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*BAN ON USE OF POLYGRAPH EVIDENCE DOES NOT
AMOUNT TO ABRIDGEMENT OF MILITARY
DEFENDANT'S RIGHT TO PRESENT A DEFENSE*

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Abstract. Military Rule of Evidence 707 excludes polygraph evidence in military trials. The Supreme Court on March 31, 1998, upheld the ban, holding that it did not violate the Sixth Amendment rights of defendants. The Court also said that the military ban on the use of such evidence "does not unconstitutionally abridge the right to present a defense."

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Ban on Use of Polygraph Evidence Does Not Amount to Abridgement of Military Defendant's Right to Present a Defense

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Summary

Military Rule of Evidence 707 excludes polygraph evidence in military trials. The Supreme Court on March 31, 1998, upheld the ban, holding that it did not violate the Sixth Amendment rights of defendants. The Court also said that the military ban on the use of such evidence "...does not unconstitutionally abridge the right to present a defense."

Background

In March of 1992, the appellant in *United States v. Scheffer*¹, began working as an informant for the Air Force Office of Special Investigations (OSI). On April 7, 1992, at the request of OSI, the appellant voluntarily provided a urine sample. Periodic urinalyses are normal procedure for volunteer informants.

On April 10th, OSI asked appellant to submit to a polygraph examination. The OSI polygraph examiner asked the appellant three questions: (1) had he ever used drugs while in the Air Force; (2) had he ever lied in any of the drug information he gave to OSI; and (3) had he told anyone other than his parents that he was assisting OSI? The appellant answered "No" to each question. The polygraph examiner concluded that "no deception" was indicated.

The appellant's urinalysis tested positive for methamphetamine. At the informant's trial, the appellant asked the military judge for an opportunity to lay a foundation for the favorable polygraph evidence. The military judge denied the request stating among other things that "the polygraph is not a process that has sufficient scientific acceptability to

¹ 66 U.S.L.W. 4235 (U.S. April 7, 1998).

be relevant.” The appellant asserted that Military Rules of Evidence, Rule 707 violated his Sixth Amendment² right to present a defense because it compelled the military judge to exclude relevant, material, and favorable evidence offered by him. He argued that he was constitutionally entitled to be given an opportunity to rebut the attack on his credibility as a witness by laying a foundation for favorable polygraph evidence. The Government alleged that Rule 707 does not impermissibly infringe on the Sixth Amendment; it argued that the Rule merely codifies all the evidentiary prohibitions against polygraph evidence and that, even without Rule 707, polygraph evidence would never be admissible. The United States Court of Appeals for the Armed Forces set aside the decision of the United States Air Force Court of Criminal Appeals which ruled in favor of the Government. The Court of Appeals for the Armed Forces ruled that the appellant should be provided an opportunity to lay a foundation for admission of the polygraph evidence.

The United States Supreme Court granted *certiorari* in *United States v. Sheffer*³, on May 19, 1997. One of the two issues⁴ presented on appeal to the Court was whether Military Rules of Evidence, Rule 707 violates the Sixth Amendment if it interferes with the accused’s right to present testimony that is relevant and material to his defense?

Prior to the Court's decision, the scientific community was extremely polarized regarding the reliability of polygraph techniques. It would appear that the *Sheffer* decision will not contribute to the reputation of the reliability of these techniques inasmuch as the Court noted that its accuracy rate has been described as being a "...`little better than could be obtained by the toss of a coin,' that is, 50 percent."⁵

Comments Regarding the Ban on Use of Polygraph Evidence Based Upon Selected Cases

It appears as if a substantial number of the federal circuits do not have a *per se* prohibition against polygraph evidence. Instead, they rely on the trial judge to apply a *Daubert* analysis.⁶ The Ninth Circuit Court of Appeals rendered its decision on remand

² The Sixth Amendment grants an accused “the right to call `witnesses in his favor’.” *Rock v. Arkansas*, 483 U.S. 44, 52 (1987); *Washington v. Texas*, 388 U.S. 14, 23 (1967) (an accused right to present testimony that is relevant and material may not be denied arbitrarily).

³ 117 S. Ct. 1817 (1997).

⁴ The other issue--not addressed by the Court-- is: whether the President complied with Article 36(a), UCMJ, 10 USC § 836(a) when he promulgated Military Rules of Evidence, Rule 707?

⁵ *Sheffer*, 66 U.S.L.W. at 4237.

⁶ See *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993), on remand 43 F.3d 1311 (9th Cir. 1995), *cert. denied* 116 S. Ct. 189 (1995).

While a definitive checklist or test to determine scientific reliability was not provided in *Daubert*, the following four factors were presented as having been considered: (1) is the technique testable? “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
(continued...)

in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁷, interpreting the Supreme Court's ruling in *Daubert*. The court first noted in performing their "gatekeeping role," judges:

must satisfy themselves that scientific evidence meets a certain standard of reliability before it is admitted. This means that the expert's bald assurance of validity is not enough. Rather the party presenting the expert must show that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology⁸

The Ninth Circuit Court of Appeals also considered three significant factors for determining whether the expert's testimony is admissible. The first factor "is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying."⁹ Second, if the expert is not testifying based upon research independent of the litigation, the party proffering it must come forward with other objective, verifiable evidence that the testimony is based on "scientifically valid principles."¹⁰ One way of showing this, as suggested by the Court, "is by proof that the research and analysis supporting the proffered conclusion have

⁶(...continued)

other fields of human inquiry." 509 U.S. at 593 ; (2) has the theory or technique been subjected to peer review and publication? "The fact of publication (or lack thereof) in a peer-reviewed journal ... will be 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; (3) in the case of scientific techniques, what is the known or potential error rate, and are there standards controlling the technique's operation? *Id.* (4) "Finally, 'general acceptance' can yet have a bearing on the inquiry. ... Widespread acceptance can be an important factor in ruling particular evidence admissible," and a technique that is known but not widely recognized "may properly be viewed with skepticism." *Id.* See also *United States v. Pulido*, 69 F.3d 192, 205 (7th Cir. 1995) (no *per se* rule against admissibility of polygraph evidence); *United States v. Posado*, 57 F.3d 428, 436 (5th Cir. 1995) (reversing *per se* exclusion of polygraph evidence); *United States v. Piccinonna*, 885 F.2d 1529, 1535 (11th Cir. 1989) (holding that polygraph evidence not admissible *per se*); *Anderson v. United States*, 788 F.2d 517, 519 n. 1 (8th Cir. 1986) (polygraph evidence admissible by stipulation); *United States v. A. & S. Council Oil Co.*, 947 F.2d 1128, 1134 n. 4 (4th Cir. 1991) (holding that polygraph evidence not admissible in 4th Circuit but recognizing that "[c]ircuits that have not yet permitted evidence of polygraph results for any purpose are now the decided minority"); but see *United States v. Scarborough*, 43 F.3d 1021, 1026 (6th Cir. 1994) (polygraph results "inherently unreliable"); *United States v. Soundingsides*, 820 F.2d 1232, 1241 (10th Cir. 1987) (polygraph evidence "not admissible to show" that witness "is truthful"); *United States v. Skeens*, 494 F.2d 1050, 1053 (D.C. Cir. 1974) (adhering to *Frye* and holding polygraph evidence inadmissible); *Dowd v. Calabrese*, 585 F. Supp. 430 (D.D.C. 1984) (polygraph results not sufficiently reliable to be admissible).

⁷ 43 F.3d 1311 (9th Cir. 1995) (decision enhanced the role of judges as evidentiary "gatekeepers", trusting them and jurors to determine the admissibility of scientific evidence).

⁸ *Id.* at 1316.

⁹ *Id.*

¹⁰ *Id.* at 1318.

been subjected to normal scientific scrutiny through peer review and publication.”¹¹ A third factor, where there is no evidence that the expert’s proffered testimony grows out of research conducted independent of litigation, or that the expert’s research has been subjected to peer review, is testimony of other experts.¹² The Court explained that for other expert testimony to be sufficient:

[T]he experts must explain precisely how they went about reaching their conclusions and point to some objective source—a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like—to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field.¹³

The Eleventh Circuit has recognized that “[s]ince the *Frye*¹⁴ decision, tremendous advances have been made in polygraph instrumentation and technique.”¹⁵ However, the court said that the effect of the Military Rule Of Evidence, Rule 707 “is to freeze the law regarding polygraph examinations without regard for scientific advances.”¹⁶ Thus, the effect of the rule would appear to limit the use of opinion or reputation evidence to establish the credibility of the appellant and “we believe that the truth-seeking function is best served by keeping the door open to scientific advances.”¹⁷ With respect to the appellant’s case, the court said:

we... cannot determine whether polygraph technique can be said to have made sufficient technological advance in the seventy years since *Frye* to constitute the type of scientific, technical or other specialized knowledge envisioned by ... *Daubert*¹⁸.

While the Court of Appeals in *Sheffer* did not decide whether polygraph examinations are scientifically valid nor did they decide that they will always assist the trier of fact in this or any other case; it merely sought to remove the obstacle of the *per se* rule against its admissibility.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *United States v. Frye*, 293 Fed. 1013 (D.C. Cir. 1923) (polygraph evidence was held to be inadmissible because it was unreliable; the 1993 *Daubert* decision modified the 1923 *Frye* test).

¹⁵ *United States v. Piccinonna*, 885 F.2d at 1532; see also *United States v. Crumby*, 895 F. Supp. 1354 (D. Ariz. 1995).

¹⁶ *Scheffer*, 44 M.J. 442, 446 (1996).

¹⁷ *Id.*

¹⁸ *Id.*

The Supreme Court, ruling 8-1, in the *Scheffer* case said "... there is simply no consensus that polygraph evidence is reliable."¹⁹ Without rejecting unqualifiedly the argument that the defendants may have a constitutional right to have polygraph evidence admitted at trial, the Court apparently is willing to allow many state and federal courts to continue banning such evidence.²⁰ The Court noted that various courts "... may reasonably reach differing conclusions as to whether polygraph evidence should be admitted."²¹ The justices may have been influenced by the fact that "[t]o this day, the scientific community remains extremely polarized about the reliability of polygraph techniques."²² While holding that the military rule does not violate the Constitution,²³ the Supreme Court noted that most state courts ban polygraph evidence. It was also noted that some federal courts have recently dropped the ban on such evidence thereby leaving the decision to the trial judges.²⁴ Although Rule 707 applies to the military courts, it is very likely that the decision will have an impact on those civilian courts which have abandoned the *per se* rule excluding polygraph evidence.²⁵

¹⁹ 66 U.S.L W. at 4237.

²⁰ *Id.*

²¹ *Id.* at 4238.

²² *Id.* at 4237.

²³ Deciding that the Sixth Amendment right of the accused to call witnesses in his favor had not been violated, the Court's reasoning appears to have been based upon the conclusion that the results of the polygraph exam did not constitute factual evidence regarding the crime at hand. "Rather the evidence introduced is the expert opinion testimony of the polygrapher about whether the subject was truthful or deceptive in answering questions about the alleged crime. A *per se* rule excluding polygraph results therefore does not prevent an accused--just as it did not prevent respondent here--from introducing factual evidence or testimony about the crime itself, such as alibi witness testimony For the same reasons, an expert polygrapher's interpretation of polygraph results is not evidence of 'the accused's whole conduct' It is not evidence of the 'accused's ... conduct' at all, much less 'conduct' concerning the actual crime at issue. It is merely the opinion of a witness with no knowledge about any of the facts surrounding the alleged crime, concerning whether the defendant spoke truthfully or deceptively on another occasion." 66 U.S.L.W. at 4239, n. 13.

²⁴ *Id.* at 4237.

²⁵ See, e.g., *United States v. Cordoba*, 104 F.3d 225, 228 (9th Cir. 1997); *United States v. Posado*, 57 F.3d 428, 434 (5th Cir. 1995).