UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO: 8:14-cr-379-T-36TGW

JESUS HERNANDO ANGULO
MOSQUERA
_____________________________________/

ORDER

This matter comes before the Court upon the Defendant's Motion for an Evidentiary Hearing on Admission of Polygraph Evidence (Doc. 67). An evidentiary hearing was held on this matter on December 23, 2014. In the motion, Defendant sought a hearing on the admissibility of the polygraph evidence and a ruling on the admissibility of said evidence. Accordingly, the Court will construe Defendant's Motion for an Evidentiary Hearing on Admission of Polygraph Evidence (Doc. 67) as a motion to determine the admissibility of the polygraph evidence under Federal Rule of Evidence 702. The Court, having considered the motion and being fully advised in the premises, will grant the Motion and permit the polygraph evidence to be admitted at trial.

I. Background

Defendant Angulo-Mosquera, a 53-year old deckhand and cook, was indicted on September 4, 2014 in the Middle District of Florida on charges related to the seizure of 1,700 kilograms of cocaine concealed on board a Ruleighter known as the "Hope II" in August 2014. Defendant Angulo-Mosquera is a Colombian national with no known criminal record in any country. He has never before been in the United States. Defendant Angulo-Mosquera denies any knowledge of the drugs found concealed on the Hope II and any involvement of any kind in the illegal drug trade.

After several lengthy interviews by counsel with the assistance of a court-certified interpreter (also from Colombia), Defendant Angulo-Mosquera agreed to submit to a polygraph examination administered by James Orr, a former special agent for the FBI with extensive experience in administering polygraph examinations on behalf of the United States government. According to Mr. Orr, the examination results indicated that there was no deception on the following relevant questions:

> 1. Did you know those drugs were on that ship before the Coast Guard boarded the ship? Answer: No.
> 2. Did you know those drugs were on the Hope II before the Coast Guard boarded that ship? Answer: No.
> 3. Did you know those drugs were on that ship before the Coast Guard found them in August? Answer: No.

Doc. 67 at p. 2; Doc. 67-1 at p. 4. Mr. Angulo-Mosquera answered "No" to all three questions. Raskin Dec. ¶ 38.

Defendant Angulo-Mosquera plans to testify in his own defense at trial and requests that the results of the polygraph examination be admitted into evidence to corroborate his testimony. The Government objects arguing that polygraph examinations are just "one step above" junk-science and are "not suitable for juror consumption." TR at 46:15-24, 49:16-17. The results of the polygraph examination, if admitted at trial, would be presented through expert witness testimony. Thus, on December 23, 2014, the Court held an evidentiary hearing to determine the admissibility of the polygraph evidence and expert testimony regarding same, under Federal Rule of Evidence 702 ("Rule 702") and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).

At the hearing, Defendant Angulo-Mosquera presented the testimony of Dr. David C. Raskin, who for 44 years has conducted laboratory and field research on polygraph techniques for the detection of deception, taught university courses about polygraph techniques, trained government and law

enforcement polygraph examiners, and published extensively on polygraph techniques, regarding the reliability of polygraph examinations in general and the examination in this case specifically.

II. Standard of Review

The Eleventh Circuit has held that polygraph evidence may be admitted to impeach or corroborate witness testimony at trial. *See United States v. Piccinonna,* 885 F.2d 1529, 1535 (11th Cir. 1989) (en banc); *United States v. Gilliard,* 133 F.3d 809, 811-12 (11th Cir. 1998).

> In *Piccinonna,* the [Eleventh Circuit] fashioned a novel approach to the admissibility of polygraph evidence. The decision to change the legal landscape was based on the Court's view that advances in the science of polygraph have greatly increased the reliability of the tests and consequently reduced many of the prejudicial effects. The Eleventh Circuit outlined two situations where polygraph evidence may be admitted. *Id*. at 1536. The first instance is stipulated polygraph evidence. The second instance, the one most relevant for the purposes of the instant case, is polygraph evidence used to impeach or corroborate the testimony of a witness at trial.
>
> The Court stated that polygraph evidence may be used to impeach or corroborate, subject to three preliminary requirements. First, the party planning to use the evidence must provide sufficient notice to the opposing party. Second, the opposing party must be given a reasonable opportunity to have its own expert administer a polygraph examination which is materially similar to the previously taken examination. Third, the admissibility of evidence is subject to the relevant provisions of the Federal Rules of Evidence, specifically, Fed. R. Evid. 608 and 702.

United States v. Crumby, 895 F. Supp. 1354, 1357 (D. Ariz. 1995). *See also United States v. Henderson,* 409 F.3d 1293, 1301-1302 (11th Cir. 2005). District courts have discretion regarding whether to admit polygraph evidence in a particular case. *See id.* Both the Eleventh Circuit and the U.S. Supreme Court have held that “reasonable judges can disagree over the reliability of polygraph methodology.” *Id.* at 1303. Thus, it is incumbent on district courts to review the evidence presented and determine admissibility under Rule 702.

Rule 702 compels district courts to perform a “gatekeeping” function, an exacting analysis of the foundations of expert opinions to ensure they meet the standards for admissibility under the

rule. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (citations and quotations omitted). This requirement is to ensure the reliability and relevancy of expert testimony. *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 152 (1999).

Thus, in determining the admissibility of expert testimony under Rule 702, courts must engage in a rigorous three-part inquiry, determining whether:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert;* and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Frazier, 387 F.3d at 1260 (citations omitted). "While there is inevitably some overlap among the basic requirements – qualification, reliability, and helpfulness – they remain distinct concepts and the courts must take care not to conflate them." *Id.* It is the proponent of expert testimony who bears "the burden to show that his expert is qualified to testify competently regarding the matters he intended to address; the methodology by which the expert reached his conclusions is sufficiently reliable; and the testimony assists the trier of fact." *Id.* (citations and internal quotations omitted).

The Supreme Court has stated that, in order for a trial judge to determine whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue, this entails "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993). Some factors that bear on this inquiry are:

1) whether the expert's theories, methods or techniques can be or have been tested;
2) whether the technique, method, or theory has been subject to peer review and publications;

3) whether the known or potential rate of error of the technique when applied is acceptable; and

4) whether the technique, method, or theory has been generally accepted in the scientific community.

Daubert, 509 U.S. at 593-94. The Supreme Court was clear, however, that this was not a definitive or exhaustive list and was intended to be applied in a flexible manner. *Id.*; *see also United Fires and Casualty Co. v. Whirlpool Corp.*, 704 F.3d 1338, 1341 (1999). The focus is on the scientific validity and the evidentiary relevance and reliability of the principles and methodology underlying a proposed submission. *Daubert*, 509 U.S at 594-95.

III. Discussion

There is no argument here that the Government lacked sufficient notice or a reasonable opportunity to have its own polygraph expert administer a test covering substantially the same questions. Thus, this Court must determine whether the Federal Rules of Evidence allow admission of this evidence at trial. *See Henderson,* 409 F.3d at 1301-1302. Dr. Raskin's testimony supported all of the *Daubert* factors, and no evidence was presented by the United States to challenge or contradict that testimony.

A. The expert's theories, methods or techniques can be and have been tested.

First, Dr. Raskin testified that there are dozens of scientific studies with regard to polygraph examinations. TR at 5:22 – 6:1; Raskin Dec. ¶¶ 12-16. In his Declaration, Dr. Raskin describes laboratory research studies and field studies that have been used to test the accuracy of polygraph examinations. Raskin Dec. ¶ 11. These studies and publications indicate that a properly performed polygraph examination has a 90% accuracy rate. TR at 6:16-20. The studies also show that the risk of a person who is lying passing the test (false negative) is less likely than a person who is telling the truth failing the test (false positive). TR at 9:15-23. An extensive study by the Department of Defense supports the accuracy and reliability of polygraph exams. TR at 11:3 - 12:6; Raskin Dec.

at p. 29. Accordingly, Defendant has shown that polygraphy can be and has been scientifically tested.

B. The technique has been subject to peer review and publications.

Polygraphs have also been the subject of numerous peer-reviewed publications. TR at 6:6-20; Raskin Dec. ¶¶ 12-16, and 21. Dr. Raskin cited numerous articles written and published in peer reviewed journals such as the Journal of Applied Psychology, the Journal of General Psychology, and the Journal of Police Science Administration. *See* Raskin Dec. at p. 6-10. Thus, the Court finds that polygraphy has been subjected to sufficient peer review and publication. *See also Crumby,* 895 F. Supp. at 1359.

C. The known or potential rate of error of the technique when applied is acceptable.

As previously discussed, the error rates are less than 10% based on the studies cited by Dr. Raskin. This error rate is certainly acceptable under *Daubert. See id.* at 1360 (citing John A. Podlesny and David C. Raskin, *Effectiveness of Techniques and Physiological Measures in the Detection of Deception,* Vol. 15 No. 4 Psychophysiology (1978); David C. Raskin, et. al., *Recent Laboratory and Field Research on Polygraph Techniques* in J.C. Yuille (ed.), *Credibility Assessment* (1989); David C. Raskin, et. al., *A Study of the Validity of Polygraph Examinations in Criminal Investigation,* Final Report to the National Institute of Justice).

D. The technique has been generally accepted in the scientific community.

Dr. Raskin testified that several "carefully constructed surveys" indicate that there is a high degree of acceptance for polygraph examinations within the scientific community. TR at 7:15 – 8:1. Moreover, all major federal law enforcement agencies use polygraphs in their investigative process and Dr. Raskin has been involved in training federal agents to conduct polygraph

examinations. TR at 6:24 – 7:5, 10:1 – 11:2. Thus, the Defendant has shown that polygraphy is generally accepted in the relevant scientific community.

E. The testimony will be helpful to the jury.

The primary evidence in Defendant's case will be his own testimony. The results of the polygraph examination and the expert testimony regarding that examination could help the jury make a credibility determination regarding that testimony. Accordingly, the evidence will be helpful to the jury.

The Government expressed concern that jurors would be overly persuaded by the results of the polygraph. However, Dr. Raskin testified that studies have shown that jurors consider polygraph examination results as they would any other piece of evidence, they do not give it any extra weight and are often cautious with such evidence. TR at 8:2-15; Raskin Dec. ¶¶ 22-25. Dr. Raskin's testimony on this issue was not challenged. Furthermore, juries are regularly presented with complex, conflicting, and persuasive evidence and trusted to weigh all evidence presented appropriately before reaching a verdict. The Court will not presume that the jury is incapable of evaluating evidence appropriately without some evidence to support that claim.

F. The Government did not present any evidence to contradict or call into question Dr. Raskin's testimony.

The Government did not present any evidence or testimony at the hearing to contradict Dr. Raskin's testimony. Instead, the government relied solely on the cross-examination of Dr. Raskin, which it aimed at calling into question the results of the polygraph examination conducted in this case. The Government attempted to show that the Defendant's responses to the relevant questions were in fact untrue because the Defendant had previously been subject to arrest on another ship that was also carrying illegal drugs. The Government's questioning was unconvincing, as that prior event had no relevance to the polygraph examination conducted here. It was clear that the questions

asked in this particular polygraph examination were aimed at this most recent incident, and that this context was explained to the Defendant prior to the test being administered. Additionally, the Government presented no evidence of the prior incident which appears to have been an arrest only, with no conviction. There is no evidence before the Court that the Defendant had knowledge of illegal substances on the prior ship and, in fact, no evidence that such illegal substances were present.

The Government placed significant emphasis on the holding in *United States v. Scheffer*, 523 U.S. 303 (1998). The *Scheffer* case involved a constitutional challenge to an executive order that prohibited the admission of polygraph evidence in the proceedings of courts martial. The Supreme Court held that the executive order did not violate the constitution. This holding, however, is irrelevant to the instant inquiry. Nothing in the *Scheffer* order has any effect on the admissibility of polygraph evidence in civilian courts. The Supreme Court did not categorically reject the admissibility of polygraph evidence but, instead, held that military defendants did not have a constitutionally protected right to admit such evidence in military courts.

The Government then suggested that this Court should use other courts' criticisms of polygraph evidence to discredit Dr. Raskin's testimony. However, as noted by the Defendant, this Court does not know what kind of evidence was before the courts in those other cases. TR at 58:1-18. Here, the only evidence presented supports the admissibility of the polygraph examination under Rule 702 and *Daubert.* Furthermore, the case law does not uniformly support exclusion. *See, e.g., United States v. Padilla*, 908 F. Supp. 923 (S.D. Fla. 1995) (holding that as long as defendant only attempted to introduce evidence of her polygraph examination to corroborate or impeach a witness' testimony at trial, the polygraph was admissible. The polygraph was relevant, and its probative value was not substantially outweighed by its prejudicial effect. The test was conducted

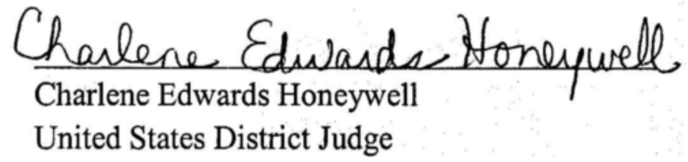
with sufficient scientific rigor to conclude that it may assist the trier of fact in determining whether defendant's confession was, in fact, induced through impermissible coercion.).

With regard to the test administered in this case, Dr. Raskin testified that the polygraph examination conducted here by Mr. Orr was of high quality, using a "Utah Probable Lie Comparison Question Test." TR at 15:5-25; Raskin Dec. ¶ 37. Dr. Raskin found the results reported by Mr. Orr to be correctly reported. TR at 15:25 – 16:2. Mr. Orr's qualifications, which have not been challenged, are extensive and are primarily bestowed by the United States' Government. *See* Doc. 67-2 at p. 3-6. Mr. Orr was an agent with the Federal Bureau of Investigation ("FBI") where he was trained to administer polygraph examinations and then did so, on behalf of the Government, for over a decade. *Id.* at p. 3. In 1999 Mr. Orr graduated from the Department of Defense Polygraph Institute in Alabama. *Id.* In 2005 Mr. Orr transferred to Florida so that he could lead the local polygraph division for the FBI. *Id.* Mr. Orr held that position until his retirement in 2011, at which time he began his own business conducting polygraph examinations and providing expert testimony. *Id.* Mr. Orr is also an instructor at the Academy of Polygraph Science in Fort Myers, Florida. *Id.*

Thus, the Court finds the polygraph evidence to be admissible at trial to either impeach or corroborate witness testimony. Further specifics regarding the admission of the polygraph evidence will be determined at the time of trial. Accordingly, it is hereby

ORDERED that Defendant's Motion for an Evidentiary Hearing on Admission of Polygraph Evidence (Doc. 67), construed as a motion to determine the admissibility of the polygraph evidence under Federal Rule of Evidence 702, is GRANTED. The Defendant may present the polygraph evidence, through expert testimony, to corroborate or impeach witness testimony at the trial in this matter.

DONE AND ORDERED in Tampa, Florida on April 9, 2015.



Charlene Edwards Honeywell
United States District Judge

Copies to:
Counsel of Record and Unrepresented Parties, if any