

IN THE UNITED STATES DISTRICT OF COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA *

Plaintiff *

CRIM. NO. 99-194 (CCC)

vs. *

DEFENDANT *

Defendant *

* * * * *

MOTION TO ADMIT POLYGRAPH EXAMINATION INTO EVIDENCE

TO THE HONORABLE CARMEN C. CEREZO
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF PUERTO RICO

COMES NOW defendant, represented by the Federal Public Defender, and respectfully
STATES and PRAYS:

I. Introduction and Pertinent Facts

Mr. Defendant currently stands charged in a one count Indictment of possessing with intent
to distribute more than 5 kilograms of cocaine.

On November 3, 1999, a polygraph examination was conducted on defendant by Mr. ,
a certified polygraph examiner. Shortly after receiving the results of the examination, the same were
made available to the U.S. Attorney's Office.

It is the intention of Mr. Defendant to present the results of the polygraph examination as
evidence at Trial. Based on the arguments to be discussed below, the defense requests this Honorable
Court to schedule an evidentiary hearing in which the admissibility of the polygraph examination

be determined. A pretrial determination of this issue will allow the parties to determine specific trial strategies, and will certainly influence on plea negotiations.

II. Current Supreme Court Case Law on Polygraph

The Supreme Court has not ruled specifically on the admissibility or exclusion of polygraph examinations in Federal litigation. The most recent case on this area is *U.S. vs Scheffer*, 140 L. Ed. 2d 413 (1998). The case reached the Supreme Court from the U.S. Court Appeals for the Armed Forces, the issue being the admissibility of polygraph evidence, in the context of court martial. After evaluating Rule 707 of the Military Rules of Evidence, which specifically prohibits the admittance of polygraph results, the Court upheld the constitutionality of the same and overturned the Circuit Court, which had admitted the results.

In the main Opinion, determining not to admit the poligraph evidence and ratifying the rationale for Military Rule of Evidence 707, Justice Thomas targets (1) the test itself, (2) the function of the jury in determining credibility, (3) the interest in avoiding collateral litigation, and (4) the accused right to present evidence. However the particularities of the *Scheffer* decision point that the discussion on the admissibility of poligraph tests if far from closed.

First, the Military Rules of Evidence makes an outright prohibition on the admission of polygraph results. Therefore the Court, instead of specifically addressing the admittance of polygraph in regular criminal litigation, was construing the constitutionality of Rule 707.

Secondly, and more importantly, the case was not decided by a majority of the Court disagreeing with the technics or admissibility of polygraph examinations, but rather with a majority agreeing on the results and the concurring members of the majority taking a clear stand on their

rationale to reach the same conclusion. The Opinion was announced by Justice Thomas, which was joined by a concurrence filed by Justice Kennedy, and that concurrence was joined by Justices O'Connor, Ginsburg and Breyer, and a dissent by Justice Stevens. These four concurring Justices, while agreeing with the result in that specific case, differ on the rationale of the main opinion, and indeed are closer on their view of polygraph examinations with the dissent. In his concurrent opinion Justice Kennedy stated:

“In my view it should have been sufficient to decide this case to observe, as the principal opinion does, that various courts and jurisdictions “may reach differing conclusions as to whether polygraph evidence should be admitted.” ...

I doubt, though, that a rule of per se exclusion is wise, and some later case might present a more compelling case for introduction of the testimony than this one does. Though the considerable discretion given to the trial Court in admitting or excluding scientific evidence is not a constitutional mandate, see *Daubert vs. Merrel Dow*, there is some tension between that rule and our holding today. And, as Justice Stevens points out, there is much inconsistency between the Government's extensive use of polygraphs to make vital security determinations and the arguments it makes here, in stressing the accuracy of these tests.

With all respect, moreover, it seems the principal opinion overreaches when it rests its holding on the additional ground that the jury's role in making credibility determinations is diminished when it hears polygraph evidence. I am in substantial agreement with Justice Stevens' observation that the argument demeans and mistakes the role and competence of jurors in deciding the factual questions of guilt or innocence. In the last analysis the principal opinion says it is unwise to allow the jury to hear “a conclusion about the ultimate issue at trial”. I had thought this tired argument had long since been given its deserved repose as a categorical rule of exclusion. The principal opinion is made less convincing by it's contradicting the rationale of Rule 704 ad the well considered reasons the Advisory committee recited in support of its adoption”

Given the above, it is still the providence of the trial court, under the specific guidelines of their respective Circuits, to determine the admissibility of polygraph examinations. Indeed, the concurring opinion by Justice Kennedy forshadows that the issue is one which has not been resolved.

III. Applicable Legal Standards to Scientific Evidence

The admissibility of Polygraph examinations, like all scientific evidence, is governed by Fed. R. Evid. 702, and by its interpretative jurisprudence, mainly *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993), and *Kumho Tire v. Carmichael*, 526 U.S. 137, 147 (1999). As will be discussed below, *U.S. vs Scheffer*, 140 L. Ed. 2d 413 (1998), did not modify the applicability of that standard.

Fed. R. Evid. 702 allows duly qualified experts to testify on the basis of “scientific” “technical” or “specialized” knowledge.¹ The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, supra, held that federal trial court judges, when faced with a proffer of expert scientific testimony, must determine at the outset whether the “reasoning or methodology underlying the testimony is scientifically valid” *Id.* at 592-93. As the Court recognized, in a case involving scientific evidence, evidentiary reliability will be based upon scientific validity. *Id.* at 590 n.9. Significantly, for purposes of this case, the Supreme Court in *Daubert*, held that this standard applies both to “novel scientific techniques” and to “well established propositions.” *Id.* at 592 n.11.²

The Supreme Court has made clear that federal trial judges, pursuant to Fed. R. Evid. 702, have a special “gatekeeping” obligation to insure that only “reliable” expert testimony be presented

¹ The full text of Rule 702 provides

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

² *Daubert* has resulted so influential in this evidentiary area that Rule 702 was modified, effective December 1, 2000, to follow its rationale.

to jurors. *Kumho Tire v. Carmichael*, 526 U.S. 137, 147 (1999) (“In *Daubert*, this Court held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to ensure that any and all [expert] testimony . . . is not only relevant, but reliable.”) (quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993)).

The *Daubert* Court suggested five factors that trial courts should ordinarily consider in determining whether proffered expert testimony is scientifically valid.³ The first and most critical factor is whether the “theory or technique . . . can be (and has been) tested.” *Id.* at 593. As the Court recognized, empirical testing is the essential criterion of science:

“Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry. The statements constituting a scientific explanation must be capable of empirical test. The criterion of the scientific status of a theory is its falsifiability, or testability.”

Id. at 593 (internal quotations and citations omitted).

A second closely related factor that the *Daubert* Court suggested should “ordinarily” be considered is the “known or potential rate of error” of the particular technique. *Id.* at 594. In this regard, the Court cited the Seventh Circuit’s decision in *United States v. Smith*, 869 F.2d 348, 353-354 (7th Cir. 1989), in which the Seventh Circuit surveyed studies concerning the error rate of spectrographic voice identification techniques. *Id.*

³ As the Supreme Court subsequently made clear in *Kumho*, these same five factors may also be applied by a district court in assessing the reliability of an expert testifying on the basis of “specialized” or “technical” knowledge. *Kumho*, 526 U.S. at 149-158 (holding that district court properly applied the *Daubert* factors to an engineering expert who opined that the tire blow out on the plaintiff’s minivan was caused by a manufacturing defect).

A third factor pointed to by the Court is the “existence and maintenance of standards controlling the technique’s operation.” *Daubert*, 509 U.S. at 594. As an example, the Supreme Court cited the Second Circuit’s opinion in *United States v. Williams*, 583 F.2d 1194, 1198 (2d Cir. 1978), in which the Second Circuit observed that the “International Association of Voice Identification . . . requires that ten matches be found before a positive identification can be made.” Id.

Fourth, the Daubert Court held that “general acceptance can . . . have a bearing on the inquiry.” Id. “A reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.” Id. (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)). As the Court recognized, “widespread acceptance can be an important factor in ruling particular evidence admissible and a ‘known technique which has been able to attract only minimal support within the community’ . . . may properly be viewed with skepticism.” Id. (quoting *Downing*, 753 F.2d at 1238)).

Finally, the *Daubert* Court recognized that an additional factor which may be considered “is whether the theory or technique has been subjected to peer review and publication.” Id. at 593. As the Court recognized, “submission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.” Id. Accordingly, “[t]he fact of publication (or lack thereof) in a peer reviewed journal . . . [is] a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.” Id. at 594.

In providing the above factors, the Supreme Court emphasized that the inquiry under Federal Rule of Evidence 702 is a “flexible one” and that, as such, additional factors may be considered. Id.

In *General Electric vs Joiner*, 533 U.S. 136 (1997) the Court held that the trial court’s decision to admit or reject expert witness testimony under the *Daubert* analysis will not be reversed on appeal unless it rises to an abuse of discretion.

IV. The Manner in Which Different Courts had Applied the Daubert Standard to Polygraph Examinations

After *Daubert* the various Circuits have dealt in different manner with the admissibility of polygraph examinations. The First Circuit has addressed the question in a tangential manner, in *U.S. vs Lynn*, 856 F. 2d 430 (1st Cir., 1988). In that case one of the witness for the Government had a plea agreement which required him to submit to polygraph examinations; failure of the same would result in nullification of the agreement. Defense counsel tried to cross the witness on that area, but was prohibited from doing so by the District Court, who determined that polygraph examinations were inherently unreliable. The First Circuit stated “Moreover, polygraph results are admissible for reasons other than proving the substance contained”, and cites *U.S. vs Black*, 684 F 2d 841 (7th Cir.), which stands for the proposition that the admissibility of polygraph results is a matter of district court discretion.

The First Circuit has never considered polygraph examinations under the *Daubert* standard, since *Lynn* case was decided 5 years before the Supreme Court ruled on *Daubert*.

Most other Circuits have admitted polygraphs examinations to larger or lesser extent. The Fourth and Fifth Circuits adhere to a per se ban on admissibility, while the Eighth Circuit allows stipulated polygraph evidence, and has been leaning towards increased admissibility. The Ninth, Third, Sixth, Seventh and Tenth Circuits permit polygraph evidence pursuant to stipulation and other certain circumstances not necessarily related to the results of the examination itself, and which are not pertinent here.

Two Districts Courts have admitted polygraph results, based specifically on the Daubert analysis. In *U.S. vs Crumby*, 895 F. Supp. 1354 (D. Arizona, 1995) the District Court of Arizona tackled an identical situation: "a criminal defendant who claims his innocence has taken and passed a polygraph examination, and seeks to introduce this potentially exculpatory evidence" *Crumby*, at 1357. After an extensive hearing, in which the Court examined the requirements of *Daubert* in detail, and the manner in which polygraph examinations complied with them, the Court admitted limited usage of polygraph results. The Court stated:

"In general, the court concludes that the maturation of the science of polygraphy, when properly coupled with a cautious acceptance of this science by federal courts, will lead to a fairer and more just system of criminal and civil jurisprudence. Courts must assist the trier of fact in it's quest to ascertain the truth, while ensuring that the trier of fact is not unduly mislead or prejudiced."

Submitting polygraph examinations to a stringent Daubert analysis, the District Court then proceeded to evaluate their admittance under Rule 403 of the Federal Rules of Evidence.

Once determining that the polygraph was admitted, the Court then evaluated the effect of other evidentiary rules to determine the manner and extent of the admissibility. Applying Fed. R. Evid 403 the Court determined that "there can be little doubt that polygraph evidence, if reliable, is

relevant evidence with an enormous probative value. In cases such as the present one, the polygraph examination is probative as to whether the subject is being truthful about whether he or she committed the crime in question. Clearly the probative value of such evidence is beyond question.”

The District Court also evaluated other concerns, on particular that the Jury would be overwhelmed by technology, time consumption on collateral matters, the “aura on infallibility” the test has, and the opinion by the expert regarding the ultimate issue. In tailoring it’s admissibility the District Court determined at page 1363:

“The use of polygraph evidence at trial must be narrowly tailored to the circumstances for which it is relevant, and it must be circumscribed so as to limit it’s potential prejudicial effects. Polygraph evidence may be admissible under a number of Federal Rules of Evidence. The Court must consider the interaction of Rules 403, 404, 608, 703. The polygraph evidence is admissible under Rule 702.

.... Therefore, the polygraph evidence may only be used to impeach or corroborate the credibility of the Defendant. Thus, if the defendant takes the stand and testifies that he did not commit the crime, and the government impeaches his credibility, then the Defendant may support his credibility with the use of the polygraph evidence. The credibility of the witness can only be supported with evidence that Defendant took a polygraph examination in connection with this case and passed the same.

... This testimony is admissible under the “impeachment by contradiction” exception to 608(b).

... Furthermore, Rule 608(b) should be narrowly read, it should not be read in a manner which precludes a criminal defendant from supporting his credibility where it has been attacked. A polygraph examination is highly probative evidence of a criminal defendant’s propensity for truthfulness with respect to the issues on the case.”

Interestingly, when in *Scheffer* the U.S. Court Appeals for the Armed Forces made it’s decision to admit the polygraph, before the case reached the Supreme Court, it did so along the lines

followed in *Crumby*, which is to say admitting the polygraph as rebuttal for an attack on the credibility of the accused.

In *U.S. vs Galbreth*, 908 F. Supp. 877 (D. New Mexico, 1995), that District Court reached a consistent result with *Crumby*. In *Galbreth* the Court made, as part of its *Daubert* analysis, a exhaustive examination of current polygraph technology and methodology. In making its final determination, at page 895, the Court stated:

“The Court finds that Dr. Raskin’s testimony is admissible under Fed. R. Evid. 403. The expert testimony is highly probative of a critical fact in issue, i.e., whether the Defendant possessed the willful mens rea at the time he failed to report certain items of income. This is so, because the accuracy of the test results is approximately 95%. In the light of such an elevated accuracy rate, the results of the test are highly probative of whether Defendant did, in fact, realize that the items he failed to report should have been reported in his income tax returns.

On the other hand, the testimony in this case is not unduly prejudicial. There is little danger that the jury will consider the polygraph technique to be shrouded with “an aura of infallibility” given that Dr. Raskin will himself testify that the technique is not infallible. Moreover, any argument that the jury will be unable to assess the true validity of the polygraph technique because of the “aura of infallibility” that surrounds scientific testimony has no empirical basis. ...

Furthermore, the Government will be afforded an opportunity to cross examine Dr. Raskin and present its own witness to refute any of Dr. Raskin testimony related to the polygraph technique in general or to the application of that technique in this case.”

As seen from the above decisions, current polygraph examinations meet all the requirements of the *Daubert* test. Polygraph techniques have been extensively reviewed and evaluated, both by academic and practitioner. They have determined appropriate procedures, error rate, standards for the test, and acceptance of the technique.

The general acceptance of reliability of polygraph examinations is extensive, and has led to it's being widely used, both in the private industry, and by the United States Government. The Federal Bureau of Investigation, the Secret Service and the Drug Enforcement Administration, the National Security Agency, the Central Intelligence Agency, among others, use polygraph examination regularly for pre-employment evaluations, review of security clearances, and evaluation of informants.⁴

The Department of Defense uses polygraph examinations extensively for employment, security clearances determinations, and for periodic "updating". The use of polygraph is so extensive within the Department of Defense that this Agency created the Polygraph Institute to provide "in-house" training and establish it's own standards. As an example, in 1996 the Department of Defense conducted 12,548 examinations.⁵

Even non-investigative agencies use polygraphs. As an example, since 1998 the Department of Energy uses polygraph examination. See 64 CFR 45062.

The Government, in it's prosecutorial capacity, has made extensive use of the polygraph during debriefings, witness examinations and plea bargaining process.

⁴ These federal agencies openly advertise its poligraph requirement. The FBI does at it's website, <http://www.fbi.gov/employment/policies.htm>. The DEA does so at it's website, <http://www.usdoj.gov/dea/job/agent/page-05.htm>. The Secret Service does so at it's website, http://www.ustreas.gov/usss/opportunities_agent.htm. The CIA does so at it's website, <http://www.cia.gov/cia/employment/reqframe.htm>.

⁵ See Department of Defense, Polygraph Program, Annual Report to Congress, 1996.

It is the intention of the defense to present more extensive expert testimony of polygraphers at the requested evidentiary hearing on how the polygraph examination made on defendant complies with all the *Daubert* test requirements, as with current polygraph standards.

VI. Conclusions and Prayers

Based on all the above, defendant respectfully request this Honorable Court to Schedule an evidentiary hearing to determine the admissibility of the polygraph results in this case.

I HEREBY CERTIFY: That a copy of the foregoing Motion was served on counsel for the government, U.S. Attorney Guillermo Gil (Attn: Assistant U.S. Attorney Rose Vega) by delivering it to his office at the Federal Building, Carlos Chardón Avenue, San Juan, Puerto Rico.

In San Juan, Puerto Rico, this February 5, 2001.

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