

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 3:08CR014

ROBERT L. MOULTRIE

**BENCH MEMORANDUM IN OPPOSITION TO
ADMISSION OF POLYGRAPH EVIDENCE**

Following the U.S. Supreme Court case Daubert, the Fifth Circuit Court of Appeals removed the per se exclusionary policy of polygraph examinations in criminal trials. United States v. Posado, 57 F.3d 428 (5th Cir. 1995). However, Posado did not open the floodgates to polygraph evidence. In fact, the Posado court stated, “we do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any individual case.” Id. at 434. After extensive research, no courts within the Fifth Circuit have permitted the introduction of the results of polygraph examination before a jury in a criminal case.

Posado articulates a three step inquiry applicable to all cases in which there is an issue of polygraph admissibility. First, the court must determine if the evidence is relevant and reliable. Second, the court must determine if the evidence assists the trier of fact in determining a fact at issue. Third, the court must decide if the evidence has an unfairly prejudicial effect that would substantially outweigh its probative value. Id. at 432- 36.

The first two inquiries involve substantial overlap. With regard to the first inquiry, the court must determine, under Rule 104(a), Federal Rules of Evidence, as to whether the proffered evidence possesses both sufficient reliability to be admissible as “scientific, technical or other specialized knowledge” and sufficient relevance to enable the trier of fact to understand better

the evidence or the issue in the case. Id. at 432. The crux of the reliability inquiry is whether or not the evidence is based on a solid foundation. Id. at 432-33. The second issue for the court to determine is whether the polygraph evidence conforms to Rule 702. The offered evidence must assist the trier of fact in understanding the evidence or in determining a fact at issue.

Despite the dicta in Posado noting the advances in polygraphy, the U.S. Supreme Court, in United States v. Scheffer, 523 U.S. 303, 309-10 (1998), held that the scientific community remains extremely polarized about the reliability of polygraph techniques. The Court further noted that “this lack of scientific consensus is reflected in the disagreement among courts concerning both the admissibility and the reliability of polygraph evidence.” Id. at 310-11. In addition, the Supreme Court cited numerous studies both regarding the reliability and unreliability of polygraph examinations, one of which was conducted and authored by Dr. David Raskins. In rejecting the pro-polygraph studies, the Supreme Court held that, “a fundamental premise of our criminal trial system is that the jury is the lie detector.” Id. at 312-13.

The uncertainty and continuing debate over the validity and reliability of polygraph evidence rages on. In 1983 Congress’ Office of Technology Assessment evaluated all available studies of polygraphs including several studies of Dr. David Raskins, and concluded that the cumulative research suggests that when used in criminal investigations, the polygraph test detects deception better than chance, but with error rates that could be considered significant. *Scientific Validity of Polygraph Testing*, Office of Technology Assessment, Ch.7, pg.2.

In a 1997 survey, University of Minnesota Psychology professors W.C. Iacono and D.T. Lykken, eminent scientists in the relevant scientific community, surveyed scientists from the Society of Psychophysiological Research and Fellows of the American Psychological Association. Most of the respondents believed that polygraphic lie detection is not theoretically

sound, claims of high validity for these procedures cannot be sustained and the lie test can be beaten easily by countermeasures. *The Validity of the Lie Detector: Two Surveys of Scientific Opinion*, W.G. Iacono and D.T. Lykken, *Journal of Applied Psychology*, 1997, vol. 82, No. 3, 426-433.

In that survey, when asked whether polygraphers who administered control question polygraph tests, such as the ones privately-administered to Moultrie, should be permitted to testify before a jury about the results of the examination less than 30% believed the results should be considered by a jury.

In 2003, the National Academy of Sciences, a non-profit society of distinguished scholars engaged in scientific research, released a comprehensive study on the accuracy of polygraph testing after reviewing 57 polygraph studies, nine of which encompassed work performed by Dr. Raskin. This study is perhaps the most comprehensive review of studies relating to the reliability, validity and accuracy of polygraph examinations ever performed.

In summary, the Committee found that the quality of studies fell short of what is desirable and that laboratory studies suffered from a lack of realism. In addition the committee opined that field studies had major problems identifying the truth against which test results should be judged and that most of the research does not fully address key potential threats to validity.

The Academy also concluded that estimates of accuracy from the 57 studies are almost certainly higher than actual polygraph accuracy and that laboratory studies tend to overestimate accuracy. The committee concluded that specific incident polygraph tests “can discriminate lying from truth at rates well above chance, though well below perfection.” *Committee to Review the Scientific Evidence on the Polygraph*, National Resource Council (2003), pages 3-4.

The above studies demonstrate that there is no general consensus between the relevant scientific bodies, Polygraph Associations, Psychological Associations or Medical Associations. Thus, such evidence is not relevant and unreliable.

The third step of the analysis involves the balancing of probative value versus the prejudicial effect under Rule 403, Federal Rules of Evidence. In this review, Rule 403 takes on an enhanced role. The Posado court described several factors that the district court should examine when making a decision regarding admissibility. Did the defense contact the prosecution before the examiners conducted the test? Was there an agreement as to the use to be made of the polygraph before it is conducted? The Posado court disfavored unilateral action as there was no risk to the party taking the test. The court in Posado was considering the polygraph results in a hearing before a judge rather than before the jury. Finally, the court looked at the need for the evidence.

In the instant matter, the defense conducted their examination without notice or participation by the government. The examinations were conducted early in the investigation before the government even had sufficient evidence of the crimes. The defense did not consult the government with regard to the detail uncovered by the investigation. The relevant questions are inappropriate and thus the tests are unreliable. Further, there was no agreement as to the use of the test results and thus no risk to the defendant. The admission of these polygraph results to a jury on the issue of guilt are highly prejudicial and so deficient that they lack probative value.

A more instructive and analogous case to the facts at hand is United States v. Pettigrew, 77 F.3d 1500 (5th Cir. 1996). Pettigrew sought to present the results of a polygraph to a jury on the issue of guilt. The district court declined the request without a hearing. The court of appeals rejected the defendants argument and affirmed the court's decision citing the absence of the

safeguards discussed above.

In addition, Rule 704(b), Federal Rules of Evidence, proscribes the use of expert witnesses to testify regarding the “ultimate issue.” Expert witnesses are prohibited from testifying about the mental state or condition of a defendant in a criminal matter. In reality, the defense, through polygraph examiners, want to place before a jury opinion evidence that the defendant did not knowingly and intentionally offer a thing of value with intent to influence or scheme to defraud others. Such ultimate issues are matters for the trier of fact, the jury.

For the above reasons, the United States respectfully submits that the defendant’s motion for the admission of polygraph examinations be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William C. Lamar, certify that I electronically filed the foregoing **BENCH**

MEMORANDUM IN OPPOSITION TO ADMISSION OF POLYGRAPH EVIDENCE

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants: None.

This the 1st day of May, 2008.

/s/ William C. Lamar

WILLIAM C. LAMAR

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