Polygraphs and Treatment Courts

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In this Q&A document, Judge William "Bill" Meyer (ret.) answers the following questions about the use of polygraphs in treatment courts:

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1. Can polygraphs or other lie detector technology (such as functional MRI) be used as a condition of probation (that is, treatment court monitoring)?

2. If such truth-testing tools can be used, in what ways can they be used?

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This issue is very complicated and jurisdiction dependent, but the two driving factors in any analysis are the unreliability of truth detection technology and the potential Fifth Amendment implications regarding self-incrimination. Judge Meyer addresses each of these factors in turn.

Reliability

In almost all circumstances, courts have prohibited the admission of polygraph tests at trial. The U.S. Supreme Court has held that a per se rule excluding polygraph tests is constitutional, and in so doing specifically referred to the fact that "[m]ost States maintain per se rules excluding polygraph evidence." *United States v. Scheffer*, 523 U.S. 303, 309, 311-12 (1998)

However, many jurisdictions have found that polygraphs are particularly useful in treating sex offenders and have authorized their use as a condition of probation and in the therapeutic context. As noted in the recent case of *Russell v. State*, 221 Md. App. 518, 109 A.3d 1249 (2015) cert. granted, 443 Md. 234, appeal dismissed, 443 Md. 734 (2015):

> Furthermore, state and federal courts have recognized that polygraph examinations further the goals of probation and/or supervised release in various ways. The United States Court of Appeals for the 10th Circuit has commented that "[p]olygraph testing could . . . encourage [a probationer] to be truthful with his probation officer, and it could alert the [probation office] to potential problems which would prompt further supervisory inquiry." *United States v. Begay*, 631 F.3d 1168, 1175 (10th Cir.2011). Other federal courts of appeals have reached similar conclusions. See *United States v. Johnson*, 446 F.3d 272, 277 (2d Cir.2006) ("[T]he incremental tendency of polygraph testing to promote . . . candor furthers the objectives of sentencing by allowing for more careful scrutiny of offenders on supervised release.

> Polygraphs have also been found to assist another sentencing objective, namely to ensure compliance with probationary terms. The lie detector may deter lying notwithstanding its arguable or occasional unreliability because of the subject's fear that it might work, or be credited by others whether it works or not." (quoting *United States v. Zinn*, 321 F.3d 1084, 1090 (11th Cir.2003))); *United States v. Lee*, 315 F.3d 206, 213 (3d Cir.2003) ("[T]he polygraph condition may provide an added incentive for [a probationer] to furnish truthful testimony to the probation officer. Such purpose would assist the officer in his or her supervision and monitoring of the appellant.").
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> State courts have similarly reasoned that, as a condition of probation, polygraph examinations support probationary goals despite their potential unreliability. Florida's intermediate appellate court held that a condition of probation requiring a probationer to submit to polygraph examinations "is valid because it provides a psychological deterrent, and will assist the work of the probation officer in assuring the probationer does not reoffend." *Cassamassima v. State*, 657 So.2d 906, 910 (Fla.Dist.Ct.App.1995). The Pennsylvania Superior Court commented that "the therapeutic polygraph is an essential tool for a therapist whose job it is to reveal an offender's deception and encourage him or her to confront his or her urges and deviant behavior. The test results further the primary goal of counseling as part of a sexual offender's sentence, which is to rehabilitate the offender and prevent recidivism, with reasonably small incremental deprivations of the offender's liberty." *Commonwealth v. Shrawder*, 940 A.2d 436, 443 (Pa.Super.2007). Other state courts have reached the same or similar conclusions. See *People v. Miller*, 208 Cal.App.3d 1311, 1314, 256 Cal.Rptr. 587 (Ct.App.1989) ("The polygraph condition helps to monitor compliance and is therefore reasonably related to the defendant's criminal offense. Because this condition is aimed at deterring and discovering criminal conduct most likely to occur during unsupervised contact with young females, the condition is reasonably related to future criminality."); *State v. Age*, 38 Or.App. 501, 590 P.2d 759, 763 (1979) ("[The polygraph requirement's] main function appears to be the added psychological factor that if the probationer fails to tell the truth, he will be detected. Such purpose would be in furtherance of a successful probation.").
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> We agree with the courts cited above that polygraph examinations serve various purposes despite their questionable reliability. Indeed, polygraphs can increase the accountability of sexual offenders for past behaviors, ensure compliance with current supervision, and serve as a deterrent is in line with the decisions reached by courts across the country. Unlike the polygraph condition in *Brown, supra*, the purpose of which was to obtain a specific piece of accurate information, 80 Md.App. at 196, 560 A.2d 605, the polygraph component of Russell's probation serves multiple purposes, including promoting candor between Russell and his probation agent, reducing recidivism by serving as a deterrent, and rehabilitation.

The unreliability of polygraph results is well demonstrated in the U.S. Supreme Court case of *United States v. Haymond*, 139 S. Ct. 2369, 204 L. Ed. 2d 897 (2019). The defendant took multiple polygraph tests in which he denied possessing or viewing

child pornography, and each time the test indicated no deception. But when the government conducted an unannounced search of his computers and cellphone, it turned up 59 images that appeared to be child pornography. Additionally, Minnesota is like many states that prohibit the use of polygraph results to revoke probation. In *State v. Nowacki*, 880 N.W.2d 396, 399 (Minn. App. 2016) the court noted that the reason that polygraph tests are not admitted is because they do not meet the *Frye-Mack* standards for reliability in order to be admissible as scientific evidence. Although the trial court has authority to order such tests as a condition of probation, the court concluded that "the admission of polygraph test results as substantive evidence of a violation in probation-revocation proceedings is improper. See also *Turner v. Virginia*, 278 Va. 739, 685 S.E.2d 665, 666 (2009); *Leonard v. State*, 315 S.W.3d 578, 580-81 (Tex. App. 2010); *Lane v. State*, 762 So.2d 560, 561 (Fla.Dist.Ct.App.2000), but see also *Hoeppner v. State*, 918 N.E.2d 695, 700 (Ind.App.2009), and *State v. Lumley,* 267 Kan. 4, 977 P.2d 914, 919-21 (1999) (both holding that polygraph examination results are admissible because a probation revocation hearing is not an adversarial criminal proceeding), and *State v. Hammond*, 218 Or. App. 574, 180 P.3d 137, 141-42 (2008) (holding that polygraph results are admissible in probation revocation proceedings because those proceedings are not governed by the rules of evidence).

The rationale for using truth ascertainment devices is not that they are necessarily reliable, but rather that the subject may believe they are reliable and be candid during questioning. As noted in *United States v. Johnson,* 446 F.3d 272, 277 (2d Cir. 2006), "the incremental tendency of polygraph testing to promote such candor [i.e., truthful statements to the defendant's probation officer] furthers the objectives of sentencing by allowing for more careful scrutiny of offenders on supervised release."

Courts have permitted the use of polygraphs despite their unreliability, because their utility is not to assess truthfulness, but rather to encourage it. *See United States v. Boles*, 914 F.3d 95, 112 (2d Cir. 2019) (polygraph testing); *United States v. Parisi*, 821 F.3d 343, 349 (2d Cir. 2016) (polygraph/computer voice stress analyzer testing).

Fifth Amendment/Self-Incrimination Issues

The Fifth Amendment applies to probationers and parolees and prohibits **compelled** self-incrimination. *Minnesota v. Murphy*, 465 U.S. 420 (1984). When a probationer is compelled to appear and answer truthfully and the state either expressly or by implication states that failure to so respond will result in a significant penalty, compulsion exists. Thus, compulsion is present when a probationer is required to "choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent." *Minnesota v. Murphy*, 465 U.S. 420, at 436; *State v. Spaeth*, 2012 WI 95, 819 N.W.2d 769 (2012). Once again, guidance from *Russell v. State*, 221 Md. App. 518, 109 A. 3d 1249 (2015) is instructive:

> The Fifth Amendment provides, in pertinent part, that no person "shall be compelled in any criminal case to be a witness against himself." In *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), the United States Supreme Court addressed the issue of compelled self-incrimination in the context of whether a probationer can be required to answer a probation agent's incriminating questions. Although *Murphy* did not involve the imposition of a polygraph test as a condition of probation, the Court addressed a condition of probation requiring that a probationer truthfully answer a probation agent's questions.

The Court emphasized that the Fifth Amendment does not prohibit a probationer from voluntarily offering incriminating information and explained that a probationer must assert the Fifth Amendment privilege and refuse to answer questions if he wishes to avoid self-incrimination. *Id.* 427-29, 104 S.Ct. 1136. The Court explained that a probationer does not lose his or her Fifth Amendment right by being convicted of a crime and by being on probation and that compelled incriminating statements "are inadmissible in a subsequent trial for a crime other than that for which he has been convicted." *Id.* at 426, 104 S.Ct. 1136. The Court held, however, that "the general obligation to appear and answer [a probation agent's] questions truthfully did not in itself convert [a probationer's] otherwise voluntary statements into compelled ones." *Id.* at 427, 104 S.Ct. 1136.

The *Murphy* Court further addressed whether Murphy had been placed in a "penalty" situation. The Court reasoned that "if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution." *Id.* at 435, 104 S.Ct. 1136. The condition requiring that Murphy be truthful with his probation agent did not indicate that his probation would be revoked if Murphy invoked the Fifth Amendment privilege. Accordingly, the United States Supreme Court held that because Murphy had not asserted the privilege, and because Murphy had not been placed in a classic penalty situation, Murphy's statements to his probation agent were not compelled. *Id*. at 440, 104 S.Ct. 1136.

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We, therefore, reject Russell's claim that the polygraph requirement is "impermissibly vague" because it does not make clear that he is not required to incriminate himself. Under *Murphy* and its progeny, the Fifth Amendment does not require that a probationer be warned that he or she is entitled to assert the Fifth Amendment privilege before the probationer is asked incriminating questions. Russell, of course, is entitled to assert his Fifth Amendment privilege when asked incriminating questions. Because Russell has not asserted the privilege, his Fifth Amendment claim is premature.

Russell's next challenge to the imposition of COMET supervision is that the sanctions for declining to answer questions during polygraph examinations violate the Fifth Amendment. Specifically, Russell asserts that the consequences for failing to answer a question during a polygraph examination—which include increased reporting requirements and/or the imposition of a curfew—deprive his liberty, and therefore, constitute a substantial penalty under Fifth Amendment jurisprudence. We disagree.

The United States Supreme Court addressed a related issue in a plurality opinion in *McKune v. Lile*, 536 U.S. 24, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002). Lile was a convicted sex offender who was required, while incarcerated, to participate in a sexual abuse treatment program. Through the program, Lile was required to disclose his full sexual history, describing in detail all sexual activities, "regardless of whether such activities constitute[d] uncharged criminal offenses." *Id*. at 30, 122 S.Ct. 2017. A polygraph examination was used "to verify the accuracy and completeness of the offender's sexual history." *Id*. If Lile refused to participate in the treatment program, his "privilege status" would be reduced. *Id*. This reduction in "privilege status" would result in the curtailment of Lile's "visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television, and

other privileges. In addition, [Lile] would be transferred to a maximum-security unit, where his movement would be more limited, he would be moved from a two-person to a four-person cell, and he would be in a potentially more dangerous environment." *Id*. at 30-31, 122 S.Ct. 2017. Lile refused to participate in the program, asserting that ". . . the required disclosures of his criminal history would violate his Fifth Amendment privilege against self-incrimination." *Id*. at 31, 122 S.Ct. 2017.

[The] plurality evaluated the consequences for failing to participate in the treatment program, emphasizing that "[a] broad range of choices that might infringe constitutional rights in a free society fall within the expected conditions of confinement of those who have suffered a lawful conviction." *Id*. at 37, 122 S.Ct. 2017. In this context, the plurality concluded that a mandatory treatment program "does not violate the privilege against self-incrimination if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life." *Id*. at 37-38, 122 S.Ct. 2017. The Court observed that "[i]t is well settled that the government need not make the exercise of the Fifth Amendment privilege cost free." *Id*. at 41, 122 S.Ct. 2017.

Justice O'Connor concurred in the judgment, agreeing that Lile's Fifth Amendment right had not been violated. She disagreed with the "atypical and significant hardship" test imposed by the plurality based upon Lile's status as an inmate, but determined that the consequences facing Lile were not "serious enough to compel him to be a witness against himself." *Id*. at 50, 122 S.Ct. 2017 (O'Connor, J., concurring in the judgment). In her concurring opinion, Justice O'Connor provided an overview of the Supreme Court's jurisprudence with respect to when a penalty imposed on the assertion of the Fifth Amendment privilege is impermissible, explaining that "[t]he text of the Fifth Amendment does not prohibit all penalties levied in response to a person's refusal to incriminate himself or herself—it prohibits only the compulsion of such testimony. Not all pressure necessarily 'compel[s]' incriminating statements." 536 U.S. at 49, 122 S.Ct. 2017. Justice O'Connor continued by describing the "penalty cases":

> Our precedents establish that certain types of penalties are capable of coercing incriminating testimony: termination of employment, *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation of City of New York,* 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968), the loss of a professional license, *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967), ineligibility to receive government contracts, *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973), and the loss of the right to participate in political associations and to hold public office, *Lefkowitz v. Cunningham*, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977).

Id. at 49-50, 122 S.Ct. 2017. As the plurality opinion noted, however, the traditional penalty cases addressed above "involved free citizens given the choice between invoking the Fifth Amendment privilege and sustaining their economic livelihood." *Id*. at 40, 122 S.Ct. 2017.

In present case, Russell occupies a middle ground between a free citizen (as in the traditional penalty cases) and an inmate, as in *McKune*. He is, however, a person who has been convicted of a crime and sentenced to a period of incarceration, which was suspended upon the condition that comply with the terms of probation. Indeed, "[p]robation is a matter of grace which is in effect a bargain made by the people with the malefactor that he may be free as long as he conducts himself in a manner consonant with established communal standards and the safety of society." *Smith v. State*, 306 Md. 1, 6, 506 A.2d 1165 (1986).

Although we recognize that *McKune, supra*, addressed the issue of penalties for failure to participate in a sex offender treatment program specifically in a prison environment, we believe that the analyses set forth in that opinion—by both the plurality and concurring opinions—are helpful in resolving this case. Agent DeGross explained that the penalties that would be imposed upon Russell if he declines to participate in a polygraph examination are increased reporting requirements and/or the imposition of a curfew. The penalties are clearly less severe than those at issue in *McKune, supra*, which included reduction in a prisoner's visitation rights, earnings, and work opportunities, as well as transfer to a maximum-security unit, among other sanctions. Indeed, "probationers do not enjoy the absolute liberty to which every citizen is entitled. Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *United States v. Knights*, 534 U.S. 112, 119, 122 S. Ct. 587, 151 L.Ed.2d 497 (2001) (internal quotation and citation omitted).

Applying the test set forth by the plurality in *McKune*, we conclude that the increased reporting and curfew potentially imposed in this case "do not constitute atypical and significant hardships in relation to the ordinary incidents of probation. *McKune, supra*, 536 U.S. at 31-32, 122 S.Ct. 2017. Furthermore, applying the standard utilized by Justice O'Connor in her concurrence, we believe that the increased reporting requirements and curfew imposed as sanctions are not "serious enough to compel [Russell] to be a witness against himself." *Id*. at 50, 122 S. Ct. 2017. Accordingly, we reject Russell's claim that the COMET program's sanctions for declining to answer questions during a polygraph examination violate the Fifth Amendment.

Summary

Therefore, the legal answers to the questions above are:

1. Generally, even though unreliable, polygraphs can be used as a term of probation when authorized by statute, court rule, or case authority. However, in many states the results of the polygraph cannot be used to revoke probation, because the results are unreliable.

2. Fifth Amendment issues can arise when the defendant is directed to tell the truth to his probation officer and then faces a significant penalty for failure to speak truthfully or refusal to speak. Under such circumstances, the statements are compelled and the evidence obtained directly or indirectly cannot be used in a criminal proceeding, unless the prosecution establishes that the evidence was obtained from a wholly independent source. *Kastigar v. U.S.*, 406 U.S. 441 (1972). However, even though the statements are compelled, such statements can be used at a probation revocation hearing because probation revocation is a civil proceeding, and the rules of evidence and exclusion don't apply to probation revocation proceedings unless the state statutory scheme prevents such use. *U.S. v. Locke*, 482 F. 3d 764 (5th Cir. 2007) (holding that the defendant's Fifth Amendment right against compelled self-incrimination had not been infringed because his answers to a polygraph examination "could not serve as a basis for a future criminal prosecution"); *State v. Spaeth*, 2012 WI 95, 819 N.W.2d 769 (2012) (compelled statement in polygraph and probation program could be used for revocation). Compare with *State v. Cagle*, M2013-02271-CCA-R3-CD (Not Selected) (Tenn. Crim. App. 12-5-2014) ("The case is remanded for a new probation violation hearing wherein the following evidence is not admissible: any proof about a polygraph examination including, but not limited to the taking of a polygraph examination by Defendant, the results

of a polygraph examination taken by Defendant, proof of Defendant's refusal or willingness to take a polygraph examination, and the consequences to Defendant's probation status by refusing or declining to take a polygraph examination"); *State, ex rel. Edmondson v. Colclazier*, 2002 Okla. Jud. 1, 106 P.3d 138 (Oklahoma 2002) (case reversed and judge recused for using polygraph results to remove person from drug court program).

Recommendations

I recommend that polygraphs or other alleged truth-divining devices not be used because:

1. First and foremost, they are not reliable. Second, they can present a host of legal issues, including Fifth Amendment claims.

2. Currently, polygraphs are being employed in probation supervision cases to get participants to be truthful. Candor is job one for the treatment court participant. Do we really need an artifice to get them there?

3. If, in the end, polygraphs are going to be used, they should be used therapeutically, namely to adjust a person's treatment and program responsibilities. Additionally, the treatment court participant should be specifically advised how the polygraph results will be used, the consequences of noncompliance, and the right against self-incrimination. Importantly, the polygraph should never be used to investigate past criminal behavior, nor to ferret out current criminal behavior. Finally, polygraph results should not be used in termination or revocation proceedings for the participant's lack of candor, but rather to put into context the participant's program and treatment compliance and participation. Such an approach is consistent with *State v. Campbell*, 2015 VT. 50, 120 A.3d 1148(2015) ("We conclude that this condition is related to the offense for which defendant was convicted. This type of non-evidentiary use of a polygraph examination will help ensure that defendant is on track with both his rehabilitation and sex offender therapy, as well as ensure public safety—all of which relate to the goals of probation and compliance investigation.") and with *Commonwealth v. A.R.*, 622 Pa. 356, 80 A.3d 1180 (2013) ("The record supports the Commonwealth's contention that appellant's polygraph results were offered, not for the truth of whether appellant received sexual gratification from his act, but to help explain the program's actions and treatment procedures. . . . The polygraph evidence was simply offered by the Commonwealth to assist the court in attaining a full picture of why appellant was dismissed from treatment.")

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