

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA)	
)	Criminal No. 3:08CR014
v.)	
)	
ROBERT L. MOULTRIE,)	
NIXON E. CAWOOD,)	
CHARLES K. MOREHEAD,)	
FACILITY HOLDING CORP., d/b/a/)	
THE FACILITY GROUP,)	
FACILITY MANAGEMENT GROUP,)	
INC., FACILITY CONSTRUCTION)	
MANAGEMENT INC., and)	
FACILITY DESIGN GROUP INC.)	

**ROBERT L. MOULTRIE’S MOTION FOR *DAUBERT* HEARING AND TO
INTRODUCE THE RESULTS OF THE TWO POLYGRAPH
EXAMINATIONS TAKEN AND PASSED BY HIM; TOGETHER WITH
SUPPORTING MEMORANDUM OF LAW**

1. Motion

COMES NOW, Robert L. Moultrie (“Mr. Moultrie”), and respectfully moves this Court to (1) conduct a *Daubert* hearing to address the admissibility of the results of two polygraph examinations taken and passed by him, and (2) rule that the polygraph examinations and the opinions of the experts administering the examinations are admissible. Alternatively, Mr. Moultrie asks the Court to reserve judgment on this motion until either the Government presents the testimony of Messrs. Richard Hall and Sean Carothers, or until Mr. Moultrie decides to testify on his own behalf.

The Defendant reasonably anticipates that a dispute will arise concerning the admissibility of the two proffered polygraph examinations and their accompanying expert opinions, and so the Defendant requests this Court undertake a preliminary examination

of the admissibility of this evidence in accordance with Fed.R.Evid. Rule 104 (“Rule 104”) and the procedures outlined by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Furthermore, this evidence is admissible under Fed.R.Evid. Rules 702 (“Rule 702”) and 403 (“Rule 403”), and the standards applicable thereto after the Supreme Court’s decision in Daubert, 509 U.S. 579 (1993), and this Circuit’s decision in United States v. Posado, 57 F.3d 428 (5th Cir. 1995).

2. Statement of facts

On December 18, 2006, Mr. Moultrie submitted to a polygraph examination administered by Clifford E. Cormany, the former Polygraph Coordinator for the Atlanta Division of the Federal Bureau of Investigation. During that examination, Mr. Cormany asked the following relevant questions and Mr. Moultrie provided the following answers:

(5) Did you ever have an agreement with anyone that your company would get work on the Mississippi Beef Project in return for making contributions to Musgrove’s campaign?

No . . .

(7) Did anyone ever communicate to you that your company would be provided work on the Mississippi Beef Project in return for contributions to Musgrove’s Campaign?

No.

(See Declaration of Clifford E. Cormany, para. 11, attached hereto as Exhibit A¹). In evaluating the results of the polygraph examination, Mr. Cormany stated: “It is the opinion of the examiner that the recorded responses to the above relevant questions are not indicative of deception.” (Attachment to Ex. A, at unnumbered page 4; *see also* Ex.

¹ The results of two polygraphs taken by Mr. Moultrie and the affidavits of three fully qualified and certified polygraphists, Messrs. Cormany, Spiers, and Keifer, who conducted the polygraphs or analyzed the results for control purposes, are attached hereto as Exhibits A through C.

A, para. 12). The undersigned counsel for Mr. Moultrie provided the results of this examination to the Government for its review in considering whether to continue its investigation of Mr. Moultrie and the other named defendants. (December 28, 2006 Letter to Assistant United States Attorney Chad Lamar, attached hereto as Exhibit D² and February 23, 2007 Letter to Assistant United States Attorney Chad Lamar, attached hereto as Exhibit F).

The results of Mr. Cormany's polygraph examination of Mr. Moultrie (including the charts and all questions asked) were submitted to Mr. Alfred E. Spiers, former FBI polygraphist in the Jackson, Mississippi Office, in order for him to conduct a quality control review. Mr. Spiers independently scored the strength of Mr. Moultrie's responses as a +6, a level that is "more than adequate to conclude that there was No Deception Indicated" by Mr. Moultrie's responses to the relevant polygraph questions. (Declaration of Alfred E. Spiers, at para. 6-9, attached hereto as Exhibit C; *see also* Attachment to Ex. C, at unnumbered page 1). This finding is significant in that the FBI itself only requires a +4 to conclude that a person has not been deceptive; in other words Mr. Moultrie's responses were 50% clearer than what is accepted by the FBI as someone being truthful. The report of Mr. Spiers' quality control evaluation of Mr. Cormany's polygraph examination of Mr. Moultrie was also made available to the Government. (January 29, 2007 Letter from Assistant United States Attorney Chad Lamar, at p. 1, attached hereto as Exhibit E).

² Because the public official referred to in Count 1 of the indictment was not named in the indictment, that official's name has been blackened out each time it appears in Exhibit D and subsequent exhibits to this Motion.

On December 8, 2007, after the Government informed the undersigned about some further details relating to its investigation concerning the Mississippi Beef project, Mr. Moultrie underwent a second polygraph examination, focusing on the issue of whether Mr. Moultrie was involved with any alleged fraudulent billing engaged in by The Facility Group (“TFG”) and its principals, and whether Mr. Moultrie knew anything about an alleged scheme to engage in fraudulent billing on the project. This second polygraph examination was performed by Richard W. Keifer, the former FBI head of quality control for polygraph examinations nationwide, who now works in Orlando in private practice. During that examination, Keifer asked the following relevant questions and Mr. Moultrie provided the following answers:

A. Did you have any type of agreement with anyone that your company could submit fraudulent bills on the Mississippi Beef contract?

Answer – No

B. Did you obtain the Mississippi Beef contract knowing your company would submit fraudulent bills?

Answer – No

C. Do you have any knowledge of fraudulent billing on the Mississippi Beef contract?

Answer – No

(Declaration of Richard W. Keifer, at para. 13, attached hereto as Exhibit B; *see also* Attachment to Ex. B, unnumbered page 1). Similar to the conclusion reached by Mr. Cormany, Mr. Keifer stated “I evaluated Mr. Moultrie’s responses . . . [and] I found that his responses were not indicative of deception. . . . Therefore, it is my opinion that Moultrie is telling the truth.” (*Id.* at para. 14; *see also* Attachment to Ex. B, at

unnumbered page 1). The results of this examination, and an opportunity to examine all of the materials from the examination, were also provided to the Government. (December 10, 2007 Letter to United States Attorney Jim Greenlee, attached hereto as Exhibit G³).

Mr. Spiers conducted a similar quality control review of Mr. Keifer's polygraph examination of Mr. Moultrie on January 24, 2008, and concurred with Mr. Keifer's conclusion, that there was no deception indicated in Mr. Moultrie's responses that denied any involvement with, or knowledge of, any scheme for fraudulent billing of the Mississippi Beef Project by him or his company. (Declaration of Alfred E. Spiers, at para. 11-14; *see also* Attachment to Ex. C, unnumbered pages 6-7). The report of Mr. Spiers' quality control evaluation of Mr. Keifer's polygraph examination of Mr. Moultrie was also made available to the Government. (January 28, 2008 Letter to United States Attorney Jim Greenlee, attached hereto as Exhibit H).

As a result of these letters, and the discussion arising from them, the Government and Mr. Moultrie, through undersigned counsel, made arrangements for Mr. Moultrie to take an FBI administered polygraph examination in Jackson, Mississippi on February 5, 2008. (February 7, 2008 Letter from Assistant United States Attorney Chad Lamar, attached hereto as Exhibit I). This polygraph examination was never administered to Mr. Moultrie, initially because unforeseen events created a personal scheduling conflict, *see* explanation in Exhibit I, but also because Messrs. Lamar and Bever discussed but

³ Copies of correspondence between counsel for Mr. Moultrie and the Office of the United States Attorney for the Northern District of Mississippi concerning the polygraphs at issue in this Motion are attached hereto, chronologically, as Exhibits D through I. (These copies have been redacted in part to eliminate portions that do not relate to polygraph issues in any way.)

were unable to reach agreement on the conditions for taking the additional polygraph – for example, limited use of any statements made during the process, see discussion in Mr. Lamar’s February 7, 2008, letter attached hereto as Exhibit I. That letter from Mr. Lamar ended, however, with an alternative to the terms that had been unsuccessfully discussed. Mr. Lamar’s letter confirmed, in writing, that the Government would “of course, administer a polygraph examination under conditions set in the standard FBI forms.” (Ex. I) Almost a month later, discussions of Mr. Moultrie taking an FBI polygraph examination were re-kindled between Messrs. Lamar and Bever and “Mr. Moultrie offered to take a standard FBI polygraph on the conditions previously set by your Office that whatever statements he made during the pretest interview could be used against him in court, and that he would sign the FBI standard waiver form.” (March 8, 2008, Letter to Assistant United States Attorney Chad Lamar, attached hereto as Exhibit J). So while Mr. Moultrie attempted to take Mr. Lamar up on his previous offer to take a standard FBI polygraph, Mr. Lamar and the Government refused to allow Mr. Moultrie to do so, depriving Mr. Moultrie of an opportunity to clear his name on their terms. (Ex. J)

Related to this case are the previously adjudicated cases of Richard Hall, the owner of Mississippi Beef Processors, LLC, which was, in turn, the owner of the Mississippi Beef Project, and Sean Carothers, the President of Carothers Construction, Inc., the General Contractor for the construction of the Mississippi Beef plant. In the indictment filed with this Court on February 13, 2008, Mr. Hall is alleged to have been the victim of the alleged fraudulent scheme engaged in by the defendants, an allegation denied by Mr. Moultrie. The truthfulness of this denial is supported by the above

discussed polygraph examinations. As the victims of the alleged crime perpetrated by the defendants, Mr. Hall and Mr. Carothers will likely be called as witnesses by the Government in making its case.

On January 24, 2006, Richard Hall entered into a plea agreement with the United States pleading guilty to charges of mail fraud and money laundering for actions arising out of his involvement with the Mississippi Beef contract with the Mississippi Development Authority. The truthfulness of the statements contained in the plea agreement is guaranteed by polygraph provisions whereby the pleading defendant agrees to submit to a polygraph at any time concerning his unlawful activities. The plea agreement contains language stating:

POLYGRAPH: The defendant agrees to submit to polygraph examination(s), if requested by the United States Attorney, by a federal polygraph examiner designated by the U.S. Attorney, regarding defendant's knowledge of these and all unlawful activities about which defendant has knowledge.

(Plea Agreement of Richard N. Hall, p. 2, para. 6, attached hereto as Exhibit K). Similarly, on January 3, 2007, Sean Carothers pled guilty to various federal crimes arising out of his relationship with Richard Hall and his involvement in the crimes committed by him. This plea agreement also contained a polygraph clause whose language that is substantial similar to the language in Hall's agreement. The agreement states:

POLYGRAPH: The defendant agrees to submit to such polygraph examination(s), as are requested by the United States Attorney, by a federal polygraph examiner designated by the U.S. Attorney, regarding defendant's knowledge of these and all unlawful activities about which defendant has knowledge.

(Plea Agreement of Sean Carothers, p. 3, para. 6, attached hereto as Exhibit L). Furthermore, the transcript from Mr. Carothers' plea hearing indicates that Mr. Carothers has in fact taken and passed a polygraph pertaining to his convictions for federal crimes stemming from his own conduct as the President of the general contractor on the Mississippi Beef project. (Transcript of January 16, 2007, Hearing in United States v. Carothers at 18, attached hereto as Exhibit M).

The American Polygraph Association ("APA") undertook to study the validity and accuracy of polygraph examinations in a study of polygraph examinations conducted since 1980. (Norman Ansley, *The Validity and Reliability of Polygraph Testing*, at 6, attached hereto as Exhibit N). The study assessed the accuracy of polygraphs based upon (a) deceptions confirmed by later confessions of the test subject; and (b) truthfulness confirmed by later confessions of others. This study ultimately found that polygraph examinations have an average accuracy of 98%. (Ex. N, at 6). A second validity study assessed accuracy by giving the case files to a panel of attorneys who examined the evidence available and then made a decision of guilt or innocence. The results of the panel's determination were compared to polygraph examinations of the defendants and all disagreements between the attorneys' findings and the polygraphs were considered polygraph errors. Two versions of this study found polygraph examinations to be 85% and 92% accurate, although the APA notes various methods that could have been used to improve the study. (Exhibit N, at 7).

Despite the fact that the Government was given the results of these two polygraph examinations – indicating that Mr. Moultrie was not involved with any bribery or fraud schemes in connection with the Mississippi Beef project – on February 13, 2008, a

federal grand jury serving in the Northern District of Mississippi returned a sixteen (16) count indictment against Mr. Moultrie and other defendants, charging them with conspiracy to commit a violation of 18 U.S.C. § 371, conspiring to violate 18 U.S.C. § 666(a)(2) and with engaging in a scheme to defraud by use of the mails in violation of 18 U.S.C. § 1341m as well as conspiracy to violate 18 U.S.C. § 1341. Because the polygraph evidence Mr. Moultrie seeks to introduce is admissible under Fed. R. Evid. 702 and *Posado*, Mr. Moultrie moves for the results of the polygraph examinations and the accompanying expert opinions to be admitted into evidence.

3. Argument and Citation of Supporting Authority

- I. A pretrial *Daubert* hearing is required under Fed.R.Evid Rule 104 in the context of the facts of this case because it is likely that the Government will oppose the proffered evidence with conflicting expert testimony of their own challenging the source, substance or methodology of the polygraph examinations.**

In the indictment, Mr. Moultrie was charged with fraud and conspiracy to commit bribery and so the Government must prove beyond a reasonable doubt that Mr. Moultrie possessed the criminal intent to defraud and the criminal intent to conspire to commit bribery. This will require the jury to determine Mr. Moultrie's subjective intent and therefore, a key issue for the jury to assess will be the credibility of Mr. Moultrie and the truthfulness of his testimony that, among other things, he lacked the requisite criminal intent to commit these crimes, assuming that Mr. Moultrie decides to testify.

Mr. Moultrie plans to offer into evidence expert testimony that is relevant to his credibility and truthfulness in his denials of being guilty of bribery and fraud. This evidence is two polygraph examinations taken and passed by him, and accompanying expert testimony concerning the reliability and relevance of the examinations. Ex. A, B &

C. Rule 702 allows scientific, technical or other specialized knowledge that is being offered to assist the trier of fact to understand the evidence, so long as the testimony is the product of reliable principles that have been applied reliably to the facts of the case. Fed.R.Evid. 702. Furthermore, Rule 104 specifically requires that “[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court.” Fed.R.Evid. 104(a). When proffered expert testimony is challenged, or will be challenged, by the opposing party, it is the role of the District Court, as “gatekeeper,” to engage in a preliminary decision of whether the evidence is admissible, reviewing the methodology of proffered expert opinions, their relevance to the facts of the case and whether they are admissible under Rule 403. Daubert, 509 U.S. 579; Posado, 57 F.3d 428 (5th Cir. 1995).

This preliminary inquiry requires a hearing when the party challenging the expert testimony presents conflicting expert testimony that attacks the source, substance or methodology of the proffered testimony while offering contrary data of its own. United States v. Hansen, 262 F.3d 1217 (11th Cir. 2001). In this case, Mr. Moultrie will offer into evidence the two polygraph examinations and their accompanying expert testimony for the purpose of proving Mr. Moultrie’s credibility and truthfulness. Based upon the facts of this case, Mr. Moultrie has a reasonable belief that the Government will challenge the admissibility of the polygraph evidence. This is apparent from the Government’s refusals to review or give any weight to the polygraph evidence when it was previously offered to the Government for the purpose of clearing Mr. Moultrie of any wrongdoing during the Governments’ investigation. *See* Ex. D, E, F, G, H, I, & J. Accordingly, Mr. Moultrie anticipates that the Government will seek to present expert

testimony of its own that conflicts with the findings of his experts and that will seek to discredit the source, substance, or methodology of the polygraph examinations offered. Accordingly, Mr. Moultrie requests that this Court grant his request for a *Daubert* hearing if the Government challenges the admissibility of the proffered polygraph examinations, and accompanying expert testimony.

II. The polygraph examinations, and their accompanying expert testimony, are admissible according to the standards set forth in *Daubert* and *Posado* because the evidence is reliable and relevant, and because its admission is not barred by Fed.R.Evid. Rule 403.

As this Court has expressly recognized, the question of whether a polygraph is to be admitted must be resolved through a *Daubert* hearing since the Fifth Circuit's rejection of the per se rule against the admission of polygraph evidence. *Parks v. Mississippi Dept. of Transp.*, 2006 WL 2483484 (N.D. Miss. 2006). This change from the old rule of per se inadmissibility was recognized by the Fifth Circuit in *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995), stating, "the rationale underlying this circuit's per se rule against admitting polygraph evidence did not survive *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993)." *Posado*, 57 F.3d at 429; *see also* *Blake v. University of Mississippi Med. Ctr.*, 2006 WL 839556 (S.D. Miss. 2006) (recognizing the Fifth Circuit's abrogation of the per se rule against admissibility of polygraph evidence). In *Posado*, the Fifth Circuit applied Fed.R.Evid. 702 ("Rule 702") according to the Supreme Court's ruling in *Daubert*; doing so through the use of a three part test for admissibility against which polygraph evidence must be applied. The first two prongs deal with whether the proffered evidence is reliable and relevant, requiring that "the proffered evidence possesses sufficient

scientific, technical, or other specialized knowledge [reliability] and [it] is relevant in the sense that it will assist the trier of fact to understand the evidence or to determine a fact in issue [relevance].” Posado, 57 F.3d at 432 *citing* Daubert, 509 U.S. 592 (internal citations removed). After having established the polygraph evidence’s reliability and relevance, the polygraph evidence must satisfy Rule 403 and its prohibition of evidence whose probative value is substantially outweighed by potential to create unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay.

A. Robert Moultrie’s two polygraph examinations are reliable evidence because the polygraph examination techniques are peer reviewed and published, the polygraph examinations exhibit an acceptable error rate, and the polygraphists administering the examinations are well qualified and certified.

In the Fifth Circuit, reliability under Rule 702 is demonstrated by a showing that the knowledge offered is “more than speculative belief or unsupported speculation.” Posado, 57 F.3d at 433 *quoting* Daubert, 509 U.S. at 590. This requires proof of scientific validity – that the principle supports what it purports to show – something that “can be measured by several factors, including whether the theory or technique can be tested and whether it has been subjected to peer review or publication.” Posado, 57 F.3d at 433.

The *Posado* court then noted several characteristics about polygraph evidence that illustrated reliability within the meaning of Daubert. The *Posado* court noted that since the time Frye was decided there have been “tremendous advances . . . in polygraph instrumentation and technique.” Id., at 434. Amongst these noted advances are a 70-90% accuracy rate, the standardization of practices, advances in instrumentation, and publication of studies. Id. at 433 (noting that “[s]uch variation also exists in many of the

disciplines and for much of the scientific evidence we routinely find admissible under Rule 702.”). Nonetheless, the Court felt the record was incomplete and therefore chose not to ultimately rule on the reliability, and consequently the admissibility, of polygraph evidence at the time of this case. *Id.* at 434. While it is true that on remand, the polygraph evidence at issue in the *Posado* case was found inadmissible, United States v. Ramirez, 1995 WL 918083 (S.D. Tex. 1998) (unreported), not all courts applying the standards set forth in *Posado* have found polygraph evidence unreliable.

In the Fifth Circuit, polygraph evidence has been found reliable. Ulmer v. State Farm Fire & Casualty Co., 897 F. Supp. 299 (W.D. La. 1995); *see also* Gibbs v. Gibbs, 210 F.3d 491 (5th Cir. 2000) (where the Court of Appeals upheld the admittance of polygraph evidence that the court had determined to be scientifically valid even though some of the questions at issue only indicated deception on the part of the examinee at a 56% probability). The Court in Ulmer found the test set forth in *Posado/Daubert* was satisfied because (1) the theory and technique had been tested, (2) it had been subject to peer review and publication, and (3) it had been shown to not have an unreasonable rate of error. *Id.* *but see* Tittle v. Raines, 231 F. Supp. 2d 537, 552 (N.D. Tex. 2002) (characterizing the accuracy of “control test” polygraph examinations as “little better than could be obtained by the toss of a coin.”). These factors mirror those emphasized by the court in *Posado*. Furthermore, the Ulmer court noted that “the polygraph examinations at issue . . . were administered and interpreted by a polygraphist certified to perform these functions by the State,” and that such certification required the polygraphist to undertake extensive training, to pass a competency examination, and to complete a 6 month internship. Ulmer, 897 F. Supp at 303. This certification, and the education and

qualifications it represented, was the most important factor in the Court's determination that the proffered polygraph was reliable under *Posado/Daubert*. Id.

Accordingly, this Court should find both of Mr. Moultrie's polygraph examinations reliable because they both satisfy numerous factors set forth by Fifth Circuit courts. First, the Fifth Circuit has already acknowledged the well established publication and peer review engaged in by the polygraph community. *See Posado*, 57 F.3d at 434, n.10 *citing* 22 Charles A. Wright & Kenneth W. Graham, Federal Practice & Procedure § 5169 at 92 n.2; Ulmer, 897 F. Supp. at 303. This conclusion, that polygraph technique literature is published and peer reviewed, is an acknowledgement that supports the reliability of Mr. Moultrie's polygraphs, particularly because this fact has not been called into question by any other Fifth Circuit courts to date.

Second, when assessing reliability assessments under *Posado/Daubert*, Fifth Circuit courts focus on the error rate and the quality of the instrumentation used. Both of Mr. Moultrie's polygraph examinations have acceptable error rates and were conducted by highly qualified examiners using modern instrumentation. According to the American Polygraph Association ("APA"), the accuracy rate for polygraph examinations since 1980 is in the range of 85%-98%. Ex. N at 6-7. The reasons why the APA uses error rate assessments since 1980 is because of the significant improvements in instrumentation that have occurred throughout the polygraph community since 1980. Ex. N at 6. This is particularly important to note when considering that much of the original precedents that looked unfavorably at polygraph examination data, were precedents based upon Frye, which found the polygraph technology of the early 1900s to be unacceptable in terms of accuracy rate and reliability. In this case, Mr. Cormany used

a high quality, post-1980, modern instrument, a Lafayette Ambassador, the same instrument he used as a polygraphist for the FBI. (Ex. A, at para. 10). Furthermore, Mr. Keifer also used modern, post-1980 instrumentation, in his polygraph examination of Mr. Moultrie. (Ex. B., at para. 10). Since Mr. Cormany and Mr. Kiefer both used modern instrumentation with accuracy rates that are at least as good as the 70-90% accuracy rate cited as acceptable by the *Posado* court and is significantly better than the 56% accuracy found acceptable in Gibbs, this Court should find the tests performed admissible because the accuracy rates of these tests are acceptable.

Finally, and most importantly according to the court in Ulmer, the polygraphists performing both of Mr. Moultrie's polygraph examinations are extremely well qualified. Mr. Cormany – who administered the first polygraph examination (Ex. A)⁴ – possesses several qualifications that are significant under the *Posado/Daubert* analysis of reliability; (1) he is a former polygraph examiner and coordinator of the Atlanta FBI Polygraph Division, (2) he is certified by the Department of Justice & FBI, (3) he was trained at the U.S. Department of Defense Polygraph Institute, and (4) he is a member of several professional polygraphist associations. (Attachment to Ex. A, at unnumbered 6) Similarly, Mr. Keifer – who administered the second polygraph examination (Ex. B) – possesses numerous qualifications that to show reliability according to *Posado/Daubert*; (1) he was the National Polygraph Program Coordinator for the FBI, (2) he has been certified by the FBI since 1982 as a Polygraph Examiner, (3) he was the FBI Polygraph Training Coordinator, (4) He has conducted over 2000 polygraph examinations, (5) he is

⁴ Recall that this polygraph examination was also given a quality control review by the former FBI polygrapher for the Jackson, Mississippi office, Mr. Spiers, who also possesses significant qualifications as a polygraph examiner (Ex. C).

an adjunct faculty member at the University of Virginia teaching courses in Polygraph studies, and (6) he has served in several professional Polygraphist organizations, specifically as Chairman, President and Director of the American Polygraph Association. (Attachment to Ex. B, at unnumbered page 3 & “Curriculum Vitae”). Furthermore, both polygraph examinations were reviewed for quality by Alfred Spiers, another highly qualified, former FBI examiner who worked in the Jackson, Mississippi Office. (Ex. C).

Recall that in Ulmer, the most important aspect of the polygraphists’ qualifications that led to a finding of reliability was that the polygraphists were certified by a professional board, in that case the Louisiana State Board. Ulmer, 897 F. Supp at 303. Here, all three of the polygraphists who were involved with the examinations at question were Certified Federal Polygraph Examiners, making them highly qualified in terms of the standards set forth in Ulmer. Furthermore, they would be as highly qualified as any FBI Polygraph Examiner who would have been used by the Government had they allowed Mr. Moultrie to accept their initial offer to take a standard FBI polygraph in an effort to clear his name. (*See* Ex. I & J). In light of the impressive qualifications of the polygraph examiners administering Mr. Moultrie’s two polygraph examinations, the low error rate associated with polygraph procedures, and the widely recognized publication and peer review concerning polygraph procedures, Mr. Moultrie’s two polygraph examinations satisfy the standards for reliability as required by the Supreme Court in Daubert and as articulated for the Fifth Circuit in Posado.

B. Robert Moultrie's two polygraph examinations are relevant evidence because they bear directly on elements of the alleged crimes which the Government must prove in its case

According to the Fifth Circuit in *Posado*, “if the polygraph technique is a valid (even if not certain) measure of truthfulness, then there is no issue of relevance.” *Id.* at 433. Accordingly, the court determined that where the answers of the examinees in court testimony are consistent with their answers under the proffered polygraph examination, the polygraph evidence is then “clearly relevant.” *Id.* This holding was articulated and applied by the *Ulmer* court, who found that “polygraph evidence will always be relevant if it tends to support or undermine the credibility of a witness whose version of events is contested at trial.” *Ulmer*, 897 F. Supp at 301. This is not to say that Fifth Circuit courts find relevance whenever a polygraph is deemed to be reliable, as some courts have found polygraphs irrelevant notwithstanding legally significant guarantees of reliability. *See United States v. Pettigrew*, 77 F.3d 1500, 1515 (5th Cir. 1996) (characterizing the proffered polygraph examinations as irrelevant because the questions were of marginal relevance or immaterial to issues in the case); *Ramirez*, 1995 WL 918083 at *4 (“Because polygraphs measure only physical reactions to stress believed to be caused by the subject’s perception of truth and do not measure objective truth, the proffered polygraph evidence in this case would not assist the trier of fact and is not relevant.”).⁵

The two polygraph examinations offered by Mr. Moultrie are relevant. The questions asked bear directly on key issues of the crimes with which Mr. Moultrie has been charged: (1) bribery (and conspiracy to commit bribery) and (2) fraud (and

⁵ Note that this conclusion is likely erroneous because even if polygraph tests measure perceived truth, perception of the truth coupled with the answer that someone gives, still bears on credibility in some sense, i.e., if someone thinks something is a lie and says it anyway, then this calls into question their credibility.

conspiracy to commit fraud). Turning to the polygraph examination administered by Mr. Cormany, conspiracy to commit bribery, it is essential to observe that conspiracy is a specific intent crime, requiring that the defendant possess the specific intent to violate the substantive offense charged. *See United States v. Ragsdale*, 426 F.3d 765, 778, n.6 (5th Cir. 2005); *United States v. Richards*, 204 F.3d 177, 208 (5th Cir. 2000). Accordingly, this requires the Government prove that Robert Moultrie possessed the specific intent to give Governor Musgrove something of value in exchange for an official act or benefit. *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999) (“for bribery [in violation of § 201(b)(1)(A)] there must be a . . . specific intent to give or receive something of value in exchange for an official act.”).

The questions posed by Mr. Cormany, and Mr. Moultrie’s subsequent answers, are relevant to this element of the offense because they directly bear on whether Mr. Moultrie possessed this specific intent when the questions asked whether Mr. Moultrie had an agreement to give contributions in exchange for the Mississippi Beef Contract, or any communications establishing such a bribery scheme. (*See* Ex. A, para. 11, and Attachment to Ex. A, unnumbered pages 2 & 4) Mr. Moultrie’s answers to polygraph questions do not concern matters immaterial to the charge of bribery, nor are they of marginal relevance, but bear directly on elements of the crime alleged by the Government, distinguishing these polygraph questions from those rejected as irrelevant by the Court in *Pettigrew*. Furthermore, even if the Court were to adopt the *Ramirez* court’s characterizations of polygraph examinations being measurements of the subject’s perception of the truth, these questions and answers would still be relevant because whether Mr. Moultrie perceived he was engaged in a relationship with Mr. Musgrove

bears directly on the question of Mr. Moultrie's intent in making campaign contributions to Governor Musgrove.

Similarly, Mr. Keifer's polygraph examination bears directly on the alleged crimes of mail fraud, and conspiracy to commit mail fraud, that the Government alleges Mr. Moultrie was involved in. In the Fifth Circuit, the requisite intent for mail fraud, and consequently conspiracy to commit mail fraud, is "the specific intent to defraud." United States v. Dotson, 407 F.3d 387, 392, (5th Cir. 2005) *citing* United State v. Strong, 371 F.3d 225, 227 (5th Cir. 2004). This means that the Robert Moultrie had to have known that the billing invoices sent to Richard Hall were false or fraudulent. United States v. Habel, 613 F.2d 1321 (5th Cir. 1980) *cert. den.* 447 U.S. 925 (In order to prove violations of substantive mail fraud counts, the Government was required to show that defendant, in furtherance of scheme to defraud, mailed letters knowing they contained untrue statements).

Since Mr. Moultrie was not directly involved with the billing process, his criminal conduct is presumably premised on his role as the Chairman of the Board and Chief Executive Officer of The Facility Group and turns on whether he had knowledge of alleged fraudulent billing engaged in by the company and whether he directed anybody to create false billing statements. Mr. Keifer's polygraph examination specifically inquired whether Mr. Moultrie knew of any alleged fraudulent billing that occurred and whether any scheme or agreement existed whereby his company would falsely bill the Mississippi Beef project. (*See* Ex. B, para. 13, and Attachment to Ex. B, at unnumbered page 1) Mr. Moultrie's answers which denied the existence of such knowledge, and the polygraph's measurement of the truthfulness of these denials, directly relate to Mr.

Moultrie's intent and to his credibility, if he chooses to testify, and accordingly they are unlike the polygraph examinations discussed by the court in Pettigrew. In the same way that Mr. Cormany's questions concerning bribery are relevant, Mr. Kiefer's questions and Mr. Moultrie's responses concerning contract fraud are relevant with respect to whether Mr. Moultrie formulated the requisite intent to defraud the government through billing practices on the Mississippi Beef contract.

Mr. Spiers' quality control evaluation specifically addressed whether the polygraphs he reviewed had relevant questions and he found that they did when he stated that the "relevant questions were clear, specific, and addressed the relevant issue of the examination." (Ex. C., paras. 7 & 12, and Attachment to Ex. C, at unnumbered pages 1 & 6) This quality control review further supports that assertion that the questions asked of Mr. Moultrie in both polygraph examinations are relevant, such that the *Posado/Daubert* analysis under Rule 702 is satisfied. Since the polygraph examinations are also reliable, *see supra* Part 3.II.A, Rule 702 is fully satisfied and the only question that remains for this Court is whether Rule 403 will bar admission of the polygraph evidence.

C. The admission of Robert Moultrie's two polygraph examinations are not prohibited by Rule 403 because the probative value of the polygraph evidence substantially outweighs any prejudicial value or any potential to confuse a jury

Even if polygraph evidence is reliable and relevant, within the meaning of *Posado/Daubert*, the Fifth Circuit still requires such polygraph evidence to pass the Rule 403 test for prejudice. Rule 403 excludes evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay." In assessing this question, the

Fifth Circuit has focused on the involvement of the Government in the polygraph examination process. Ramirez, 1995 WL 918083 at *4 (where the defendant was commended by the court for giving the Government prior notice of the polygraph examination and an opportunity to participate in it); United States v. Dominguez, 902 F. Supp. 737, 740 (S.D. Tex. 1995) (where the court, in discussing how courts should assess the potential prejudice of a polygraph examination, listed ten factors that should be assessed by court's making such an inquiry, most of which focus on the Government's involvement in the polygraph examination process). Among the ten factors listed in Dominguez were: (1) an opportunity for all parties to observe the proceedings, (2) the availability of the defendant to testify at trial, and (3) the Government's involvement in pretest interviews of the examinee. Dominguez, 902 F. Supp. at 740. Similarly, in United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989), polygraph evidence was held to be admissible to impeach or corroborate a witness at trial, lending credence to the Dominguez court's recognition that polygraph may be appropriately introduced where the defendant's personal testimony is questioned. This notion – that where a witness' credibility has been attacked, polygraph examinations of such witnesses possess enhanced probative value – is also implied in the *Posado* opinion. Posado, 57 F.3d at 435 (where the court discusses how the probative value of polygraphs may be “substantially boost[ed]” in certain situations, particularly when the defendant plans to testify and put his or her word against that of an accusers). Thus, many circuits recognize the principle that polygraph evidence is not unfairly prejudicial where the Government is involved or where the evidence is introduced in order to corroborate the defendant's in court testimony. Dominguez, 902 F. Supp. 737; Piccinonna, 885 F.2d 1529.

Furthermore, it is important to note a touchstone issue in the Rule 403 analysis that was discussed in *Posado* and subsequent cases. In *Posado* the court's Rule 403 inquiry involved

the degree to which, 'both parties have a risk in the outcome of the polygraph examination.' [quoting *Posado* at 435]. In *Posado*, for example, the court noted that the party opposing introduction of the polygraph evidence, the prosecution in that case, had been contacted prior to the examinations and given an opportunity to participate in them. *Id.* In such circumstances, the court found, the risk of unfair prejudice was reduced while the reliability of the evidence was enhanced.

Ulmer, 897 F. Supp. at 302. Accordingly, the more opportunity the Government has to be involved in a polygraph examination and the more risk that either of the parties encounter in the taking of the polygraph examination, the less prejudicial and the more reliable the polygraph examination will become.

In this case there has been ample opportunity for the Government to be involved with the polygraph examinations of Mr. Moultrie. The Government was fully apprised of the results of the polygraph examinations, and their quality control reviews, and the Government was afforded the opportunity to review any and all data obtained by the polygraphists who administered the examinations. (Ex. D, E, F, G, & H) The questions asked of Mr. Moultrie were based on the Government's investigation, and the Government never questioned or challenged the wording or relevance of the questions. Furthermore, the polygraphists are all former Government polygraphists, and, therefore, their method of administering, and reviewing, the examinations would be substantially similar to the method that any other FBI polygraphist would use in administering the

examinations.⁶ (Ex. A, B, & C). Most importantly, Mr. Moultrie has attempted to fully involve the Government in the taking of an additional polygraph on the same subjects as the two previously taken polygraphs. The Government, however, refused to honor its written offer and unequivocal commitment to let Mr. Moultrie take a standard FBI polygraph. (Ex. I & J). It would be disingenuous to say now that the Government had no opportunity here to be involved with the polygraph process, particularly in light of the overtures extended by both sides verbally and in writing in trying to schedule an FBI run polygraph examination for Mr. Moultrie; an examination that would have had Government involvement in the pretest interview as well.

It is also important to note that in Ulmer, the court recognized that there are times when there is a “special need” for probative evidence, such that the probative value of it will outweigh any prejudice. Ulmer, 897 F. Supp. at 303-4 (where the court found a special need for the polygraph evidence in order to explain why the State’s investigator concluded that there was insufficient evidence to continue with his investigation of the defendant). The facts of this case present a special need for the admission of Mr. Moultrie’s polygraphs because of the latent prejudice that will likely be presented by the testimony of Mr. Hall and Mr. Carothers. Mr. Hall and Mr. Carothers are two likely Government witnesses whose testimony will be bolstered by their plea agreements with the Government. These plea agreements contain language whereby the witnesses volunteer to subject themselves to Government run polygraph examinations upon request of the Government. (Ex. K, at p. 2, para. 6, & Ex. L, at p. 3, para. 6); *see also* Ex. M, at 18 (indicating that Carothers is on record as having already passed a polygraph, a fact the

⁶ This is particularly so with respect to Mr. Keifer, who was in fact the former head of quality control for polygraphs with the FBI. *See* Ex. B.

Government may use to try to bolster his credibility). Language referring to polygraph examinations in plea agreements has been found by numerous courts as having the effect of unfairly bolstering the credibility of witnesses such as Mr. Hall and Mr. Carothers. Jackson v. Johnson, 194 F.3d 641, 654 (5th Cir. 1999) (court acknowledged that reference to polygraph examination in plea agreement is inappropriate bolstering); United States v. Porter, 821 F.2d 968, 974 (4th Cir. 1987) (where the court noted the negative bolstering effect of a reference to a potential polygraph examination in the plea agreements of co-conspirators whose testimony was the primary basis of the government's case); United States v. Hill, 835 F.2d 875, *2 (4th Cir. 1987) (unpublished) (favorably citing Porter for the proposition that language concerning potential polygraph examinations in plea agreements typically has a prejudicial effect); United States v. Hilton 772 F.2d 783, 787 (11th Cir. 1985) (reference to potential polygraph examinations unfairly bolsters an individual's testimony); U.S. v. Burnsten, 560 F.2d 779, 785 (7th Cir. 1977) (condemning the routine practice of including potential polygraph language in plea agreements because of the effect it may have on the jury)..

The fact that Mr. Carothers has taken and passed a polygraph examination concerning criminal conduct by him in connection with the Mississippi Beef project could also bolster his credibility in a manner that is prejudicial to Mr. Moultrie. *See, e.g.*, United States w. Brown, 720 F.2d 1059, 1073 (9th Cir. 1983) (where the court concluded that polygraphs, like promises of truthfulness, may have effect of making a "witness, who would otherwise seem untrustworthy, . . . appear to be compelled . . . to come forward and be truthful.")

Given the legitimate concern held by many Circuits, including the Fifth Circuit (Jackson, *supra*), that the existence of potential polygraph clauses in a plea agreement may inappropriately bolster the credibility of a witness to juries, it follows that defendants should be able to offer polygraph evidence of their own in order to bolster their own credibility when it is challenged by the Government. Where such special needs exist, a polygraph – which has been deemed reliable and relevant under the *Posado/Daubert* tests – has more probative value than it typically would have. Thus, in this special situation the prejudicial value of the polygraph evidence does not substantially outweigh the probative value of the evidence, satisfying Rule 403.

Specifically to this case, because Mr. Hall and Mr. Carothers are key Government witnesses whose testimony was guaranteed by plea agreements containing polygraph clauses, the bolstering effect that the plea agreements will have on their testimony can only be appropriately balanced by the bolstering effect that admitting Mr. Moultrie's reliable and relevant polygraph would have. Thus, even if this Court cannot find that Mr. Moultrie's polygraph evidence is admissible in its own right, it should find that the evidence is admissible if and when Messrs. Hall and Carothers are called to testify or if Mr. Moultrie decides to testify on his own behalf. This is because, in these special circumstances, the polygraph examinations conducted by Messrs. Cormany and Keifer will have increased probative value concerning Mr. Moultrie's credibility. In light of the increased probative value of the polygraphs under these circumstances and the fact that the Government has been given full access to all charts and records of all polygraphs taken by Mr. Moultrie, this Court should find that the probative value of the polygraph examinations substantially outweighs any prejudicial value. As a result, if Mr. Moultrie

chooses to testify, Rule 403 will not be implicated and the polygraph examinations should clearly be admissible into evidence.

4. Conclusion

For the foregoing reasons, after the Court has had the opportunity to consider the issues relevant to this Motion that will arise at trial, Mr. Moultrie respectfully requests that the Court (a) grant this Motion for a *Daubert* Hearing and for introduction of the results of the two polygraph examinations previously taken and passed by Mr. Moultrie; and (b) in the alternative, reserve judgment on the matters raised in this Motion until Messrs. Hall and Carothers are called to testify or until Mr. Moultrie decides to testify on his own behalf at trial.

Respectfully submitted this 25th day of March 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of March, 2008, served via the Court's electronic filing system, a true and correct copy of the above and foregoing counsel as follows:

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