IN THE SUPREME COURT OF FLORIDA

CHARLES SEATON DAVIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO.69,677

REPLY BRIEF ON THE MERITS

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the Appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and Appellee in the lower courts. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

RB = Respondent's Brief on the Merits

RA = Respondent's Appendix

STATEMENT OF THE CASE AND FACTS

Petitioner relies on his statement of the case and facts submitted in his initial brief.

ARGUMENT

WHEN POLYGRAPH EVIDENCE IS ADMITTED BY STIPULATION, AND A PARTY REQUESTS A PROPER INSTRUCTION ON THE SCIENTIFIC UNRELIABILITY OF POLYGRAPH RESULTS, IT IS REVERSIBLE ERROR FOR THE TRIAL COURT TO FAIL TO SO INSTRUCT THE JURY

Respondent contends that Petitioner is not entitled to a limiting instruction on polygraph evidence and that polygraphs yield reliable evidence that should be admissible in court proceedings. Respondent misreads the record below and ignores the significance of recent national developments in this area. Respondent's sparse analysis and tenuous conclusions contribute nothing to the serious issue before this Court.

A. Entitlement to an Instruction

Respondent bases its argument that Petitioner is not entitled to a limiting instruction on several distinct notions (RB5-18). These notions are addressed as follows:

1. Respondent suggests that is is inequitable for Petitioner to waive objection to the admissibility of the polygraph and then seek to attack the polygraph result when admitted at trial (RB7-8). Once again Respondent ignores the sequence of events at trial - it was the state that first introduced evidence (over Petitioner's objection) of the reliability of the polygraph to bolster the conclusion of Detective

Rios.[1] It was this trial tactic which triggered the need for a limiting instruction. Respondent's persistent refusal to recognize this reality undermines its argument.[2]

2. Respondent also suggests that polygraph evidence is admitted in part because of a"tacit belief" that they are accurate (RB8-9). This view wholly misapprehends the realities of what a stipulation to admissibility means - a stipulation does not mean the parties believe in the accuracy of the polygraph, but rather, that the parties are willing to accept the results.[3] Respondent's attempt to (in effect) add a clause to the stipulation is a futile exercise in speculation and ignores defense counsel's unwavering position at trial.

3. Respondent also contends that the instruction on expert testimony sufficiently addresses Petitioner's concerns (RB13-18). This is more than a near-sighted oversight, it is complete blindness to the history of this complex issue. Courts have wrestled with the many aspects of this issue since Frye v. United States, 293 F. 1013 (D.C.Cir. 1923). It is pure folly to suggest that one of the general standardized instructions will adequately instruct the jury on an issue that has vexed the courts for over sixty years. The weight of authority supports this common sense notion - only four jurisdictions permit

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1 The prosecutor brought out this material on direct examination of Detective Rios, not on redirect, as if in response to Petitioner's cross examination.

2 Moreover, this sequence of events is probably typical in other cases - due to the adversary nature of criminal proceedings, the prosecution can be expected to always seek to put on more evidence than the polygraph examiner's conclusion on one question. Thus, there is an inherent motivation to bolster the polygraph result before it is attacked on cross-examination.

3 This is especially true in light of the unequal bargaining position of the parties in a criminal proceeding.

polygraph evidence to be admissible without a limiting instruction. See Petitioner's Brief on the Merits, p.13 n.7. Respondent seeks to have this Court go out on a very weak limb indeed.

4. Respondent finally argues that a limiting instruction, as requested by Petitioner, is a comment on the evidence (RB14-16). As noted before, this argument has been implicitly rejected by the weight of authority. Moreover, Respondent mischaracterizes Petitioner's request - Petitioner does not seek to have the jury instructed to disregard the polygraph and instead, seeks only to help the jury evaluate such controversial, potent evidence and be able to properly perform its function.

B. Was Petitioner's Requested Instruction A Proper Request?

Respondent summarily concludes that the en banc Fourth District was correct in its determination on this issue (RB16). Thus, Respondent makes the same mistake as the Fourth District and fails to explain how Petitioner's request was off the mark. This is no small oversight - it is a critical flaw. Indeed, the en banc court below hinged its decision on this point. As Petitioner noted in his initial brief, to hold Petitioner's instruction improper, raises serious policy questions regarding the responsibilities of the trial judge and counsel and, more importantly, wholly disregards defense counsel's good faith efforts. Petitioner's Brief on the Merits, pp. 13-17.

C. Harmless Error

Respondent then predictably argues that regardless of whether Petitioner is entitled to an instruction, the failure to give the instruction here was harmless (RB18-23). Initially,

Petitioner questions whether the harmless error doctrine can ever be used in this type of case. Courts uniformly recognize the tendency of polygraph evidence to pervert the judicial process. Failure to limit the jury's consideration of this unique evidence will likely infect the trial to an intolerable degree. More importantly, the paucity of support cited by Respondent to support this proposition suggests that harmless error is rarely, if ever, applicable in this instance.

Even if this Court accepts Respondent's general claim, it must reject Respondent's further assertion that harmless error exists in this case. Interestingly, Respondent's conclusion ignores the decision of the Fourth District (both the panel and en banc courts). More importantly, this conclusion belies the evidence in this case. The evidence in this case, as in many "paper trail" cases, is notable in one respect - there is no direct evidence linking Petitioner to the crime. Furthermore, there are other possible suspects. This is far from "overwhelming" evidence of guilt and the effect of this potent, direct evidence of guilt cannot be understated and easily disposed. The error here directly affected the outcome below.

D. Per se Inadmissibility

Respondent answers Petitioner's suggestion that polygraph evidence become per se inadmissible by arguing for the "status quo" - admissibility by stipulation, with safeguards (RB25-41). Respondent makes several arguments to support its position:

1. Respondent first proposes a new evidentiary standard for the admissibility of scientific evidence - the "relevancy approach" - in contravention to the Frye "general

scientific acceptance" norm (RB27-28)[4]. Respondent seemingly adopts the view espoused by Justice Ervin in Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983). In Brown, Justice Ervin, speaking for the court, held that the Florida Evidence Code and policy require that

> [a]ny relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion.

Id. at 88, quoting McCormick on Evidence, §203 (2d.ed. 1972) at 491. Thus, Justice Ervin proposes a liberal approach opposed to the more stringent requirements of Frye.

The debate engendered by Brown was kept lively by the equivocal stance of this Court in Bundy I and by Justice Ervin. See Hawthorne v. State, ~~420~~ 470 So.2d 770 (Fla. 1st DCA 1985) (J. Ervin, concurring in part and dissenting in part) (Hawthorne II). Nonetheless, this issue was resolved by this Court in Bundy II. In Bundy II, this Court addressed the questions left unanswered in Bundy I - whether the Frye test of general scientific acceptance or the Brown relevancy approach controls the admissibility of hypnotically induced testimony. This time the answer was unambiguous:

> Hypnosis has not received sufficient general acceptance in the scientific community to give reasonable assurance that the results produced under even the best of circumstances will be sufficiently reliable to outweigh the risks of abuse and prejudice.
>
> ...[U]ntil hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately

[4] Prior to 1985, Frye had never been explicitly accepted by Florida courts, see Bundy v. State, 455 So.2d 330, 341 (Fla. 1985) (Bundy I), until Bundy v. State, 471 So.2d 9 (Fla. 1985) (Bundy II) affirmed its validity in this state. See, text infra.

> improved without undue danger of distortion, delusion, or fantasy and until the barriers which hypnosis raises to effective cross-examination are somehow overcome, the testimony of witnesses which has been tainted by hypnosis must be excluded in criminal cases.

471 So.2d at 18, citing People v. Gonzalez, 329 N.W. 2d 743, 748 (Mich. 1982) (e.s.). Based on this standard, hypnotically enhanced testimony was held to be per se inadmissible. Id.[5] The result and reasoning in Bundy II leave no doubt that contrary to Respondent's wishes, Frye is the rule in Florida.

Furthermore, Respondent does more than avoid the effect of Bundy II as to the proper test to be used - Respondent also conveniently ignores this Court's language in Bundy II that directly bears on polygraph evidence:

> We are swayed by the opinions of the courts of other jurisdictions that have held that the concerns surrounding the reliability of hypnosis warrant a holding that this mechanism, like polygraph and truth serum results, has not been proven sufficiently reliable by experts in the field to justify its validity as competent evidence in a criminal trial.

471 So.2d at 18 (e.s.). Thus, this Court need not go far in completing what was started in Bundy II - polygraph evidence has had no notable demonstration of accuracy or reliability since Bundy II and thus, the observations in Bundy II remain true.[6]

2. Respondent also contends that this evidence is merely an opinion by an expert and therefore admissible (RB28-30). Respondent relies on United States v. Ridling, 350 F.Supp.

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5 This result is directly contrary to the result in Brown (which approved hypnotically enhanced testimony) and undermines, if not overrules, that case and its rationale.

6 This does not mean that polygraph evidence will always prohibited - when, and if, this technique is shown to have gained general scientific acceptance, then it would be admissible in Florida.

90 (E.D. Mich. 1972). The Ridling cases is widely noted in the literature, but primarily because it is one of very few courts to take such a literal view on this subject. This is understandable because this view belies the fact that the theory and reality of polygraph evidence is inextricably intertwined with the examiner's opinion. In other words, the basis for the opinion - the polygraph process and theory - is a major focus in theory and at trial. It is artificial to analyze these factors separately.

3. Respondent's analysis on this issue overlooks an important consideration - in addition to the accuracy and validity problems with the polygraph, polygraphs improperly prejudice the defendant because they purport to resolve the issue in the trial. This Court has recognized this problem from its first treatment of the issue in Kaminski v. State, 63 So.2d 339 (Fla. 1952) and it remains true today. Inexplicably, Respondent does not address this issue. Petitioner urges this Court to consider and weigh this important factor. See Petitioner's Brief on the Merits, pp. 24-26.

4. Respondent then falls back on an argument that calls for an enlightened approach to this type of evidence -admissibility by stipulation with written, stringent safeguards (RB32-33, RA1-2). Petitioner welcomes Respondent's awareness of the delicate nature of this type of evidence but submits that Respondent has not gone far enough. As this Court noted in Bundy II, safeguards are no insurance of reliability. 471 So.2d at 18.

5. Respondent attempts to minimize the practical problems sure to surround the admissibility of polygraph evidence with cursory analysis and conclusory remarks (RB38-40). Petitioner relies on his initial brief in this respect and submits that Respondent has not effectively refuted those arguments. See Petitioner's Brief on the Merits, pp. 26-28.

6. Finally, Respondent's analysis is lacking in one vital respect - Respondent refuses to acknowledge, or address, the growing trend of jurisdictions that have declared a per se rule of inadmissibility for this type of evidence. See Petitioner's Brief on the Merits, pp. 17-18. While Respondent would have this Court believe that the national trend is towards admitting the improved polygraph, the reality is that "[t]he trend is to the contrary." Ice v. Commonwealth, 667 S.W. 2d 671, 675 (Ky. 1984). Several of these recent courts have arrived at this conclusion after a period of experimentation with the stipulation approach. These decisions, and experience, should inform this Court.

E. Prospectivity v. Retroactivity

Respondent alternatively urges this Court to limit the effect of any per se rule of inadmissibility to cases in the future (RB23-26). Petitioner readily understands Respondent's concern, but submits that Petitioner is not the party to argue this issue. That is, Petitioner is unaffected by this aspect of this case - it has never been the case that relief has denied to the parties before the court. Thus, Respondent seeks to have

Petitioner argue for a principle that he has no interest in. This is not a proper, adversarial method to debate this important issue.

CONCLUSION

Respondent seeks to have Florida drink from the cup of polygraph evidence in the belief that it is half full, not half empty (RB26). Respondent exaggerates how much is in the glass and is blind to the bigger problem - Florida does not need to drink this type of liquid at all. Because the polygraph is unreliable and extremely prejudicial, criminal defendants are entitled, at a minimum, to a limiting instruction. Moreover, these same considerations strongly suggest that this Court continue down the path of Bundy II and make such evidence per se inadmissible. The integrity of Florida's judicial system is at stake. Florida should join the growing trend to reject, for now, this incompetent evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished, by courier, to Deborah Guller, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 24th day of March, 1987.

Thomas F. Ball

Of Counsel