

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNITED STATES, Petitioner v. EDWARD G. SCHEFFER  
CASE NO: 96-1133 c. /  
PLACE: Washington, D.C.  
DATE: Monday, November 3, 1997  
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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :  
Petitioner :  
v. : No. 96-1133  
EDWARD G. SCHEFFER :  
- - - - -X

Washington, D.C.  
Monday, November 3, 1997

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:02 a.m.

APPEARANCES:

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of  
the Petitioner.  
KIM L. SHEFFIELD, ESQ., Washington, D.C.; on behalf of  
the Respondent.

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1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 96-1133, United States v. Edward G.  
5 Scheffer. Mr. Dreeben.

6 ORAL ARGUMENT OF MICHAEL R. DREEBEN

7 ON BEHALF OF THE PETITIONER

8 MR. DREEBEN: Mr. Chief Justice, and may it  
9 please the Court:

10 Polygraph evidence is opinion evidence about  
11 credibility. Based on inherent doubts about the  
12 reliability of polygraph evidence and the burdens of  
13 litigating about polygraph results, it has long been  
14 banned from courtrooms in a majority of the States.

15 In 1991, the President adopted the same rule for  
16 military courts martial. Exercising delegated authority  
17 from Congress, the President promulgated Rule 707, which  
18 makes polygraph evidence per se inadmissible in military  
19 courts martials.

20 That determination is constitutionally valid for  
21 three main reasons. First, the reliability of the  
22 polygraph remains unproven. Second, polygraph evidence is  
23 not necessary to help the trier of fact perform its core  
24 function of determining credibility of witnesses, and  
25 third, the costs of litigating about the reliability of

1 polygraph evidence on a case-by-case basis outweigh any  
2 limited probative value that the polygraph may have.

3 QUESTION: Would that have been the -- was that  
4 the consequence of the Armed Forces Court of Appeals  
5 opinion here that the validity of each individual  
6 polygraph examination had to be tested in each case?

7 MR. DREEBEN: I think that's correct, Mr. Chief  
8 Justice. In 1987, the Court of Appeals for the Armed  
9 Forces, then the Court of Appeal -- Military Appeals,  
10 determined that the per se rule against polygraph evidence  
11 which had prevailed in the military should be dropped, and  
12 that individual defendants should have the opportunity to  
13 litigate about it in each case, and in 1991 the evident  
14 response to that was to reinstate the per se rule that had  
15 been prevalent in courts across the country as well as the  
16 military courts.

17 QUESTION: How is it handled in other  
18 jurisdictions where there's no per se rule in effect? Is  
19 it treated like any other bit of scientific evidence?

20 MR. DREEBEN: It is not, Justice O'Connor. In  
21 the States, 27 States have per se rules; 22 States allow  
22 polygraph evidence into -- to be admitted only if there is  
23 a stipulation between the parties so that the parties have  
24 agreed to it.

25 QUESTION: And so from your research no State is

1 treating it like other expert testimony, in effect.

2 MR. DREEBEN: One State is. The State of New  
3 Mexico is allowing polygraph evidence in on a routine  
4 basis, provided that a very strict list of procedural  
5 requirements are satisfied, but --

6 QUESTION: But even New Mexico doesn't follow  
7 the typical expert testimony approach.

8 MR. DREEBEN: I think that that's fair. The  
9 requirements are spelled out in the statute with a --

10 QUESTION: Right.

11 MR. DREEBEN: -- far greater degree of  
12 specificity than for other expert testimony.

13 Now, in the Federal system --

14 QUESTION: Daubert, of course, is in the civil  
15 context, but would you say that the petitioner's -- pardon  
16 me, that the respondent's position here is consistent  
17 generally with what we held in Daubert?

18 MR. DREEBEN: I think the respondent's position  
19 here is -- goes quite a bit further than Daubert.  
20 Daubert, of course, is simply an interpretation of Federal  
21 Rule of Evidence 702. The respondent's position here is  
22 that the Constitution prohibits any promulgator of a  
23 system of evidentiary rules from establishing a per se  
24 rule.

25 QUESTION: I recognize the difference. I'm

1 talking about the thrust of the case and what it held,  
2 which was to undercut the Frye-type rule which is really  
3 being applied by the military here.

4 MR. DREEBEN: That is --

5 QUESTION: I recognize one's civil, one's  
6 criminal, one's constitutional, one's evidence, but so far  
7 as the thrust of what the Court was talking about so far  
8 as sound management of trials, isn't there some  
9 inconsistency with your position in Daubert?

10 MR. DREEBEN: I don't think there is any  
11 inconsistency. The point of Daubert was to drop the  
12 strict rule of general acceptance in the scientific  
13 community as a prerequisite for scientific evidence to be  
14 admitted.

15 Daubert did not do away with the rest of the  
16 evidentiary considerations that may bear on whether  
17 particular evidence may be admitted. Prominent among  
18 those are the requirement in Rule 702 itself that evidence  
19 in the form of expert testimony must assist the trier of  
20 fact, and furthermore that it's benefits, its probative  
21 value must not be significantly outweighed by the waste of  
22 time, confusion, or redundancy of other evidence that  
23 might be admitted. Those type of considerations amply  
24 justify exclusion of polygraph evidence.

25 Polygraph evidence is very different from most



1 other kinds of scientific evidence that comes into the  
2 courtroom. It represents in essence the opinion of the  
3 polygraph examiner that, based on an examination of the  
4 particular subject, he was deceptive or not deceptive on  
5 one particular occasion.

6 QUESTION: Mr. Dreeben, when the Government  
7 itself is responsible for the polygraph, and the  
8 Government is attacking the credibility of the defendant,  
9 isn't that a different situation?

10 This doesn't have to be all or nothing, but at  
11 least as in this case, where the Government itself chose  
12 to administer a polygraph test and in prosecuting attacked  
13 the credibility of the defendant, when you have those two  
14 things, why isn't that enough to trigger a constitutional  
15 concern?

16 MR. DREEBEN: Justice Ginsburg, the Government  
17 might have had a particular defendant interviewed by a  
18 psychiatrist if the defendant consented to that, and the  
19 psychiatrist might say, based on my expert opinion and  
20 analysis of this particular person's responses in the  
21 interview, I can render an opinion that he was quite  
22 certainly deceptive or not deceptive.

23 That kind of evidence is never admitted in  
24 courtrooms in this country. Outside opinion, expert  
25 testimony that vouches for the credibility of a witness

1 who testifies, is routinely excluded by both the State and  
2 Federal courts as not being needed to assist the trier of  
3 fact and, indeed, of impinging on the trier of fact's core  
4 function, and it is not --

5 QUESTION: Mr. Dreeben, can I ask you this.  
6 There's a brief filed by an amicus, a group of social  
7 scientists who say that, if properly conducted, these  
8 tests are accurate about 90 percent of the time.

9 Now, I don't know whether you would accept that,  
10 or you would say that's probably wrong, but assume that's  
11 correct, and if there are proper safeguards given and all  
12 the rest, what would your position be? Even if it was 100  
13 percent accurate, would you still say, along the argument  
14 you're making to Justice Ginsburg, this still should be  
15 excluded?

16 MR. DREEBEN: Yes. I think, Justice Stevens,  
17 that it has a drawback from the point of view of courtroom  
18 evidence that justifies its exclusion even on the  
19 assumption --

20 QUESTION: Even if completely reliable?

21 MR. DREEBEN: Well, completely reliable, I think  
22 that no form of scientific tests will ever be viewed by  
23 any --

24 QUESTION: Well, at least as reliable as  
25 fingerprints or DNA or something like that.

1 MR. DREEBEN: Even if it had achieved that  
2 degree of reliability, which I think there's no reason to  
3 believe that it has, and there's no reason why the  
4 President as a matter of constitutional law must assume,  
5 it still has a different character --

6 QUESTION: I understand.

7 MR. DREEBEN: -- than other forms of scientific  
8 evidence in two key respects. The first is that it tells  
9 the trier of fact something that we have traditionally  
10 entrusted the trier of fact to determine itself, namely,  
11 whether a particular witness should be believed. There  
12 are many kinds of experts who might be willing to come  
13 into court and render an opinion about credibility and say  
14 yes, indeed, I'm an expert on this. My work has been  
15 validated by numerous outside bodies, and I think that  
16 this particular witness is credible.

17 QUESTION: But why doesn't --

18 MR. DREEBEN: We don't have that --

19 QUESTION: Why doesn't fingerprint do the --  
20 evidence do the same thing if the witness says -- gets on  
21 the stand and says, I was never in the place where the  
22 crime took place, and somebody says, well, your  
23 fingerprints were there. Doesn't that do the same thing?

24 MR. DREEBEN: No. It does something quite  
25 different, Justice Stevens, and that's my second

1 distinction of polygraph evidence. It provides the trier  
2 of fact with factual information that it would otherwise  
3 have no access to.

4 An expert who was able to bring to the jury's  
5 attention specific scientific information that has a  
6 degree of reliability that is outside the realm of normal  
7 jurors' comprehension serves a valid function in the trial  
8 system, and is unlikely ever to be excluded by a  
9 reasonable system of evidentiary rules precisely because  
10 it does enable the proof of facts that could not occur  
11 otherwise.

12 Rules of evidence must be evenhanded, and the  
13 Government bears the burden of proof beyond a reasonable  
14 doubt in a criminal case of establishing a suspect's  
15 guilt, and it is therefore extremely unlikely that a  
16 reasonable system of rules of evidence will ever exclude  
17 reliable scientific testimony that is necessary to  
18 determine the facts. The Government would suffer far more  
19 than any criminal defendant in such a system, because we  
20 would lose the ability --

21 QUESTION: Well, this rule cuts both ways,  
22 because there might be times when the Government would  
23 like to produce a polygraph test in court because it shows  
24 the defendant is lying.

25 MR. DREEBEN: That's correct, Justice --



1 QUESTION: And under the military rule, the  
2 Government can't do that. So it cuts both ways here, I  
3 assume.

4 MR. DREEBEN: It does, and I think that that  
5 largely reflects the fact that we take a consistent  
6 position on this. We don't believe that it's sufficiently  
7 reliable for courtroom evidence, and we think that it  
8 performs a function that the trier --

9 QUESTION: What -- under what authority did the  
10 President adopt the rule? What is the provision that says  
11 the President may adopt these evidentiary rules?

12 MR. DREEBEN: The President is delegated  
13 authority under Article 36 of the U.C.M.J., which is  
14 reprinted in footnote 2 on page 5 of our principal brief,  
15 and it says that pretrial, trial, and post trial  
16 procedures, including modes of proof, may be prescribed by  
17 the President by regulations which, so far as he considers  
18 practicable, apply principles of law and the rules of  
19 evidence generally recognized in a trial of criminal cases  
20 in the United States district courts.

21 QUESTION: Getting back to your colloquy with  
22 Justice O'Connor just a moment ago, I think perhaps the  
23 Court of Appeals for the Armed Forces might have taken a  
24 different view if the Government had sought to introduce  
25 the polygraph test, because they seem to base their

1 constitutional decision on the defendant's right to call  
2 witnesses in his favor.

3 MR. DREEBEN: That is absolutely right,  
4 Mr. Chief Justice. This was not a two-way-street  
5 decision. The decision partially invalidated Rule 707 to  
6 the extent that it erects a per se bar to the defendant's  
7 presentation of evidence. The rule would otherwise remain  
8 in effect and bar the Government from introducing it, but  
9 I think --

10 QUESTION: Well, the President could change  
11 that, the scope of --

12 MR. DREEBEN: The President could change that.  
13 Justice Scalia, the President could certainly change it,  
14 but I think it's important to emphasize here that the  
15 Department of Justice in criminal trials in the civilian  
16 courts takes the position that polygraph evidence should  
17 not be offered by prosecutors even when it might arguably  
18 be of assistance to us, and that it should be opposed when  
19 presented by defense lawyers, and we do that precisely for  
20 the same reasons that the President relied on in  
21 promulgating Rule 707.

22 The underlying scientific validity of polygraph  
23 evidence has always been a source of extreme controversy,  
24 and it has --

25 QUESTION: Mr. Dreeben, as to the truth-telling

1 identification that the polygraph is offered for, it's  
2 been traditionally allowed to have a character witness for  
3 defendants. Defendant testifies and he has a character  
4 witness that testifies to his reputation in the community  
5 for truth-telling.

6 MR. DREEBEN: Correct.

7 QUESTION: Well, isn't the polygraph far more  
8 reliable than just any character witness the defendant  
9 wants to present?

10 MR. DREEBEN: Well, Justice Ginsburg, I think  
11 that that assumes that there is scientific validity and  
12 accuracy to the polygraph, which we dispute, but more  
13 importantly, the system of rules of evidence that we have  
14 in courtrooms specifically right now allows opinion  
15 evidence and reputation evidence about a trait of  
16 character of a witness, but it does not allow specific  
17 instances, and it certainly does not allow a witness to  
18 say, I know this person, he did denied committing the  
19 crime to me, and I believe him. That kind of testimony is  
20 routinely disallowed in criminal trials around --

21 QUESTION: No, but it's reputation as to  
22 credibility that the character witness testifies to.

23 MR. DREEBEN: The character witness testifies  
24 only about what the individual's reputation --

25 QUESTION: As to credibility.

1 MR. DREEBEN: As to credibility, and --

2 QUESTION: Right. It's precisely the same issue  
3 that the polygraph evidence is directed to, credibility.

4 MR. DREEBEN: I think there's an important  
5 distinction, Justice Stevens, and that is the polygraph  
6 examiner will not render an opinion that I believe that  
7 this person is generally credible.

8 He will render an opinion that says, based on  
9 physiological responses that I observed, and all other  
10 information that was available to me in whatever hour and  
11 a half I had with this individual, I concluded that he did  
12 not exhibit physiological signs of deception on this  
13 particular instance, and that is akin to an expert  
14 psychiatrist meeting with a defendant, interviewing him,  
15 and coming away with the view that I think this man is  
16 credible when he says that he didn't commit the act.

17 QUESTION: Yes, but there's a difference as to  
18 the degree of reliability between the two, obviously,  
19 and -- but your position as I understand it is, even if it  
20 were totally reliable, you would still take the same  
21 position it's inadmissible.

22 MR. DREEBEN: I do, Justice Stevens.

23 QUESTION: Yes.

24 MR. DREEBEN: I recognize that the Court might  
25 view that as a somewhat different case, and I think that



1 if, in fact, there were a 100-percent reliable --

2 QUESTION: But then how do you -- but then are  
3 you saying that the scientists who filed a brief saying  
4 it's 90-percent accurate if conducted properly, that we  
5 should disbelieve the substance of that brief? That's  
6 basically what you're saying.

7 MR. DREEBEN: I think all the Court has to do is  
8 realize that this is an area of extraordinary scientific  
9 polarization, and that a reasonable system of evidentiary  
10 rules is entitled to deference in the conclusion that  
11 polygraph has not progressed to the point where its  
12 reliability justifies --

13 QUESTION: Well --

14 MR. DREEBEN: -- that we litigate about this in  
15 every single case where the defendant wants to present it.

16 QUESTION: -- we don't ordinarily make findings  
17 of fact on the basis of briefs, I guess.

18 MR. DREEBEN: I think that that is certainly an  
19 additional point here. This Court is not sitting to  
20 decide --

21 QUESTION: No, but it is true, is it not, that  
22 we can take judicial notice of the practice of the  
23 Government itself in routinely using its experts for this  
24 very purpose?

25 MR. DREEBEN: Well, I think equally pertinent is

1 the fact that we take the position that it should not be  
2 admitted into evidence. Out of court --

3 QUESTION: Mr. --

4 MR. DREEBEN: -- uses of investigatory tools  
5 such as the polygraph, which then do not come into  
6 evidence because they are either not sufficiently reliable  
7 or not needed, are common. In investigating a crime, we  
8 will look at a suspect's arrest record. If we have 30  
9 potential suspects, we don't know who did it, we will look  
10 at what the arrest records are of the suspects. Those who  
11 have arrest records may get particular investigatory  
12 focus.

13 We don't admit arrest records into evidence. We  
14 will engage in profiling of criminal suspects of unsolved  
15 crimes, where we call upon various scientific disciplines,  
16 such as psychiatrists, forensic experts, and develop a  
17 profile of who the likely criminal is, but we don't --

18 QUESTION: Mr. Dreeben, could you go back to  
19 your use of the polygraph itself? What decisions does the  
20 Government make itself on the basis of polygraph evidence?  
21 I mean, one of the -- excuse me. I'm just adverting to  
22 the issue of arbitrariness in saying it can't come in but  
23 we use it for other purposes. What decisions does the  
24 Government make in reliance on polygraph evidence?

25 MR. DREEBEN: I want to be clear about this,

1 Justice Souter. The official policy of most of the users  
2 of the polygraph in personnel screening, which is its main  
3 application, is that the polygraph result itself is not a  
4 basis for any action one way or the other.

5 QUESTION: Not even to hire or not hire someone?

6 MR. DREEBEN: Not even to hire or not hire,  
7 except in extraordinary circumstances, and I certainly  
8 don't want to say that it never would be relied on as a  
9 sole factor, but it primarily is used in personnel  
10 screening in this way:

11 Questions are asked. If the examiner concludes  
12 that there is some deception, there is an effort to  
13 determine what the truth is by further investigation,  
14 further questioning of the applicant and so forth.  
15 Generally, problems can get resolved that way, and it is  
16 the entire body of evidence that is developed in a  
17 background check that leads to a decision.

18 The polygraph itself is not supposed to be a  
19 tool used in isolation, and it is distinguishable to say  
20 that in a context where the Government is considering  
21 whether to give access to an individual for national  
22 security purposes to use anything available that might be  
23 helpful in developing an accurate picture of an  
24 individual. It's quite another thing --

25 QUESTION: So basically you use it as a kind of

1 a tip-off of something, as a means of putting somebody on  
2 the spot, legitimately, but that's as far as the  
3 Government goes?

4 MR. DREEBEN: I don't want to be categorical and  
5 say that's as far as the Government goes.

6 QUESTION: No, I realize there may be  
7 exceptions, but in sub -- substantially, that is the only  
8 kind of use that's made.

9 MR. DREEBEN: Substantially in the personnel  
10 screening area that's the use that's made. I don't --

11 QUESTION: In criminal investigation likewise, I  
12 assume?

13 MR. DREEBEN: In investigations, the polygraph  
14 is an extraordinarily productive interrogation tool. An  
15 enormous amount of confessions are given when a suspect  
16 either fails a polygraph or believes that a polygraph is  
17 about to smoke him out.

18 I have to say that in that sense there are  
19 examiners who believe that it is entirely reliable in this  
20 respect, and that it's a great interrogation tool because  
21 it's accurate. There are other people who will say that,  
22 well, it's a great placebo.

23 There is a story of a police interrogation in a  
24 State system where the police put a colander on a  
25 suspect's head and wired it up to a Xerox machine, and



1 then pressed a button that produced a picture, a little  
2 copy that said, you're lying, every time the suspect  
3 answered.

4 (Laughter.)

5 MR. DREEBEN: The suspect confessed.

6 (Laughter.)

7 MR. DREEBEN: So if a suspect believes that the  
8 polygraph is accurate and is about to catch him, then it  
9 will be very useful to do that.

10 QUESTION: It's the tainted morsel of the 20th  
11 Century.

12 (Laughter.)

13 MR. DREEBEN: Well, it has a certain use in that  
14 respect that would suggest that the Government continues  
15 to use it, but at the same time, it's not arbitrary to say  
16 that, look, not everything that we do in the investigatory  
17 phase should come into admission in evidence.

18 QUESTION: Are there instances in which an  
19 employee is terminated for failure to take a polygraph,  
20 Government employment?

21 MR. DREEBEN: My understanding, Justice Kennedy,  
22 is that in the -- certain national security agencies if  
23 you're not willing to take a polygraph, then you won't be  
24 able to work at that agency.

25 In the Department of Defense, for example, you

1 may be transferred to an equivalent job that doesn't  
2 require access to particular national security  
3 information, but you won't be terminated.

4 And Congress, of course, which has addressed  
5 extensively the problem of polygraph reliability, has  
6 banned most of its uses entirely in the private sector in  
7 large part because of concerns about its reliability, so  
8 the President, when considering whether military courts  
9 martials ought to be a forum for the admission of  
10 polygraph evidence, is entitled to take into account the  
11 findings of Congress in enacting the Polygraph Protection  
12 Act, the fact that 27 States enjoy a per se rule that bars  
13 polygraph evidence, and the fact that until this Court  
14 decided Daubert, the uniform rule in the Federal courts,  
15 with the exception of the Eleventh Circuit in 1989, was  
16 that polygraph evidence is per se inadmissible.

17 And even after Daubert has been decided, and  
18 several Federal courts have reconsidered whether it is  
19 appropriate to have a per se rule and have opted some  
20 case-by-case litigation, polygraph evidence is rarely  
21 being admitted in criminal trials in the civilian courts,  
22 by and large because the judges are concluding that either  
23 it will not assist the trier of fact, or it is unreliable  
24 either in a particular instance or across the board, or  
25 because traditional Rule 403 balancing considerations

1     justify the exclusion of the evidence because it's not  
2     really needed.

3             I think that the President is certainly in a  
4     position to take all of that into account and to conclude  
5     that the military courts, of all places, should not be a  
6     place where experimentation with new evidence is to be  
7     carried out.

8             If there ever came a time when experience in the  
9     civilian courts revealed that the polygraph was a vital  
10    engine for getting out the truth, and that it ought to be  
11    part of our criminal trial process, I'm quite sure that  
12    the President or an appropriate rulemaking authority would  
13    recommend reconsideration of Rule 707.

14            QUESTION: Mr. Dreeben, why doesn't it work the  
15    other way with respect to the military courts, because my  
16    understanding is that the courts martial, the equivalent  
17    to the jurors, are of a certain high level, perhaps higher  
18    than the ordinary jury that would sit in a Federal court  
19    in a criminal case.

20            MR. DREEBEN: Justice Ginsburg, I wouldn't want  
21    to disparage the ability of the courts martial members to  
22    understand and deal appropriately with scientific  
23    evidence, but it is still true that the military conducts  
24    an inordinate number of court martial proceedings around  
25    the world.

1           These proceedings in which, under Daubert,  
2   litigants have attempted to admit polygraph evidence  
3   usually involve extensive evidentiary hearings back and  
4   forth with experts testifying at great length about the  
5   supposed merits of the polygraph while other experts come  
6   forward and testify about the demerits of the polygraph.

7           One recent hearing that was carried out under  
8   the Court of Appeals for the Armed Forces decision in  
9   Scheffer took 3 days.

10          QUESTION: Well, it seems to me you're somewhat  
11   deflecting the thrust of Justice Ginsburg's question, and  
12   I notice this in your brief, too. You talk about danger  
13   of confusion of the jury.

14          The military rules allow conclusions of experts  
15   on the very premise that military juries are somewhat more  
16   sophisticated than most juries.

17          MR. DREEBEN: That is true, Justice Kennedy, and  
18   I don't disagree with that submission. My point is the  
19   different one, in that polygraph evidence simply doesn't  
20   have a history of use in the civilian courts in this  
21   country. It is in an experimental phase in the Federal  
22   courts. Massachusetts, which had a 15 --

23          QUESTION: Well, that may be true, but it  
24   doesn't go to the point of the differences in the trier of  
25   fact Justice Ginsburg was referring to.

1 MR. DREEBEN: The triers of fact may or may not  
2 be superior in the military, but the point is that this  
3 particular form of evidence, unlike most other forms of  
4 evidence, doesn't have a track record. In fact --

5 QUESTION: Well, I suppose one could argue that  
6 if the triers of fact are indeed superior, they need less  
7 help from this sort of evidence.

8 MR. DREEBEN: Mr. Chief Justice, that is  
9 certainly an additional consideration that supports the  
10 rule here.

11 (Laughter.)

12 MR. DREEBEN: -- happy to accept that.

13 What does distinguish polygraph evidence, again,  
14 from the other kinds of scientific evidence or ultimate  
15 opinion evidence that might come in in these proceedings  
16 is that it's about credibility. It's an out-of-court  
17 opinion based on one experience, or exposure to the  
18 defendant that says that he was not credible or he was  
19 credible on this particular occasion, and it's not a form  
20 of evidence that is particularly necessary, and it has  
21 high costs as far as the litigation of the reliability of  
22 the polygraph whenever it is admitted.

23 I would like to save the rest of my time for  
24 rebuttal.

25 QUESTION: Very well, Mr. Dreeben.



1 Ms. Sheffield, we'll hear from you.

2 ORAL ARGUMENT OF KIM L. SHEFFIELD

3 ON BEHALF OF THE RESPONDENT

4 MS. SHEFFIELD: Mr. Chief Justice, and may it  
5 please the Court:

6 Airman Scheffer's polygraph examination was one  
7 of 34,788 polygraph examinations conducted by the  
8 Department of Defense in fiscal year 1992. Although  
9 Department of Defense personnel rely on polygraph results  
10 in matters of national security, Military Rule of Evidence  
11 707 automatically predetermines, without any evidentiary  
12 hearing whatsoever, that the results of Airman Scheffer's  
13 examination were both unreliable and a waste of the  
14 court's time.

15 Despite the fact that polygraph examinations are  
16 used in the ordinary course of government business, the  
17 rule further predetermined that the military officers who  
18 sat in Airman Scheffer's panel were incapable of properly  
19 using or evaluating these results, even with proper  
20 cautionary instructions from the military judge.

21 QUESTION: Those -- those other uses you're  
22 referring to, I mean they are very common. It seems to me  
23 are quite different. I mean, it's not a use for the  
24 purpose of deciding whether you're going to send somebody  
25 to jail.

1 MS. SHEFFIELD: No, Your Honor --

2 QUESTION: Or for whether you're going to let a  
3 murderer back -- back out on the streets.

4 MS. SHEFFIELD: No, Your Honor, they're very  
5 different uses, but -- but they are also very important  
6 uses. They're used for counterintelligence operations,  
7 where it's absolutely critical that we know, you know,  
8 national security issues. They're used in whether or not  
9 people are going to have sensitive compartmented access to  
10 the secrets of the Nation.

11 QUESTION: Well, but, you know, I mean, I -- I  
12 might exclude somebody from the sensitive secrets of  
13 his -- of the Nation if his -- you know, if his -- if his  
14 uncle is a -- a Chinese Communist. Could I use that in a  
15 criminal trial? I mean, what -- you know, what the  
16 government thinks creates enough of a doubt to exclude  
17 somebody from sensitive in -- information bears no  
18 relationship to what creates enough of a doubt to be  
19 admissible in a criminal trial.

20 MS. SHEFFIELD: Yes, Your Honor. And I  
21 understand this is a different scenario --

22 QUESTION: So, then, all of these uses are  
23 really -- don't -- don't establish your point at all.

24 MS. SHEFFIELD: Well, what the uses establish,  
25 Your Honor, we would submit, is this -- if this polygraph

1 were so unreliable, why are millions of tax dollars being  
2 spent for it? It has a certain level of reliability or we  
3 would not be able to use it.

4 QUESTION: I don't think they deny that it might  
5 have a certain level of reliability and -- and, just in  
6 case it does, they -- they use it. And however doubtful  
7 it may be, they -- they -- they choose to exclude people  
8 from national security information on that basis. But  
9 that -- that -- that's a world apart from saying it's  
10 reliable enough to make the decision whether you're going  
11 to send somebody to jail or not send somebody to jail who  
12 belongs there.

13 MS. SHEFFIELD: Well, Your Honor, we would  
14 submit that it's at least as reliable enough -- well --  
15 well, first off, on sending people to jail, the use we're  
16 talking about here is basically coming in, in an  
17 exculpatory sense, not in an inculpatory sense.

18 QUESTION: Yes, but I think you can't just close  
19 the door at that point.

20 MS. SHEFFIELD: Yes.

21 QUESTION: Because the President would be free  
22 to say, okay, all bets are off, and the next case, there  
23 is no rule. It's the same government examiner that has  
24 given the polygraph. And there is an inculpatory result.  
25 And the government says, fine. As Justice O'Connor

1 suggested, this is a two-way street, and we're going to  
2 use it. He gets on the stand. We're going to say, he's a  
3 liar, and here's the polygraph to prove it.

4 MS. SHEFFIELD: Yes, Your Honor, you're  
5 absolutely right. If -- if the rulemaker were to take 707  
6 off the books, which they would have to do, because, right  
7 now, we just have a very narrow constitutionally required  
8 exception, but if the rulemaker were to take Rule 707 off  
9 the books, the potential for inculpatory results would  
10 come in. Now, we would submit that would come in, in a  
11 parallel sense. For example, in this case, the defendant  
12 took the stand. He testified. His credibility was  
13 attacked. And it was brought in to bolster his  
14 credibility.

15 We would submit that the parallel right, then,  
16 would be for when a defendant who takes the stand has  
17 taken a government polygraph and failed -- that that could  
18 perhaps come in to impeach his credibility.

19 QUESTION: Would your rule extend to a crucial  
20 defense witness as well, whose credibility is attacked?

21 MS. SHEFFIELD: It would --

22 QUESTION: Here is -- here is the state, has the  
23 burden of proof, brings in a crucial witness, who says, I  
24 saw the defendant stab the victim. And there's a  
25 polygraph test that might be favorable to the defense of

1 this witness. Would your rule encompass that as well?

2 MS. SHEFFIELD: Well, Your Honor, the Court of  
3 Appeals for the Armed Forces specifically limited their  
4 holding to a polygraph examination of the defendant.

5 QUESTION: And what would your position be,  
6 logically?

7 MS. SHEFFIELD: Your Honor --

8 QUESTION: From the position you're taking here,  
9 it's part of the defense?

10 MS. SHEFFIELD: Right.

11 Your Honor, it would depend on exactly how  
12 critical it was. And --

13 QUESTION: Well, it's critical.

14 MS. SHEFFIELD: -- I -- I --

15 QUESTION: This is the eyewitness.

16 MS. SHEFFIELD: Your Honor, then I would say you  
17 would have to -- you would have to do the same balancing  
18 we're doing here. If it's a critical -- critical  
19 favorable evidence for the defense, we would have to look  
20 at the rule and look at the basis for the rule, and  
21 determine if in fact --

22 QUESTION: So we'd have a big evidentiary  
23 hearing in every case where the polygraph was used?

24 MS. SHEFFIELD: It would call for evidentiary  
25 hearings where there was an exculpatory polygraph, Your



1 Honor, or one in favor of the defense. But bear in mind  
2 the net picture. The government focuses a great deal on  
3 the individual cases where the polygraph evidence comes  
4 up. But -- but these cases are few and far between. The  
5 greater weight of cases, where you have an exculpatory  
6 polygraph, the military convening authority knows that.  
7 And, many times, based on that, elects not to take the  
8 case to trial at all. And if the -- if he knew that those  
9 results were admissible, that's very much a factor.

10 As Judge Gerky pointed out for the Court of  
11 Appeals for the Armed Forces, in his opinion, look at the  
12 overall effect on military justice with this rule. It's  
13 the rare case that's going to come in and have the 3-day  
14 hearing. Most of the cases, it's going to either --

15 QUESTION: But --

16 MS. SHEFFIELD: -- be disposed of pretrial --

17 QUESTION: But how -- how about a defendant,  
18 before the case is brought, who fails a polygraph test;  
19 there may be other reasons now why the -- the -- the Armed  
20 Forces would say, let's not bring this guy to trial. But  
21 this gives them an added sling in their bow, an added  
22 arrow in their bow, doesn't it?

23 MS. SHEFFIELD: Yes, Your Honor, it does right  
24 now, as well.

25 QUESTION: And don't you think that might lead

1 to more cases being brought?

2 MS. SHEFFIELD: I would not think so. And --  
3 and the other effect, Your Honor, is, oftentimes, when  
4 someone fails a polygraph, if they're truly guilty, it is  
5 a great confession inducer, if the government as quite  
6 straightforwardly told you. And also it pushes sometimes  
7 the defendant into actually pleading guilty, which is far  
8 more expedient as well.

9 QUESTION: How -- how would you avoid the  
10 endless hearings that would -- or the disputes before the  
11 jury about whether the polygraph is given in the best  
12 possible way, of whether it is in fact, in this instance,  
13 how probative, of whether or not polygraphs, in general,  
14 are reliable or even if they are, in general, often  
15 reliable, whether this is the kind of one that is really  
16 that reliable or not, all of which, before a finder of  
17 fact that's not necessarily sophisticated in scientific  
18 matters?

19 MS. SHEFFIELD: Well, Your Honor, a -- a couple  
20 of points. First off, in the military, it's -- it's done  
21 in what's called an Article 39(a) session. So the  
22 military judge would sort much of that out prior to it  
23 going to the jury. And he has -- of course, he applies  
24 403, which is the same rule that you have in the --

25 QUESTION: I don't understand what you mean.

1 What do you mean, he would sort it out?

2 MS. SHEFFIELD: Well, basically --

3 QUESTION: The issue for the jury, it seems to  
4 me, is whether this person who administered the polygraph  
5 test is any good.

6 MS. SHEFFIELD: Yes, Your Honor, but a lot of --

7 QUESTION: How can the judge decide that?

8 MS. SHEFFIELD: Well, at the preliminary  
9 hearing, under -- on 102, he is going to make a  
10 determination of whether or not it should even go to the  
11 jury, like was done in this --

12 QUESTION: Yeah, but once it goes to the jury,  
13 the ju -- the jury is certainly entitled to come to the  
14 conclusion that this person who administered the polygraph  
15 test is a hack.

16 MS. SHEFFIELD: Yes, Your Honor, they certainly  
17 could.

18 QUESTION: And comes to the wrong conclusion  
19 most of the -- isn't the jury entitled to do that?

20 MS. SHEFFIELD: Yes, Your Honor.

21 QUESTION: So aren't you entitled to put in  
22 evidence to show that this person is a hack?

23 MS. SHEFFIELD: Absolutely, Your Honor.

24 QUESTION: Okay.

25 MS. SHEFFIELD: I --

1 QUESTION: Well, I don't know how you avoid  
2 that.

3 QUESTION: May I ask, along that line, you're  
4 objecting to a per se rule. Supposing they change the  
5 per se rule and said, no polygraph evidence shall be  
6 admitted unless the examiner met the following  
7 qualifications: 5 years training, a degree from such and  
8 such a school, and so forth and so on. Would you  
9 challenge that kind of per se rule?

10 MS. SHEFFIELD: No -- no, Your Honor, because at  
11 least -- the -- the problem with this rule is there's no  
12 exceptions, no matter how qualified.

13 QUESTION: I understand. But I'm -- I'm asking  
14 about a -- a proposed hypothetical per se rule that  
15 defined minimum qualifications for the examinations, and  
16 just categorically said, all those that don't meet this  
17 standard are, per se, inadmissible?

18 MS. SHEFFIELD: As long as the standards were  
19 not arbitrary and disproportionate, Your Honor, we  
20 would -- we would not be doing that.

21 One of the critical things about this case  
22 that's so ironic is this is a case that, if ever there  
23 were indicia of reliability, we'd have it. Even the worst  
24 critics of polygraph will -- will tell you that much of  
25 the -- whether or not the test is reliable depends on the

1 examiner, his qualifications and his training. And much  
2 of what the States complain of in their amicus brief is  
3 the problem, then, in the States: there is no common  
4 training base and there's no standardized procedures.  
5 In --

6 QUESTION: Well, is there any basis in the  
7 law -- suppose we adopted your reliability test. Now,  
8 make it as strict as you want. If the Supreme Court says  
9 that the Constitution requires the defendant to have a  
10 right to put those results into evidence, I guess, then,  
11 States could say, well, we will permit prosecutors to do  
12 the same. After all, if it's that reliable.

13 MS. SHEFFIELD: Well, Your Honor --

14 QUESTION: And there would be no rule of law  
15 that I'm aware of that would stop it. But I'm raising it  
16 because I think -- I don't see how it could be -- you  
17 would prevent, in practice, what I'd call tit for tat, or  
18 whatever --

19 MS. SHEFFIELD: Yes. Yes, Your Honor.

20 QUESTION: -- the -- the prosecution -- defense  
21 can do it, the prosecution can do it. And so, pretty  
22 soon, we have a contest of -- of lie detector experts, one  
23 for the prosecution and one for the defense.

24 MS. SHEFFIELD: Yes, Your Honor. But please  
25 understand, we are not asking the Supreme Court to hold



1 that this test should have been admitted, or that any test  
2 of any defendant anywhere in the Nation be admitted; only  
3 that they have a chance to lay their evidentiary  
4 foundation, and let the judge evaluate it.

5 QUESTION: In this case, it was the govern --  
6 government's own --

7 MS. SHEFFIELD: Yes, ma'am.

8 QUESTION: -- test.

9 MS. SHEFFIELD: Yes, Your Honor.

10 QUESTION: And we could presume that that would  
11 meet whatever standards one might set up. If your  
12 position is correct, that the defendant is entitled to use  
13 this evidence to bolster his credibility, then, in the  
14 next case, suppose the government said, we're not going to  
15 give this person a test; we think this person could  
16 probably pass one. Could that -- that defendant then  
17 insist, as a matter of his Sixth Amendment right, to have  
18 the government provide a polygraph test, which he could  
19 then use in his defense?

20 MS. SHEFFIELD: Your Honor, we submit no. And  
21 on this case, this wasn't a test that this defendant asked  
22 for. That's another thing to bear in mind. The  
23 government wanted this test done. And they went to him.

24 QUESTION: I don't understand this  
25 constitutional rule you're asserting. You're asserting

1 that if the evidence exists out there already, because the  
2 government has given a test, he has a constitutional right  
3 to have it admitted. But he does not have a  
4 constitutional right to develop a test on his own, to his  
5 own -- his own polygraph administrator and have that put  
6 before the jury?

7 MS. SHEFFIELD: Your Honor, he could hire  
8 someone on his own. I don't think it establishes a  
9 constitutional right for the government to manufacture  
10 exculpatory evidence.

11 QUESTION: No; I understand. But -- but isn't  
12 it -- isn't it the logic of your position not only that  
13 what polygraph tests are extant, having been given by the  
14 government, must be admitted, but also that you must allow  
15 a defendant to hire a -- a -- and administer a polygraph  
16 test, and -- and get that admitted, if it's -- if it's a  
17 reliable --

18 MS. SHEFFIELD: Yes, Your Honor. But, again,  
19 our position is --

20 QUESTION: I don't think so.

21 MS. SHEFFIELD: -- not that it must be  
22 admitted -- simply that he has the opportunity for his  
23 hearing, for his day in court.

24 QUESTION: Well, the --

25 MS. SHEFFIELD: To show that his test was

1 reliable.

2 QUESTION: Isn't it also the logic of your  
3 position that if we agree with you to exactly that extent,  
4 we would also have to strike down a rule, a per se rule,  
5 that excluded the opinions of psychiatrists or  
6 psychologists on the specific truth telling of a witness?

7 MS. SHEFFIELD: Well, Your Honor --

8 QUESTION: We would -- we would -- we would have  
9 to say, well, the door is not entirely shut to that.

10 MS. SHEFFIELD: Well, Your Honor -- and --  
11 and -- and that is a tough issue. But looking at --

12 QUESTION: Well, what's the answer?

13 MS. SHEFFIELD: Well --

14 QUESTION: We'd -- we'd have to -- we'd have  
15 to --

16 (Laughter.)

17 QUESTION: -- we'd have to open the door.

18 MS. SHEFFIELD: Well -- well, Your Honor,  
19 perhaps and perhaps not. Because the other experts that  
20 we're shutting the door on giving truth testimony, a lot  
21 of times the most common example is the child  
22 accommodation syndrome, where you bring in a clinical  
23 social worker who treats abused children, their area of  
24 expertise is treating abused children. And then, the  
25 types of cases where that ultimate truth testimony is

1 precluded is with that kind of expert.

2 Well, we would submit, the difference with the  
3 polygraph, and of course you have to accord some  
4 reliability to it, is that this person's expertise is in  
5 using a scientific machine and a -- a tested theory and a  
6 methodology to arrive at a credibility determination.

7 QUESTION: Yeah, but you can make the same  
8 argument, absent the -- the -- the mechanics on -- on the  
9 part of the psychiatrist, a psy -- or a psychologist,  
10 with -- with long clinical experience, and the opportunity  
11 to verify the stories of the -- of the people interviewed,  
12 with -- with independently verified facts. And it seems  
13 to me that, on your logic, that kind of specific  
14 credibility testimony would at least have to be ad --  
15 admissible potentially. Wouldn't -- wouldn't you agree?

16 MS. SHEFFIELD: Yes, Your Honor, the -- the  
17 courts don't allow that now. And -- and I -- I agree with  
18 you that the theory would seem to apply to that as well.  
19 And oftentimes it comes extremely close.

20 QUESTION: But --

21 MS. SHEFFIELD: It's a hairline difference  
22 between what they actually can get in.

23 QUESTION: But -- but you really -- therefore,  
24 if we accept your position, we're -- we're going to make a  
25 determination not only about polygraphs, but I suppose we

1 would be making a -- a kind of sea change in -- in -- in  
2 a -- in a constitutional evidence rule. Because we would  
3 be, in effect, forcing the courts into a -- a realm of  
4 evidence which, as a -- as a general rule, an almost  
5 universally general rule, is inadmissible. And that is,  
6 evidence about the specific truth telling in a given  
7 instance. *by and other reasons, all of them have*  
8 *exceptions* So we would -- we would really be entering a --  
9 a new evidentiary realm here. *it does:*

10 MS. SHEFFIELD: Well, Your Honor, I -- I would  
11 think that the -- the -- whether or not it's a sea change  
12 is going to depend on how narrowly or broadly this Court  
13 chooses to view this. Because if you look at it from a  
14 standpoint of a polygrapher being someone who has *when the*  
15 specialized expertise in judging credibility, and look at  
16 the others as their specialized expertise in perhaps *rules*  
17 treating children or victims, there could be *igation of*  
18 differentiations made. *lets of evidence or particular thing*

19 *should be* QUESTION: Yet -- but your point in -- in *every*  
20 response to some of the questions, Ms. Sheffield, has *d*  
21 been, you know, we don't ask that it be admitted, we just  
22 ask that it be submitted to a judge to decide. But it *les*  
23 seems to me, following up on Justice Souter's question,  
24 you could then call into question all of the hearsay rule.  
25 In other words, don't exclude hearsay that -- it doesn't



1     come within the traditional exception, but if it has a lot  
2     of -- it seems reliable, put people on the stand and let  
3     the judge decide whether it should come in.

4             MS. SHEFFIELD:   Well, Your Honor, I'm glad --  
5     I'm glad you mentioned the hearsay, because the thing with  
6     the other evidentiary rules, designed to ensure  
7     reliability and other reasons, all of them have  
8     exceptions.   Hearsay does.   And --

9             QUESTION:   Of course it does.

10            MS. SHEFFIELD:   -- and -- and if there is a  
11     case, I believe, where the defense thinks their case is  
12     strong enough and there's enough indicia of reliability,  
13     they will probably make a proffer, under the residual  
14     exception.   Even privilege rules have exceptions when the  
15     policy reasons that underpin them aren't at issue.

16            QUESTION:   But, nonetheless, there -- the rules  
17     tend to be categorical.   They don't have litigation of  
18     whether a particular piece of evidence or particular thing  
19     should be admitted, just to be inquired into de novo every  
20     time.   Because a trial would last for months if you did  
21     that.

22            MS. SHEFFIELD:   Yes, Your Honor.   But the rules  
23     that are there now have existing exceptions.   All we are  
24     asking for is --

25            QUESTION:   Is your argument, every rule has to

1 have an exception? This -- this -- this is -- this is the  
2 principle you're urging upon us?

3 (Laughter.)

4 MS. SHEFFIELD: Well, Your Honor, what we're  
5 saying, basically, is, one, when -- when a defendant's  
6 constitutional rights are clearly at issue, where he has a  
7 Sixth -- an arguable Sixth Amendment right that's at  
8 issue, a per se rule -- you -- you have to see if it apply  
9 -- if the reasons for the per se rule apply in his case.  
10 That's what Rock basically said: wholesale  
11 inadmissibility is going to be arbitrary.

12 QUESTION: But Rock -- Rock was the defendant's  
13 own testimony.

14 MS. SHEFFIELD: Yes, Your Honor. But the  
15 underpinnings of Rock, it seems that it would apply with  
16 equal force. In fact, I think, in a -- in -- in this  
17 Court's opinion in another case -- which escapes me --  
18 but -- but, basically, the Court said that in Rock --

19 QUESTION: Are you talking about the other case  
20 or about Rock?

21 MS. SHEFFIELD: Okay. The other case -- in  
22 Taylor v. Illinois -- in a footnote, the Court said:  
23 Although in Rock we were addressing the specific issue of  
24 the defendant's right to offer testimony, it derived its  
25 standard from general compulsory process case law on the

1 theory that the right to present one's own testimony  
2 extended at least as far as a right to present testimony  
3 of others.

4 I see nothing constitutionally in Rock that  
5 would say it could not apply with equal force to someone  
6 other than the defendant's testimony.

7 QUESTION: Well, that -- you -- you're entitled,  
8 certainly, to take an expansive view of Rock. But I think  
9 you should remember it was a 5 to 4 decision.

10 MS. SHEFFIELD: Yes, Your Honor.

11 (Laughter.)

12 QUESTION: Really, the -- the -- the key  
13 difference between -- between all of these -- all of these  
14 other rules of admissibility and -- is what Justice Souter  
15 was inquiring into. And that is, leaping over, into --  
16 into this new field of -- of accepting evidence on  
17 whether -- whether the defendant is lying here, today, in  
18 this trial, on this fact.

19 And that's -- that's -- if -- if polygraphs are  
20 really that good, you know, 90 percent accurate, what do  
21 you think the accuracy of juries is? You think it's 90  
22 percent?

23 MS. SHEFFIELD: Your Honor, I don't --

24 QUESTION: I mean, if it's lower than 90  
25 percent, maybe we should just dispense with juries and

1 have polygraphs. You wouldn't need juries.

2 (Laughter.)

3 MS. SHEFFIELD: Well, Your Honor, to me, the --  
4 the most perplexing argument is this idea that the jury  
5 can determine credibility and the polygraph usurps their  
6 function. It is one tool they use. It is simply one  
7 piece of the puzzle. And military juries especially, they  
8 balance things all the time and weigh competing interests  
9 to make important decisions.

10 QUESTION: I thought that the argument that  
11 Mr. Dreeben was making was not that it usurps the jury's  
12 function, but that it's unnecessary, since juries, from  
13 time immemorial, have been judging questions of  
14 credibility. I thought his argument was, on that branch,  
15 it's unnecessary and it's very costly.

16 MS. SHEFFIELD: Well -- well, Your Honor, we --  
17 we submit that it's not unnecessary. And in Airman  
18 Scheffer's case, it would be particularly helpful to a  
19 jury. Credibility was the issue in this case. Twenty-one  
20 times, in closing argument alone, he was called a liar or  
21 said his credibility was lacking, even while the trial  
22 counsel knew he'd passed this government-initiated  
23 polygraph.

24 And interestingly, the government brought in  
25 evidence of his external physical manifestations going to

1 credibility. There was testimony in the record from  
2 Special Agent Shilaikis, when they -- when Airman Scheffer  
3 came in, and he explained what happened to him the night  
4 before the urinalysis, they elicited from their witness,  
5 well, what was his demeanor when he testified? Well, he  
6 was nervous. He used a fast rate of speech. Now,  
7 arguably, that went to whether drugs were in his system or  
8 credibility. But reading the record, it's clear, they're  
9 trying to use evidence to go to his credibility.

10 As one judge from the Air Force Court of  
11 Criminal Appeals said in this case, Airman Scheffer's  
12 credibility was the whole ball game.

13 QUESTION: Well, of course, they -- they weren't  
14 purporting to be experts, reaching a conclusion as to  
15 credibility?

16 MS. SHEFFIELD: No, Your Honor, they were not.

17 QUESTION: All right. Are there other instances  
18 in which experts, as Justice Stevens indicated,  
19 psychologists or psych -- psychiatrists, are called to --  
20 to testify about credibility? Does this ever happen in --  
21 in State proceedings?

22 MS. SHEFFIELD: Your Honor, I'm not familiar  
23 with State proceedings enough to answer that. I can tell  
24 you that, in military proceedings, that they are called.  
25 And although they are not permitted to say, I believe the



1 witness, everything they're saying is basically saying, I  
2 believe the witness, without using those words. It's  
3 very, very close. *FIELD: Yes. And -- and, often,*  
4 *Independent* QUESTION: May I ask what the rule is in the  
5 military, if there is one, in cases involving very young  
6 children who might have been cla -- claim to have been  
7 sexually abused or something of that kind, who recount the  
8 instance to a -- a caretaker soon after the incident  
9 occurred. Is the caretaker allowed to testify as to his  
10 or her opinion as to the truthfulness of what the child  
11 was describing? *something. I guess everybody would know it*  
12 *would be* MS. SHEFFIELD: Not as to the truthfulness, Your  
13 Honor. But -- but demeanor and -- and everything else,  
14 and then will bring in experts, who talk about child abuse  
15 accommodation syndrome and whether or not what the child  
16 said to the caretaker would or would not be consistent  
17 with a child who was fabricating or involved in fantasy or  
18 telling the truth. *at weight of the -- the -- the basis*  
19 *for these* QUESTION: I'm slightly curious how they know  
20 what -- whether these are reliable or not. I take it the  
21 question is whether a person who says "I'm innocent" is  
22 really guilty. And then we have these numbers in the *room*  
23 brief that say, well, it's 90 percent of the time. How  
24 would anyone know that? I mean, how -- how -- you have  
25 somebody who says "I'm innocent." How, in some test or

1 something, do they know wheth -- whether he -- how do they  
2 know, independently, he's guilty?

3 MS. SHEFFIELD: Yes. And -- and, often,  
4 independent proof is one of the problems. And it is more  
5 the -- the accuracy rates are somewhat less in proving  
6 that an innocent person is telling the truth.

7 QUESTION: Yeah, but my question is, how do they  
8 get these numbers, the accuracy rate?

9 MS. SHEFFIELD: Your Honor --

10 QUESTION: I mean, you'd have to have, like, a  
11 laboratory or something. I guess everybody would know it  
12 would be like a game. So I guess it's a question whether  
13 a game replicates reality. And if you go outside the  
14 laboratory, to the field, how does anybody know what the  
15 truth is to make this accuracy estimate?

16 MS. SHEFFIELD: Yes, Your Honor. And -- and  
17 exactly what you said, Your Honor. They do do laboratory  
18 studies. And a great weight of the -- the -- the basis  
19 for these cred -- these reliability estimates come from  
20 laboratory studies. They also do real-life studies. And  
21 what they'll do is they'll go back and review cases in  
22 which someone subsequently confessed or some other person  
23 subsequently confessed.

24 QUESTION: Yeah, but a confession wouldn't work  
25 in a case where a person is innocent. There would be

1 very -- there would be a handful of cases in which the  
2 person was really guilty and he confessed. But there  
3 might be a lot of cases where he's really guilty and he  
4 didn't confess.

5 MS. SHEFFIELD: Yes, Your Honor. Yes, Your  
6 Honor.

7 QUESTION: So how would you know in -- how would  
8 you ever -- how do they ever go about figuring this out?

9 MS. SHEFFIELD: And -- and that's one of the  
10 problems with nailing it down. But --

11 QUESTION: Ms. Sheffield, a moment ago, you  
12 were -- you read a quotation from Taylor against Illinois.  
13 Were you quoting from the court opinion or the dissent?

14 MS. SHEFFIELD: It was a dissent, Your Honor.  
15 And I should have specified.

16 QUESTION: I think you should have made that  
17 clear.

18 MS. SHEFFIELD: I apologize, Your Honor.

19 QUESTION: Ms. Sheffield, what do you make of  
20 the -- the -- of the information provided in one of the  
21 government briefs -- I forget which -- to the effect that  
22 less than one-third of the members of the two major  
23 polygraph examiners' organizations are of the opinion that  
24 their -- that their -- that their opinions should be  
25 admissible in evidence?

1 MS. SHEFFIELD: Well, Your Honor, that came from  
2 a study -- a survey that was conducted by Dr. Licken --  
3 Dr. Lykken -- I'm not sure which the correct way was. The  
4 study has been called into question by the amicus brief  
5 that we have done by the Committee for Concerned Social  
6 Scientists. Basically, they -- they -- obviously, it is  
7 polarized. There's no doubt about that.

8 Dr. Raskin and Dr. Honts and some other  
9 scientists talk about this study that the government  
10 relies on, and says less than one-third said that.

11 But there were some problems with the survey  
12 that they point out. They -- they -- to question whether  
13 it was a random sampling, the context that the survey was  
14 sent out under. Apparently, it had a cover letter that  
15 dealt with the O.J. Simpson case. It asked them about  
16 legal implications.

17 And we would submit that there are two other  
18 surveys that are out there that show very different  
19 results from that. In fact, two other surveys -- one done  
20 by Gallup in 1982, I believe, and -- and another survey  
21 done by a Dr. Amato, both show that about two-thirds of  
22 that same group would support the polygraph being used, at  
23 least in conjunction with -- as one piece, with other  
24 evidence, in -- in making this type of determination.

25 And the last survey that they reference in their



1 brief was conducted by someone who is noted for being  
2 almost a vitriolic critic of polygraph evidence.

3 So there's -- again, it's a polarized thing and  
4 there's viewpoints on either side.

5 QUESTION: Ms. Sheffield, if -- if we agree that  
6 polygraphs have to be used in the -- as -- that the  
7 Constitution requires polygraphs to be used in military  
8 trials, I suppose it would follow that -- that they have  
9 to be used in civilian criminal trials. I mean, we -- we  
10 couldn't have one rule for the milit -- one constitutional  
11 rule for the military and -- right? I mean, a fortiori --

12 MS. SHEFFIELD: Yes, Your Honor.

13 QUESTION: -- in -- in Federal District Courts,  
14 we have -- what about civil cases, is there any reason why  
15 the constitutional requirements wouldn't apply to civil  
16 cases?

17 MS. SHEFFIELD: Well, Your Honor, I -- I  
18 wouldn't think that the Sixth Amendment would be  
19 implicated in a civil case.

20 QUESTION: Is that right, there -- there are  
21 no -- there -- there are no restrictions on the processes  
22 that -- that can be used in -- in civil trials --

23 MS. SHEFFIELD: Your Honor --

24 QUESTION: -- especially in those civil trials  
25 in Federal courts, where a jury is required?



1 MS. SHEFFIELD: Well, Your Honor, it's my  
2 understanding that -- that it does come in, in civil  
3 trials, even in some jurisdictions that don't allow it in  
4 criminal. I'm not conversant enough in Federal civil  
5 practice to say --

6 QUESTION: Well, I -- I would expect the same  
7 argument to be made. Look, I'm -- I'm trying to prove my  
8 case, defend my property, my livelihood.

9 MS. SHEFFIELD: Yes, Your Honor.

10 QUESTION: And you're excluding perfectly  
11 relevant evidence that -- that the Constitution requires  
12 to be allowed in criminal trials. As a matter of due  
13 process, I don't know how you could exclude it from a  
14 civil trial.

15 MS. SHEFFIELD: But -- but, again, we're not  
16 asking this Court to hold it has to be admitted. Only let  
17 a person show --

18 QUESTION: Yes, it --

19 MS. SHEFFIELD: -- in his case.

20 QUESTION: -- it -- it has to be admitted if the  
21 judge finds -- finds that this is a good -- a good enough  
22 expert.

23 MS. SHEFFIELD: Yes, Your Honor.

24 QUESTION: It would be a strange rule that said  
25 you had to admit it, even if you found the expert was a

1 fraud.

2 MS. SHEFFIELD: Absolutely, Your Honor. And  
3 that's why we're not asking this Court to hold that.  
4 We're simply saying, let the military courts, like the  
5 vast majority of the Federal Circuits do, let the trial  
6 judge hear the evidence. Let him do his 403 balancing.  
7 Let him see, and -- and make a determination.

8 QUESTION: Well, if -- if -- if we were the  
9 co -- Court of Appeals for the Armed Forces, and -- and  
10 there weren't any Rule 707 promulgated by the President,  
11 your presentation cert -- certainly would make a great  
12 deal of sense. But you -- you're in the position where it  
13 isn't just a common law judgment on our part. The  
14 President has said this will not come in. And so you have  
15 to say there's a constitutional principle that says it has  
16 to come in.

17 MS. SHEFFIELD: Yes, Your Honor. Yes, we do.

18 And -- and -- and we -- and we, of course, do  
19 assert that. And -- and what's ironic is the reasons that  
20 are adduced here for allowing poly -- keeping polygraphs  
21 out make less sense in the military context than they do  
22 in the civilian. We -- the -- the States --

23 QUESTION: Well, let -- let me ask you.

24 MS. SHEFFIELD: Yes.

25 QUESTION: Is there any way of -- of limiting

1 the rule adopted by the Court of Appeals for the Armed  
2 Forces to military criminal trials, as opposed to civilian  
3 criminal trials? As I read the -- the opinion, there --  
4 there is no effort to. I mean, it comes in as a  
5 constitutional matter, the right to -- for a defendant to  
6 present its case.

7 MS. SHEFFIELD: Yes, Your Honor. However, in  
8 this Court, looking at it, such a limiting could be done.  
9 Of course, the Court of Appeals --

10 QUESTION: How -- how would you suggest that we  
11 do it?

12 MS. SHEFFIELD: Well, basically, the reasons  
13 that are problems for a lot of the States are not present  
14 for us. If you look at their amicus brief, they cite  
15 things like there's no standardized training for  
16 polygraphers. Much of the reliability depends on the  
17 qualifications and training of the examiner.

18 The States, unlike the Department of Defense, do  
19 not have the Department of Defense Polygraph Institute.  
20 They don't have standardized equipment. They don't have  
21 standardized protocol. They don't have two layers of  
22 independent review above the polygrapher.

23 We have protections that make our tests more  
24 reliable, more trustworthy, that don't exist in the  
25 States, which would be a basis for this Court not to apply

1 this case beyond the -- the military.

2 QUESTION: But then what -- but you would still  
3 have to derive it from the same constitutional principle,  
4 wouldn't you -- the right of the defendant to call  
5 witnesses in his defense?

6 MS. SHEFFIELD: Yes, Your Honor. But I think  
7 the argument would be on the -- as far as the States, that  
8 the government reasons are not arbitrary. Which they are  
9 in the military and which they are in Airman Scheffer's  
10 case specifically -- arbitrary or disproportionate.  
11 Because we have safeguards in our system that they don't  
12 have that make these rules arbitrary and disproportionate,  
13 and certainly in Airman Scheffer's case. Even the thing  
14 about the waste of time and everything else is --

15 QUESTION: Well, if those safeguards were --  
16 were eliminated, the Army could -- could then no longer  
17 admit polygraph evidence?

18 MS. SHEFFIELD: They would --

19 QUESTION: I mean, if -- if we rule that it must  
20 be admitted only because there are all of these  
21 safeguards, the military could get them unadmitted again  
22 by simply eliminating all the safeguards.

23 MS. SHEFFIELD: If they wanted to throw their --  
24 their thou --

25 QUESTION: Yes.

1 MS. SHEFFIELD: -- hundreds of thousands of  
2 polygraphs into disarray.

3 QUESTION: Yeah. I mean, go -- go under the  
4 colander, the colander theory instead, just --

5 (Laughter.)

6 QUESTION: Right.

7 MS. SHEFFIELD: And -- and, you know, what's  
8 interesting about the colander theory is that confession  
9 would be admissible. But if an individual defendant goes  
10 through this grueling process, designed to elicit  
11 confessions, and he's been there, done that, and doesn't  
12 confess, he can --

13 QUESTION: Thank you, Ms. Sheffield. Your time  
14 has expired.

15 Mr. Dreeben, you have 5 minutes remaining.

16 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

17 ON BEHALF OF THE PETITIONER

18 MR. DREEBEN: Thank you, Mr. Chief Justice.

19 The fundamental unreliability of polygraph  
20 evidence is underscored not only for the reasons that  
21 Justice Breyer adverted to, but also because of the  
22 possibility that countermeasures can defeat any test. Any  
23 individual who wants to can go on the Internet and  
24 download a book called "Beat the Box: The Insider's Guide  
25 to Outwitting the Lie Detector."



1           And studies have shown that with about a half an  
2 hour of education in how to outwit the lie detector test,  
3 a suspect can do that by provoking physiological responses  
4 that fool the examiner by measures as easily as pressing  
5 his toes against the ground or biting his tongue when  
6 asked particular questions. Those kinds of ways of  
7 skewing any reliability that polygraph might otherwise  
8 have make it clear that the examiner can never be  
9 confident to the level that should be required before this  
10 form of evidence is admitted in a criminal trial.

11           If the Court has no further questions, thank  
12 you.

13           CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
14 Dreeben. The case is submitted.

15           (Whereupon, at 10:58 a.m., the case in the  
16 above-entitled matter was submitted.)  
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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

UNITED STATES, Petitioner v. EDWARD G. SCHEFFER  
CASE NO: 96-1133

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BY Donna Marie Fedele-----

(REPORTER)