. As we explained: "[T]he test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." *Id.* Further:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict.

Id. at 1139.

Under the *DiGuilio* test, we do not find that "there is *no* reasonable possibility that the error contributed to the conviction." *Id.* at 1138 (emphasis added). The statements made by the tool mark expert which linked the murder weapon to the defendant quite possibly could have influenced the jury verdict. We find that the testimony of the tool mark expert positively identifying Ramirez's knife as the murder weapon cannot be viewed as harmless error, particularly in view of the fact that there was some limited evidence from which the jury could infer that Ramirez did not commit the offense.

Accordingly, for the reasons expressed, we reverse the convictions and the sentence of death, and remand this cause for a new trial.

It is so ordered.

OVERTON, SHAW, BARKETT, GRIMES and KOGAN, JJ., concur.
EHRLICH, C.J., and McDONALD, J., dissent.

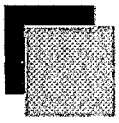
Fla.,1989.
Ramirez v. State
542 So.2d 352, 83 A.L.R.4th 651, 14 Fla. L. Weekly 119

END OF DOCUMENT

The Effects of the *Daubert* Trilogy in Delaware Superior Court

Nicole L. Waters, Ph.D.
National Center for State Courts
Project Director

Jessica P. Hodge, M.S.
University of Delaware
Project Staff



Conclusions

The overall impact of *Daubert* has been minimal compared to what was originally feared when the decision came down from the U.S. Supreme Court. Delaware Superior Court was not affected by excessive or unnecessary cost or delay as a result of *Daubert*. Although *Daubert* has created additional barriers to civil plaintiffs' ability to bring their case to trial, the impact has been isolated to a small number, albeit important and complex, cases.

Overall, counsel in only 16 percent of product liability cases and 8 percent of felony murder and rape cases question an expert's testimony.

As confirmed in other work in this area, challenges to expert witness testimony are not a frequent occurrence in either civil or criminal cases in the Delaware Superior Court. The practice of holding *Daubert* hearings is even less frequent. *Daubert* motions appeared most frequently in mature cases ready for trial, and judges typically rendered a ruling on the expert's deposition and attorneys' briefs. *Daubert* hearings were reserved for complex civil cases and occasionally entertained during a criminal trial. In fact, a well-respected and now retired judge in Delaware, Judge Quillen, stated in *Minner v. American Mortgage*, that if requests for hearings were,

> *"granted in every case, [it] could cripple the trial calendar. While the matter is always discretionary, absent a special reason and need to have the hearings, requests for them should generally be denied."*[43]

Counsel challenged few types of experts. Most common in the product liability cases, the challenged expertise was engineering and/or medicine. Commonly the expertise discussed biomechanical engineering concepts by duo-experts (medical doctors teamed with mechanical engineers). In the criminal cases, the expertise was more varied, but nevertheless included limited backgrounds. Common criminal experts included DNA scientists, psychologists, medical doctors, and a handful of other forensic experts. The case facts obviously predicted the nature of the expertise.

Civil defense attorneys, by and large, filed the majority of motions to challenge expert testimony. The differential impact of these motions was realized by civil plaintiffs, due to the potential dispositive nature of the motion against a lone expert. The plaintiffs' bar experienced the brunt of the impact of *Daubert*. Yet defense attorneys in Delaware did not complain of frequently encountering proffered "junk science." In large part, the civil defense attorneys challenged experts as a tactical maneuver. The DAG's office proceeded with several cases even after a successful *Daubert* motion, indicating that the excluded expert evidence was not the sole evidence against the defendant and therefore, less consequential.

[43] *Minner v. American Mortgage & Guaranty Co.*, 791 A.2d 826 at 845. C.A. No. 96c-09-263-WTQ.

Daubert motions are used effectively as leverage in civil disputes. One civil attorney stated that *Daubert* has become a "sword not a shield" in the game of litigation. In particular, defense attorneys carefully scrutinize plaintiffs' proffered expert witnesses. If a *Daubert* motion is granted and excludes a key or sole plaintiff expert, the defense will likely be granted a summary motion, demonstrating the large incentive to artfully craft a *Daubert* motion. As such, the pre-trial phase becomes of primary interest to any researcher hoping to better understand the impact of *Daubert* at the trial court level.

Because of the scheduling orders in place by most judges, filing *Daubert* motions requires more extensive preparation on the part of the attorneys. *Daubert* criteria necessitate higher quality experts (at times drawing on international experts) and expert reports. Thus, attorneys are required to seek experts who are credentialed; yet at the same time, conduct depositions in a timely manner so that they are prepared to file motions when appropriate.

Although Daubert did not have as big of an impact as many expected, nevertheless, it was perceived as a good doctrine.

Due to the higher quality of experts required by *Daubert*, the criterion set forth within this decision consequently commands more restriction and a higher scrutiny of expert testimony. Whereas in pre-*Daubert* times, counsel motioned the courts to exclude the opposing party's expert on grounds of relevancy, or questioned the expert's qualifications or expertise; in post-*Daubert* times, counsel presented the issues with more specificity. Indeed, the attorneys often cited *Daubert*, yet addressed the general acceptance factor and generally questioned the reliability of the expert's methods. Judges, following the restrictive nature of *Daubert*, often limited the scope of expert testimony (i.e., partial exclusion), which resulted in fewer bench or jury trials and more dispositions outside of the courtroom.

The Court rendered varied rulings on the motions in limine. Most importantly, the ruling was not categorically granted or denied, but often the motion was granted in part and denied in part. Partial exclusions by the Court were in response to attorneys' motions which were not always drafted to exclude an expert, but drafted to limit the scope of the proffered testimony. Any future study on *Daubert* should account for these nuances in the data.

Did *Daubert* alter the method of disposition in a case? The Court did not appear to rule vastly different on the motions in limine in the post-*Daubert* era when compared to the pre-*Daubert* era. Nonetheless, it was revealed that the exclusionary rulings within the post-*Daubert* era less often resulted in a jury or bench trial. In other words, the dispositions oftentimes resulted in a summary judgment or a settlement between parties, not a trial.

In the interest of adhering to the standards set by the scientific method, the results of what impact *Daubert* has had on the Delaware Superior Court admittedly cannot control for the impact of influential factors which alter case processing over time. For instance, the results indicate that fewer cases reached trial post-*Daubert*. It is possible that the judge's new gatekeeper role is an effective way to screen out cases with weak or problematic expert witnesses from reaching trial. In fact, one attorney believed that, "judges do not

want the case to go to trial." However, it is likely that other factors such as effective pre-trial case management or the increased use of alternative dispute resolution techniques also affect this outcome, as compared to the impact of the *Daubert* trilogy alone.

Part of the success of the Delaware Superior Court in avoiding added cost or delay that was feared to accompany the Daubert ruling was because the Court has developed effective case management strategies to properly address Daubert and expert testimony.

The Delaware case, *Minner v. American Mortgage*, emphasized the importance of effective pre-trial case management and reliance upon the discovery record as a basis for ruling.[44] However, case management strategies differed for civil and criminal caseloads. For instance, with civil cases, *Daubert* motions and hearings were primarily conducted pre-trial. On the other hand, criminal cases often involved motions and hearings at trial or at the eve of trial. The caseloads differed, not only because judges were more apt to hear *Daubert* motions in criminal cases due to the higher stakes (i.e., a person's liberty), but also because novel scientific evidence is more common in civil cases. Whereas criminal cases often involve "*Daubertized* experts" (i.e., experts that routinely testify in court—e.g., medical examiners and law enforcement officers), civil cases are more likely to involve new science (e.g., novel prescription medicine).

Although most judges admitted they were not "amateur scientists," *Daubert* certainly required them to take on an active role. In pre-*Daubert* times, judges would let admissibility or credibility issues be sorted out through cross-examination during trial. A judge admitted during the interviews,

> *"Now, the Court has an independent duty to be gatekeeper, even if there is no opposition from the other side. The Court has the responsibility to make sure the expert does not get in, if not qualified."*

Albeit some judges are more active than others, most judges in Delaware actively participated in the voir dire of the expert witness. *Daubert* has bestowed upon trial judges the responsibility to render admissibility decisions. It is a great responsibility that is likely not carried out in a similar manner by judges, yet appeared to be taken very seriously by the Delaware bench. Apropos, one judge stated,

> *"I ask questions of the expert because I'm the gatekeeper and must be satisfied."*

---

[44] *Minner v. American Mortgage & Guaranty Co.* 791 A.2d 826.

> [A]s some commentators predicted, *Daubert*, particularly as extended by *Joiner* and *Kumho Tire*, has become a far broader and stricter test than *Frye* ever was . . . . [I]nstead of being the vanguards of strict scrutiny of scientific evidence, *Frye* courts are stretching *Frye* beyond its original boundaries in a struggle to keep up with Supreme Court precedents. A better solution would be for *Frye* jurisdictions to adopt amended Federal Rule of Evidence 702, which incorporates the holding of the Supreme Court's expert evidence trilogy.

David E. Bernstein, *Frye, Frye, Again: The Past, Present, and Future of the General Acceptance Test*, 41 Jurimetrics J. 385, 385 (2001).

> [I]t is far from clear that *Daubert* employs "a more lenient standard" for admissibility of expert testimony than does the *Frye* standard. See § 13.2. If anything, there seems to be at least anecdotal evidence that *Daubert*, in practice, sets a stricter standard than the *Frye* standard it displaced in many jurisdictions.

Stephen Mahle, *Daubert and Commercial Litigation Expert Testimony*, Bus. Lit. in Fla., Chap. 13 § 1 (2010).

Joseph Sanders, Shari S. Diamond & Neil Vidmar, Legal Perceptions of Science and Expert Knowledge, 8 Psychol., Pub. Pol'y & L. 139, 141 n.13 (2002) (noting that early on, both plaintiffs and defendants attempted to spin *Daubert* in their direction, but that ultimately "in practice the *Daubert* test has been more restrictive than *Frye*").

Lloyd Dixon & Brian Gill, Changes in the Standards for Admitting Expert Evi-dence in Federal Civil Cases Since the *Daubert* Decision xv (2001) (reporting that after *Daubert*, "[federal] judges scrutinized reliability more carefully and applied stricter standards in deciding whether to admit expert evidence")

50 So.3d 1166, 35 Fla. L. Weekly D2827
(Cite as: 50 So.3d 1166)

H

District Court of Appeal of Florida,
Fourth District.
Michael HOOD and Teri Hood, his wife, Appellants,
v.
MATRIXX INITIATIVES, INC., a Delaware corporation, f/k/a Gumtech International Inc., a foreign corporation, and ZICAM, LLC, a limited liability corporation, f/k/a Gel Tech, LLC, an Arizona limited liability company, Publix Super Markets, Inc., a Florida corporation, and Botanical Laboratories, Inc., Appellees.

No. 4D09–1994.
Dec. 15, 2010.
Rehearing Denied Feb. 10, 2011.

Background: Consumer, who alleged that he lost his sense of smell as the result of his use of nasal gel, which was a homeopathic over-the-counter cold remedy, brought products liability, negligence, and breach of warranty claims against gel's developer, gel's manufacturer, and the store which sold the gel. The Circuit Court for the Seventeenth Judicial Circuit, Broward County, Cheryl J. Alemán , J., entered summary judgment for defendants, and consumer appealed.

Holding: The District Court of Appeal, held that otolaryngology professor's expert opinions on causation were admissible.

Reversed and remanded.

West Headnotes

[1] Evidence 157 ⇐555.10

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.10 k. Medical testimony. Most Cited Cases

Evidence 157 ⇐557

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k557 k. Experiments and results thereof. Most Cited Cases

To extent that otolaryngology professor relied upon "new and novel" experiments that he personally conducted regarding nasal gel, which was over-the-counter cold remedy, such as cadaver experiments, the evidence regarding such experiments was not admissible as pure opinion evidence in consumer's products liability action, alleging that he lost his sense of smell as the result of his use of nasal gel; such evidence had to satisfy the *Frye* test governing admissibility of expert testimony that espoused new or novel theories.

[2] Evidence 157 ⇐555.10

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.10 k. Medical testimony. Most Cited Cases

Otolaryngology professor's expert opinions on causation should have been admitted in consumer's products liability action, alleging that he lost his sense of smell as result of his use of nasal gel, which was a homeopathic over-the-counter cold remedy; professor's causation opinion relied upon review of consumer's medical history, clinical examination, professor's personal experience regarding nasal anatomy, published research, and a differential diagnosis, and professor opined that nasal gel was cause of consumer's smell loss, ruling out other causes based on strong temporal association and acute nature of loss of smell following application of gel, and professor's pure opinion testimony did not have to meet *Frye* test governing admissibility

of expert testimony that espoused new theories.

[3] Evidence 157 ⚖555.2

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and sufficiency. Most Cited Cases

Florida continues to adhere to the *Frye* test as the proper standard for admitting novel scientific evidence in Florida, and under *Frye*, the proponent of the expert evidence bears the burden of establishing by a preponderance of the evidence the general acceptance of the underlying scientific principles and methodology; this test requires that the scientific principles undergirding the evidence be found by the trial court to be generally accepted by the relevant members of its particular field.

[4] Evidence 157 ⚖555.2

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and sufficiency. Most Cited Cases

Pure opinion testimony does not have to meet the *Frye* test for admitting novel scientific evidence because this type of testimony is based on the expert's personal experience and training.

[5] Evidence 157 ⚖555.10

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.10 k. Medical testimony. Most Cited Cases

Medical expert testimony concerning the causation of a medical condition will be considered pure opinion testimony, and thus not subject to the *Frye* test for admitting novel scientific evidence, when it is based solely on the expert's training and experience; however, *Frye* will be applied when particular expert testimony concerning the cause of a medical condition is based on a novel scientific methodology.

[6] Damages 115 ⚖185(1)

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k185 Personal Injuries and Physical Suffering
115k185(1) k. In general. Most Cited Cases

Products Liability 313A ⚖390

313A Products Liability
313AIV Actions
313AIV(C) Evidence
313AIV(C)4 Weight and Sufficiency of Evidence
313Ak389 Proximate Cause
313Ak390 k. In general. Most Cited Cases

It is unnecessary for a plaintiff to conclusively demonstrate a causal link or to identify the precise etiology of the medical condition allegedly caused by the substance or predicate event.

[7] Evidence 157 ⚖555.10

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.10 k. Medical testimony. Most Cited Cases

Where the scientific literature recognizes an association or possible etiology between a medical condition and a predicate event, a medical expert may render a medical causation opinion based upon a differential diagnosis.

[8] Evidence 157 ⚖555.10

50 So.3d 1166, 35 Fla. L. Weekly D2827
(Cite as: 50 So.3d 1166)

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.10 k. Medical testimony. Most Cited Cases

The fact that precise causation was still under investigation did not make otolaryngology professor's expert opinion causally linking consumer's use of nasal gel, which was homeopathic over-the-counter cold remedy, to consumer's anosmia (the loss of his sense of smell) new or novel or inadmissible under the more demanding requirements of the *Frye* test for admitting novel scientific evidence.

***1168** Keith Chasin of Law Office of Keith Chasin, Miami, for appellants.

Alan J. Lazarus of Drinker Biddle & Reath, L.L.P., San Francisco, California, and Mercer K. Clarke, Karen H. Curtis and Matthew Cordis of Clarke Silverglate & Campbell, P.A., Miami, for appellees.

PER CURIAM.

Michael Hood and his wife, Teri Hood, appeal the summary final judgment entered in this product liability action in favor of Matrixx Initiatives, Inc., Zicam, LLC (collectively referred to as "Matrixx"), Publix Super Markets, Inc. (Publix), and Botanical Laboratories, Inc. (Botanical). We reverse the summary judgment because we find that the relevant issue—whether the Hoods' expert, Dr. Bruce Jafek, should be allowed to testify that Mr. Hood's use of Zicam gel caused him to lose his sense of smell—is controlled by the standards set forth in the Florida Supreme Court's decision in *Marsh v. Valyou,* 977 So.2d 543 (Fla.2007). Applying *Marsh,* we find that the trial court erred in refusing to allow Dr. Jafek to testify on the issue of causation.

The present action arises out of Michael Hood's claim that he sustained personal injuries as the result of his use of Zicam nasal gel, a homeopathic over-the-counter cold remedy that the Hoods purchased at a Publix grocery store. In particular, Mr. Hood alleged that in November of 2000, he used Zicam to prevent a possible cold. Zicam is used by squirting a gel-like substance, which contains zinc gluconate, into the nose. Mr. Hood alleged that as a result of the application of Zicam gel in his nose, he developed anosmia, otherwise known as the loss of the sense of smell.

The Hoods brought this action against several defendants that were involved in the development, manufacturing, marketing, or retail sale of Zicam nasal gel—Matrixx, Publix and Botanical. Mr. Hood asserted various claims, including strict products liability, negligence, and breach of warranty. In addition, his wife, Teri, brought a claim for loss of consortium.

By way of background, it is generally accepted that there are multiple possible causes of persistent loss of smell, such as upper respiratory infections, sinonasal disease, and head trauma. In an effort to prove the element of causation, the plaintiffs presented the opinion of Dr. Bruce Jafek, a professor of otolaryngology at the University of Colorado, School of Medicine. Dr. Jafek conducted an independent medical examination on Mr. Hood in December 2005. Dr. Jafek subsequently prepared a medical report which described Mr. Hood's medical history, discussed the results of the medical examination, reviewed medical and scientific literature, and set forth Dr. Jafek's opinions regarding the cause of Mr. Hood's anosmia. The plaintiffs also presented excerpts of Dr. ***1169** Jafek's deposition testimony in other Zicam cases, as well as medical case study articles regarding anosmia after the use of zinc gluconate. *See* Bruce W. Jafek et al., *Anosmia after Intranasal Zinc Gluconate Use,* 18 Am. J. Rhinol. 137 (2004); T.H. Alexander & T.M. Davidson, *Intranasal Zinc and Anosmia: The Zinc–Induced Anosmia Syndrome,* 116 Laryngoscope (Vol. 2) 217–20 (Feb.2006).

According to Dr. Jafek's written report, Mr. Hood used Zicam because he thought he might be getting a cold. Mr. Hood squirted Zicam into each

nostril, sniffed, and experienced an immediate burning sensation, lasting several hours. Soon after using Zicam, Mr. Hood noticed a loss of smell, and when it did not return, he consulted several doctors. He was evaluated with both CT and MRI testing, both of which were normal, thus excluding trauma as a possible cause of his anosmia. Dr. Jafek performed an examination of Mr. Hood's olfactory groove, which he reports showed "apparent scarring of the mucosa (olfactory epithelium) of the olfactory cleft...." Having reviewed the patient data, Dr. Jafek concluded that Mr. Hood's allergies, medications, past history, social history, family history, and other medical history were not contributing factors to his anosmia.

In his report, Dr. Jafek further opined that: (1) Zicam nasal gel, when used according to the directions contained in the package, reaches the olfactory epithelium (smell tissue) in humans; (2) the active ingredient in Zicam, zinc gluconate, is toxic to the olfactory epithelium; (3) Zicam nasal gel is toxic to the olfactory epithelium in the amounts delivered with the pump; (4) Zicam toxicity to the olfactory epithelium is permanent in some cases; and (5) the acute nature and strong temporal association of Mr. Hood's loss, accompanied by burning pain (a recognized sign of injury), strongly supports that the application of Zicam was the cause of Mr. Hood's loss of smell, as opposed to the other "several hundred causes of loss of smell described in the literature."

One of Dr. Jafek's foundational opinions on causation is that Zicam nasal gel, when used as directed, can reach the olfactory epithelium (i.e., tissue containing nerve cells that detect smell). Through personal observations, Dr. Jafek noted that the Zicam nasal pump could squirt gel into the air at a distance of four to ten feet, routinely reaching the ceiling. He further noted that Zicam gel, when pumped, travels in a straight stream, according to his personal observation. Dr. Jafek asserted that the pathway from the nasal sill (the outer opening of the nose) to the cribiform plate (the site of the olfactory epithelium) is straight in most patients, as shown in a 1930s polio study. Dr. Jafek relied upon a 1937 article entitled "The Chemical Prophylaxis for Poliomyelitis," which studied whether the intranasal application of zinc sulfate could protect children from the polio virus. *See* Max M. Peet et al., *The Chemical Prophylaxis for Poliomyelitis,* 108 J. Am. Med. Ass'n 2184 (1937). In Dr. Jafek's opinion, there was no visible obstruction or significant septal deviation in Mr. Hood's nose.

Another of Dr. Jafek's foundational opinions is that zinc gluconate is toxic to the olfactory epithelium. Dr. Jafek's conclusion in this regard is founded in large part on polio studies of the 1930s and 40s, animal experiments, and his own protein-precipitation experiment. In the polio studies, polio researchers applied a zinc sulfate solution directly to the olfactory epithelium, attempting to prevent the entry of the polio virus. The polio studies demonstrated that zinc sulfate is toxic to the olfactory epithelium. However, the active ingredient of Zicam is zinc gluconate.***1170** Dr. Jafek concluded that zinc gluconate produces analogous effects to zinc sulfate, reasoning that: (1) zinc gluconate releases zinc ions when dissolved in water, (2) zinc sulfate and zinc gluconate had similar solubility, (3) zinc sulfate does not react with water to form sulfuric acid, which indicates that it is the zinc ion (rather than sulfuric acid) causing the toxicity, (4) animal studies, in particular a study on fish, showed that it was the release of zinc ions from the zinc sulfate that is toxic to olfactory tissue, as sodium sulfate was not toxic to the olfactory tissue, (5) zinc ions are "the standard method" to produce the loss of smell in animals, and (6) Dr. Jafek's own protein-precipitation experiment showed that zinc gluconate produces analogous effects to other zinc salts, "implying analogous pharmacodynamic mechanisms in the production of loss of smell."

Dr. Jafek further opined that zinc gluconate is toxic to the olfactory epithelium in the amounts delivered with the pump. Dr. Jafek based this opinion on an animal study regarding the toxicity of zinc

sulfate to the olfactory epithelium in mice. Dr. Jafek's report noted that the olfactory epithelium of a mouse is approximately the same size as that of a human. Dr. Jafek asserted that the recommended human dose of zinc gluconate in Zicam is 17 1/2 times the LOEL (least observable effect level) for olfactory damage in mice.

The defendants moved to exclude the testimony of Plaintiffs' sole causation expert, Dr. Jafek, and for summary judgment. The defendants contended that Dr. Jafek's expert opinion testimony that Zicam nasal gel reached Mr. Hood's olfactory epithelium failed to meet the standards set forth in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), because this opinion had not been generally accepted by the relevant scientific community, and further contended that his opinion concerning the toxicity of zinc gluconate was new and novel and not based on scientific principles.

The Hoods opposed the defendants' motion, arguing that Dr. Jafek's medical opinion, based on a "differential diagnosis," was a "pure opinion" that was not subject to *Frye* and was admissible under *Marsh*. Second, they argued that even if *Frye* applied, Dr. Jafek's opinion satisfied *Frye*, as it was based upon a differential diagnosis as well as studies dating back to the 1930s linking zinc to anos- mia.

At an October 2008 hearing on defendants' motion to exclude Dr. Jafek's testimony, the defendants presented multiple expert reports and studies in support of their motion to exclude the expert report and testimony of Dr. Jafek.[FN1] The defendants also relied upon a number of federal opinions excluding Dr. Jafek's causation testimony as unreliable under the federal standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), *See, e.g., Polski v. Quigley Corp.*, 538 F.3d 836, 841 (8th Cir.2008) (affirming the exclusion of Dr. Jafek's opinions on causation because they all "relied on his untested opinion that Cold–Eeze, when used as directed, comes into direct contact with the olfactory epithelium"); *Lusch v. Matrixx Initiatives, Inc.*, 74 Fed.R.Evid. Serv. 880 (D.Or.2007) (excluding Dr. Jafek's causation opinion and finding that there is no reasonable scientific evidence supporting ***1171** his opinions that Zicam actually reaches the olfactory epithelium, that Zicam is toxic to the olfactory epithelial tissue, or that Zicam is delivered in a dose sufficient to permanently damage olfactory epithelial tissue); *O'Hanlon v. Matrixx Initiatives, Inc.*, 2007 WL 2446496 (C.D.Cal.2007) (finding, among other faults, that Dr. Jafek merely extrapolated from an accepted premise, that zinc ions are toxic to the olfactory epithelium, to an unfounded conclusion, that zinc ions contained in a dose of Zicam are toxic to the olfactory epithelium); *Benkwith v. Matrixx Initiatives, Inc.*, 467 F.Supp.2d 1316, 1332 (M.D.Ala.2006) (excluding Dr. Jafek's causation opinions because "he attempts to use animal studies without support for extrapolation to humans, cites 'epidemiologic studies' that fail to follow the fundamentals of epidemiology, makes unsupported analogies between different chemical substances, performs unsound experiments, draws impermissible conclusions from other scientists' articles and experiments, and relies on irrelevant and unreliable data"); *Sutherland v. Matrixx Initiatives, Inc.*, 2006 WL 6617000 (N.D.Ala.2006) (concluding that "the methods and procedures [Dr. Jafek] employed are not sufficiently reliable under *Daubert* and Rule 702 to allow him to share his opinions with a jury"); *Hans v. Matrixx Initiatives, Inc.*, 2006 WL 5229820 (W.D.Ky.2006) (same).[FN2]

FN1. For example, Defendants presented evidence of multiple studies (funded by Matrixx) investigating Zicam, including the initial efficacy studies (which did not specifically set out to study possible links to anosmia), nasal distribution studies, and an animal toxicology study. Without delving into specifics, the results of these studies were inconsistent with Dr. Jafek's conclusions.

FN2. Additionally, subsequent to the hearing on the defendants' motion to exclude, the federal district court for the Middle District of Florida excluded medical expert opinions on causation in Zicam litigation, finding that those opinions lacked "reliable factual and methodological foundations" because the doctors "lack the specialized knowledge and training needed to properly opine on the toxicity of Zicam and zinc gluconate and have not made up for these shortcomings with adequate investigation or experimentation." *Evans v. Matrixx Initiatives, Inc.,* 2009 WL 2914252 (M.D.Fla.2009).

The defendants also presented testimony from Dr. Richard Dalby, Ph.D., a professor of pharmaceutical sciences and a researcher in the field of nasal and respiratory drug delivery. Dr. Dalby testified to the various methods used by scientists to investigate nasal drug delivery, including gamma scintigraphy (a technique whereby the dosage delivery can be non-invasively imaged), dye-tracking studies in living humans, studies on "model noses," and mathematical models based on particle dynamics to make predictions about where the fluid will travel. Noting that the user is instructed not to sniff after applying Zicam gel, Dr. Dalby testified that if an individual follows the instructions "exactly as they are written," it was "extraordinarily certain" that the gel would be deposited in the lower nasal cavity, below the smell tissue.

Dr. Dalby criticized the methodologies employed by Dr. Jafek, explaining that there is no correlation between open air spray characteristics and intranasal deposition patterns. Dr. Dalby also criticized the methodology of a "cadaver experiment" performed by Dr. Jafek,[FN3] in which Dr. Jafek added blue dye to Zicam nasal gel and sprayed it into the nasal cavity of a cadaver to demonstrate that the Zicam can reach the olfactory epithelium. Dr. Dalby testified that "this type of experiment with a cadaver" was not a reliable or generally accepted method for testing whether a nasal solution will reach the olfactory region in a living human. Dr. Dalby was unaware of anyone, other than Dr. Jafek, who used this method to investigate nasal drug deposit patterns. Dr. Dalby also criticized ***1172** Dr. Jafek's use of an "incredibly deep insertion" during his cadaver experiment.

FN3. Plaintiffs' counsel asserted that Dr. Jafek was not relying on the cadaver experiment as the basis for his opinion that Mr. Hood has anosmia secondary to Zicam usage.

The trial court granted the motion to exclude Dr. Jafek's general causation opinion, ruling that it did not meet the standards for the admissibility of expert scientific testimony under *Frye.* The trial court concluded that "Plaintiffs have failed to carry their burden of demonstrating that the methods and techniques upon which Dr. Jafek relies to form his causation opinion have been shown to [be] reliable through general acceptance in the scientific community as required by *Frye.* " The trial court's evidentiary ruling excluded the plaintiffs' sole causation expert and, therefore, the trial court subsequently granted Defendants' motion for summary judgment.

[1][2] The plaintiffs contend on appeal that the trial court erred in relying on *Frye* to exclude Dr. Jafek's testimony, arguing that Dr. Jafek's testimony is admissible pursuant to the standards articulated by the Florida Supreme Court in *Marsh.* The plaintiffs argue that under *Marsh,* Dr. Jafek's expert medical causation testimony is not "new or novel" and is not subject to the *Frye* test. The plaintiffs point out that Dr. Jafek's opinion was based upon his clinical experience, his review of Mr. Hood's medical history, a physical examination, and a review of scientific literature, which documents a link between zinc ions and damage to the olfactory epithelium. Alternatively, Plaintiffs argue that even if *Frye* applied, Dr. Jafek's opinion satisfied *Frye,* as it was based upon a differential diagnosis, as well as studies linking zinc to anosmia dating back to the 1930s.

Defendants contend that the trial court properly applied *Frye* to exclude Dr. Jafek's opinions on causation because the methods used by Dr. Jafek to reach his opinions as to general causation [FN4] are neither reliable nor generally accepted in the scientific community. In particular, the defendants maintain that Dr. Jafek failed to employ generally accepted scientific methods in reaching his opinions that (1) zinc ions reach the smell tissue under conditions of ordinary use of Zicam, (2) the properties of zinc gluconate are chemically analogous to the properties of zinc sulfate, and (3) the amount of Zicam administered by the pump is sufficient to cause the anosmia (i.e., the dose-response relationship). Finally, Defendants contend that Dr. Jafek's testimony is not "pure opinion" testimony immune from *Frye* scrutiny.

> FN4. The question of general causation focuses on whether a substance is capable of causing a particular disease, while the question of specific causation focuses on whether the substance did, in fact, cause the disease in a specific individual. *See, e.g., Berry v. CSX Transp., Inc.,* 709 So.2d 552 (Fla. 1st DCA 1998). The federal courts have held that in toxic tort cases, a plaintiff must prove both general causation and specific causation. *See, e.g., Norris v. Baxter Healthcare Corp.,* 397 F.3d 878, 881 (10th Cir.2005) ("Plaintiff must first demonstrate general causation because without general causation, there can be no specific causation.").

[3] The Florida Supreme Court continues to adhere to the *Frye* test as the proper standard for admitting novel scientific evidence in Florida. *See Hadden v. State,* 690 So.2d 573, 578 (Fla.1997) ("Our specific adoption of that test after the enactment of the evidence code manifests our intent to use the *Frye* test as the proper standard for admitting novel scientific evidence in Florida, even though the *Frye* test is not set forth in the evidence code."); *Flanagan v. State,* 625 So.2d 827, 829 n. 2 (Fla.1993) ("Florida continues to adhere to the *Frye* test for the admissibility of scientific opinions."). Under *Frye,* the proponent of the expert evidence "bears the burden of establishing by a preponderance ***1173** of the evidence the general acceptance of the underlying scientific principles and methodology." *Castillo v. E.I. Du Pont De Nemours & Co.,* 854 So.2d 1264, 1268 (Fla.2003). "This test requires that the scientific principles undergirding this evidence be found by the trial court to be generally accepted by the relevant members of its particular field." *Hadden,* 690 So.2d at 576. Nonetheless, "the *Frye* standard only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques." *U.S. Sugar Corp. v. Henson,* 823 So.2d 104, 109 (Fla.2002). Therefore, *Frye* is inapplicable to the "vast majority" of cases. *Marsh,* 977 So.2d at 547.

In *Marsh,* the Florida Supreme Court explained the distinction between "pure opinion" testimony and novel scientific testimony in considering whether *Frye* applies to medical expert testimony causally linking trauma to fibromyalgia. *Id.* at 544.

[4][5] "Pure opinion" testimony does not have to meet *Frye* because this type of testimony is based on the expert's personal experience and training. *Flanagan,* 625 So.2d at 828. This court has explained that "pure opinion" testimony "refers to expert opinion developed from inductive reasoning based on the experts' own experience, observation, or research, whereas the *Frye* test applies when an expert witness reaches a conclusion by deduction, from applying new and novel scientific principle, formula, or procedure developed by others." *See Holy Cross Hosp., Inc. v. Marrone,* 816 So.2d 1113, 1117 (Fla. 4th DCA 2001). Thus, "medical expert testimony concerning the causation of a medical condition will be considered pure opinion testimony—and thus not subject to *Frye* analysis—when it is based solely on the expert's training and experience." *Gelsthorpe v. Weinstein,* 897 So.2d 504, 510 (Fla. 2d DCA 2005). " *Frye* will be applied where particular expert testimony concern-

ing the cause of a medical condition is based on a novel scientific methodology." *Id.*

Our supreme court, in *Marsh,* held that *Frye* does not apply to expert testimony causally linking trauma to fibromyalgia and that "even if the testimony had to satisfy *Frye,* it does." *Marsh,* 977 So.2d at 546. First, the court concluded that the expert medical causation testimony was not "new or novel," explaining that Marsh's experts had based their opinions about the cause of her fibromyalgia "on a review of her medical history, clinical physical examinations, their own experience, published research, and differential diagnosis." *Id.* at 548. The court reasoned that because testimony causally linking trauma to fibromyalgia is based on the experts' experience and training, it is "pure opinion," admissible without having to satisfy *Frye. Id.* at 549. The court then elaborated:

> Marsh's experts did not base their opinions on new or novel scientific tests or procedures, and Respondents did not challenge the patient history, examination methods, clinical practices, or other methodologies upon which they did rely. In fact, Respondents could not challenge the underlying methodology, as we have previously held that differential diagnosis is a generally accepted method for determining specific causation. Instead, Respondents challenged the experts' *conclusions* that trauma caused Marsh's fibromyalgia .

Id. (citations omitted) (emphasis in original).

The court in *Marsh* also concluded that even if subject to *Frye,* the testimony linking trauma to fibromyalgia satisfies the *Frye* test. Noting that there are numerous published articles and studies which recognize an "association" between trauma ***1174** and fibromyalgia, the court reaffirmed that a "lack of studies conclusively demonstrating a causal link between trauma and fibromyalgia and calls for further research do not preclude admission of the testimony." *Id.* at 550. The court held that *Frye* does not require unanimity, and Marsh had sufficiently demonstrated the reliability of her experts' testimony, even though "the precise etiology of fibromyalgia" was not fully understood. *Id.*

The Third District recently applied the analysis of *Marsh* in *Andries v. Royal Caribbean Cruises, Ltd.,* 12 So.3d 260 (Fla. 3d DCA 2009). In *Andries,* the issue was whether the trial court properly excluded the plaintiff's experts' testimony that her staphylococcus infection caused an incurable kidney disease known as " IgA nephropathy." One of the plaintiff's experts testified that the staph infection likely caused the plaintiff's IgA nephropathy, relying on a differential diagnosis to rule out other conditions associated with IgA nephropathy. *Id.* at 262. Another of the plaintiff's experts testified to an observed association between staph infections and IgA nephropathy. *Id.* at 263. By contrast, a defense expert testified that "the etiology of IgA nephropathy is unknown" and criticized the studies relied upon by the plaintiff's experts on the basis that the studies were either unreliable or were not scientific proof that a staph infection may cause IgA nephropathy. *Id.* at 263–64.

On appeal, the Third District reversed the trial court's exclusion of the plaintiff's experts' testimony, finding that the plaintiff's medical and scientific evidence constituted a sufficient predicate for admissibility under *Marsh.* The Third District explained:

> In this case, therefore, as in *Marsh,* the clinical observations (based on Ms. Andries' physicians' "review of her medical history, clinical physical examinations, their own experience, published research, and differential diagnosis") indicate a link between a staph infection and Ms. Andries' kidney disease. Because of the general acceptance of those evaluative measures in the scientific community, her experts' opinions are not "new or novel" within the meaning of *Frye* and *Marsh.*
>
> The experts' disagreements on the nature of the staph-IgA nephropathy link, and the lack of certainty regarding the precise causative process, are

genuine disputes that should be decided by a jury. The jurors will give appropriate weight to the experts, their qualifications, and the facts and literature relied upon by each expert in rendering his or her opinion.

Marsh represents the latest effort in a continuing attempt to limit the admission of opinions based on so-called "junk science" or pseudo science. In this case, however, each condition (staph infection and IgA nephropathy) is a recognized diagnosis, and the anecdotal association between the two has been recognized to be worthy of formal and published research. The fact that the precise causation is still under investigation does not make the expert opinions in this case "new or novel" or inadmissible under the more demanding requirements of *Frye*.

* * *

[I]n this case qualified physicians for the appellant have expressed an opinion that there is a link between recognized medical condition X and sequela Y, those and other observations have been found worthy of further detailed scientific investigation, and the published results of such investigations have focused on the possible etiology. It is precisely this sort of disagreement that, under *Marsh,* *1175 amounts to a duel of competing—and admissible—pure opinions.

Id. at 264–65 (footnote omitted).

[6][7] While we recognize the federal courts' uniform refusal to admit Dr. Jafek's testimony, we are compelled to find that Dr. Jafek's opinion is admissible in Florida under *Marsh.* As explained in *Marsh,* it is unnecessary for a plaintiff to conclusively demonstrate a causal link or to identify the "precise etiology" of the medical condition allegedly caused by the substance or predicate event. Accordingly, *Marsh* presents a "battle-of-the-experts" approach to the admissibility of expert testimony, designed to prevent trial judges from usurping "the jury's role in evaluating the credibility of experts and choosing between legitimate but conflicting scientific views." *Marsh,* 977 So.2d at 549. Our understanding of *Marsh* is that where the scientific literature recognizes an association or possible etiology between a medical condition and a predicate event, a medical expert may render a medical causation opinion based upon a differential diagnosis.

Here, as in *Marsh* and *Andries,* Dr. Jafek's causation opinion relied upon a review of Mr. Hood's medical history, a clinical examination, Dr. Jafek's personal experience regarding nasal anatomy, published research, and a differential diagnosis. Dr. Jafek opined that Zicam was the cause of Mr. Hood's smell loss, ruling out other causes based on the strong temporal association and the acute nature of the loss of smell following the application of the Zicam. The defendants did not specifically challenge Dr. Jafek's differential diagnosis below, as their motion challenged only Dr. Jafek's general causation testimony that Zicam can cause anosmia.

Defendants attempt to distinguish *Marsh* by arguing that Dr. Jafek's causation opinion is not based solely on his experience and training, but is rather subject to *Frye* because it was based in part on experiments and studies. However, in both *Marsh* and *Andries,* the medical experts relied upon published articles and studies regarding a possible association between the predicate event and the disease, yet in both of those cases, the medical causation opinions were deemed "pure opinion." One possible distinction between this case and *Marsh* is that here, Dr. Jafek did personally conduct experimentation in support of his general causation theory, including a cadaver experiment regarding nasal distribution of Zicam, as mentioned in many of the federal cases. However, the cadaver experiment was not specifically mentioned in Dr. Jafek's report, and the plaintiffs specifically represented that they were not relying upon the cadaver experiment as support for Dr. Jafek's opinion that Mr. Hood has anosmia secondary to Zicam usage. To the extent that Dr. Jafek

relied upon "new and novel" experiments that he personally conducted regarding Zicam, such as the cadaver experiment, evidence regarding such experiments is not admissible as "pure opinion." Dr. Jafek's remaining opinions, however, are admissible as "pure opinion" testimony. Furthermore, Dr. Jafek's testimony regarding the scientific literature he relied upon is also admissible. *See Andries,* 12 So.3d at 264 ("The jurors will give appropriate weight to the experts, their qualifications, and the facts and literature relied upon by each expert in rendering his or her opinion.").

[8] Under the reasoning of *Marsh,* the fact that precise causation is still under investigation does not make Dr. Jafek's expert opinion causally linking Mr. Hood's use of Zicam nasal gel to his anosmia "new or novel" or inadmissible under the more demanding requirements of *Frye.* With the exception of any "new or novel" scientific methodology that Dr. Jafek relied ***1176** upon to form a causation opinion (i.e., the cadaver experiment), Dr. Jafek may testify to any "pure opinion" he formed based upon his review of Mr. Hood's medical history, his clinical physical examinations, his personal experience, published research, and differential diagnosis. *See Marsh,* 977 So.2d at 548.

Reversed and remanded for further proceedings.

GROSS, C.J., CIKLIN, J., and KEYSER, JANIS BRUSTARES, Associate Judge, concur.

Fla.App. 4 Dist.,2010.
Hood v. Matrixx Initiatives, Inc.
50 So.3d 1166, 35 Fla. L. Weekly D2827

END OF DOCUMENT

COMMITTEE MEETING REPORT

Judiciary Committee

2/1/2012 8:30:00AM

Location: 404 HOB

HB 401 : Effect of Dissolution or Annulment of Marriage on Certain Designations

[X] *Favorable With Committee Substitute*

	Yea	*Nay*	*No Vote*	*Absentee Yea*	*Absentee Nay*
Daphne Campbell	X				
Eric Eisnaugle	X				
Matt Gaetz			X		
Tom Goodson	X				
Bill Hager	X				
Gayle Harrell			X		
Shawn Harrison	X				
John Julien	X				
Charles McBurney	X				
Larry Metz	X				
Kathleen Passidomo	X				
Ray Pilon	X				
Ari Porth	X				
Elaine Schwartz	X				
Darren Soto	X				
Richard Steinberg	X				
Michael Weinstein	X				
William Snyder (Chair)	X				
	Total Yeas: 16	**Total Nays: 0**			

HB 401 Amendments

Amendment 566403

[X] *Adopted Without Objection*

Appearances:

HB 401
Dunbar, Peter (Lobbyist) - Waive In Support
Real Property, Probate & Trust Law Section
c/o The Florida Bar 651 E Jefferson St
Tallahassee FL 32399
Phone: (850)222-3533

Committee meeting was reported out: Wednesday, February 01, 2012 10:52:25AM

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

favorable 2.1.12

Committee/Subcommittee hearing bill: Civil Justice Subcommittee
Representative Moraitis offered the following:

Amendment (with title amendment)

Remove lines 251-279

T I T L E A M E N D M E N T

Remove lines 31-39 and insert:
specified interests and rights; providing

COMMITTEE MEETING REPORT

Judiciary Committee

2/1/2012 8:30:00AM

Location: 404 HOB

CS/HB 437 : Protection of Minors

[X] *Favorable*

	Yea	*Nay*	*No Vote*	*Absentee Yea*	*Absentee Nay*
Daphne Campbell	X				
Eric Eisnaugle	X				
Matt Gaetz			X		
Tom Goodson	X				
Bill Hager	X				
Gayle Harrell			X		
Shawn Harrison	X				
John Julien	X				
Charles McBurney	X				
Larry Metz	X				
Kathleen Passidomo	X				
Ray Pilon	X				
Ari Porth	X				
Elaine Schwartz		X			
Darren Soto	X				
Richard Steinberg	X				
Michael Weinstein	X				
William Snyder (Chair)	X				
	Total Yeas: 15	**Total Nays: 1**			

Appearances:

CS/HB 437
Colletta, Gail (General Public) - Information Only
President, Florida Action Committee
7054 Palazzo Reale
Boynton Beach FL 33437
Phone: 561-305-4959

CS/HB 437
Imhof, PsyD, Eric (General Public) - Information Only
4577 Nob Hill Rd
Sunrise FL 33351
Phone: 954-646-6141

CS/HB 437
Peritz, Victoria (General Public) - Information Only
100 Xanadu Place
Jupiter FL 33477
Phone: 561-305-3915

CS/HB 437
McClamma, Barbara (General Public) - Information Only
7209 Dusty Rd
Riverview FL 33569
Phone: 813-677-8158

Committee meeting was reported out: Wednesday, February 01, 2012 10:52:25AM

Location: 404 HOB

CS/HB 437 : Protection of Minors (continued)

Appearances: (continued)

CS/HB 437
Snurkowski, Caroline (State Employee) - Information Only
Associate Deputy Attorney General, Attorney General's Office
The Capitol
Tallahassee FL 32303
Phone: 850-410-3566

CS/HB 437
Weiss, David (General Public) - Waive In Support
Florida Action Committee
2501 Cormel Lane
Eustis FL 32726
Phone: 352-483-8117

CS/HB 437
Diaz, Catherine (General Public) - Waive In Support
854 San Remo Drive
Weston FL 33326
Phone: 954-614-5003

CS/HB 437
Lopez-Diaz, Ligia (General Public) - Waive In Support
834 San Remo Drive
Weston FL 33326
Phone: 954-389-1046

CS/HB 437
Lopez, Clara (General Public) - Waive In Support
8434 NW 10 Street
Plantation FL 33322
Phone: 954-382-3456

CS/HB 437
Case, Kimberly (Lobbyist) - Proponent
Office of the Attorney General
PL-01 The Capitol
Tallahassee FL 32399-1050
Phone: (850)245-0176

CS/HB 437
McClamma, Willard (General Public) - Waive In Support
Florida Action Committee
7209 Dusty Road
Riverview FL 33569
Phone: 813-677-8158

COMMITTEE MEETING REPORT

Judiciary Committee

2/1/2012 8:30:00AM

Location: 404 HOB

HB 631 : Terms of Courts

[X] *Favorable With Committee Substitute*

	Yea	*Nay*	*No Vote*	*Absentee Yea*	*Absentee Nay*
Daphne Campbell	X				
Eric Eisnaugle	X				
Matt Gaetz			X		
Tom Goodson	X				
Bill Hager	X				
Gayle Harrell			X		
Shawn Harrison	X				
John Julien				X	
Charles McBurney	X				
Larry Metz	X				
Kathleen Passidomo	X				
Ray Pilon	X				
Ari Porth	X				
Elaine Schwartz	X				
Darren Soto	X				
Richard Steinberg	X				
Michael Weinstein	X				
William Snyder (Chair)	X				
	Total Yeas: 15	**Total Nays: 0**			

HB 631 Amendments

Amendment 007995

[X] *Adopted Without Objection*

Amendment 489507

[X] *Adopted Without Objection*

Committee meeting was reported out: Wednesday, February 01, 2012 10:52:25AM

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 631 (2012)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

favorable 2.1.12

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Weinstein offered the following:

Amendment

Remove lines 155-160 and insert:

its own opinions and orders for the purpose of making the same accord with law and justice. Accordingly, an appellate court has the power to recall its own mandate for the purpose of allowing it to exercise such jurisdiction and power in a proper case. A mandate may not be recalled more than 120 days after it has been issued.

Amendment No. 2

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	____

favorable 2.1.12

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Weinstein offered the following:

Amendment

Remove lines 203-216 and insert:

that ~~the like~~ offense committed after the former conviction~~,~~ and ~~whoever is at the same term of the court convicted~~ on ~~upon~~ three distinct charges of such offense committed within a six month period~~,~~ shall be deemed a common utterer of counterfeit bills, and shall be punished as provided in s. 775.084.

Section 15. Section 831.17, Florida Statutes, is amended to read:

831.17 Violation of s. 831.16; second or subsequent conviction.~~—~~A person previously ~~Whoever having been~~ convicted of violating ~~either of the offenses mentioned in~~ s. 831.16 who~~,~~ is again convicted of violating that statute ~~either of the same offenses,~~ committed after the former conviction on ~~, and whoever is at the same term of the court convicted upon~~ three distinct

Amendment No. 2

charges of said offenses committed within a six month period~~,~~

commits a felony of the second degree~~,~~

COMMITTEE MEETING REPORT

Judiciary Committee

2/1/2012 8:30:00AM

Location: 404 HOB

CS/HB 667 : Murder

[X] *Favorable With Committee Substitute*

	Yea	*Nay*	*No Vote*	*Absentee Yea*	*Absentee Nay*
Daphne Campbell	X				
Eric Eisnaugle	X				
Matt Gaetz			X		
Tom Goodson	X				
Bill Hager	X				
Gayle Harrell			X		
Shawn Harrison	X				
John Julien	X				
Charles McBurney	X				
Larry Metz	X				
Kathleen Passidomo	X				
Ray Pilon	X				
Ari Porth	X				
Elaine Schwartz	X				
Darren Soto	X				
Richard Steinberg	X				
Michael Weinstein	X				
William Snyder (Chair)	X				
	Total Yeas: 16	**Total Nays: 0**			

CS/HB 667 Amendments

Amendment 441421

[X] *Adopted Without Objection*

Appearances:

CS/HB 667
Malady, Captain, Jim (General Public) - Waive In Support
Florida Sheriff's Association
1330 Indian Lake Road
Daytona Beach FL
Phone: 386-254-1502

Committee meeting was reported out: Wednesday, February 01, 2012 10:52:25AM

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___ (Y/N)
ADOPTED AS AMENDED	___ (Y/N)
ADOPTED W/O OBJECTION	___ (Y/N)
FAILED TO ADOPT	___ (Y/N)
WITHDRAWN	___ (Y/N)
OTHER	_____

favorable 2.1.12

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Corcoran offered the following:

Amendment (with title amendment)

Between lines 157 and 158, insert:

Section 2. Section 782.065, Florida Statutes, is amended to read:

782.065 Murder; law enforcement officer, correctional officer, correctional probation officer.—Notwithstanding ss. 775.082, 775.0823, 782.04, 782.051, and chapter 921, a defendant shall be sentenced to life imprisonment without eligibility for release upon findings by the trier of fact that, beyond a reasonable doubt:

(1) The defendant committed murder in the first degree in violation of s. 782.04(1) and a death sentence was not imposed; murder in the second or third degree in violation of s. 782.04(2), (3), or (4); attempted murder in the first or second degree in violation of s. 782.04(1)(a)1. or (2); or attempted felony murder in violation of s. 782.051; and

(2) The victim of any offense described in subsection (1) was a law enforcement officer, part-time law enforcement officer, ~~or~~ auxiliary law enforcement officer, correctional officer, part-time correctional officer, auxiliary correctional officer, correctional probation officer, part-time correctional probation officer, or auxiliary correctional probation officer, as those terms are defined in s. 943.10, engaged in the lawful performance of a legal duty.

T I T L E A M E N D M E N T

Remove line 9 and insert:
circumstances; amending s. 782.065, F.S.; requiring life imprisonment for defendants convicted of specified offenses where the victim is a correctional or correctional probation officer; amending s. 921.0022, F.S.; revising

COMMITTEE MEETING REPORT

Judiciary Committee

2/1/2012 8:30:00AM

Location: 404 HOB

CS/HB 715 : Self-service Storage Facilities

[X] *Favorable*

	Yea	*Nay*	*No Vote*	*Absentee Yea*	*Absentee Nay*
Daphne Campbell	X				
Eric Eisnaugle	X				
Matt Gaetz			X		
Tom Goodson	X				
Bill Hager	X				
Gayle Harrell			X		
Shawn Harrison	X				
John Julien	X				
Charles McBurney	X				
Larry Metz	X				
Kathleen Passidomo	X				
Ray Pilon	X				
Ari Porth	X				
Elaine Schwartz			X		
Darren Soto	X				
Richard Steinberg	X				
Michael Weinstein	X				
William Snyder (Chair)	X				
	Total Yeas: 15	**Total Nays: 0**			

Appearances:

CS/HB 715
Dietz, Tim (General Public) - Waive In Support
Sr. Vice President, Government Relations, Self Storage Association
1900 N Beauregard, Suite 450
Alexandria VA 23211
Phone: 703-575-8000

CS/HB 715
Chaires, Steve (General Public) - Waive In Support
Advanced Moving and Storage
7963 Apalachee Parkway
Tallahassee FL 32311
Phone: 850-556-8877

Committee meeting was reported out: Wednesday, February 01, 2012 10:52:25AM

COMMITTEE MEETING REPORT

Judiciary Committee

2/1/2012 8:30:00AM

Location: 404 HOB

CS/HB 1193 : Pub. Rec./Victims of Violence

[X] *Favorable With Committee Substitute*

	Yea	*Nay*	*No Vote*	*Absentee Yea*	*Absentee Nay*
Daphne Campbell	X				
Eric Eisnaugle	X				
Matt Gaetz			X		
Tom Goodson	X				
Bill Hager	X				
Gayle Harrell			X		
Shawn Harrison	X				
John Julien	X				
Charles McBurney	X				
Larry Metz	X				
Kathleen Passidomo	X				
Ray Pilon	X				
Ari Porth	X				
Elaine Schwartz			X		
Darren Soto	X				
Richard Steinberg	X				
Michael Weinstein	X				
William Snyder (Chair)	X				
	Total Yeas: 15	**Total Nays: 0**			

CS/HB 1193 Amendments

Amendment 954641

[X] *Adopted Without Objection*

Appearances:

CS/HB 1193
Wiseman, Leisa (Lobbyist) - Waive In Support
Director, External Affairs Florida Coalition Against Domestic Violence
425 Office Plaza Drive
Tallahassee FL 32301
Phone: (850) 425-2741

Committee meeting was reported out: Wednesday, February 01, 2012 10:52:25AM

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	____

favorable
2-1-12

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Jones offered the following:

Amendment (with title amendment)

Remove lines 70-191 and insert:

petitioner makes a request for notification, the clerk must apprise the petitioner of her or his right to request in writing that the information specified in sub-subparagraph b. be held exempt from public records requirements for 5 years. The Florida Association of Court Clerks and Comptrollers may apply for any available grants to fund the development of the automated process.

b. Upon implementation of the automated process, information held by clerks and law enforcement agencies in conjunction with the automated process developed under sub-subparagraph a. which reveals the home or employment telephone number, cellular telephone number, home or employment address, electronic mail address, or other electronic means of identification of a petitioner requesting notification of

service of an injunction for protection against domestic violence and other court actions related to the injunction for protection is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, upon written request by the petitioner. Such information shall cease to be exempt 5 years after the receipt of the written request. Any state or federal agency that is authorized to have access to such documents by any provision of law shall be granted such access in the furtherance of such agency's statutory duties, notwithstanding this sub-subparagraph. This sub-subparagraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2017, unless reviewed and saved from repeal through reenactment by the Legislature.

6. Within 24 hours after an injunction for protection against domestic violence is vacated, terminated, or otherwise rendered no longer effective by ruling of the court, the clerk of the court must notify the sheriff receiving original notification of the injunction as provided in subparagraph 2. That agency shall, within 24 hours after receiving such notification from the clerk of the court, notify the department of such action of the court.

Section 2. Paragraph (c) of subsection (8) of section 784.046, Florida Statutes, is amended to read:

784.046 Action by victim of repeat violence, sexual violence, or dating violence for protective injunction; dating violence investigations, notice to victims, and reporting; pretrial release violations; public records exemption.—

(8)

(c)1. Within 24 hours after the court issues an injunction for protection against repeat violence, sexual violence, or dating violence or changes or vacates an injunction for protection against repeat violence, sexual violence, or dating violence, the clerk of the court must forward a copy of the injunction to the sheriff with jurisdiction over the residence of the petitioner.

2. Within 24 hours after service of process of an injunction for protection against repeat violence, sexual violence, or dating violence upon a respondent, the law enforcement officer must forward the written proof of service of process to the sheriff with jurisdiction over the residence of the petitioner.

3. Within 24 hours after the sheriff receives a certified copy of the injunction for protection against repeat violence, sexual violence, or dating violence, the sheriff must make information relating to the injunction available to other law enforcement agencies by electronically transmitting such information to the department.

4. Within 24 hours after the sheriff or other law enforcement officer has made service upon the respondent and the sheriff has been so notified, the sheriff must make information relating to the service available to other law enforcement agencies by electronically transmitting such information to the department.

5.a. Subject to available funding, the Florida Association of Court Clerks and Comptrollers shall develop an automated process by which a petitioner may request notification of

service of the injunction for protection against repeat violence, sexual violence, or dating violence and other court actions related to the injunction for protection. The automated notice shall be made within 12 hours after the sheriff or other law enforcement officer serves the injunction upon the respondent. The notification must include, at a minimum, the date, time, and location where the injunction for protection against repeat violence, sexual violence, or dating violence was served. When a petitioner makes a request for notification, the clerk must apprise the petitioner of her or his right to request in writing that the information specified in sub-subparagraph b. be held exempt from public records requirements for 5 years. The Florida Association of Court Clerks and Comptrollers may apply for any available grants to fund the development of the automated process.

b. Upon implementation of the automated process, information held by clerks and law enforcement agencies in conjunction with the automated process developed under sub-subparagraph a. which reveals the home or employment telephone number, cellular telephone number, home or employment address, electronic mail address, or other electronic means of identification of a petitioner requesting notification of service of an injunction for protection against repeat violence, sexual violence, or dating violence and other court actions related to the injunction for protection is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, upon written request by the petitioner. Such information shall cease to be exempt 5 years after the receipt of the written request.

Any state or federal agency that is authorized to have access to such documents by any provision of law shall be granted such access in the furtherance of such agency's statutory duties, notwithstanding this sub-subparagraph. This sub-subparagraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2017, unless reviewed and saved from repeal through reenactment by the Legislature.

6. Within 24 hours after an injunction for protection against repeat violence, sexual violence, or dating violence is lifted, terminated, or otherwise rendered no longer effective by ruling of the court, the clerk of the court must notify the sheriff or local law enforcement agency receiving original notification of the injunction as provided in subparagraph 2. That agency shall, within 24 hours after receiving such notification from the clerk of the court, notify the department of such action of the court.

Section 3. It is the finding of the Legislature that it is a public necessity that personal identifying and location information of victims of domestic violence, repeat violence, sexual violence, and dating violence held by the clerks and law enforcement agencies in conjunction with the automated process developed by

---

T I T L E A M E N D M E N T

Remove lines 7-20 and insert:

held by the clerks and law enforcement agencies in conjunction with the automated process developed by the association by which

a petitioner may request notification of service of an injunction for protection against domestic violence, repeat violence, sexual violence, or dating violence and other court actions related to the injunction for protection; providing that the exemption is conditional upon the petitioner's request; providing specified duration of the exemption; providing for access by state or federal agencies in furtherance of the agencies' statutory duties; providing that the clerk must

COMMITTEE MEETING REPORT

Judiciary Committee

2/1/2012 8:30:00AM

Location: 404 HOB

HB 4067 : Marshals of District Courts of Appeal

[X] *Favorable*

	Yea	*Nay*	*No Vote*	*Absentee Yea*	*Absentee Nay*
Daphne Campbell	X				
Eric Eisnaugle	X				
Matt Gaetz			X		
Tom Goodson	X				
Bill Hager	X				
Gayle Harrell			X		
Shawn Harrison	X				
John Julien				X	
Charles McBurney	X				
Larry Metz	X				
Kathleen Passidomo	X				
Ray Pilon	X				
Ari Porth	X				
Elaine Schwartz	X				
Darren Soto	X				
Richard Steinberg				X	
Michael Weinstein	X				
William Snyder (Chair)	X				
	Total Yeas: 14	**Total Nays: 0**			

Committee meeting was reported out: Wednesday, February 01, 2012 10:52:25AM

COMMITTEE MEETING REPORT

Judiciary Committee

2/1/2012 8:30:00AM

Location: 404 HOB

HB 4069 : County Courts

[X] *Favorable*

	Yea	*Nay*	*No Vote*	*Absentee Yea*	*Absentee Nay*
Daphne Campbell	X				
Eric Eisnaugle	X				
Matt Gaetz			X		
Tom Goodson	X				
Bill Hager	X				
Gayle Harrell			X		
Shawn Harrison	X				
John Julien				X	
Charles McBurney	X				
Larry Metz	X				
Kathleen Passidomo	X				
Ray Pilon	X				
Ari Porth	X				
Elaine Schwartz	X				
Darren Soto	X				
Richard Steinberg	X				
Michael Weinstein	X				
William Snyder (Chair)	X				
	Total Yeas: 15	**Total Nays: 0**			

Committee meeting was reported out: Wednesday, February 01, 2012 10:52:25AM

COMMITTEE MEETING REPORT

Judiciary Committee

2/1/2012 8:30:00AM

Location: 404 HOB

HB 4081 : District Courts Of Appeal

[X] *Favorable*

	Yea	*Nay*	*No Vote*	*Absentee Yea*	*Absentee Nay*
Daphne Campbell	X				
Eric Eisnaugle	X				
Matt Gaetz			X		
Tom Goodson	X				
Bill Hager	X				
Gayle Harrell			X		
Shawn Harrison	X				
John Julien				X	
Charles McBurney	X				
Larry Metz	X				
Kathleen Passidomo	X				
Ray Pilon	X				
Ari Porth	X				
Elaine Schwartz	X				
Darren Soto	X				
Richard Steinberg	X				
Michael Weinstein	X				
William Snyder (Chair)	X				
	Total Yeas: 15	**Total Nays: 0**			

Committee meeting was reported out: Wednesday, February 01, 2012 10:52:25AM

COMMITTEE MEETING REPORT

Judiciary Committee

2/1/2012 8:30:00AM

Location: 404 HOB

PCB JDC 12-02 : Clerks of Court

[X] *Favorable*

	Yea	*Nay*	*No Vote*	*Absentee Yea*	*Absentee Nay*
Daphne Campbell	X				
Eric Eisnaugle	X				
Matt Gaetz			X		
Tom Goodson	X				
Bill Hager	X				
Gayle Harrell			X		
Shawn Harrison	X				
John Julien				X	
Charles McBurney	X				
Larry Metz	X				
Kathleen Passidomo			X		
Ray Pilon	X				
Ari Porth	X				
Elaine Schwartz	X				
Darren Soto	X				
Richard Steinberg	X				
Michael Weinstein	X				
William Snyder (Chair)	X				
	Total Yeas: 14	**Total Nays: 0**			

Appearances:

PCB JDC 12-02 -- Clerks of Court
Baggett, Fred (Lobbyist) - Waive In Support
Florida Association of Court Clerks & Comptrollers
3544 Maclay Blvd
Tallahassee FL 32312
Phone: (850)222-6891

Committee meeting was reported out: Wednesday, February 01, 2012 10:52:25AM