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Michael J. Ligons

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Comment

Polygraph Evidence: Where Are We Now?

I. INTRODUCTION

Polygraph evidence has been the pariah of the courtroom since the adoption of the “general acceptance” test for the admission of scientific evidence in *Frye v. United States.* While the *Frye* court’s decision to exclude lie detector evidence was correctly based upon the state of polygraph technology at that time, many courts have subsequently failed to recognize the many advances in polygraphy and have excluded test results without further consideration. Indeed, polygraph evidence seems to be considered by courts, in practice if not in actual theory, to be sui generis. Recent trends toward the recognition of polygraph evidence as having a degree of reliability have resulted in many courts taking a new look at the admissibility of polygraph evidence. While many other courts have modified their outdated approaches to the admission of polygraph evidence, Missouri courts are still applying the *Frye* test and, it seems, are using any other available excuse to prevent the admission of polygraph evidence.

II. POLYGRAPHY

A. Polygraph Examination

The polygraph examination works on the principle that a person who is telling the truth has different physiological reactions than a person who is telling a lie. The polygraph machine is equipped with various sensors that can detect changes in “blood pressure-pulse, respiration, and galvanic skin resistance.” The machine measures changes in the subject’s physiological reactions as the examiner asks questions and records both the questions and the answers. These changes in the test subject’s physiological responses result from stress or fear of being discovered telling a lie. Therefore, the test subject’s belief in the accuracy of the results of the polygraph examination is needed to ensure an

1. 293 F. 1013 (D.C. Cir. 1923).
2. See infra notes 74-128 and accompanying text.
3. See infra notes 129-33 and accompanying text.
4. See infra notes 132-36 and accompanying text.
5. See infra notes 134-46 and accompanying text.
7. Id.
8. Id.
9. Id.
accurate test. If the subject is telling the truth but is worried that the test may falsely indicate deception, there is a possibility that the examiner will mistakenly attribute physiological responses to deception. Likewise, if the subject is telling a lie but is firmly convinced that the test will not reflect it, the examiner may not detect any physiological response.

While experts in polygraphy use several different methods of examining test subjects, one of the most common is the Control Question Technique (CQT).10 In CQT, the examiner asks three types of questions: neutral, relevant, and control.11 Neutral questions are those questions designed to determine the subject’s normal response to truthful answers.12 Examples of neutral questions are: “Is your name [subject’s name]?” or “Do you live at [subject’s address]?”13 Relevant questions are related to the subject matter of the examination.14 Examples of relevant questions are: “Did you [commit this crime]?” or “Do you know anything [about this crime]?”15 Control questions are more general questions dealing with areas similar to those covered in the subject matter questions.16 For example, “Before the age of 25, did you ever take anything that was not yours?” or “Before the age of 21, did you ever lie to get out of trouble?”17 Control questions are designed to make most people lie and so are also termed “probable lie questions.”18 The theory behind the use of control questions has been explained as follows: The control question deals with similar subject matter, is very general in nature, covers a long span of time and a large number of possible acts, and is almost impossible for most people to answer with an unequivocal “no” and with certainty that they are being completely truthful. If the subject answers “yes” to the control question, the examiner should ask about the incident and then ask, “Except for that incident [the subject of the original query]?” This process should continue until the subject answers “No.” Only then will the result be useful because only then has the subject indicated doubt about whether the answer is strictly true.19

The polygraph expert then examines the results—the subject’s physiological reactions in relation to the subject’s responses. The key to the

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11. See Gianelli, supra note 6, at 267.
12. See Gianelli, supra note 6, at 267.
13. See Gianelli, supra note 6, at 267.
14. See Gianelli, supra note 6, at 267.
15. See Gianelli, supra note 6, at 267.
16. See Gianelli, supra note 6, at 267.
17. See Gianelli, supra note 6, at 267.
18. See Gianelli, supra note 6, at 267.
analysis is in the comparison of the control questions and the relevant questions. "Generally, the truthful person will respond more to the control questions than to the relevant questions because they represent a greater threat to that person."20 The reverse is also true. Generally, the deceptive person will have a greater reaction to the relevant questions.21 The greater the difference between the subject's responses, the easier it is for the examiner to establish the conclusiveness of the test.22 In CQT, as well as in other testing methods, the examiner conducts a pre-test interview with the test subject.23 This interview is important for two reasons: (1) The examiner must demonstrate the accuracy of the test so that the physiological responses recorded will be accurate; and (2) the examiner must determine with particularity what questions will be asked.24 In order to ensure that the changes in physiological reactions, which the polygraph machine is designed to record, are a result of deception, the testee must believe that the machine is accurate.25 During the pre-test interview, the examiner will conduct a demonstration of, or give a lecture on, the machine's accuracy. The pre-test interview also allows the examiner to determine which questions should be asked.26 For example, if the subject is accused of committing a crime at a particular location and admits that he was at the location near the time of the crime, asking the subject if he was at the location of the crime may not be the best question. Presumably, it would be better to ask a more specific question about whether the subject committed the crime. However, if the subject denies being in the state on the day of the crime, asking the subject if he was at the location of the crime may be effective. The experience of the polygraph examiner is a relevant factor in the accuracy of polygraph examinations in all respects;27 however, it has been noted that the experience of the examiner is most important with regard to the pre-test interview.28

B. Admissibility of Scientific Evidence

As previously stated, Frye was the first case to address the issue of the admissibility of polygraph evidence. In Frye, the defendant offered an expert witness to testify to the result of a systolic blood pressure deception test.29 The court acknowledged that expert testimony is admissible in cases where the

20. Giannelli, supra note 6, at 267.
21. See Giannelli, supra note 6, at 267.
22. See Giannelli, supra note 6, at 267.
23. See Giannelli, supra note 6, at 266.
24. See Giannelli, supra note 6, at 266.
25. See Giannelli, supra note 6, at 266.
26. See Giannelli, supra note 6, at 266.
27. See Giannelli, supra note 6, at 263.
28. See Raskin, supra note 19, at 12.
question involved "does not lie within the common experience or common knowledge." However, the court held that, "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." The court went on to hold that the systolic blood pressure deception test had not gained the requisite general acceptance.

The "general acceptance" test espoused in Frye went on to become the primary test for admission of scientific evidence in nearly every state and federal court. Accordingly, Frye became the basis for excluding polygraph evidence in virtually every jurisdiction for fifty years. Thereafter, courts increasingly criticized use of Frye to exclude polygraph evidence. Critics of Frye began to argue, with a great deal of success, that the "general acceptance" test prohibited the use of reliable and useful techniques or principles until they had received widespread peer approval. Frye was also criticized for failing to explain how courts should connect novel techniques or methods to specific fields of science. Determining which scientific field was relevant was problematic, and courts expanded or narrowed the definition of the relevant field to manipulate admissibility of evidence. Further problems emerged when parties began to manipulate admissibility by asserting that the relevant field should be narrowed to a sub-specialty within that field.

Congress's enactment of the Federal Rules of Evidence in 1975 produced further ammunition for critics of Frye. Rule 702 deals with the admission of scientific evidence, and critics of Frye were quick to point out that neither the

30. Id.
31. Id.
32. Id.
35. See, e.g., U.S. v. Piccinonna, 885 F.2d 1529, 1532 (11th Cir. 1989); CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 203, at 628 (3d ed. 1984).
37. Id.
38. See Gianelli, supra note 6, at 1208-11.
39. See Gianelli, supra note 6, at 1208-11.
40. Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

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text of the Rule nor the Advisory Committee notes mention Frye. Therefore, the critics pointed out, the admissibility of scientific evidence under Rule 702 does not have to meet the Frye test. 

Finally, in 1993, the Supreme Court rejected Frye’s “general acceptance” test. In Daubert v. Merrell Dow Pharmaceuticals, Inc., the court held that the general acceptance requirement of Frye was at odds with the more liberal approach to the admissibility of opinion testimony contained in the Federal Rules. While the court recognized that the trial judge must still “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable,” the court went on to find that Frye was not, in and of itself, the proper test.

While holding that there is no definitive checklist or test that a trial judge should use when deciding admissibility, the court did suggest a nonexclusive list of factors that should be considered. These factors include: (1) whether the theory or technique can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the theory or technique’s known or potential rate of error; and (4) whether the theory or technique has been generally accepted within the relevant scientific community. Under this new standard, trial judges play a much larger role. Instead of merely asking what other scientists think of a particular technique or method, the judge now determines whether the proponent of the evidence has demonstrated that the evidence is “good evidence, perhaps in spite of what other experts think about it.”

Because each state has its own law of evidence, the effect that Daubert has had upon the states is somewhat varied. “Because Daubert was premised on an interpretation of a federal rule of evidence, its rejection of Frye is not binding authority for state courts.” Although some states now employ Daubert, or a similar approach, as their standard for analyzing the admissibility of scientific evidence...

42. Id.
44. Id. at 588.
45. Id. at 589.
46. Id. at 593.
47. Id. at 593-94.
evidence,\textsuperscript{50} some states continue to follow \textit{Frye}.\textsuperscript{51} Several states, including Missouri, have not addressed \textit{Daubert}'s effect in their jurisdictions.\textsuperscript{52}

III. ARGUMENTS AGAINST THE ADMISSIBILITY OF POLYGRAPH EVIDENCE

\textbf{A. Polygraph Unreliability}

Arguably, the most often cited reason for excluding polygraph results is that the polygraph test is unreliable.\textsuperscript{53} While the test’s accuracy rate is still being debated, it is clear that the modern polygraph is much more accurate than the systolic blood pressure deception test that was under examination in \textit{Frye}. One study by polygraph enthusiasts claims that ninety-four percent of all subjects can be tested accurately, with less than one percent error.\textsuperscript{54} Another study claims to

\textsuperscript{50} Fourteen states follow a standard for admissibility similar to \textit{Daubert}: Georgia, Hawai, Idaho, Maine, Nevada, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, and Wisconsin. Fourteen states have addressed the issue and now apply \textit{Daubert}: Arkansas, Connecticut, Delaware, Kentucky, Louisiana, Maryland, Massachusetts, Montana, New Mexico, Oklahoma, South Dakota, Vermont, West Virginia, and Wyoming. \textit{See} Loyd C. Peeples et al., \textit{Exculpatory Polygraphs in the Courtroom: How the Truth May Not Set You Free}, 28 CUMB. L. REV. 77, 115 n.60 (1997-1998).

\textsuperscript{51} Currently eleven states have considered \textit{Daubert} and rejected it in favor of \textit{Frye}: Alaska, Arizona, California, Colorado, Florida, Illinois, Kansas, Nebraska, New Jersey, New York, and Washington. \textit{See} Peeples, \textit{supra} note 50, at 115 n.61.

\textsuperscript{52} Eleven states have either merely noted \textit{Daubert} and taken no action to accept or reject it or have not addressed the issue at all: Alabama, Indiana, Iowa, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, North Dakota, Pennsylvania, and Rhode Island. \textit{See} Peeples, \textit{supra} note 50, at 115 n.62.

\textsuperscript{53} \textit{See}, e.g., United States v. Scarborough, 43 F.3d 1021, 1026 (6th Cir. 1994) (holding that polygraph results are “inherently unreliable”); People v. Baynes, 430 N.E.2d 1070, 1079 (Ill. 1981) (“Polygraph evidence is not reliable enough to be admitted.”); State v. Ulland, 943 P.2d 947, 954 (Kan. Ct. App. 1997) (stating that “the results of a polygraph examination are too unreliable to be admissible at trial”); Morgan v. Commonwealth, 809 S.W.2d 704, 706 (Ky. 1991) (“The results of polygraph examinations are unreliable and are therefore inadmissible in evidence.”); People v. Leone, 255 N.E.2d 696, 700 (N.Y. 1969) (holding that the polygraph’s reliability had not been established); Fulton v. State, 541 P.2d 871, 872 (Okla. Crim. App. 1975) (stating that polygraphs are not admissible because of “the potential unreliability of polygraph examinations”); Commonwealth \textit{ex rel.} Riccio v. Dilworth, 115 A.2d 865, 867 (Pa. Super. Ct. 1955) (“The reliability and scientific infallibility of the polygraph . . . must be more definitely established before our courts will accept their results as credible.”); Lee v. Commonwealth, 105 S.E.2d 152, 155 (Va. 1958) (“stating that [polygraph] tests generally have not as yet been proved scientifically reliable”); Peeples, \textit{supra} note 50, at 93.

\textsuperscript{54} \textit{John E. Reid \& Fred E. Inbau, Truth and Deception: The Polygraph} ("LIE
have achieved definite results 95.6% of the time, with only three known errors out of 4,093 reports.\textsuperscript{55} Two other experimental studies reported that a experienced polygraph examiner could correctly identify one hundred percent of all innocent students, and eighty-eight to ninety-four percent of all guilty students.\textsuperscript{56} In yet another carefully controlled study, experts concluded that polygraph examiners can determine truth or deception in better than eighty-seven percent of all cases.\textsuperscript{57}

While it is certainly understandable why the fallibility of polygraph evidence would cause concern with its admission, it is unclear why this creates a complete bar to admission. Courts routinely allow admission of scientific evidence that cannot be verified as one hundred percent accurate.\textsuperscript{58} Various courts have admitted expert evidence of controversial scientific reliability, such as psychological evidence of child abuse,\textsuperscript{59} post-hypnotic identification by a victim,\textsuperscript{60} evidence concerning rape trauma syndrome,\textsuperscript{61} and evidence concerning battered women syndrome.\textsuperscript{62} While psychiatric judgment expert testimony and polygraphy may be used to prove vastly different types of evidence, there is no escaping the fact that expert testimony concerning psychiatric judgments is far less reliable than polygraph results.\textsuperscript{63} However, it has long been accepted as standard practice to admit expert psychiatric testimony. If one accepts the proposition that psychiatric judgment testimony is less reliable than, or at least only as reliable as, polygraph evidence, then the reliability argument seems to be applied differently with regards to the two types of evidence. While it is true that the two types of evidence are admitted for different purposes, there does not seem to be any reason to admit unreliable evidence for one purpose and not the other. Presumably, as with psychiatric testimony, argument from the party opposing the evidence and rebuttal testimony from her own expert would sufficiently apprise the trier of fact of the fallibility of the polygraph results.

\textsuperscript{55} See Fred E. Inbau, Lie Detection and Criminal Interrogation (1968).

\textsuperscript{56} See P.O. Davidson, Validity of the Guilty Knowledge Technique: The Effects of Motivation, 52 J. Applied Psychol. 63-64 (1968).

\textsuperscript{57} See Frank S. Hovarth et al., The Reliability of Polygraph Examiner Diagnosis of Truth and Deception, 62 J. Crim. L. Criminology 276 (1971).

\textsuperscript{58} See Bruce J. Ennis et al., Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Cal. L. Rev. 693 (1974).

\textsuperscript{59} See United States v. Tsinnijinnie, 91 F.3d 1285, 1288 (9th Cir. 1996).

\textsuperscript{60} See White v. Ieyoub, 25 F.3d 245, 247 (5th Cir. 1994).


\textsuperscript{63} Id. at 736.
B. Lack of Standardized Procedures

Another often cited reason for excluding polygraph evidence under Frye is the lack of standardized procedures in administering the actual polygraph test and in qualifying test examiners. With the adoption of the Daubert standard, courts will rarely be able to refuse to admit polygraph evidence on this basis so long as the evidence appears to be reliable in each individual case. Even in those jurisdictions that still follow Frye, this problem could easily be remedied by the adoption of standardized procedures for polygraph examiners. In United States v. Dominguez, a Texas federal court proposed several factors to be considered in determining whether polygraph evidence should be considered reliable:

(1) That all parties be present to observe the proceedings. (2) That there be a legal commitment irrevocably allowing the admission of the results by both sides. (3) That the subject commit to be examined by any polygraphic expert designated by the other side. (4) When more than one exam is contemplated, the choice of the first examiner take place by chance. (5) That the pre-test interview be allowed by all sides with all sides present. (6) That the post-test interview be allowed by all sides with all sides present. (7) That immediately prior the test the subject be examined for any sedative or drugs in his body. (8) That the rules that do not admit character evidence for truthfulness be legally waived. (9) That no questions be permitted to the mental state of the defendant at the time of the alleged commission of the event. (10) The failure of the Defendant to make himself available to testify in the case should also be a consideration.

These factors could be adopted, in whole or in part, as standard procedures. However, Frye contemplated that the standardized procedures would be adopted by the scientific community because of necessity and would thus be indicative of reliability. Judicial adoption of standardized procedures would not fix the problem, but would merely cover up the deficiency.


65. See supra note 48 and accompanying text.


67. Id. at 740-41 (footnote omitted).
C. Undue Influence on the Jury

While the two previously discussed problems may be, at least to a large degree, remedied through scientific advancements and improvements in the polygraph field, the undue influence argument would seem to apply to a polygraph examination with one hundred percent reliability. It is often stated that polygraph evidence will infringe upon the province of the jury to determine credibility of witnesses and will have an undue influence on the jury’s decision.68 This argument ignores the safeguards inherent in our judicial system: the judge may give instructions regarding the evidence,69 lawyers may argue the relative fallibility of polygraph testing, and the jury will have the good sense to weigh the evidence according to its value.70 Moreover, the same rationale supporting the argument for the exclusion of polygraph evidence because of undue influence is applicable to other probative scientific evidence, such as rape trauma syndrome evidence, which is nonetheless routinely admitted.71

D. Other Evidentiary Objections

As courts become more willing to ignore the arguments outlined above for exclusion of polygraph evidence, they will be forced to deal with nonscientific evidentiary objections.72 Three objections often tendered in this vein are that: (1) testimony concerning polygraph results violates the hearsay rule; that (2) testimony concerning polygraphy results is inadmissible unless the accused elects to testify at trial; and that (3) testimony concerning polygraphy results is inadmissible as proof of the subject’s character trait of truthfulness.73

68. See Peeples, supra note 50, at 94-95.
69. For example, the judge could instruct the jury that the evidence may be used in the determination of a specific issue and not for the determination of the ultimate guilt or innocence of the accused.
71. See ROBERT J. GOODWIN & JIMMY GURULE, CRIMINAL AND SCIENTIFIC EVIDENCE 52, 382-409 (1997). The authors explain how expert testimony concerning rape trauma syndrome affects the weight of the evidence at trial. “In cases that are essentially swearing matches between the accused and the victim, expert testimony that the victim suffered from symptoms that are associated with forcible rape strengthens the case for lack of consent.” Id. at 385.
72. As used in this Comment, “nonscientific evidentiary objections” are objections that are not based on the outcome of the Frye or Daubert approaches to admissibility.
73. See Edward J. Imwinkelried et al., Issues Once Moot: The Other Evidentiary Objections to the Admission of Exculpatory Polygraph Examinations, 32 WAKE FOREST L. REV. 1045 (1997).
IV. APPROACHES TO ADMISSIBILITY

Jurisdictions approach the admissibility of polygraph evidence in a variety of ways. Courts generally employ one of three main approaches: per se inadmissibility, stipulated admissibility, and admissibility under certain circumstances.

A. Per Se Inadmissibility

From the Frye decision in 1923 until 1974, no appellate court upheld a trial court’s admission of polygraph evidence. Following Frye, most jurisdictions adopted the rule that polygraph evidence was not admissible under any circumstances, or, in other words, was per se inadmissible. Under this approach, polygraph evidence by either party is barred regardless of its purpose. Per se inadmissibility is the most widely adopted approach among the states.

Per se inadmissibility poses constitutional problems with regard to exculpatory polygraph results. The right of the criminal defendant to present evidence in his defense is based on both the Sixth Amendment Compulsory


75. Id.

Process Clause and the Fifth Amendment Due Process Clause.\textsuperscript{77} The Supreme Court generally has been very diligent in protecting this constitutionally guaranteed right.\textsuperscript{78} However, in \textit{United States v. Scheffer},\textsuperscript{79} the Court, in an eight to one decision, upheld the constitutionality of a military rule excluding any polygraph evidence, including that which is exculpatory, from being used in courts-martial.\textsuperscript{80} It should be noted, however, that in making this ruling, four of the concurring justices believed that the per se ban was "unwise."\textsuperscript{81} In order to form a better understanding of the decision in \textit{Scheffer}, it is necessary to examine \textit{Chambers v. Mississippi}\textsuperscript{82} and \textit{Rock v. Arkansas}.\textsuperscript{83}

In \textit{Chambers}, the Supreme Court held that the defendant's due process rights were violated by a state hearsay rule that had compromised the defendant's right to call witnesses in his behalf.\textsuperscript{84} A trial court in Mississippi had convicted Chambers of murdering a policeman.\textsuperscript{85} After Chambers had been arrested for the crime, another man, McDonald, repeatedly confessed to having committed the murder.\textsuperscript{86} Of course, Chambers's main defense was that McDonald, the confessor, and not Chambers, actually committed the murder.\textsuperscript{87} The prosecution did not call McDonald as a witness for the state, but Chambers called McDonald as a defense witness.\textsuperscript{88} McDonald repudiated his prior confession on the stand, and the prosecution argued that McDonald was not an

\textsuperscript{77} For a detailed discussion of the right to present a defense, see Robert N. Clinton, \textit{The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials}, 9 IND. L. REV. 711 (1976).

\textsuperscript{78} See, e.g., Washington v. State, 388 U.S. 14, 16-17 (1967) (invalidating a Texas statute that provided that "persons charged or convicted as coparticipants in the same crime could not testify for one another, although [they could testify] for the State" on the grounds that the defendant's right to have compulsory process was violated in that the state "arbitrarily denied him the right to put on the stand a witness . . . whose testimony would have been relevant and material to the defense"); Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (holding that when the constitutional right to present evidence in one's defense is directly affected "the hearsay rule may not be applied mechanistically" because "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense"); Rock v. Arkansas, 483 U.S. 44, 61 (1987) (striking down a per se exclusion of hypnotically refreshed recollection asserting that "[a] State's legitimate interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in an individual case").

\textsuperscript{79} 523 U.S. 303 (1998).

\textsuperscript{80} \textit{Id.} at 317.

\textsuperscript{81} \textit{Id.} at 317.

\textsuperscript{82} 410 U.S. 284 (1973).

\textsuperscript{83} 483 U.S. 44 (1987).

\textsuperscript{84} \textit{Chambers}, 410 U.S. at 302.

\textsuperscript{85} \textit{Id.} at 285.

\textsuperscript{86} \textit{Id.} at 287-88.

\textsuperscript{87} \textit{Id.} at 289.

adverse witness because he had never implicated Chambers. The trial judge agreed with the argument and did not allow Chambers to cross-examine McDonald as an adverse witness.

In support of his defense, Chambers sought to introduce testimony from three witnesses that they each heard McDonald say that he committed the murder. The court ruled that the testimony was inadmissible hearsay. In addressing the trial judge's hearsay ruling, the Supreme Court noted that when a constitutional right such as the right to present evidence in one's defense is directly affected, "the hearsay rule may not be applied mechanically to defeat the ends of justice." Additionally, the Court noted that the right to present witnesses on one's behalf is an essential component of due process. The Court held that Chambers's due process rights had been violated and reversed the conviction.

The Court did not, however, go so far as to rule that all evidence favorable to the defendant should be admitted. The Court tempered its holding by stating that "[i]n reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." The Court also noted that "the right to confront and cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Chambers stands for the proposition that exclusionary rules conflicting with a defendant's constitutional due process rights will be subject to stricter review.

In Rock, the Supreme Court applied Chambers to strike down a per se exclusion of hypnotically refreshed recollection. A state court had convicted Rock of manslaughter for shooting her husband. Rock had shot her husband during an argument that evolved into a scuffle. After the incident, Rock could not remember the details of the shooting. At the advice of her counsel, Rock...
submitted to two sessions with a neuropsychologist trained in hypnosis. Therefore, Rock's testimony contained only testimony about her recollection before she underwent hypnosis. In affirming the trial court, the Arkansas Supreme Court held that hypnotically refreshed testimony is per se inadmissible. In deciding Rock, the Supreme Court had to decide whether Arkansas's per se inadmissibility rule invaded Rock's right to present evidence in her defense. The Court noted that the Compulsory Process Clause grants a defendant the right to call witnesses on his behalf and applies to the states through the Fourteenth Amendment. The Court stated that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purpose they are designed to serve. In applying its evidentiary rules, a state must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." The Court ruled that the Arkansas Supreme Court's ruling was improper and held that the per se inadmissibility rule "infringed impermissibly on the right of the defendant to testify on his or her own behalf."

Rock's holding, of course, is confined to hypnotically refreshed testimony. However, the Rock Court's rationale is applicable to polygraph evidence. Before this decision, state and federal courts had developed three standards of admissibility for hypnotically refreshed testimony: per se admissibility, per se inadmissibility, and a qualified admissibility based on an adherence to procedural safeguards. Courts have developed similar standards for the admissibility of polygraph evidence. Additionally, it should be noted that in its holding in Rock, the Supreme Court asserted that "[a] state's legitimate interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in an individual case." While the facts of Rock limit this statement, it is clear that a defendant should have the opportunity to argue the admissibility of reliable exculpatory evidence on a case-by-case basis.

102. Id. at 46-47.
103. Id. at 47.
104. Id.
105. Id.
108. Id.
109. Id. at 62.
111. Rock, 483 U.S. at 61.
Taken together, Chambers and Rock stand for the proposition that a defendant’s constitutional rights to due process require that rules which interfere with the defendant’s right to present a defense must be examined closely in order to prevent a denial of those constitutional rights. These cases further illustrate that this inquiry should be made on a case-by-case basis.

In Scheffer, however, the Supreme Court ruled that a per se ban on polygraph evidence was permissible despite statements contained in Chambers and Rock which suggested a contrary result.113 Edward Scheffer, an airman in the United States Air Force, was an informant in drug investigations of the Air Force Office of Special Investigations (OSI).114 From time to time, OSI asked Scheffer to submit to drug and polygraph testing.115 In early April 1992, Scheffer provided a urine sample and agreed to take a polygraph test before the results of the urinalysis were known.116 It was the opinion of the polygraph examiner that the test indicated “no deception” when Scheffer denied any drug use.117 Shortly thereafter, Scheffer went AWOL (Absent Without Leave) for approximately two weeks until being discovered by the Iowa state patrol during a routine traffic stop.118 OSI agents later learned that Scheffer’s urinalysis revealed the presence of methamphetamine.119

Scheffer was tried by general court martial on charges of using methamphetamine as well as being AWOL and uttering seventeen insufficient fund checks.120 Scheffer denied having knowingly ingested methamphetamine and sought to introduce his polygraph results as evidence in support of his testimony.121 The military judge excluded the testimony, relying on Military Rule of Evidence 707, which provides, in pertinent part: “Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.”122 Scheffer was convicted.123 The United States Court of Appeals for the Armed Forces reversed the conviction and held that “[a] per se exclusion of polygraph evidence offered by an accused to rebut an attack on his credibility . . . violates his Sixth Amendment right to present a defense.”124

114. Id. at 305.
115. Id.
116. Id. at 305-06.
117. Id. at 306.
118. Id.
119. Id.
120. Id.
121. Id.
122. Id. at 306-307.
123. Id. at 307.
reversed and stated that “[a] defendant’s right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions.”\textsuperscript{125} The Court’s opinion, written by Justice Thomas and joined by Justices Rehnquist, Scalia, and Souter, determined that Rule 707 served the legitimate interests of “ensuring that only reliable evidence is introduced at trial, preserving the jury’s role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial.”\textsuperscript{126} However, the concurring opinion, written by Justice Kennedy and joined by Justices O’Connor, Ginsburg, and Breyer, agreed that preserving the jury’s role in determining credibility and avoiding litigation of collateral issues were legitimate interests that justified a per se exclusion of polygraph results.\textsuperscript{127} Nonetheless, the concurring opinion agreed that “various courts and jurisdictions ‘may reasonably reach differing conclusions as to whether polygraph evidence should be admitted.’”\textsuperscript{128}

While Scheffer gives constitutional validity to per se inadmissibility of polygraph evidence, it should be noted that a majority of the Justices (Kennedy, O’Connor, Ginsburg, Breyer, and Stevens) believed that per se exclusion of polygraph evidence is unwise,\textsuperscript{129} with Justice Stevens considering per se exclusion unconstitutional.\textsuperscript{130}

\section*{B. Admissibility By Stipulation}

Several states admit polygraph evidence if the parties have stipulated to its admissibility before a polygraph test is administered.\textsuperscript{131} A typical stipulation will include the following: (1) The defendant will submit to a polygraph test; (2)

\begin{itemize}
  \item \textsuperscript{125} United States v. Scheffer, 523 U.S. 303, 308 (1998).
  \item \textsuperscript{126} Id. at 309.
  \item \textsuperscript{127} Id. at 318.
  \item \textsuperscript{128} Id. at 318 (quoting majority opinion, id. at 312).
  \item \textsuperscript{129} Id. at 318.
  \item \textsuperscript{130} Id. at 320.
\end{itemize}
The polygraph results and the examiner's opinion thereon will be admissible at trial; (3) The judge may refuse to admit such evidence if the examiner is found to be unqualified or the test is found to have been conducted under improper circumstances; (4) The party opposing the offer of evidence shall have the right to cross-examine the examiner; and (5) the judge will give a limiting instruction to the jury on the weight of the examiner's testimony.  

The admission of polygraph by stipulation, while less offensive to constitutional sensibilities than the per se inadmissibility approach, still does not address fully the constitutional issues or other aspects of admissibility. For instance, how does mere stipulation make evidence, which otherwise would be considered inadmissible because of its lack of reliability, suddenly sufficiently credible? It would seem that the stipulation does not make the evidence any more reliable. In fact, a practical consequence is that stipulated evidence may be less reliable. For example, if a defendant stipulates before the test that the results will be admissible, it is likely that he is either innocent or believes that he knows how to manipulate the test. If he is innocent and the test inaccurately shows deception, the results will nonetheless be admissible. Likewise, an attempt at manipulation, or a firm belief in one's ability to manipulate the test, will have an affect on the results. Additionally, if the prosecution does not enter into the stipulation, the defendant is still faced with the problem of not being able to admit exculpatory evidence.

C. Admissibility Under Certain Circumstances

Many jurisdictions, regardless of whether they generally adhere to admissibility by stipulation or per se inadmissibility, will otherwise admit polygraph evidence under certain circumstances. The most typical exception is when the polygraph evidence is introduced for a limited purpose unrelated to

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132. Ronald J. Simon, Adopting a Military Approach to Polygraph Evidence Admissibility: Why Federal Evidentiary Protections Will Sufice, 25 TEX. TECH. L. REV. 1055, 1069 (1994); see also State v. Valdez, 371 P.2d 894, 900-01 (Ariz. 1962) (setting forth the following qualifications for admissibility: (1) any stipulation must be in writing; (2) notwithstanding any stipulation, admissibility is subject to the trial judge's discretion; (3) the opposing party retains the right to cross-examine the expert; and (4) the trial judge should provide a detailed instruction to the jury concerning the weight of the evidence and the purpose for which it is admitted).

133. See, e.g., State v. Catanese, 368 So. 2d 975, 982 (La. 1979) (admissible in certain post-trial proceedings); State v. Baldwin, 808 S.W.2d 384, 392 (Mo. Ct. App. 1991) (admissible to rebut a negative inference raised by the protesting party); State v. Dorsey, 539 P.2d 204, 204-05 (N.M. 1975) (admissible if (1) the operator was qualified, (2) the testing procedures were reliable, and (3) the test of the particular subject was valid); State v. Wright, 471 S.E.2d 700, 701 (S.C. 1996) (admissible at trial judge's discretion); State v. Blake, 478 S.E.2d 550, 557 (W. Va. 1996) (admissible to impeach a witness).
the substantive correctness of the results.\textsuperscript{134} For example, where admission of polygraph evidence is necessary to show that a test was given, regardless and irrespective of the results.\textsuperscript{135} For this limited purpose, considerations of \textit{Daubert}, \textit{Frye}, and constitutional issues are irrelevant.

V. MISSOURI

Missouri, along with several other states, has not adopted the \textit{Daubert} standard for the admission of scientific evidence. The Missouri Supreme Court has consistently applied only the \textit{Frye} test to the admission of expert testimony since \textit{State v. Stout} in 1972.\textsuperscript{136} Missouri lower courts have not adopted the \textit{Daubert} standard, despite various opportunities to do so.\textsuperscript{137} This is true despite the state legislature’s adoption of a statute that contains wording nearly identical to the federal rule on which the \textit{Daubert} decision was based.\textsuperscript{138} Missouri courts

\textsuperscript{134} See, e.g., United States v. Hall, 805 F.2d 1410, 1416-17 (10th Cir. 1986) (admitting evidence concerning the fact that the defendant had failed a polygraph examination in order to rebut an attempt by the defendant to impugn the quality of the Government’s investigation); Tyler v. United States, 193 F.2d 24, 29 (D.C. Cir. 1951) (admitting testimony concerning the fact that the defendant confessed after he had been told that he had “failed” a lie detector test in order to reveal the circumstances leading up to the confession); State v. Baldwin, 808 S.W.2d 384, 392 (Mo. Ct. App. 1991) (allowing the state to introduce evidence that a polygraph examination was given to rebut negative inference created by the defendant’s testimony about the length of his interrogation).

\textsuperscript{135} See, e.g., United States v. Miller, 874 F.2d 1255, 1261 (9th Cir. 1989), \textit{cert. denied}, 510 U.S. 894 (1993); United States v. Bowen, 857 F.2d 1337, 1341 (9th Cir. 1988).

\textsuperscript{136} 478 S.W.2d 368 (Mo. 1972).


\textsuperscript{138} MO. REV. STAT. Section 490.065 reads as follows:

1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will
have rejected the argument that the adoption of this statute requires application of Daubert rather than Frye.\footnote{139}

In applying the Frye “general acceptance” test to polygraph evidence, the courts have, in the end, adopted the per se inadmissibility rule, concluding that “examination results lack wide scientific approval of their reliability and are inadmissible.”\footnote{140} Additionally, the Missouri Supreme Court has said that polygraph tests are not uniformly sanctioned by the scientific community, they contain a high degree of interpretive subjectivity, they are not susceptible to in-court examinations and testing, and they are subject to an unusually high degree of reliance by juries.\footnote{141}

For a period of time, Missouri courts allowed the introduction of polygraph by stipulation of the parties. In State v. Fields,\footnote{142} a division of the supreme court held that admission of polygraph evidence after a pre-trial waiver of objections by the parties did not infringe upon any of the defendant’s constitutional rights or privileges.\footnote{143} Despite the narrow holding of Fields, appellate courts began to read the holding as permitting the admission of polygraph results where the defendant had waived objections by a prior stipulation.\footnote{144} It was not until 1980, in State v. Biddle,\footnote{145} that the Missouri Supreme Court again addressed the issue and held that polygraph evidence is per se inadmissible notwithstanding a prior stipulation.\footnote{146}

\footnote{139} See, e.g., Kinder, 942 S.W.2d at 326; Swain, 977 S.W.2d at 86.
\footnote{140} State v. Biddle, 599 S.W.2d 182, 191 (Mo. 1980).
\footnote{141} Id. at 187-90.
\footnote{142} 434 S.W.2d 507 (Mo. 1968).
\footnote{143} Id. at 515.
\footnote{144} See, e.g., State v. Scott, 570 S.W.2d 813, 814-15 (Mo. Ct. App. 1978) (holding that “the results of the polygraph examination administered to the defendant would have been inadmissible as evidence because they lacked scientific support for their reliability. However, the written stipulation entered into between the parties gave the polygraph examination administered to defendant a legal aura of reliability, thereby infusing the conclusive results obtained with probative value.”) (citations omitted); State v. Mick, 546 S.W.2d 508, 509 (Mo. Ct. App. 1976) (stating that “[h]owever anomalous it may be, the parties, by stipulation, may waive objections to the admission of polygraph examinations and their results, and in that sense imbue them with reliability and probative value”).
\footnote{145} 599 S.W.2d 182 (Mo. 1980).
\footnote{146} Id. at 185-87. The court listed seven reasons for its holding:
(1) A polygraph test is not independent proof of any fact, but merely bears on the credibility of the defendant.
(2) The admission of the polygraph test has such an impact on the jury that the truth seeking function of the trial will be destroyed.
(3) Unreliable evidence should not play a major part in the conviction or acquittal of a person charged with a crime.

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While generally applying the per se inadmissibility rule, Missouri courts have occasionally admitted polygraph evidence for specific purposes under certain circumstances. It is well established in Missouri that evidence which would otherwise be inadmissible is admissible in order to rebut an inference created by the opposing party.\textsuperscript{147} Missouri courts seem reluctant to apply this premise to polygraph evidence, but have done so in appropriate circumstances.\textsuperscript{148}

VI. CONCLUSION

After \textit{Scheffer}, it is clear that Missouri, at least for the time being, is on constitutionally solid ground in regarding polygraph evidence as per se inadmissible. However, it is becoming equally clear that, with the scientific and technological advances of polygraph technology, Missouri may be excluding evidence which is both reliable and probative in some circumstances. It is obvious after \textit{Scheffer} that either a change in the make-up of the Supreme Court, or the development or discovery of better indications that polygraph evidence is reliable in certain circumstances, could mean that a per se exclusion of polygraph evidence may be found to violate the constitutional rights of an accused in a \textit{Frye} jurisdiction. It is equally clear after \textit{Scheffer} that a per se exclusion is probably a violation of an accused's constitutional rights in a \textit{Daubert} jurisdiction today.

In light of these new possibilities, Missouri courts should begin to re-examine the arguments for and against the admission of polygraph evidence to make certain that this evidence is not being rejected merely on reflex. While the problems of admitting polygraph evidence are numerous and should not be taken lightly, the constitutional right of the accused to present exculpatory evidence may require that Missouri move away from per se exclusion toward a more individualized, case-by-case determination.

\textbf{Michael J. Ligons}

\textsuperscript{4} A stipulation cannot make unreliable evidence reliable.
\textsuperscript{5} A stipulation that makes unreliable evidence admissible is contrary to public policy.
\textsuperscript{6} A stipulation that unreliable evidence is reliable is really a stipulation of law and therefore invalid.
\textsuperscript{7} It would be inconsistent for a court to refuse to admit polygraph tests into evidence because they are unreliable and then admit them into evidence by stipulation.

\textit{Id.} at 187 (quoting People v. Monigan, 390 N.E.2d 562, 563 (Ill. 1979)).

\textsuperscript{147} See State v. Odom, 353 S.W.2d 708, 711 (Mo. 1962).

\textsuperscript{148} See, \textit{e.g.}, State v. Baldwin, 808 S.W.2d 384, 387 (Mo. Ct. App. 1991) (allowing the state to introduce evidence that a polygraph examination was given to rebut negative inference created by the defendant's testimony about the length of his interrogation).