Polygraphy Revisited: *U.S. v. Scheffer*

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U.S. v. Scheffer **is a case that poses two questions. First, must a defendant who wishes to place polygraphic evidence before the court be allowed to do so for fear that refusal will create a Constitutional issue by depriving him of due process? Second, is polygraphic evidence admissible evidence at all, as defined by the Military Rule of Evidence or the Federal Rules of Evidence? The case, originally tried in Court-Martial, was reviewed by two military courts of appeal, with resulting judicial dissention leading to the granting of *certiorari* by the U.S. Supreme Court. In its decision, the Supreme Court affirmed the refusal of the Court-Martial to admit the requested polygraphic evidence.**

Airman Edward G. Scheffer had been convicted in a general court-martial in 1992. Contrary to his pleas of innocence, he was charged with and convicted of passing bad checks to the extent of more than $3,300.00, "wrongfully using methamphetamine" (does the Air Force acknowledge a right way to use it?), failing to go to his appointed place of duty, and being absent without leave (AWOL) for 13 days. Scheffer had been picked up in Iowa, far distant from his California base to which he was promptly returned. He had been driving at an excessive speed and with a suspended license.

As further background, in March 1992, Scheffer had begun to work as an informant for the Office of Special Investigations (OSI) of the United States Air Force (U.S.A.F.). Soon afterward, he told OSI about two men who were dealing in large amounts of illicit drugs. Scheffer was asked by OSI to provide a urine specimen, a routine procedure for controlled informants. He readily agreed to do so, but asked for a delay of a day because, as he explained, he was able to urinate only once daily. A few days later, OSI asked him to submit to a polygraphy examination. The examiner asked three questions: (1) had he ever used drugs while in the Air Force; (2) had he ever lied regarding any of the information given to OSI; and (3) had he ever told anyone other than his parents that he worked for OSI? No other questions were noted in the descriptive histories of the case in any of the court summaries, so it is not known here if any other questions were asked of the defendant. But regarding those three significant questions quoted, Scheffer answered all

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of them in the negative, and the examiner concluded that no deception was indicated. However, the urinalysis had proven positive for methamphetamine, a situation discovered by OSI only after the polygraphy examination.

The court-martial sentenced him to a bad conduct discharge, a reduction to the lowest enlisted grade, total forfeitures, and a 30-month confinement. The U.S.A.F. Court of Criminal Appeals reviewed the matter and affirmed the decision of the court-martial.[1] On May 8, 1996, the case was argued before the U.S. Court of Appeals for the Armed Forces. The issue to be decided by that court was "whether the military judge erred in denying appellant's motion to present evidence of a favorable polygraph result concerning his denial of use of drugs while in the Air Force".[2]

The decision of that court was that the original decision of the court-martial and the affirmation by the U.S.A.F. Court of Criminal Appeals was to be set aside. In the opinion of the higher appellate court, the rule prohibiting polygraph evidence was unconstitutional as ". . . applied to the case in which the testifying accused offered it to rebut the attack on his credibility." The court also held that foundational evidence for the proffered polygraph examination must establish that the underlying theory is scientifically valid and can be applied to the accused's case.

The affirmation by the U.S.A.F. Court of Criminal Appeals had been made in the face of knowledge that a higher court, the U.S. Court of Appeals for the Armed Forces, had previously held that polygraph examinations could be considered relevant to the credibility of a witness. In part, the analysis of Scheffer's case by the U.S.A.F. Court of Criminal Appeals stated that, although there must be an assumption that Scheffer's credibility was indeed relevant and vital to his defense, ". . . we do not believe that presentation of polygraph evidence was vital to the court members' assessment of. . . [his]. . . credibility." That affirming Appellate Criminal Court reviewed considerable law regarding polygraphy, going back to the familiar Frye test (*Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923)). They noted their ". . . inability to locate any federal case, either before or after the promulgation of the Federal Rules of Evidence, which suggests that the federal rule or any similar state rule unconstitutionally interferes with an accused's rights to due process or to present a defense." They also commented about the fact that, at the time their opinion was written, "most of the federal courts of appeal still hold that polygraph evidence cannot be introduced . . . to establish the truth of statements made during the examination. . . . "

One of the U.S.A.F. Court of Criminal Appeals judges, in his separate, partially dissenting opinion, opined that the prosecution's case rested entirely on the scientific evidence of the urinalysis. The judge asked:

> Do urinalysis machines, or their operators, make "mistakes" which go undetected through normal quality control? We need only look at Pentium computer chips that cannot divide, nuclear reactors that go haywire, and space shuttles that don't launch to answer that question.
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> So what if you are wrongfully accused of drug use based upon an erroneous urinalysis result?. . . . Because of the nebulous nature of

> the prosecution's evidence, you basically have only your word. But why should a judge or jury believe you, as opposed to the prosecution's "scientific" evidence, if you choose to testify? Credibility!
>
> In a urinalysis case, the accused's credibility becomes the whole ball game... since urinalysis machines cannot be cross-examined... Polygraphs are also machines operated by humans which produce results interpreted by humans. Polygraph evidence reflects on the credibility of an accused's denial of having used the drug charged (*U.S. v. Gipson,* 24 M. J., 253; *U.S. v. McMorris,* 643 F.2d, at 461–2). Is it admissible on an accused's behalf? We think so despite the absolute prohibition in Military Rule of Evidence 707.... [3]

Thus, polygraphy remains a seemingly constant focus of arguments in the courts. In *Scheffer*, the first appellate court knew that the higher court would probably disagree, but it nonetheless ruled to affirm the court-martial's refusal to allow polygraph evidence. In that court, however, as has been noted, a dissenting judge disagreed with the Military Rule of Evidence regarding polygraphy. A reading of his opinion may reflect the notion that if one "machine" proving evidence can be accepted, another "machine" can, too, especially if it has an operator to cross-examine.

On the basis of one aspect of logic, that conclusion makes sense. On the basis of another, aside from the fact that even "urinalysis machines" have operators, it makes none at all, as most psychiatrists would agree. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (509 U.S. 579 (1993)) sometimes tends to affirm that as well, again depending upon the opinion of the judge. The *Daubert* decision, of course, reset the standard for admission of expert testimony under the Federal Rules of Evidence. Judges now must act as gatekeepers. They may seek to determine (with expert help, it is hoped) whether or not a mechanism, theory, machine, or what-have-you, upon which expert testimony is based, is acceptable to a significant proportion of the members of that expert's profession.

The dissenting judge in the U.S.A.F. Court of Criminal Appeals, regardless of his certainly being close either to touting the machines purporting to uncover lies or else selling short any and all machines purporting to tell or do anything, in the end properly based his dissent on legal rather than scientific grounds. He stated that he recognized "... a constitutional escape clause to Military Rule of Evidence 707.... " He noted that the Military Rules of Evidence indicate that polygraph evidence is "... not admissible unless it is 'constitutionally required to be admitted,' that is, unless it is relevant material and favorable to the defense. cf. U.S. v. Williams, 37 M.J. 352 (C.A.A.F. 1993).... " The dissenting judge opined that the military judge in the court-martial denied the defendant the opportunity to demonstrate that his polygraph evidence met the constitutionally required criteria for admission.

The decision of the U.S. Court of Appeals for the Armed Forces, in setting aside the decision of the court-martial and the affirmation of the earlier appellate court, noted that, at the court-martial, the defendant had asked the military judge for an opportunity to lay a foundation for the favorable polygraphic evidence. That request had been denied. The military judge in the court-martial ruled that the

President of the United States, in his capacity as Commander-in-Chief, may, ". . . through the Rules of Evidence, determine that credibility is not an area in which a fact finder needs help, and the polygraph is not a process that has sufficient scientific acceptability to be relevant. . . . " Obviously, the court-martial judge took greater stock in the "urinalysis machine" than in the "lie detection machine," as well as placing far greater weight on the other damning aspects of the record. Like the dissenting appellate judge quoted above, the court-martial judge made his decision on legal grounds, although providing as well his own opinion that the lie detector is not a sufficiently acceptable scientific instrument.

Sometimes the law is confusing. Even though that truism often provides forensic psychiatrists with headaches, it is probably best that we are not in the judges' chairs so that it would be up to us to interpret the law. We can go only so far in providing courts with our opinions, regardless of how solidly scientifically based—at least, according to our own points of departure— the opinions may be. I would, of course, be the first to leap into the fray regarding polygraphy, pointing out all of the research demonstrating its inability to be considered by serious scientists as a truly scientific instrument. In no way, however, should it be considered a nonuseful instrument. It has been demonstrated repeatedly that polygraphs provide investigators with considerable data, even including confessions. That is not a result of science, however. It is, in contrast, often based simply upon the mythology of the machine and the fears it engenders in the subjects who are strapped to it.

In reviewing their appellate decision, the opinion of the U.S. Court of Appeals for the Armed Forces stated:

> Polygraph examinations were relatively crude when *Frye* was decided. . . . The Eleventh Circuit has recognized that, "[s]ince the *Frye* decision, tremendous advances have been made in polygraph instrumentation and technique". . . . The effect of Mil. R. Evid. 707 is to freeze the law regarding polygraph examinations without regard for scientific advances. We believe that the truth-seeking function is best served by keeping the door open to scientific advances. . . . With respect to appellant's case, we, like the Fifth Circuit, 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 Rule 702 and *Daubert*." *U.S. v. Posado*, 57 F.3d at 433. We will never know unless we give appellant an opportunity to lay the foundation. . . . Like the Court in *Posado*, "We do not hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the *per se* rule against admissibility. . . . "[4]

Of course, the doors to all courtrooms must be held open for scientific advances that can help fact finders in all cases. But, have tremendous advances really been made in the *science* of polygraphy? I have no doubt that the techniques of many polygraph examiners have become far more finely honed, although I must wonder about the OSI examiner who may have asked Scheffer only three questions (insofar as we know). For a review of the accepted but embattled schools of polygraphic questioning, the author's earlier paper on the subject might be helpful.[5] In their own seminal work in this area, such

researchers as Saxe,[6] Lykken,[7] Raskin,[8] and Ekman[9] have described and touted various techniques, often disparaging other techniques as they did so. The literature provided by the psychologists and other mental health experts in the field of polygraphy is probably most politely described as contentious. That description alone might well be enough to demonstrate that there is really no fully accepted science at the basis of the genuine art of polygraphy, other than the fact that stress may cause well accepted changes in physiologic responses. Even considering the contentiousness of the literature, I doubt that any of these writers would consider a three-question examination a complete and dependable one (if, in fact, those were the only questions posed to the accused); but no other questions, relevant or not, were mentioned in any summary of the case.

So, now cometh the United States Supreme Court, granting *certiorari* in 1997, based upon the dissention in the ranks of the judicial officers in each of the lower courts that had previously heard this case. But there is really dissention about the dissention! Is the dissention in *Scheffer* about the constitutional right to present evidence deemed essential by the defense, or is it about whether lie detection evidence ought to be attended to at all?

In brief, the answer is yes. The Supreme Court dwelt on both issues, and in reading their decision, it seems as if both contributed to their eventual judgment. Their ultimate ruling was that the decisions of both of the lower appellate courts were to be overturned and that the conviction ruled by the original court-martial should stand. On the other hand, the Supreme Court decision was not in any sense unanimous, and dissenting opinions followed at great length after the delivery of the majority ruling by Justice Thomas.[10]

In sum and substance, Justice Thomas stated that a defendant's right to present relevant evidence is subject to "reasonable restrictions to accommodate other legitimate interests in the criminal trial process." Continuing, citing *Rock v. Arkansas*, 483 U.S. 44, 55, he wrote, "Such rules do not abridge an accused's right to present a defense as long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve'.... Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only when it has infringed upon a weighty interest of the accused.... " The so-called "other legitimate interests in the criminal trial process" include such quantities as "ensuring that only reliable evidence is introduced at trial, preserving the jury's role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial."

Justice Thomas cited *United States v. Barnard* (490 F. 2d 907, 912 (9th Cir. 1973)), which stated, admirably, that "a fundamental premise of our criminal trial system is that 'the jury is the lie detector'.... By its very nature, polygraph evidence may diminish the jury's role in making credibility determinations.... " Justice Thomas's majority opinion then noted, "Unlike other expert witnesses who testify about factual matters outside the jurors' knowledge... a polygraph ex-

pert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth. . . "

Can one argue the notion, however, that an interest of the accused to try to be found innocent is not weighty? My own bias toward civil libertarianism is offended here. On the other hand, my other relevant bias, that of disputing the validity of polygraphy examinations except when they result in the subject "spilling the beans" about whatever the case is about, is satisfied by Justice Thomas's reference that "only reliable evidence" may be introduced at trial.

This is a forensic psychiatric journal, however, not a law review. My civil libertarian bias will have to be defended by lawyers or law professors, who have far more to say about the law and the constitutional issues than I do. Suffice it to say, that as much as I mistrust polygraphic evidence (again, other than confessions made during those examinations, or other information extracted during them), I believe that the defense ought to have a right to petition the court to present this evidence. Obviously, I would be first in line (were I still in practice) to try to demolish such evidence, and many currently active colleagues are probably eager to step into that line too. And they could do it well, even if they restrict their testimony to discussing the polygraphic literature generally and its manifold internal contradictions. Even the 1983 report by the Congress's Office of Technology Assessment concluded that ". . . the cumulative research evidence suggests that when used in criminal investigations, the polygraph test detects deception better than chance, but with error rates that could be considered significant. . . . "[11]

My earlier paper[5] quotes the long-since retired, then-Deputy Director of the Counterintelligence and Investigative Programs of the Department of Defense, who was kind enough to allow an interview for the purpose of that article. In defense of the Department's very frequent use of polygraphy, his major thesis about the instrument and the controversy over it was: "We never said it was scientifically valid but, rather, that it was useful." He later amplified this, with considerable, joyful affect, when he exclaimed, "You just wouldn't believe what people tell us when we have them on the machine! You'd be amazed at what some people open up and talk about!"[12]

The Deputy Director emphasized the difference between *scientific validity* and *usefulness* in his descriptions of the value of the polygraph. In my opinion, that differentiation continues to ring true. Is polygraphy "junk science," *'a la Daubert*? Is it science at all? All of the attempts in the psychological and forensic literature to validate the scientific basis of polygraphy have gone for naught because of the dissention among its proponents, whereas the usefulness of the instruments cannot be disputed by even its strongest critics—admittedly, such as me. Its indisputable usefulness, however, does not extend to the distinction between the subject's truthfulness and falsehood. Instead, it enters into the area of creating an aura of fear that causes the subject to break down and either confess whatever there is to confess or else to contribute to the

investigation by discussing issues that he or she had kept veiled until then. In short, just as I have previously said about the polygraph in the earlier paper, it is actually a coercive instrument. It uses the trickery of enormous suggestion to be as effective as it is. As a coercive instrument, in my opinion, its use should be off-limits to psychiatrists.[13]

The examiners are the main issue here. Skilled examiners can play the game of creating that aura of fear like virtuosi. The subjects begin to develop the impression that it is fruitless to try to hide before this highly touted, supposedly invincible, supposedly scientific machine. Not-so-skilled examiners may not know how to work as well with the subjects or may totally misinterpret the subjects' responses. Many courts have echoed to the arguments between polygraphers, just as they have to arguments between all profferers of opinion evidence—certainly including forensic psychiatrists.

In *Scheffer*, as in many other cases, the courts are faced with the specific dilemma of determining whether the instrument can actually distinguish truth from lying, especially when a subject is charged with an offense. The real issue is whether the polygraph examiner/interpreter is able to make that distinction on the basis of the autonomic responses registered by the instrument. All of the other evidence indicates that Scheffer had indeed ingested methamphetamine (he insisted that it was given to him without his knowledge) and that he was operating as if he knew he had got himself into terribly serious trouble. But the polygraph examiner decided that the responses were truthful when Scheffer denied the volitional ingestion.

Both the military judge in the court-martial and the majority of Supreme Court justices seemed to agree that this situation *per se* invalidated the *validity* of the polygraph in this matter, even its *usefulness* in this specific differentiation between truth and falsehood. Whether the defendant still should have had the right to present the opinion evidence of the polygraph, as stated before, is a legal question, as is the *relevance* of that data. I would not intervene there, despite my civil libertarian bias. Even so, it seems to me that a better case than this ought to serve as the basis for a full-blown discussion by legal authorities regarding admission of polygraph evidence.

Justice Kennedy[14] seems to agree. He wrote a partially dissenting opinion for the Supreme Court in *Scheffer*, in which he was joined by Justices O'Connor, Ginsburg, and Breyer. "In my view, it should have been sufficient to decide this case to observe, as the principle opinion does, that various courts and jurisdictions 'may reasonably reach differing conclusions as to whether polygraph evidence should be admitted.'" Justice Kennedy continued later, "Given the ongoing debate about polygraphs, I agree that the rule of exclusion is not so arbitrary or disproportionate that it is unconstitutional. I doubt, though, that the rule of *per se* exclusion is wise, and some later case might provide a more compelling case for introduction of the testimony than this one does. . . ."[14]

On the other hand, in a more far-reaching dissenting opinion, Justice Stevens[15]

believed that the polygraphic evidence ought to have been admitted. As he wrote, ". . . [The defendant's] principle defense was 'innocent ingestion;' even if the urinalysis. . . correctly indicated that he did ingest the substance, he claims to have been unaware of that fact. The results of the lie detector test conducted three days later, if accurate, constitute factual evidence that his physical condition at that time was consistent with the theory of his defense and inconsistent with the theory of the prosecution. The results were also relevant because they tended to confirm the credibility of his testimony. Under Rule 707, even if the results of the polygraph test were more reliable than the results of the urinalysis, the weaker evidence is admissible and the stronger evidence is inadmissible. . . . "[15]

The above-referenced writing is a little confusing. Even though Justice Stevens goes on, later in his dissent, to appear to believe relatively strongly in the validity of the polygraph and the examiners, I think he is really saying here that, regardless of whether evidence is stronger or weaker, it should all come in. Toward the end of his dissent, he summarizes his position: "There is no legal requirement that expert testimony must satisfy a particular degree of reliability to be admissible. Expert testimony about a defendant's 'future dangerousness' to determine his eligibility for the death penalty, even if wrong 'most of the time,' is routinely admitted. *Barefoot v. Estelle*, 463 U.S. 880, 898–901 (1983)."[16]

Thus, Justice Stevens seems to support, at least to some degree, my own, previously acknowledged civil libertarian bent, shared gratefully with many colleagues. But that "feel good" indulgence, if shared by the courts, is at the terrible cost of a lot of time and money and terrifically wasted energy. Remarkably inconsistent determinations have always been the remarkably consistent results when these battles have been fought over and over again in the courts. Seeds are sown thereby only for further conflict over an issue that should have been put to rest long ago, because the objective literature shows that the polygraph is neither scientific nor reliable as a teller of truth.

So what? The bigger deal is that *Daubert* wins again. At this time, as always, it is up to the expert witnesses to present opinion and other evidence regarding the validity of so-called scientific or other opinion evidence, whether self-presented or in response to other experts on either side. It is currently legally correct to say that such evidence does not have to be reliable to a specific degree. Its basis might not now, under *Daubert*, even have to be accepted by a majority of the practitioners of that particular discipline or science. Experience shows that separate hearings are often held to determine admissibility. Those "battles of the experts" are now usually held pretrial, away from the hearing of the jury.

Trial judges, for the most part, in or out of the military, continue to look askance at the admission of polygraph evidence, regardless of a few changes in some jurisdictions, and even there the admissibility hearings often lead to exclusion. As one distinguished jurist told me, quite informally and anonymously, "After all, some might believe that examination of

owl entrails can produce truth. If that is all the defendant can produce, would we be obliged to admit it at trial?" The answer is that the "we," representing the judges themselves, must make that determination under *Daubert*. Does preventing polygraphic testimony from entering into the courtroom represent interference with a defendant's due process guarantees? Can *everything* be brought in, regardless of validity, reliability, or proven scientific basis; even owl entrails? We civil libertarians are quick to say, "Sure!" But somewhere a line will have to be drawn. Is polygraphy that line? Are closed *Daubert*-based hearings enough to determine that line? If some judges allow polygraphic testimony to be admitted after *Daubert* hearings, will they allow expert testimony in open court, during the trial, to impeach that evidence, or might they say that the pretrial hearings had already decided that issue?

In sum and substance, *Scheffer* seems to leave us at just about the same place as before. Polygraphy remains a sticking point in our courts, both military and civilian. Although the arguments in *Scheffer* may try to emphasize the controversy over a possible blanket exclusion, I doubt that the same battles would be fought over something other than the polygraph. As in President Clinton's problems, where the situation really centers around sex and not perjury, here it seems to be polygraphy, not legality.

The solution is basically legislative, not judicial. Evidentiary rules and other court procedures are determined by state and federal legislative action. If the polygraph is definitely denied admittance to the courtroom via a legislated blanket exclusion, one problem may be solved. However, the price we as a society may have to pay for that luxury is the possible eventual, generalized disuse of the polygraph as a useful investigative tool by law enforcement or security agencies. Its value in such settings has been proven time and time again—but not so much as a truth-determining instrument as an instrument with an "aura" that causes people to open up and talk. That eminently worthwhile use may gradually disappear under the burden of the legislatures' and courts' blanket exclusion of the instrument.

The ability of the polygraph specifically to determine validly and reliably the truth of what an individual is saying, especially given the heightened emotional stance of the type of situation in which it is usually used, remains dubious at best. That, however, is unfortunately the specific use to which polygraphy is put currently in courtrooms. The examiners might be even more dubious than their instrument, at least as described often by examiners or professors from contentiously competing schools of polygraphic inquiry.

Finally, throwing all false reticence aside, I am left with one more question. "Mr. Justice Thomas, why didn't your clerks find *my* paper to cite?"

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