

2019 BROWARD COUNTY BENCH/BAR CONVENTION

Judge William Dimitrouleas, U.S. District Court Judge
Chief Judge Spencer Levine, 4th District Court of Appeal
Judge Carol Phillips, Administrative Judge 17th Circuit
Judge Lisa Small, Administrative Judge 15th Circuit
Chief Judge Jack Tuter, 17th Circuit



The Vanishing Jury Trial

Only 2% of federal criminal defendants go to trial, and most who do are found guilty

- Nearly 80,000 people were defendants in federal criminal cases in fiscal 2018, but just 2% of them went to trial. The overwhelming majority (90%) pleaded guilty instead, while the remaining 8% had their cases dismissed, according to a Pew Research Center analysis of [data collected by the federal judiciary](#).

- Most defendants who *did* go to trial, meanwhile, were found guilty, either by a jury or judge. (Defendants can waive their right to a jury trial if they wish.)
- Put another way, only 320 of 79,704 total federal defendants – fewer than 1% – went to trial and won their cases

2017 CIVIL CASES IN FLORIDA

- Total Dispositions 278,649
- Total Jury Trials 677
- Percentage of Jury Trials 0.24%

ARE THE NUMBER OF APPEALS DECREASING?

• 2016

Total Appeals – 3415

Total Petitions 972

- Administrative – 107
- Civil – 1184
- Criminal – 1479
- Family – 334
- Guardianship – 16
- Juvenile – 228
- Probate – 67

Totals 4391

• **2017**

- Total Appeals – 3040
- Administrative – 107
- Civil – 1055
- Criminal – 1349
- Family – 235
- Guardianship – 14
- Juvenile – 226
- Probate – 54

Total Petitions 943

Totals 3983

• **2018**

• Total Appeals – 2879

• Administrative – 98

• Civil – 1028

• Criminal – 1262

• Family – 255

• Guardianship – 12

• Juvenile – 174

• Probate – 50

Total Petitions 913

Totals 3792

• **2018**

• Total Appeals – 2879

• Administrative – 98

• Civil – 1028

• Criminal – 1262

• Family – 255

• Guardianship – 12

• Juvenile – 174

• Probate – 50

Total Petitions 913

Totals 3792

4th DCA APPEALS THREE YEAR COMPARISON

- 2016 4391
- 2017 3983
- 2018 3792

DAUBERT IS BACK

- *Daubert* is the standard for the admission of expert testimony in the federal courts, and has been since the United States Supreme Court issued its opinion in 1993. In 2000, the Federal Rules of Evidence were amended to reflect the standard enunciated in the *Daubert* case. As such, there is an abundance of federal case law on a multitude of issues relating to *Daubert* *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

- On May 23, 2019, the Florida Supreme Court adopted the ‘*Daubert* Amendments,’ thus amending: . . . sections 90.702 (Testimony by experts) and 90.704 (Basis of opinion testimony by experts), Florida Statutes, of the Florida Evidence Code to replace the *Frye* standard for admitting certain expert testimony with the *Daubert* standard, the standard for expert testimony found in Federal Rule of Evidence 702. *In*
- We now **recede** from the Court’s prior decision not to adopt the Legislature’s *Daubert* amendments to the Evidence Code and to retain the *Frye* standard

- Whereas the *Frye* standard only applied to expert testimony based on new or novel scientific techniques and general acceptance, *Daubert* provides that ‘the trial judge must ensure that **any and all** scientific testimony or evidence admitted is not only relevant, but reliable.’

On July 31, 2019, in *Kemp v. State*, the Fourth District Court of Appeal recognized the Florida Supreme Court's May 23, 2019 opinion and the '*Daubert* amendments' to the Evidence Code, and applied them to this matter, vacating a previously issued opinion and issuing a substitute opinion. In doing so, it set forth a thorough analysis under the *Daubert* standard for the admission of expert testimony, citing directly to *Daubert* and its progeny.

- The issue at trial was whether a defendant operated a motor vehicle in a reckless manner. A key factual dispute was whether he was in control of his car at the time of the crash. He contended that he fainted at the wheel and did not have control at the time of the collision. *To prove that he did have control*, the State relied on the opinion of an expert, Corporal Dooley, who was a law enforcement officer assisting in the investigation of the crash. Corporal Dooley believed Mr. Kemp applied the brakes before the crash (thus refuting his claim that he fainted), *“based solely on his visual observation of the ‘crush damage’ to the victims’ car.”*

- The Court held, we conclude that the expert's testimony was woefully insufficient to establish the reliability of his methodology under *Daubert*. There was no evidence that the expert's methodology had even been tested. Nor was there evidence that the expert's methodology had been subjected to peer review or publication. The expert could not reference any specific studies or peer-reviewed materials, much less any blind studies showing that it is possible to accurately infer braking from the shape of crash damage alone.

ESSENTIAL CONSIDERATIONS IN A DAUBERT ANALYSIS

- The testimony is **based upon sufficient facts or data**;
- The testimony is the **product of reliable principles and methods**; and
- The witness has **applied the principles and methods reliably to the facts of the case**.

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- A *Daubert* objection must be made in advance of trial. Additionally, in order for such objections to be facially sufficient, they must set forth specific defects in the expert's opinion, including issues concerning the relevancy or reliability of the expert opinion

THE TRIAL JUDGES GATEKEEPER ROLE

- The trial judge should not simply admit proffered scientific testimony and permit the jury to determine its weight, but must screen such evidence to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

- **Factors to consider which bear on the ‘reliability’ inquiry:**
 - **Whether the theory can be or has been tested;**
 - **Whether the theory or technique has been subjected to peer review and publication;**
 - **The known or potential rate of error of a particular scientific technique, as well as the existence of standards controlling the technique’s operation; and**
 - **general acceptance in the scientific community**

QUESTIONS OR COMMENTS