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EMBEZZLER ASKS COURT TO ACCEPT GAMBLING DEFENSE

David Heckelman
Law Bulletin staff writer

SPRINGFIELD -- Adopting a more relaxed standard for the admission of novel scientific evidence would bring Illinois courts "up to speed" with the federal courts and those of most other states, a criminal defense attorney said Monday.

Marc W. Martin of Chicago said most state courts have followed the U.S. Supreme Court's decision in [Daubert v. Merrell Dow Pharmaceuticals Inc.](#), 509 U.S. 579, 113 S.Ct. 2786 (1993), which adopted the standard of [Rule 702 of the Federal Rules of Evidence](#).

Federal [Rule 702](#) allows the introduction of scientific testimony that "will assist the trier of fact to understand the evidence or to determine a fact in issue."

And Martin's client, Edward Lowitzki, has asked the Illinois Supreme Court to apply the Daubert standard and allow him to present testimony in support of his insanity defense based on pathological gambling.

Lowitzki last week petitioned the high court for leave to appeal from a recent 1st District Appellate Court decision that prevented him from raising his gambling problem as a defense to charges of theft.

Justice Robert Chapman Buckley, writing for a unanimous 1st Division panel, said the Cook County trial court properly barred the defendant from introducing testimony in support of a claim that his pathological gambling made it impossible for him to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

The appeals court noted that the Illinois standard for admission of novel scientific evidence remained that of [Frye v. United States](#), 293 F. 1013 (D.C. Cir. 1923), requiring that the proffered testimony be based on principles that have gained "general acceptance" in the sci-

entific community.

The court found that Lowitzki's insanity defense did not meet the Frye standard, specifically noting a state expert's testimony "that there is not general agreement within the psychiatric community that pathological gambling deprives people of the substantial capacity to conform their conduct to the requirements of the law."

The court also said that Lowitzki had failed to show that his gambling problem actually had caused him to commit the offense in question, the embezzlement between May 1990 and May 1992 of \$101,000 in funds from the Palatine High School Booster Club, of which he served as treasurer.

The court therefore upheld the trial court's refusal to allow the defendant to present an insanity defense.

Justices Warren D. Wolfson and Everette A. Braden concurred in the 15-page opinion, which affirmed the defendant's conviction and four-year prison sentence. *People v. Edward Lowitzki*, No. 1-93-2616 (Dec. 9, 1996).

But in his petition for leave to appeal under [Supreme Court Rule 315](#), filed last Monday and received by the high court on Thursday, the defendant argues that the court should follow "the modern trend liberalizing certain trial procedures."

He said that in [People v. Miller](#), 173 Ill.2d 167 (1996), a capital case involving the issue of the admissibility of statistical DNA evidence against a murder defendant, the high court had acknowledged that Daubert's "more flexible standard of admissibility" had replaced the Frye test in federal court.

"However, because neither party had requested the court to abandon Frye and adopt the reasoning of Daubert, the Miller court declined to decide the issue sua sponte," the defendant said in a petition submitted by Martin and by Edward M. Genson of Genson & Gillespie.

Martin had taken the opposite position during oral argument before the high court in a paternity case, contending that the Frye standard should be applied to exclude DNA evidence tending to show that the defendant was the father of the plaintiff's child.

The high court ultimately dismissed that appeal for lack of jurisdiction, returning the case to the Cook County Circuit Court for determination of additional issues. [Franson v. Micelli](#), 172 Ill.2d 352 (1996).

Martin said the Franson case originally was filed in 1990 and remains pending in the trial court.

He said the Lowitzki case was distinguishable from Franson, because the Daubert decision had been issued before the briefs were filed in the appeals court in the present case.

The defendant's petition for leave to appeal remains pending. People v. Edward Lowitzki, No. 82605.

---- INDEX REFERENCES ---

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