IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA *

v. * **Criminal No. MJG-01-0403**

KEVIN S. BENJAMIN *

* * * * * * * * * * * * * *

MOTION *IN LIMINE* TO ADMIT POLYGRAPH
EVIDENCE OR, IN THE ALTERNATIVE, FOR A *DAUBERT* HEARING

Kevin S. Benjamin, through counsel, James Wyda, Federal Public Defender for the District of Maryland, and Sarah S. Gannett and Andrea Dennis Callaman, Assistant Federal Public Defenders, moves this Honorable Court for an *in limine* order allowing a certified polygraph expert, William L. Cotton, III, to testify regarding a polygraph examination that he administered to Mr. Benjamin on October 9, 2001.

In the alternative, Mr. Benjamin requests a hearing on this motion, in accordance with *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

This motion is made pursuant to Federal Rule of Criminal Procedure 12(b), Federal Rule of Evidence 104(a), and Rules 105.1 and 105.6 of the Local Rules of the United States District Court for the District of Maryland, and is based upon the memorandum of fact and law filed with it.

Respectfully submitted,

JAMES WYDA
Federal Public Defender for the
District of Maryland

_____
Sarah S. Gannett
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REQUEST FOR A HEARING

Pursuant to Rule 105.6 of the Local Rules of the United States District Court for the District of Maryland, Defendant requests a hearing on this motion.

_____
Sarah S. Gannett
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of November, 2001, a copy of the foregoing Motion *In Limine* to Admit Polygraph Evidence or, in the Alternative, for a *Daubert* Hearing was hand-delivered to: Lisa Turner, Assistant United States Attorney, Office of the United States Attorney, 101 West Lombard Street, 6625 U.S. Courthouse, Baltimore, Maryland 21201.

_____
Sarah S. Gannett
Assistant Federal Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA *

v. * **Criminal No. MJG-01-0403**

KEVIN S. BENJAMIN *

* * * * * * * * * * * * * *

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION *IN LIMINE* TO ADMIT POLYGRAPH
EVIDENCE OR, IN THE ALTERNATIVE, FOR A *DAUBERT* HEARING

Kevin S. Benjamin, through counsel, James Wyda, Federal Public Defender for the District of Maryland, and Sarah S. Gannett and Andrea Dennis Callaman, Assistant Federal Public Defenders, submits the following memorandum in support of his Motion *In Limine* to Admit Polygraph Evidence or, in the Alternative, for a *Daubert* Hearing.

I. Preliminary Statement

Mr. Benjamin respectfully requests that this Court allow William L. Cotton, III, a certified polygraph expert with over twenty-two years of experience, to testify regarding a polygraph examination that he administered to Mr. Benjamin on October 9, 2001. The Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *General Electric Company v. Joiner*, 522 U.S. 136 (1997), have considerably changed the law involving the admissibility of expert scientific testimony, and have called into question the Fourth Circuit's general reluctance to admit polygraph evidence. Moreover, the significant advances in polygraph technique in recent years make that general reluctance -- grounded in the application of the now superseded *Frye* test to early polygraph examinations[1] -- outdated.

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[1] *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

The Fourth Circuit has not squarely addressed the question whether its law on polygraph evidence should be reconsidered in light of *Daubert*, *Joiner*, and the significant advances in the field of polygraphy. *Cf. United States v. Sanchez*, 118 F.3d 192, 197 n.3 (4th Cir. 1997). Indeed, in its most recent published opinion addressing the admissibility of polygraph evidence, the Fourth Circuit made clear that the question is still unsettled. *See United States v. Ruhe*, 191 F.3d 376, 388 n.9 (4th Cir. 1999).

II. Factual Background

According to the police report in this case, on June 23, 2001, at approximately 4:30 a.m., Officers Thomas Mistysyn and Broderick Clarke of the Baltimore City Police Department responded to a 911 call for an armed person in a vehicle located in the 400 Block of Edsdale Road. Upon responding, the officers observed Mr. Benjamin sleeping in the rear seat of a Toyota Camry, which was registered to Mr. Benjamin. Upon further investigation, the officers found an unloaded handgun on the floor near Mr. Benjamin.

Mr. Benjamin was arrested and charged with knowingly possessing a firearm after having previously been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). At trial, the government must prove that Mr. Benjamin both knew that the firearm was on the floor of the car and that he intended to exercise dominion and control over the firearm. *See United States v. Blue*, 957 F.2d 106, 107-08 (4th Cir. 1992).

At trial, Mr. Benjamin intends to offer evidence that he did not know that the firearm was in the car prior to his arrest and that he did not intend to exercise dominion and control over the handgun. In support of that evidence, Mr. Benjamin respectfully requests that he be permitted to introduce the expert testimony of William L. Cotton, III, regarding a polygraph examination Mr. Cotton administered to Mr. Benjamin on October 9, 2001. *See* Report, Exhibit A. The results of the

examination, which demonstrate that Mr. Benjamin truthfully denied possession of the handgun, corroborate the evidence of his innocence that will be presented by the defense.

Counsel informed the government by telephone on October 12, 2001, that Mr. Benjamin had submitted to a polygraph examination and that the results of the examination suggested that he was truthful in denying that he possessed the handgun in question in this case. Counsel have attached a copy of the results of the polygraph examination to this motion to provide the government the opportunity to have a polygraph examiner of its choosing review the results. Counsel also will make any documentation underlying the attached results available to the government. Further, counsel are prepared to make Mr. Cotton available to the government or its expert to respond to questions regarding the examination of Mr. Benjamin.

III. Argument

A. *Daubert* and *Joiner* Considerably Changed the Law Governing the Admissibility of Expert Scientific Evidence, such as Polygraph Examinations.

Prior to the Supreme Court's opinion in *Daubert*, 509 U.S. 579, the test for admissibility of expert opinion evidence was whether the scientific technique in question was "generally accepted in the relevant scientific community." *Frye*, 293 F. at 1013. *Daubert* rejected the *Frye* test, holding that it had been effectively replaced by the adoption of Federal Rule of Evidence 702,[2] a more liberal standard of admissibility. *See Daubert,* 509 U.S. at 588-9. Subsequent to *Daubert*, the Supreme

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[2] Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand that evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Court's opinion in *Joiner*, 522 U.S. at 141-43, underscored the authority and flexibility that *Daubert* gave to district court judges, holding that determinations of the admissibility of expert scientific testimony would not be disturbed on review absent an abuse of discretion.

To the extent that the Fourth Circuit has adopted a *per se* rule excluding polygraph evidence, that rule is based upon the now superseded *Frye* test, and outmoded polygraph technology, and denies district courts the discretion vested in them by *Daubert* and *Joiner*.

The case frequently cited as authority for the supposed *per se* rule is *United States v. Brevard*, 739 F.2d 180, 181-82 (4th Cir. 1984), in which the court held that an FBI agent's repeated references to a polygraph exam he administered to the defendant constituted reversible error. *See, e.g., United States v. A & S Council Oil Company*, 947 F.2d 1128, 1133 (4th Cir. 1991); *United States v. Grandison*, 780 F.2d 425, 434 (4th Cir. 1985). In *Brevard*, the entirety of the court's explanation as to why the polygraph references were improper is contained in one sentence, "Evidence that the accused or a witness has taken a polygraph is inadmissible," and in a citation to an Eleventh Circuit case, *United States v. Holman*, 680 F.2d 1340, 1351-52 (11th Cir. 1982). *Holman* relies on authority interpreting *Frye* as establishing a rule in federal criminal trials that the results of polygraph tests are inadmissible. *See United States v. Clark*, 598 F.2d 994 (5th Cir. 1979) (*cited in Holman*, 680 F.2d at 1351). Thus, the Fourth Circuit's *per se* rule, if any, excluding polygraph evidence is based upon the *Frye* standard, which is no longer good law in light of *Daubert* and *Joiner,* and is based upon application of that standard to the polygraph technique used nearly eighty years ago, when *Frye* was decided.

The lack of any analysis whatsoever relating to the reliability of the polygraph in *Brevard*, however, strongly suggests that the Fourth Circuit did not intend to establish a stringent, bright-line rule in that case. In addition, the characterization of Fourth Circuit law as an absolute or *per se* ban

is misleading since the Fourth Circuit has repeatedly recognized that district courts have the discretion to admit polygraph evidence. *See, e.g., United States v. Bice-Bey*, 701 F.2d 1086, 1091 (4th Cir. 1983) (admitting the results of defendant's polygraph after defendant testified); *United States v. Webster*, 639 F.2d 174, 186 (4th Cir. 1981) (noting that the "broad discretionary powers of the district judge perhaps would have made admission of polygraph evidence proper" under the circumstances in the case); *Jackson v. Garrison*, 677 F.2d 371, 373 (4th Cir. 1981) (citing *Webster*, 639 F.2d at 186, as authority "which recognized the discretionary power of district courts to admit polygraphs"); *United States v. Wade*, No. 97-4002, 1998 WL 141161 (4th Cir. Mar. 30, 1998) (unpublished opinion) (admitting the results of defendant's polygraph to determine if defendant violated plea agreement); *United States v. Brook*, No. 97-4170, 1998 WL 228197 (4th Cir. 1998) (unpublished opinion) (citing *Webster*, 639 F.2d at 186, for the proposition that "[c]ourts have broad discretion whether to admit or exclude polygraph evidence" and allowing the district court to consider the results of defendant's polygraph on the question whether he had violated his plea agreement).[3]

As the Fourth Circuit has acknowledged, *Daubert*, and the subsequent decision in *Joiner*, vested significant discretion in the district court to decide on the admission of expert scientific evidence. *See Maryland Cas. Co. v. Therm-O-Disc., Inc.*, 137 F.3d 780, 783-85 (4th Cir. 1998); *see also Cavallo v. Star Enterprise*, 100 F.3d 1150, 1158-59 (4th Cir. 1996); *Black v. Rhone-Poulenc, Inc.*, 19 F. Supp. 2d 592, 596-97 (S.D. W.Va. 1998). Although the Supreme Court established two criteria for admissibility -- reliability and helpfulness-- it "left the means by which these criteria are evaluated to the sound discretion of the district judge." *Maryland Cas. Co.*, 137 F.3d at 785. Accordingly, this Court may rule on the admissibility of any expert scientific evidence in its cases. The polygraph

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[3] In accordance with the Local Rules of this Court, the unpublished opinions in *Wade* and *Brook* are attached as Exhibits B and C, respectively.

evidence at issue in Mr. Benjamin's case should be given the same consideration as other types of proffered expert scientific evidence. *See, e.g., Ruffin v. Shaw Industries, Inc*. 149 F.3d 294, 296-97 (4th Cir. 1998) (conducting an analysis under Rule 702 and considering several *Daubert* factors); *Maryland Cas. Co.*, 137 F.3d 783-85 (finding no error where the district court determined that evidence was admissible in accordance with *Daubert* and *Joiner*); *Cavallo*, 100 F.3d at 1158-59 (recognizing that the *Daubert* analysis is the proper one).

Indeed, many federal courts have ruled recently that their blanket exclusion of polygraph evidence did not survive *Daubert* and its progeny, leaving the question of admission or exclusion to the discretion of the trial court. *See, e.g., United States v. Call*, 129 F.3d 1402 (10th Cir. 1997); *United States v. Cordoba*, 104 F.3d 225 (9th Cir. 1997); *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995); *United States v. Crumby*, 895 F. Supp. 1354 (D. Ariz. 1995); *United States v. Galbreth*, 908 F. Supp. 877 (1995). Other federal courts have abandoned *per se* rules excluding polygraph evidence for reasons unrelated to, or only indirectly related to, *Daubert* and *Joiner*. *See e.g., United States v. Robbins*, 197 F.3d 829, 843-44 (7th Cir. 1999) (holding that in exercising its discretion regarding the admissibility of polygraph evidence, the district court must use Rule 403 as its guide); *United States v. Piccinonna*, 885 F.2d 159, 1537 (11th Cir. 1989) (noting the "tremendous advances" in polygraphy since *Frye* and concluding that "the science . . . has progressed to a level of acceptance sufficient to allow [its] use . . . in limited circumstances . . . .").

Although the Supreme Court in *United States v. Scheffer*, 523 U.S. 303, 311-12 (1998), upheld the Military Rule of Evidence prohibiting any reference to polygraphs, four justices, in a concurring opinion, expressed doubts that a "per se rule of exclusion is wise" and recognized the tension between

Daubert and the plurality's holding. *Id.* at 319–20 (Kennedy, J., concurring, joined by O'Connor, Ginsburg, and Breyer, JJ.). In his dissent, Justice Stevens stated:

> Well reasoned opinions are concluding, consistent with this Court's decisions in *Daubert* . . . and *Joiner* . . . , that the federal rules wisely allow district judges to exercise broad discretion when evaluating the admissibility of scientific evidence. Those opinions correctly observe that the rules of evidence generally recognized in the trial of civil and criminal cases in the federal courts do not contain any blanket prohibition against the admissibility of polygraph evidence.

Id. at 321. This Court should exercise the discretion afforded it by *Daubert* and *Joiner*, particularly in light of the Fourth Circuit's acknowledgment that exclusion is the "least favored means of rendering questionable scientific evidence ineffective." *Cavallo*, 100 F.3d at 1158-59.

B. Polygraph Evidence is Admissible Under Federal Rule of Evidence 702, as Informed by *Daubert* and *Joiner*.

Mr. Cotton's testimony regarding his polygraph examination of Mr. Benjamin is admissible under Federal Rule of Evidence 702, as informed by *Daubert* and *Joiner*, because it is based upon "scientific knowledge" that will "assist the trier of fact."

Under Federal Rule of Evidence 702, a federal trial court faced with a proffer of expert testimony must determine whether the testimony is "scientific knowledge" that is sufficiently reliable to be admitted as evidence. To assist trial judges in making this determination, the *Daubert* Court offered five nonexclusive factors for the trial court to consider: (1) whether the technique has been tested; (2) whether a known or potential error rate of the technique has been established; (3) whether standards are in place for controlling the operation of the technique; (4) whether the technique has been subjected to peer review and publication; and (5) whether the technique enjoys general acceptance within the relevant community. *See Daubert,* 509 U.S. at 593-94. The *Daubert* Court emphasized that the inquiry contemplated by Rule 702 should be a flexible one, and that its

overarching purpose is to assure the scientific validity of the technique that underlies the proposed testimony. *See id.*

In determining whether the proposed expert testimony will "assist the trier of fact," the court must determine "whether the reasoning or methodology underlying the proposed testimony properly can be applied to the facts in issue." *Id.* This requirement is essentially one of relevance-- that is, the expert's testimony must relate to an issue in dispute. *See id*.

1. Mr. Cotton will testify about "scientific knowledge" that is sufficiently reliable.

The polygraph is premised on the belief that people exhibit physiological signs of anxiety when they lie, and that such signs are not exhibited when they tell the truth. When an individual lies, he experiences a change in the rate and pattern of breathing, in blood pressure, in rate and volume of blood flow, and in the moisture on the skin of the proponent of falsehood. A polygrapher evaluates his subject's physiological responses to questioning and determines whether they suggest that the subject is lying or is telling the truth.

The modern polygraph bears little resemblance to the crude instrument and technique used nearly eighty years ago when the Supreme Court decided *Frye*. The examiner in that case used a simple systolic blood pressure test, comprised of a cuff and microphone. The examiner asked the subject a series of questions, during which time the examiner periodically took the subject's blood pressure.

By contrast, the polygraph instrument used by Mr. Cotton in the examination of Mr. Benjamin measures the four above-mentioned physiological functions. The instrument includes a cardiograph, which monitors change in blood volume and heart rate; a pneumograph, which monitors respiratory activity in both the abdominal and thoracic areas; and a galvanograph, which records the changes in resistance to electrical current on the surface of the skin. During questioning, changes in these

measurements are transmitted to pens which record them on moving chart paper attached to the instrument.

The technique used by Mr. Cotton is the "zone comparison technique," which is commonly referred to as the "control question technique." The examiner conducts a pre-test interview in which he explains the nature of the polygraph instrument, the purpose of the testing, and the pertinent issues. Each of the test questions is reviewed with the subject to ensure that the subject understands them and to eliminate any surprise, which may cause similar physiological changes as deception or lying.

During the testing phase, the sensors for the polygraph are attached to the subject, and the examiner asks questions while the polygraph records the subject's physiological reactions. The examiner asks three types of questions: neutral, relevant, and control. The neutral questions determine the subject's normal reactions to questions such as "Is your first name [subject's name]?" The relevant questions relate to the subject matter under investigation. In Mr. Benjamin's case the relevant questions were: (1) Did you know the gun was in your car prior to your arrest?; (2) During June 2001, did you have personal possession of the gun that was recovered from your vehicle?; and (3) Did you lie when you said the gun did not belong to you? *See* Exhibit A. The control questions relate to acts similar to the one under investigation, but are more general, cover longer periods of time, and are deliberately vague. The control questions are designed to lead the subject to answer "no," even as he doubts the truthfulness of his answer. For example, in a theft case, the polygrapher may ask, "Before the age of twenty-one, had you ever thought of taking something that wasn't yours?"

The theory of the control question technique is that examinees who give truthful responses to the relevant questions are more concerned about the control questions, about which they may have doubts. Thus, examinees who are being truthful have stronger physiological responses to the control questions than the relevant questions. In contrast, examinees who are not being truthful are more

concerned about the relevant questions than the control questions. Accordingly, deceptive examinees have stronger physiological reactions to relevant questions than to control questions.

The American Polygraph Association ("APA") has established a protocol for polygraph examination. First, the test should be conducted at least three times to ensure accuracy. Next, upon completion, the polygrapher should compare the subject's physiological reactions to the control questions with his physiological reactions to the relevant questions using a numeric scale and applying a standardized set of scoring rules. Additionally, the examiner also should consider results that are electronically tabulated by the polygraph instrument. Finally, an independent, disinterested polygraph examiner who was not a party to the examination should review the results to minimize the effect of any examiner subjectivity, and to protect against error.

The examination conducted by Mr. Cotton followed this protocol. Mr. Cotton conducted a pre-test interview, formulated and asked appropriate questions during the testing phase, and analyzed the results using the prescribed method. Alex Tateum, a former FBI agent who is now in private practice, reviewed the results of Mr. Benjamin's examination and agreed with Mr. Cotton that Mr. Benjamin was truthful in asserting that he did not knowingly possess the handgun in this case.

The reliability of the examination conducted by Mr. Cotton is reinforced by his knowledge and experience in the field of polygraphy.[4] As a member of the Baltimore County Police Department from 1964 to 1986, Mr. Cotton conducted in excess of 2000 polygraph examinations. Mr. Cotton is currently a partner at Cotton & Krahling Special Services, Inc., where he specializes in conducting polygraph examinations. Since his retirement from the police department, he has conducted polygraph examinations for the State of Maryland, the Mass Transit Administration Police Force, the University of Maryland Police Force, and Dunbar Armored Corporation, among others. Mr. Cotton originally

[4] Mr. Cotton's curriculum vitae is attached as Exhibit D.

was certified as a polygraph expert in 1976 and has regularly attended seminars and courses covering the advances in polygraph instrumentation, theory, and technique since that time. He serves on the Board of Directors of the Maryland Polygraph Association and is a member of the American Polygraph Association.

An analysis under the factors suggested in *Daubert* reveals that the control question technique used by Mr. Cotton, are scientifically valid and sufficiently reliable to be admitted under Rule 702.

(a) The control question technique has been tested.

The control question technique has been subject to extensive testing, including laboratory and field studies. *See Crumby*, 895 F. Supp. at 1354; *Galbreth*, 908 F. Supp. at 885-88. One expert estimated that hundreds of studies have been conducted and reported in the literature, including dozens of high quality studies. *See Galbreth*, 908 F. Supp. at 885.

(b) The control question technique error rate is low.

The high quality studies -- those that are properly conducted by a qualified examiner using the appropriate scoring system -- indicate a 10% error rate for false positives (examiner incorrectly determines that the subject is lying) and a 5% error rate for false negatives (examiner incorrectly determines that the subject is telling the truth). *See Crumby*, 895 F. Supp. at 1359-60; *Galbreth*, 908 F. Supp. at 885; *see also United States v. Scheffer*, 523 U.S. 303, 333 & accompanying notes (1998) (Stevens, J., dissenting) (discussing and citing a number of studies of the reliability of polygraph tests).

(c) The control question technique is standardized.

Polygraph technique and requirements for professional polygraphers are increasingly standardized. *See United States v. Posado*, 57 F.3d 428, 434 & n. 9 (5th Cir. 1995). *Id.* The APA has established a test protocol which, as discussed above, was followed by Mr. Cotton during his examination of Mr. Benjamin. The APA, of which Mr. Cotton is a member, screens its members and

administers written and oral tests to graduates to assure an established level of competency. Further, the APA enforces its standards by sanctioning members who do not follow the protocol. *Id.*

(d) The control question technique has been subjected to peer review and publication.

Hundreds of studies and articles have been published on the control question technique, many in peer-reviewed journals. *See Galbreth*, 908 F. Supp. at 891. These articles and studies appear in publications such as *The Journal of Applied Psychology*, *The Journal of General Psychology*, *Psychophysiology*, *The Journal of Police Science and Administration* and *The Journal of Research in Personality*, and *Law and Human Behavior*. *See United States v. Cordoba*, 991 F. Supp. 1199, 1203 n.10 (C.D. Cal.1998). Publishing in such journals is very difficult due to the rigorous nature of the peer review process. *See Crumby*, 895 F. Supp. at 1359.

(e) The control question technique is generally accepted in the scientific community.

That the polygraph technique has gained general acceptance in the relevant community is demonstrated by its increasingly widespread use in law enforcement, by investigative agencies such as the FBI, the CIA, and the Secret Service, and by psychophysiologists. *See Picconna*, 885 F.2d at 1532; *Crumby*, 895 F. Supp. at 1359. In the Fourth Circuit, the government has repeatedly made criminal defendants' submission to, and truthful responses during, a polygraph examination a condition of plea agreements. *See, e.g., Wade*, 1998 WL 141161; *Brook*, 1998 WL 228197.

2. The polygraph evidence presented by Mr. Cotton will "assist the trier of fact."

Rule 702's requirement that the evidence assist the trier of fact is essentially one of relevance. *See Daubert*, 509 U.S. at 593-94. Put simply, the expert testimony must relate to an issue in dispute. In this case, Mr. Benjamin intends to offer evidence that he was neither in actual nor constructive possession of the handgun found in his car. Mr. Cotton's expert testimony demonstrating that Mr.

Benjamin truthfully denied knowledge of, and intent to exercise dominion or control over, the handgun clearly relates to this central issue. *See United States v. Biaggi*, 909 F.2d 662, 691-92 (2nd Cir. 1990) (holding that evidence of defendant's innocent state of mind was "critical to a fair adjudication of criminal charges.").

C. The Polygraph Evidence is Admissible Under Rule 403.

Federal Rule of Evidence 403 provides that even reliable and relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice.

In this case, the probative value of admission of the polygraph evidence is considerable, while the prejudicial effect is minimal. There is little doubt that polygraph evidence can be enormously probative. Where the examination conducted is scientifically reliable, as in this case, the polygraph sheds light on whether the examinee committed the crime at issue. *See Crumby*, 895 F. Supp. 1354, 1361-62. Specifically, the polygraph examination in Mr. Benjamin's case, is probative of whether or not Mr. Benjamin was in possession of the handgun.

Several cases from the Fourth Circuit suggest that the admission of polygraph evidence is not unfairly prejudicial. Not only has the Fourth Circuit allowed the district court discretion in the admission of polygraph evidence in certain circumstances, *see, e.g., Webster*, 639 F.2d at 186, it has also held that the erroneous admission of polygraph evidence can be harmless error and that an impermissible reference to a polygraph can be cured by an appropriate jury instruction. *See, e.g., United States v. Porter*, 821 F.2d 968, 974 (4th Cir. 1987); *United States v. Tedder*, 801 F.2d 1437, 1444-45 (4th Cir. 1986); *United States v. Morrow*, 731 F.2d 233, 238 (4th Cir. 1984).

Mr. Benjamin has sought to minimize any potential prejudice by providing notice to the government of the examination, and allowing the government an opportunity to have an expert of its own choosing review the results and the underlying documentation. Counsel will also make Mr.

Cotton available to the government or its expert to respond to any questions regarding his examination of Mr. Benjamin.

In addition, Mr. Benjamin did not engage in the practice of "polygrapher shopping." Mr. Cotton was the first and only polygraph examiner to test Mr. Benjamin about the circumstances surrounding the issues in this case. Counsel are informed that Mr. Cotton has a reputation in the field as a careful and rigorous examiner, who does not 3easily "pass" his subjects.

Finally, vigorous cross-examination by the government can eliminate any potential prejudice. Mr. Benjamin's willingness to make the examiner and all the documentation relating to the polygraph examination available to the government will allow the government to adequately prepare for cross-examination and to retain an expert of its own choosing.

Conclusion

For these reasons, and those to be presented at the hearing on this motion, Mr. Benjamin urges this Court to admit the testimony of William L. Cotton, III, regarding the polygraph examination he administered to Mr. Benjamin on October 9, 2001.

Respectfully submitted,

JAMES WYDA
Federal Public Defender for the
District of Maryland

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of November, 2001, a copy of the foregoing Memorandum of Law in Support of Defendant's Motion *In Limine* to Admit Polygraph Evidence or, in the Alternative, for a *Daubert* Hearing was hand-delivered to: Lisa Turner, Assistant United States Attorney, Office of the United States Attorney, 101 West Lombard Street, 6625 U.S. Courthouse, Baltimore, Maryland 21201.

_____
Sarah S. Gannett
Assistant Federal Public Defender