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On the 20th day of March 2009, the Official Court Reporter for the Second Judicial District, filed in the Office of the Clerk of the Court a Transcript of Proceedings on Appeal to the NEW MEXICO SUPREME COURT.

SECOND JUDICIAL DISTRICT COURT  
COUNTY OF BERNALILLO  
STATE OF NEW MEXICO

ORIGINAL

CR-2004-3558; Supreme Court No. 29,978

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

MARIO CHAVEZ,

Defendant-Appellant.

SUPREME COURT OF NEW MEXICO  
FILED

APR - 9 2009 Supplement

*Richard J. ...*

*Romana D. ...*

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FILED  
SECOND JUDICIAL DISTRICT

TRANSCRIPT OF PROCEEDINGS

On the 24th day of January 2006, at approximately 1:33 p.m., this matter came on for hearing on a various motions before the HONORABLE RICHARD KNOWLES, Division XV, Judge of the Second Judicial District, State of New Mexico.

The Plaintiff-Appellee, STATE OF NEW MEXICO, appeared by Counsel of Record, KARI E. BRANDENBURG, District Attorney, and TODD HEISEY, Chief Deputy District Attorney, 520 Lomas Northwest, Albuquerque, New Mexico 87102.

The Defendant-Appellant, MARIO CHAVEZ, appeared by Counsel of Record, JOSEPH N. RIGGS, III, Attorney at Law, 20 First Plaza Northwest, #303, Albuquerque, New Mexico 87102.

At which time the following proceedings were had:



1 presented in a motion for polygraph, we're doing jury  
2 selection on Monday. I don't know how it's going to come  
3 out, and it may be at the conclusion of this hearing that I  
4 have no concerns, but if I grant the Defense motion to  
5 exclude certain polygraph tests, it's the kind of thing that  
6 if it shows up in the paper, it could wind up contaminating  
7 the entire jury poll. If I deny the motion and they're going  
8 to hear about it anyway, then it's something else. So if  
9 you've got enough of a story and you can live without that  
10 portion or delay that portion of the story, that would be  
11 nice. If you decide to put it in, that's okay too. Like I  
12 said, I'm not going to hold either decision against you.  
13 That's the main concern I have.

14 I just, and I'm not putting this responsibility in  
15 front of you. If I can't pick a jury here, then we're  
16 talking about going somewhere else, and that's a really  
17 expensive and inconvenient thing, so do what you think is  
18 right.

19 Who's arguing the polygraph?

20 MR. RIGGS: I am, Your Honor. I couldn't do this  
21 without Mrs. Bruce, but I'm arguing this, as you see. She is  
22 handing me the information. This case relating to this  
23 polygraph represents a certain set of circumstances that is  
24 new ground and new ground for me. I suspect it's new ground  
25 for the Court and for the State. The Court knows as a

1 predicate that Mario Chavez took two polygraphs with a  
2 polygrapher, Pete Pierangeli during the spring and summer of  
3 2005. I disclosed that in an effort to show the State the  
4 error of its ways in terms of prosecuting Mario Chavez and  
5 requested that they refocus on the guilt of Eloy Montano.

6 The State, best of my understanding, sought -- made  
7 contact with a number of New Mexico polygraphers, ended up  
8 with Charles Honts from Boise, Idaho, who reviewed the Pete  
9 Pierangeli polygraphs, suggested, as we typically find,  
10 mistakes or different interpretations, et cetera.

11 At that point, because of my belief in my client's  
12 innocence and his truthfulness, we proposed to the State that  
13 he would take another polygraph with Mr. Honts. This Court  
14 knows that we --

15 THE COURT: It's actually Dr. Honts.

16 MR. RIGGS: Dr. Honts.

17 THE COURT: I've had him testify in front of me at  
18 least once before.

19 MR. RIGGS: You know him well.

20 THE COURT: I don't know about that, but I've had  
21 him testify in front of me a couple of times.

22 MR. RIGGS: Judge, we entered into a stipulation  
23 last year. That stipulation, and you'll probably see an  
24 exhibit here in a minute -- actually, mine is written on.

25 THE COURT: It was attached to the State's

1 response.

2 MR. RIGGS: Very good.

3 THE COURT: There's a couple of things -- I've  
4 read the motion and I've read the response. There's a couple  
5 of things that I want you to focus in on, and you may or may  
6 not be aware of or recall. Dr. Honts testified in *Lee vs.*  
7 *Martinez*. He testified that he, in fact, used and endorsed  
8 the directed the lie version of the control question  
9 polygraph test. In fact, that was one of the polygraph tests  
10 that the State was seeking to exclude that was ultimately  
11 consolidated. I don't remember which of the underlying  
12 cases, but I remember he  
13 was -- my recollection of the facts was he was like in  
14 Carlsbad or somewhere in the Fifth Judicial District, met  
15 with the defendant, and I actually had some concerns about  
16 how the individual test was done. That wasn't the issue in  
17 front of me in that case. It was an *Alberico/Daubert* issue,  
18 but he met with the defendant in an open pod as opposed to  
19 individually in a room.

20 The defendant in that instance had taken some type of  
21 medication. You're supposed to inquire about that, but he  
22 said in that case it didn't matter, but that was his  
23 testimony. He uses the directed-lie method, talked about his  
24 qualifications at some length, and in fact said that he was  
25 working on a computer directed polygraph examination program

1 where the computer does the testing. I don't know where he's  
2 gotten that software. Again, that wasn't the issue in front  
3 of me, but the point I'm making is the directed-lie version  
4 of the control version test was part of *Lee vs. Martinez*,  
5 one; two, my recollection of -- my understanding of it, and  
6 the way I did my findings of fact in the case were that  
7 directed-lie, probable-lie are both control tests under that  
8 subset of the polygraph test.

9 There's another type of polygraph test that was not in  
10 issue, the name eludes me now, but it's like a restricted  
11 knowledge, things you would ask, kind of like the game of  
12 "Clue." The defendant or the suspect was a homicide  
13 committed with a gun, with a rope, with a knife, and how the  
14 defendant would react, presumably as an answer to the  
15 question because the defendant didn't know, but would have a  
16 response because that was used in Israel and some other  
17 places, but my understanding was control question tests  
18 included both probable-lie and directed-lie, and the last  
19 thing, in looking at the motion you filed, and this is  
20 something I wrestled with. In fact, I double checked because  
21 I still have the book on polygraph tests and in paragraph  
22 five of page three, it said that the directed-lie control  
23 question lacks construction and contains a significant number  
24 of potential responses capable of producing false negatives.

25 The trouble I had was remembering the false -- a false

1 negative -- let me put it this way: A positive result means  
2 the person appears deceptive and a negative result means the  
3 person does not appear deceptive and, in fact, is deceptive,  
4 so a false negative would mean that it looks like the person  
5 is being truthful, when they're denying whatever it is  
6 they're being accused of, or whatever, so that's something  
7 that may tend to produce false negatives, would tend to imply  
8 that it doesn't tend to show there was a problem with a false  
9 positive, but the false negative is less of a concern for  
10 somebody who, you know, does he got a better chance of  
11 falsely passing a polygraph if there's a higher percent of  
12 false negatives? So those are the points I wanted to make  
13 before you went on with it.

14 And I've got a question for you. At the end of this,  
15 are you asking that all the polygraphic results stay out,  
16 including Mr. Pierangeli's, or are you saying you get yours  
17 and they don't get theirs?

18 MR. RIGGS: This is an issue that we really  
19 struggled with.

20 THE COURT: I bet. What was the result of the  
21 struggle?

22 MR. RIGGS: The basis for the struggle is -- I  
23 know this Court knows that I have a belief in polygraph. Two  
24 of the cases that you heard in the *Martinez* case were my  
25 cases. You know, Scott Robinson, and the other one escapes

1 me, Rudy and Mary Ann Gonzales, and although I did -- I  
2 didn't try that, I know this Court took an enormous amount of  
3 testimony, and I think you probably know more about  
4 polygraphs than any judge in the State, and probably more  
5 than about 99 percent of all the lawyers.

6 THE COURT: More than I ever wanted to know.

7 MR. RIGGS: More than you ever wanted to know, and  
8 we get the *Martinez* decision, which I know testimony was  
9 taken on directed-lie, but in reading the *Martinez* decision,  
10 I don't think that they sanctioned the directed-lie, although  
11 it's unclear.

12 THE COURT: Let's go back. At the end of the day,  
13 are you asking to have your polygraph and keep theirs out, or  
14 are you saying you don't want any polygraphs at all in this  
15 trial?

16 MR. RIGGS: I'm asking for either, and I'll tell  
17 you why.

18 THE COURT: Let me just --

19 MR. RIGGS: I don't think it's fair to ask that  
20 the Honts' polygraph go out and not the Pierangeli.

21 THE COURT: Let me stop you there for a minute.  
22 with an option on the table, and I'm not looking as being  
23 committed to this, Mr. Riggs, I'm just asking the question.

24 From the State's perspective, if the option of having  
25 none is there, is that a reasonable result at the end of the

1 day, or is it your position as opposed to Mr. Riggs would  
2 rather have just one or none, he would rather have both or  
3 none, preferably both.

4 MS. BRANDENBURG: Your Honor, I think if there's  
5 case law and argument to be had, the right thing to do,  
6 regardless of what we want, the lawful, appropriate thing to  
7 do is they all come in, for different reasons. We will not  
8 agree to --

9 THE COURT: Like I said, I'm just trying to get a  
10 baseline. In other words, if both sides said we're happy if  
11 none of this comes in, just throwing it out there, it's kind  
12 of like a stipulated challenge for cause with respect to a  
13 juror. I would give that type of agreement a great deal of a  
14 break. I don't mind using the time. I was just asking so --

15 MS. BRANDENBURG: That's not an option for the  
16 State, Your Honor.

17 THE COURT: I understand. Like I say, I'm not  
18 trying to force something down anybody's throat. I want to  
19 get an idea --

20 MR. RIGGS: When we entered into the agreement.  
21 We entered into it with the assumption, and I say  
22 "assumption" that Honts would replicate the Pierangeli  
23 polygraph, and the Court knows the distinction.

24 THE COURT: Let me ask -- I mean, did you look --  
25 I don't know if it's on there or not, but I assume you looked



1 at his CV at some point?

2 MR. RIGGS: Yes, and he has worked with Dave  
3 Raskin, and the Court knows the history of that and knows  
4 that he and I talked with a number of lawyers, Ray Twohig,  
5 Chuck Daniels, and they said if he gives the control  
6 question, the probable-lie technique, then because Mario  
7 Chavez had taken two of that sort, then that would be  
8 appropriate. And that's why we said in point number 3 of our  
9 stipulation, use the same questions, with the exception of  
10 the comparison questions, and he can formulate his own  
11 comparison, assuming that he could replicate the test.

12 THE COURT: There's no language in there about  
13 control-lie versus direct-lie.

14 MR. RIGGS: That's correct. And it was the  
15 belief, because the psychological mindset of a person who, in  
16 a probable -- in a Pete Pierangeli style of test, tell the  
17 truth as to the test of your ability; as to the control, tell  
18 the truth to the best of your ability about the  
19 relevant -- you take two tests like that, but you go into it  
20 with the mindset of what I'm being tested on is truthfulness,  
21 and we believe that Honts would recognize that.

22 You then don't go to someone and say, Okay, now what I  
23 want to you do in the directed-lie is to lie to all of these,  
24 because the psychological result of that, the psychological  
25 result of that is clearly confusion. And when I talked about

1 this with other lawyers, they said no, Honts won't go in and  
2 do directed-lie because he will recognize the inherent  
3 contradiction for the subject and won't do it.

4 Now, he has a long history of working with Raskin, who  
5 does the probable-lie. And that --

6 THE COURT: Raskin, as you probably know, way back  
7 when ten years ago was a strong proponent of directed-lie.

8 MR. RIGGS: Exactly, and now says and publishes  
9 that he won't use it.

10 THE COURT: They both claim the same --

11 MR. RIGGS: Honts doesn't.

12 THE COURT: He used probable-lie ten years ago.

13 MR. RIGGS: That's correct, and so they have  
14 diverged and so the dynamic here, and of course you know Pete  
15 Pierangeli sat through the polygraph, but at my direction did  
16 nothing, said nothing, because I said it was a violation of,  
17 you know, of our agreement that there be no interference.  
18 But, you know, he is the one that said he will do a  
19 probable-lie because you can't change in the middle because  
20 of the inherent confusion to the subject of "tell the truth"  
21 and then "tell a lie."

22 THE COURT: If someone is confused, they've heard  
23 the control questions -- I mean the relevant questions  
24 already, it would seem to me that you would feel the  
25 confusion, therefore, stress; therefore, when you hear the

1 directed-lie as opposed to the probable-lie would tend to  
2 mean you have a higher response rate to the direct-lie than  
3 you do to the relevant question, which would tend to mean it  
4 looks like you're being truthful when you answer the relevant  
5 questions because you compare the two.

6 MR. RIGGS: But at the end of the day, the subject  
7 sitting there who has been told to tell the truth and then  
8 told to lie, there is an inherent confusion. I didn't  
9 prepare him to say -- because I told him, "You will be told  
10 to tell the truth, and you need to go in and tell the truth."  
11 He is going to replicate, although he may change the wording  
12 of some of the questions of the Pierangeli polygraph. Is  
13 this an error on my part? It probably is.

14 In retrospect, I should have said "You have to give  
15 this kind of test." I knew Honts' history, but I also know  
16 that he has used and has been a proponent of probable-lie,  
17 and he is, and I know some cases in which he has given that  
18 kind of test. So the issue here is we think that now, with  
19 respect to both literature and all the research, Honts is now  
20 the only person in the United States that does the  
21 directed-lie. And even since this Court had heard the  
22 *Martinez* case, he is alone among polygraphers in the United  
23 States that does the directed-lie, in part because the  
24 subsequent research by the Department of Defense Polygraph  
25 Institute, Raskin and others, is that the breathing mechanism

1 test shows a contradiction, and so DODPI now says we don't  
2 use it, Raskin says we don't use it because it requires three  
3 different measures.

4 THE COURT: The Department of Defense -- this is  
5 for Frances -- DODPI, D-O-D-P-I, that would stand for --

6 MR. RIGGS: They say no to directed-lie.

7 THE COURT: The acronym.

8 MR. RIGGS: Department of Defense Polygraph  
9 Institute.

10 THE COURT: That's for your record.

11 MR. RIGGS: Sorry. So the inherent contradiction  
12 of what we have here is two different kinds of tests with a  
13 suspect that is expecting he's going to do that.

14 My instruction to Pete Pierangeli is don't stop the  
15 test in the middle. He was inclined to do so because he  
16 realized the dilemma for the subject, but I barred him from  
17 doing anything. Also, our agreement said if Mario backs out  
18 of it, then that evidence would be used. And if I had Pete  
19 stop the test, then it might be implied that Mario was  
20 backing out of it.

21 So we do have a dilemma and we don't think that if an  
22 appropriate review is given to directed-lie, whether it is a  
23 subset of a control question technique or not, that the  
24 literature now is you can't score the breathing because it  
25 shows a contradictory result and, therefore, is in violation

1 of 11-707.

2 I mean, I hear what the Court is saying. The Court's  
3 probably going to say, they both come in or neither one of  
4 them come in.

5 THE COURT: Listen, I'm not, with all candor, a  
6 huge fan of polygraph. I've got huge questions about the  
7 reliability.

8 MR. RIGGS: Maybe this illustrates why the Court  
9 has a good reason for having that reluctance.

10 THE COURT: I think where the Supreme Court and I  
11 differ on it is, you know, with all of the literature on the  
12 comparison question test, which is what the literature was,  
13 the Supreme Court said if it goes from 50/50 to 51 percent,  
14 more likely to be telling the truth; if it increases the  
15 likelihood, it makes it more likely than not, therefore, it  
16 is relevant, therefore -- and they didn't address some of the  
17 issues I raised under 608 and I think 403. They just said  
18 we're finding as a matter of law it doesn't stay out under  
19 *Alberico* and *Daubert*, but this directed-lie was one of the  
20 specific types of cases they looked under. So I think that's  
21 where we are.

22 MR. RIGGS: Exactly. And here we are. So I don't  
23 know, I struggled over this motion because it appears to be a  
24 contradiction to say theirs can't come in, even though I've  
25 signed this agreement and ours should. You know, I struggled

1 with this issue a lot. I struggled with it a lot because in  
2 all honesty, I felt somewhat betrayed because I believed that  
3 our agreement was a replication of the Pierangeli test with  
4 the same style and, you know, I thought this agreement  
5 covered that, you know? Everybody said, No, no, he won't do  
6 directed-lie because you can't and --

7 THE COURT: I've got to ask you, and I think I  
8 know what the answer is. If that was an issue --

9 MR. RIGGS: Then it should have been in the  
10 agreement.

11 THE COURT: Pretty much, yeah.

12 MR. RIGGS: Exactly. So that is the basis for it,  
13 and that's why, you know, I, with some reluctance, I filed  
14 this, but of course we will bring -- I mean, it's going to be  
15 a battle of the polygraphs when it really shouldn't be, and  
16 of course I think one of the reasons for the Court's findings  
17 of fact and conclusions is to avoid these kind of situations,  
18 but I think even with the Supreme Court rulings, this Court  
19 still retains, under *Martinez*, the power to control your  
20 courtroom and to make a decision that is in the best interest  
21 of both the State and the defendant. So I will leave it  
22 there. I mean --

23 THE COURT: I don't know what to tell you. Let me  
24 hear what the State has to say.

25 MS. BRANDENBURG: Your Honor, and I will be brief,

1 and I think our response really says it all. We don't get  
2 into the validity of the polygraph, the reliability.  
3 Basically, we entered into an agreement with Mr. Riggs. He  
4 had two polygraphs given to the defendant by Peter  
5 Pierangeli. In the first polygraph, the result was  
6 inconclusive, and there was a break in the tape, so it wasn't  
7 even admissible. We would argue under the Rule, in the  
8 second polygraph, what Mr. Pierangeli did is he said, Well,  
9 it's inconclusive on the two first questions but, you know,  
10 he's truthful on the last question.

11 I've never heard of a polygraph being squared like that  
12 but, anyway, Mr. Riggs came to us and said, You must  
13 appreciate the error of yours ways.

14 So what we did is we went out to find a polygrapher, a  
15 defense polygrapher, someone who, if he had any advice, it  
16 would be in favor of the defendant in this case and that  
17 would have credibility, and we went to Dr. Honts, and I don't  
18 believe -- I think I asked him, "How many times have you  
19 worked for the State?"

20 And I think the comment was, "Maybe once or twice." I  
21 mean, "All of my work is working for defendants."

22 And we said, "Here's the material."

23 THE COURT: If it helps you, I think Mr. Cox  
24 determined in the *Miles Harris* case ten years ago --

25 MS. BRANDENBURG: That's one occasion, and I would

1 suggest maybe there were others that I'm not aware of, but  
2 he's got a reputation for being a defense polygrapher, so we  
3 go to him. If he had any bias, it would be in favor of the  
4 defendant.

5 We are after justice, and he pointed out all the  
6 different things and supported the polygraphs as negative 23  
7 and negative 11, both deceptive and pointed out that there  
8 were problems with the pretest questions and all sorts of  
9 issues, so Mr. Riggs came to us, and I believe we have  
10 attached his letter.

11 THE COURT: You attached his letter.

12 MS. BRANDENBURG: And the agreement to show that  
13 we didn't suggest or coerce Mr. Riggs in any way.

14 When he came to us with his letter, we were speechless,  
15 absolutely speechless, and we had some concerns and the  
16 State -- I mean, the Court's very well aware of the position  
17 that the State took in the polygraph issue a couple of years  
18 ago. We were against polygraphs, but we went ahead and  
19 decided we are fighting for justice, whatever that is, and we  
20 don't always determine or very rarely determine what that is,  
21 and so we worked out an agreement with Mr. Riggs. It was  
22 discussed. We put things in there. It was mutual.

23 There was absolutely -- as an officer of the Court, any  
24 conversation about a direct-lie or probable-lie or guilty  
25 knowledge or anything, what he said is in the agreement he



1 will use the same questions as used by Peter Pierangeli in  
2 the two prior tests with the exception of comparison  
3 questions. Dr. Honts can formulate his own comparison  
4 questions. That's in number 3 of our agreement. We didn't  
5 want Mr. Pierangeli to be around. We thought that that could  
6 later be used as -- that's why the polygraph's not valid is  
7 because there was some kind of distraction or something, but  
8 Mr. Riggs insisted that Mr. Pierangeli be there, so we said,  
9 fine, he will be there. He can assist Dr. Honts, and it's up  
10 to Dr. Honts' discretion to determine to what extent his  
11 assistance is necessary simply because he was the one that  
12 was going to take responsibility for the polygraph  
13 examination and was going to score. This is an absolute  
14 complete agreement that was discussed.

15 As the Court knows, we did and we even had blood tests,  
16 we had everything to make sure all of the bases were covered.  
17 If Mario Chavez had passed that polygraph, we would be  
18 sitting there and dealing with it because that's what this  
19 agreement stipulates to. We had Mario Chavez also sign this  
20 agreement in addition to Mr. Riggs. We are asking --  
21 everybody knows what the stakes were. Everybody had input  
22 into this agreement. Nobody forced anybody to do anything.

23 It's unfortunate for Mr. Chavez that he flunked the  
24 polygraph, but we have a right, and this stipulation gives us  
25 the right to introduce that polygraph in our case-in-chief at

1 trial in this matter, and we ask that the Court enforce this  
2 agreement.

3 Mr. Riggs is an accomplished, experienced attorney. He  
4 had every bit as much input into this agreement as we did, if  
5 not more. What we were interested in is a fair result. We  
6 got a fair result, and we ask that the Court simply follow  
7 through and ask that this agreement be enforced.

8 And I stand to answer any questions. If he doesn't  
9 agree with anything, the correct option is cross-examination,  
10 cross-examination of Dr. Honts, and that's an avenue  
11 available to him, and it's the only appropriate avenue  
12 available to him at this point in time.

13 THE COURT: Thanks.

14 Reply.

15 MR. RIGGS: Judge, I think this Court knows more  
16 about this stuff than everybody and, you know, I mean, we  
17 will let the Court make its decision. I mean, I think the  
18 Court sees the dilemma for all, and in the end, I think we  
19 all know that the jury will accept some, reject some, but in  
20 the end, I think the jury's going to decide this case based  
21 upon the facts and not the polygraph. So I will respect your  
22 decision.

23 THE COURT: That's what I thought about Lee vs.  
24 Martinez.

25 Let me put it this way. You all -- I don't know what

1 else to tell you. I agree that there's issues to raise on  
2 cross-examination. I don't think the agreement says you  
3 don't get to cross-examine him on the technique used, and you  
4 can cross-examine him fully, but you pay your dollar and you  
5 take your chance, and that's where you are. I honestly think  
6 that direct-lie, I've got questions about all forms of direct  
7 control questions, but I think that the issue of whether or  
8 not it comes in under *Daubert*, *Alberico* has been decided by  
9 the Supreme Court in *Lee vs. Martinez*. That was decided. So  
10 there's the question: Is there any reasonable doubt? And  
11 you have the agreement, so that's the breaks.

12 We're going to take about a ten minute recess. I'll  
13 let you all take a break and, also, if you would talk to each  
14 other about the relevance issues, I don't need to hear  
15 arguments on the things you agree on, and I'll have Sammy  
16 check with you in ten minutes.

17 MR. RIGGS: Thank you, Your Honor.

18 (Note: Court in recess at 3:20

19 And reconvened at 3:35.)

20 THE COURT: We're back on the record.

21 MR. RIGGS: Judge, we're obviously now moving  
22 to -- can I argue from Counsel table?

23 THE COURT: Sure.

24 MR. RIGGS: I hate this podium. When you have a  
25 pile it is -- can we get another podium? I know that's being