

Case No. F-2020-805

**COURT OF CRIMINAL APPEALS FOR THE STATE OF
OKLAHOMA**

Benjamin Lawrence Petty, *Appellant*

V.

The State of Oklahoma, *Appellee*

Appeal from the Murray County District Court

**BRIEF OF THE INNOCENCE PROJECT AS *AMICUS CURIAE* IN
SUPPORT OF APPELLANT**

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STATEMENT OF INTEREST

The Innocence Project, Inc. is a not-for-profit organization that provides *pro bono* legal services and other resources to indigent prisoners whose innocence may be established through post-conviction DNA testing. The Innocence Project also researches the causes of wrongful convictions and advocates—both in individual cases and through legislative and administrative initiatives—for changes in the law (and law-enforcement procedures) to reduce the risk of wrongful conviction or, in this case, wrongful confinement.

Significantly, the Innocence Project’s research demonstrates the threats posed by unreliable or exaggerated forensic evidence. Nearly fifty-two percent of the individuals exonerated by post-conviction DNA testing were convicted based at least in part on expert forensic evidence that turned out to be wrong.¹ As a result, the Innocence Project has consistently urged courts to ensure that forensic evidence be admitted only to the extent it has been shown to be scientifically supported.

INTRODUCTION AND OVERVIEW OF POLYGRAPH EVIDENCE

Central to the Innocence Project’s mission of preventing wrongful convictions is the fundamental principle that no one should be deprived of their liberty based on unreliable evidence. In 2003, the National Academy of Sciences (NAS) published a report titled, “The Polygraph and Lie Detection,” describing how, despite “almost a century of research in scientific psychology and

¹ See Innocence Project, Overturning Wrongful Convictions Involving Misapplied Forensics, <https://www.innocenceproject.org/overturning-wrongful-convictions-involving-flawed-forensics/> (last visited March 2, 2021).

physiology,” no studies have established that polygraph tests are, in fact, reliable.² Existing scientific research indicates that it is nearly impossible to test the accuracy of polygraphs, since it is unlikely that experiments can fully mimic the circumstances of an actual criminal investigation.³ For this and other reasons, explored below, the NAS’s 2003 report concluded that the polygraph is “intrinsically susceptible to producing erroneous results” and that efforts to improve polygraph procedures are unlikely to bring significant improvements in accuracy.⁴ Nearly two decades later, this scientific consensus surrounding polygraphs remains unchanged.⁵

The risk posed by this kind of unreliable evidence is not theoretical: there have been *at least fifty* exonerations where the investigation involved a “failed” polygraph test⁶—including Innocence Project clients such as Keith Allen Harward, John Restivo, and Dennis Halstead, who collectively spent seventy years in prison for crimes they did not commit.⁷

Polygraph examinations are highly susceptible to error for a number of reasons. First, the entire undertaking of polygraph examination is premised on the flawed assumption that certain physiological responses—such as heart rate and blood pressure—are reliable indicators of deception when, in fact, they are not. There is “no unique physiological response to deception,” and therefore, these measured reactions can actually be responses to a range of other psychological

² National Research Council, “The Polygraph and Lie Detection,” Washington, DC: The National Academies Press (2003), 2.

³ *Id.*

⁴ *Id.*

⁵ See William G. Iacono & Gershon Ben-Shakhar, *Current Status of Forensic Lie Detection With the Comparison Question Technique: An Update of the 2003 National Academy of Sciences Report on Polygraph Testing*, 43 LAW & HUM. BEHAV. 86 (2019) (The authors undertook a scientific review of polygraph examinations, concluding that the “quality of research has changed little in the years elapsing since the release of the NAS report, and that the report’s landmark conclusions still stand.”).

⁶ See National Registry of Exonerations, *Exoneration Detail List*, available at https://www.law.umich.edu/special/exoneration/Pages/detail_list.aspx (accessed Dec. 2, 2021).

⁷ See Innocence Project, *Keith Allen Harward*, available at <https://innocenceproject.org/cases/keith-allen-harward/> (accessed Dec. 2, 2021); *Dennis Halstead*, available at <https://innocenceproject.org/cases/dennis-halstead/> (accessed Dec. 2, 2021); *John Restivo*, available at <https://innocenceproject.org/cases/john-restivo/> (accessed Dec. 2, 2021).

states—such as general anxiety about the interrogation or trauma unearthed by the polygraph examiner’s description of a violent crime.⁸ Thus, innocent, truthful people can fail a polygraph test simply because they are highly anxious about taking it.

Second, although the polygraph itself is an “objective” instrument, polygraph results are necessarily biased by the subjectivities of the human examiner administering the test. Established social science demonstrates that humans are universally informed by their preexisting experiences and implicit biases which, in the context of polygraphs, can influence “the way examiners conduct their interviews, the questions they ask,” and “the conclusions they draw from test results.”⁹

Because of this fundamental lack of demonstrated reliability, the overwhelming majority of U.S. states has deemed polygraph results inadmissible as evidence in criminal trials.¹⁰ The U.S. Supreme Court has upheld such *per se* bans, citing the lack of scientific consensus surrounding polygraphs. *See, e.g., United States v. Scheffer*, 523 U.S. 303, 305-314, 317, 118 S. Ct. 1261, 1263-1267, 1269 (1998) (1998) (noting that *per se* polygraph rules “served several legitimate interests, such as ensuring that only reliable evidence was introduced at trial”). Indeed, several decades ago, this Court itself established that polygraph evidence is too unreliable to be the “sole determinant of whether [a] person would be incarcerated.” *Wilson v. State*, 1981 OK CR 9, ¶ 9, 624 P.2d 80, 81.

Given the inherent unreliability of polygraphs, and considering that polygraph results have been deemed too unreliable to be admitted in criminal trials, such evidence should similarly be barred in *any case that implicates liberty interests*. Here, the court’s error in admitting this

⁸ *Id.*

⁹ Saul M. Kassin, Itiel E. Dror, & Jeff Kukucka, *The forensic confirmation bias: problems, perspectives, and proposed solutions*, 2 J. of Appl. Res. in Mem. and Cogn. 42, 46 (2013).

¹⁰ Although polygraph is *generally* inadmissible, some jurisdictions allow for its admission in criminal trials only if “both parties stipulate in advance to circumstances of test and to scope of its admissibility.” *See* Gary A. Udashen and Nathan Knight, *The Law of Polygraph Evidence*, Advanced Criminal Law Course, 2003.

evidence was exacerbated by its refusal to allow Mr. Petty to call an expert witness to challenge the polygraph results. The court's denial of Mr. Petty's request for a brief continuance effectively prevented him from subjecting the polygraph evidence to a rebuttal—resulting in his incarceration. This represented a gross violation of Mr. Petty's procedural due process rights and rendered the results of his revocation hearing fundamentally unfair. *See Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038 (1973); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Thus, the Innocence Project respectfully urges this Court to vacate and/or reverse the full revocation of Mr. Petty's suspended sentence.

I. BECAUSE REVOCATION PROCEEDINGS IMPLICATE LIBERTY INTERESTS, MR. PETTY HAS A FUNDAMENTAL DUE PROCESS RIGHT TO PRESENT EVIDENCE ON HIS OWN BEHALF.

In Oklahoma, clearly established law provides that the person facing revocation has the right to present evidence on their own behalf. 22 O.S.Supp.2008, § 991b. Indeed, because “principles of justice and fairness” are necessary “in matters of terminating conditional freedom,” this Court has found that the accused must be afforded a reasonable opportunity for a revocation hearing. *Chase v. Page*,¹¹ 1969 OK CR 196, ¶ 19, 456 P.2d 590, 5985; *see also Gagnon*, 411 U.S. at 781 (Since the results of a revocation hearing could cause the accused to suffer a substantial loss of liberty, they must be “accorded due process.”); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (Although the person facing revocation is “in custody” of the State, they are still “within the protection of the Due Process Clause of the Fourteenth Amendment.”).

¹¹ It is important to note that *Chase* applies to parole revocations and that, under Oklahoma law, probationers—such as Mr. Petty—are accorded *even more* process, including the statutory right to have a revocation hearing before a Judge in the District Court. 22 O.S.Supp.2008, § 991b.

Notably, these due process requirements include giving the accused the opportunity to “present witnesses and documentary evidence” on their own behalf. *Gagnon*, 411 U.S. at 786; *Morrissey*, 408 U.S. at 489.

On multiple occasions, the U.S. Supreme Court has held that this right to proffer witness testimony represents one of the *most fundamental components* of due process. See *Chambers*, 410 U.S. at 302 (“Few rights are more fundamental than that of an accused to present witnesses in his own defense.”); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (“The right to offer the testimony of witnesses [...] is in plain terms the right to present a defense, the right to present the defendant’s version of the facts [...] to the [factfinder] so it may decide where the truth lies. This right is a fundamental element of due process of law.”). Moreover, the Court has explicitly affirmed that expert testimony falls under these protections, acknowledging that, if the accused cannot present a defense expert’s opposing view, they lose a “significant opportunity to raise in the [factfinder’s mind] questions about the State’s proof of an aggravating factor.” *Ake v. Oklahoma*, 470 U.S. 68, 69 (1985) (determining that denial of expert assistance deprived accused of due process and a fair opportunity to present his defense).

In Oklahoma, as in jurisdictions across the country, courts have reinforced the importance of allowing the defense to put on experts in cases implicating liberty interests. See *Castro v. Oklahoma*, 71 F.3d 1502, 1514-1515 (10th Cir. 1995) (*Ake* duty to provide defense expert is implicated any time the State presents evidence, “psychiatric or otherwise,” of “defendant’s future dangerousness or continuing threat to society”); *Standridge v. State*, 1985 OK CR 64, ¶ 14, 701 P.2d 761, 764 (leaving open the question of whether *Ake* extends to non-psychiatric experts); *United States v. Durant*, 545 F.2d 823, 827 (2d Cir. 1976) (When an expert is reasonably necessary, an “adequate defense” must include “presentation of an expert defense witness.”); *State v.*

Copeland, 226 S.W.3d 287, 290 (Tenn. 2007) (holding that person facing incarceration was entitled to new trial due to trial court's erroneous exclusion of defense expert); *State v. Chapple*, 135 Ariz. 281, 298, 660 P.2d 1208, 1225 (1983) (reversing conviction after finding prejudicial error in trial court's exclusion of defense expert); *State v. Whaley*, 305 S.C. 138, 140, 406 S.E.2d 369, 370 (1991) (same); *State v. Clopten*, 223 P.3d 1103, 1118 (Utah 2015) (same).

In fact, many courts have deemed defense counsel's failure to seek expert assistance to amount to ineffective assistance of counsel. *See Wiggins v. Smith*, 539 U.S. 510 (2003) (sustaining a claim of ineffective assistance of counsel because the defense attorney failed to commission its own independent expert report); *Proffitt v. U.S.*, 582 F.2d 854, 857 (4th Cir. 1978) (Expert assistance should be required "whenever the expert services are necessary to the preparation and presentation of an adequate defense [...] failure of defense counsel to seek such assistance when the need is apparent deprives an accused of adequate representation in violation of his [S]ixth [A]mendment right to counsel."). As such, defense counsel's request for the brief continuance in order to present expert testimony was fundamental to Mr. Petty's right to counsel, and the court's denial effectively deprived Mr. Petty of the opportunity to present an adequate defense.

Thus, per Oklahoma statutes and established case law, Mr. Petty had an indisputable, procedural due process right to present an adequate defense against the accusations leveled against him at his revocation hearing—which should have entitled him to call his own expert witness to testify to the lack of reliability of the polygraph evidence that was used to incarcerate him.

II. THE RIGHT TO PRESENT EVIDENCE IS ESPECIALLY CRITICAL IN CASES-LIKE MR. PETTY'S-INVOLVING HIGHLY DISCREDITED AND PREJUDICIAL FORENSIC TECHNIQUES.

Where, as here, the State seeks to use flawed forensic testimony to deprive someone of their liberty, the right to rebut that evidence becomes all the more vital. Unreliable forensic evidence—like the polygraph at issue in Mr. Petty's case—should not be allowed to form the factual predicate necessary to incarcerate someone. Indeed, this Court has held that the termination of conditional liberty requires a “hearing structured to assure that the finding of a [...] violation will be based on *verified facts* and that the exercise of discretion will be informed by an *accurate knowledge of the [defendant's] behavior*.” *Hampton v. State*, 2009 OK CR 4, ¶ 22, 203 P.3d 179, 188 (quoting *Morrissey*, 408 U.S. at 484) (emphasis added).¹²

As such, this Court has repeatedly overturned revocation decisions when the accused has not been accorded this minimum threshold of due process. *See Montemayor v. State*, 1988 OK CR 285, ¶¶ 4, 6, 766 P.2d 1000, 1001 (reversing order of revocation because trial court lacked “direct evidence” of appellant's actions and thus, the “appellant was denied minimal due process of law” during the revocation proceedings); *Lennox v. State*, 1984 OK CR 22, ¶¶ 6-8, 674 P.2d 1146, 1149 (reversing order of revocation because due process requirements were not met, “thus depriving the defendant of an opportunity to prepare a defense”).

Therefore, these procedural safeguards take on an outsized importance in cases such as Mr. Petty's, in which the primary evidence consisted of a State polygraph examiner's subjective determination of a “failed” lie detection test—a forensic result that both the relevant scientific community and courts across the country have overwhelmingly deemed unsound. Mr. Petty should

¹² Again, as with *Chase*, *supra* n.11, the *Hampton* decision is in the context of a parole revocation, and, due to the statutory rights laid out in 22 O.S.Supp.2008, § 991b, probationers—such as Mr. Petty—are entitled to *even more* process.

have been able to establish, through expert testimony, that, due to the inherent unreliability of polygraphs, the “failed” test could *not* provide a factual basis for the revocation decision.¹³ Furthermore, even if polygraph *could* provide reliable results—which it cannot—Mr. Petty’s proffered expert was also prepared to testify to the fact that the examiner in this case failed to follow the established standards and procedures for administering the test, rendering the result all the more suspect. *See* “Polygraph Expert George Maschke’s Critique and Evaluation of the Polygraphs of Mr. Petty” (attached to “Notice of Extra-Record Evidence Supporting Propositions I, III and IV of Brief of Appellant and/or Alternative Application for Evidentiary Hearing on Sixth Amendment Claims” as Ex. A, C-D).

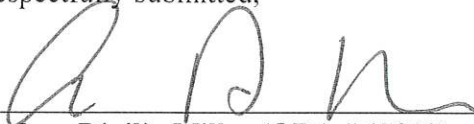
For the above reasons, this unreliable and prejudicial polygraph evidence *should not be admitted at all* in legal proceedings in which a person’s liberty is at stake. Where, as here, it is admitted as a factor in a revocation decision, *the least* the court can do is ensure that the accused has an ability to effectively rebut it through expert testimony. *See United States v. Smith*, 621 F. Supp. 2d 1207, 1222 (M.D. Ala. 2009) (establishing that the admission of the “defendant’s proffered expert testimony” gave the factfinder “important and practical information” to engage in “fair, thorough, informed, and rigorous decisionmaking”). Here, the trial court deprived Mr. Petty of this critically important opportunity to challenge the polygraph results used to justify the revocation of his suspended sentence—violating his procedural due process rights and rendering the results of his revocation proceedings fundamentally unfair.

¹³ Iacono & Ben-Shakhar, *Current Status of Forensic Lie Detection With the Comparison Question Technique* at 91 (asserting that polygraph results “should be treated with great caution”).

CONCLUSION

For the above reasons, we respectfully urge this Court to overturn the decision below and to vacate and/or reverse the full revocation of Mr. Petty's suspended sentence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. Digilio Miller', is written over a horizontal line.

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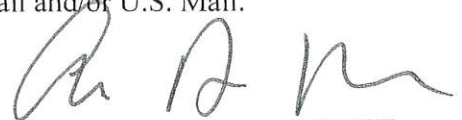
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CERTIFICATE OF SERVICE

Pursuant to Rule 1.9(B) of the Rules of the Oklahoma Court of Criminal Appeals, Ch. 18 of Tit. 22, the Attorney General's Office will be served directly by the Clerk of this Court and counsel for Mr. Petty shall be served by the undersigned via e-mail and/or U.S. Mail.


ANDREA DIGILIO MILLER