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STIPULATION CANNOT MAKE POLYGRAPH RESULTS ADMISSIBLE

State v. Biddle[1]

The defendant, Thomas Biddle, was arrested and charged with robbing an Otterville, Missouri liquor store.[2] Before trial, the defendant submitted to a polygraph examination[3] and, pursuant to a stipulation, agreed to the admission of the polygraph results at trial.[4] The polygraph examiner testified that the defendant's responses to questions about the robbery indicated deception. The trial court denied Biddle's motion to suppress the polygraph evidence, and he was convicted of first degree robbery.[5]

The Missouri Court of Appeals for the Western District reversed, finding that the polygraph evidence was inadmissible; consequently, the evidence was insufficient to sustain a conviction.[6] The case was transferred to the Missouri Supreme Court on certification by a dissenting judge that the decision was contrary to existing authority.[7] The supreme court upheld the court of appeals[8] and absolutely prohibited the admission of polygraph examination results.[9]

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1. 599 S.W.2d 182 (Mo. En Banc 1980).
2. *Id.* at 184.
3. The polygraph is a pneumatically operated machine that records changes in blood pressure, pulse, and respiration, supplemented with a unit for recording galvanic skin reflexes. The theory behind polygraphy is that a subject's attempt to deceive will result in measurable, involuntary physiological changes that will be recorded by the polygraph and interpreted by the examiner. J. REID & F. INBAU, TRUTH AND DECEPTION 4 (1966).

   An extensive discussion of the polygraph technique is beyond this casenote. *See generally id.*; Abrams, *Polygraphy Today*, 3 NAT'L J. CRIM. DEF. 85 (1977); Axelrod, *The Use of Lie Detectors by Criminal Defense Attorneys*, 3 NAT'L J. CRIM. DEF. 107 (1977); Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 YALE L.J. 694 (1961).
4. The stipulation provided that either party would be permitted to introduce the results of the polygraph examination in evidence. 599 S.W.2d at 185.
5. *Id.*
6. *Id.*
7. One of the court of appeals judges dissented and certified for the purpose of transfer to the supreme court that the court of appeals opinion was in conflict with State v. Fields, 434 S.W.2d 507 (Mo. 1968), regarding the admissibility of polygraph examination results and the sufficiency of the evidence to sustain a conviction. 599 S.W.2d at 184-85.
8. 599 S.W.2d at 195.
9. *Id.* at 191.

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The supreme court first considered the admissibility of polygraph examination results in *State v. Cole.*[10] Cole contended that the trial court erred in excluding expert testimony about the effectiveness of the polygraph and in refusing appellant's request to be subjected to the lie detector test.[11] Relying on the general scientific acceptance test first enunciated in *Frye v. United States*,[12] the court held that the lie detector technique had not received the requisite "wide scientific approval" necessary for the results to be admissible in evidence.[13] After *Cole*, Missouri courts routinely held results of lie detector examinations to be inadmissible.[14]

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10. 354 Mo. 181, 188 S.W.2d 43 (1945). Cole was charged with first degree murder. At trial Cole denied his guilt and testified that the police coerced his written confession with beatings. The trial court convicted Cole of first degree murder and imposed the death penalty. *Id.* at 183-88, 188 S.W.2d at 45-48.

11. *Id.* at 192, 188 S.W.2d at 50. Cole also assigned as error the trial court's overruling of his motion that all witnesses be subjected to lie detector tests. *Id.* at 191, 188 S.W.2d at 50. The supreme court held that witnesses could not be subjected to such "inquisitorial and deceptive tests without their consent," and observed that the use of the lie detector machine before the jury would serve only to "distract them and impede the trial." *Id.* at 193, 188 S.W.2d at 51.

12. 293 F. 1013 (D.C. Cir. 1923). In *Frye*, the trial court excluded the testimony of a scientist who conducted a systolic blood pressure deception test, the forerunner of today's polygraph, on the defendant and refused the defendant's offer to have the scientist conduct the test in the presence of the jury. The jury convicted Frye of second degree murder. The appellate court sustained the actions of the trial court and set forth the test that has been the basis for the exclusion of the results of polygraph examinations in evidence for over half a century:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and 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.
>
> We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among *physiological and psychological authorities* as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.

Id. at 1014 (emphasis added).

13. 354 Mo. at 193, 188 S.W.2d at 51. In overruling defendant's assignments of error, the court actually gave two reasons: "[s]uch tests should not be made before the jury during the trial . . . and appellant's offer of proof did not show that method of detecting guilt had sufficient scientific support." *Id.* at 193, 188 S.W.2d at 51. The court admitted that the lie detector "may point to evidence which is competent," but found that "it has no place in the courtroom." *Id.* at 193, 188 S.W.2d at 51.

14. *See, e.g.*, State v. Weindorf, 361 S.W.2d 806, 811 (Mo. 1962); State v. Stidham, 305 S.W.2d 7, 8 (Mo. 1957).

A later supreme court decision, however, weakened the prohibition on polygraph evidence. In *State v. Fields*,[15] the defendant waived any objection to the prosecution's evidential use of the polygraph examination results.[16] The defendant appealed, arguing that the admission of such evidence violated his constitutional rights.[17] The *Fields* court expressly declined to rule on the admissibility of polygraph evidence in regard to its scientific reliability.[18] The court noted that a defendant may waive his constitutional rights if the waiver is intelligent and voluntary.[19] The court ended its analysis of Fields' polygraph stipulation by stating, "[N]one of defendant's constitutional rights or privileges were infringed, *under these circumstances*, by the admission of this evidence. The weight of the evidence was solely for the jury, in the light of a most extensive cross-examination."[20] Relying on these two sentences in *Fields*, subsequent appellate decisions held the results of polygraph examinations to be admissible[21] if there had been a prior stipulation.[22]

The *Biddle* court's holding subjects all polygraph evidence to complete exclusion.[23] The court rejected the popular interpretation that *Fields* provided for the admission of stipulated polygraph evidence and held that *Fields*

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15. 434 S.W.2d 507 (Mo. 1968). In *Fields*, the defendant, charged with armed robbery, pleaded not guilty and requested that he be given a lie detector test. *Id.* at 509-10.

16. The defendant, his counsel, and the prosecutor executed a stipulation that was filed and approved by the court. The stipulation provided that the defendant waived "absolutely and irrevocably each and every objection to the use in evidence by the prosecution of the results of said test." In the stipulation the defendant specifically agreed that the examiner should be permitted to testify without objection about the test and its results, including whether defendant's answers were truthful or not. *Id.* at 511.

17. *Id.* at 512. The defendant contended that the admission of the polygraph evidence violated his rights under U.S. CONST. amend. IV, V & XIV and MO. CONST. art. 1, §§ 10 & 19.

18. 434 S.W.2d at 513.

19. *Id.* at 515.

20. *Id.* (emphasis added). The holding in *Fields* was meant to be very narrow, applying only to the circumstances of this particular case. *See* 599 S.W.2d at 186. For a more detailed analysis of *Fields*, see *Judicial Acceptance of Results of Scientific Evidence—The Paraffin Test and the Polygraph*, 34 MO. L. REV. 592 (1969).

21. *See, e.g.*, State v. Hughes, 594 S.W.2d 630, 632 (Mo. App., E.D. 1980); State v. Stowers, 580 S.W.2d 516, 518 (Mo. App., E.D. 1979); State v. Scott, 570 S.W.2d 813, 815 (Mo. App., K.C. 1978).

22. *See* State v. Scott, 570 S.W.2d 813, 813 (Mo. App., K.C. 1978) ("[T]he 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."); State v. Mick, 546 S.W.2d 508, 509 (Mo. App., K.C. 1976) ("However 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.").

23. 599 S.W.2d at 191.

had been misread.[24] Although recognizing the various approaches taken by courts in other jurisdictions,[25] the court chose the most restrictive stance on polygraph evidence. The court's primary reasons for holding polygraph examination results inadmissible in evidence were the polygraph's lack of reliability[26] and the concern that polygraph evidence invades the province of the jury.[27]

The court began its analysis by agreeing that evidence lacking scientific reliability cannot be made admissible by stipulation.[28] Starting from this premise, the court addressed the issue left unanswered by the *Fields* decision: the scientific reliability of the polygraph examination.[29] The *Biddle* court found that since *Cole*, the advances in polygraph technology have not made polygraph examination results sufficiently reliable for admission in evidence.[30] In support of this conclusion, the court quoted *People v. Monigan*,[31]

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24. *Id.* at 186. The court reaffirmed *Fields*, "limiting that decision to the issue regarding a voluntary and intelligent waiver of a constitutional right against self-incrimination." *Id.*

25. *See* notes 57-63 and accompanying text *infra*.

26. 599 S.W.2d at 191.

27. *Id.* These are basically the same two reasons the court relied on to exclude the polygraph evidence in State v. Cole, 354 Mo. 181, 193, 188 S.W.2d 43, 51 (1945). *See* note 13 *supra*.

28. 599 S.W.2d at 188. The court also pointed out that parties cannot make evidence admissible by written stipulation. *Id.* (citing State v. Frazier, 252 S.E.2d 39, 46 (W. Va. 1979), *cited with approval in* People v. Monigan, 72 Ill. App. 3d 87, 93, 390 N.E.2d 562, 566 (1979)). *See also* Stine v. Kansas City, 458 S.W.2d 601, 606 (Mo. App., K.C. 1970).

The view that otherwise inadmissible evidence may be rendered admissible by a stipulation has been criticized as logically unsound. *See The Role of the Polygraph in Criminal Trials under Massachusetts Law and the Federal Rules of Evidence*, 15 NEW ENG. L. REV. 837, 841 (1980). The theory usually advanced for allowing admission of stipulated polygraph evidence is based on estoppel. *Id. See also* note 59 and accompanying text *infra*.

29. 599 S.W.2d at 185-86.

30. Critics of the polygraph technique contend that polygraph evidence should never be introduced in the courtroom. Skolnick, *supra* note 3, at 727. *Contra* Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System*, 26 HASTINGS L.J. 917, 920 (1975); *Criminal Procedure—Polygraph Evidence—Impeachment of Polygraph Examiner Testimony by Defense Experts Allowed at Admissibility Hearing*, 63 MARQ. L. REV. 143, 158 (1979).

31. 72 Ill. App. 3d 87, 390 N.E.2d 562 (1979). In *Monigan*, the court reversed a murder conviction, holding that polygraph results are inadmissible in evidence notwithstanding a written stipulation. *Id.* at 100, 390 N.E.2d at 571. The court found that the polygraph technique had not yet met the *Frye* test of general scientific acceptance and held that mere stipulation between the parties did nothing to enhance such "unreliable and untrustworthy evidence." *Id.* For cases culminating in the prohibition of polygraph evidence in Illinois, see People v. Triplett, 37 Ill. 2d 234, 238, 226 N.E.2d 30, 32 (1967); People v. Nimmer, 25 Ill. 2d 319, 320, 185

an Illinois appellate decision, and *State v. Frazier*,[32] a West Virginia Supreme Court decision, to the effect that polygraph examination results are not suitable for admission in evidence.[33] In both *Monigan* and *Frazier*, the prosecution was allowed to introduce the results of the defendants' polygraph examinations conducted pursuant to stipulations similar to the one in *Biddle*.[34] The appellate courts reversed, reasoning that polygraph examination results are inadmissible because they lack scientific reliability.[35] The *Biddle* court observed that the range of error for a given polygraph examination is estimated to be from five to thirty percent[36] and that a polygraph examination may produce erroneous results[37] regardless of an examiner's qualifications.[38]

N.E.2d 249, 250 (1962); People v. Ferguson, 84 Ill. App. 3d 175, 180, 405 N.E.2d 21, 25 (1980); People v. Ackerman, 132 Ill. App. 2d 251, 253, 269 N.E.2d 737, 739 (1971).

32. 252 S.E.2d 39 (W. Va. 1979). *Frazier* is apparently a case of first impression in West Virginia. Frazier was convicted of delivering marijuana. Prior to trial, he submitted to a polygraph examination, pursuant to a written stipulation signed by him, his counsel, and the prosecutor. *Id.* at 43. The polygraph examiner testified that the defendant's denial of delivering the marijuana was a lie, and the trial court admitted the examiner's testimony over defendant's objection. The West Virginia Supreme Court of Appeals reversed, holding that polygraph examination results are not admissible in evidence in a criminal trial. *Id.* at 49.

33. 599 S.W.2d at 189 (quoting *Frazier* and *Monigan*).

34. *See* notes 31 & 32 *supra*.

35. People v. Monigan, 72 Ill. App. 3d 87, 100, 390 N.E.2d 562, 571 (1979); State v. Frazier, 252 S.E.2d 39, 49 (W. Va. 1979).

36. 599 S.W.2d at 189-90. *See also* Abbell, *Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials*, 15 AM. CRIM. L. REV. 29, 35 (1977); Radek, *The Admissibility of Polygraph Results in Criminal Trials: A Case for the Status Quo*, 3 LOY. U. CHI. L.J. 289, 297 (1972); Comment, *The Courtroom Status of the Polygraph*, 14 AKRON L. REV. 133, 137 (1980). On the other hand, leading polygraph proponents contend that studies show the polygraph technique reaches correct results more than 95% of the time. J. REID & F. INBAU, *supra* note 3, at 234; Horvath & Reid, *The Reliability of Polygraph Examiner Diagnosis of Truth and Deception*, 62 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 276, 278 (1971); Note, *The Emergence of the Polygraph at Trial*, 73 COLUM. L. REV. 1120, 1124 (1973). Critics, however, find the accuracy figures compiled by Reid and Inbau to be unsatisfactory because of the lack of an independent means to check the phenomenon of lying. Skolnick, *supra* note 3, at 699.

37. Erroneous results may be produced because the autonomic responses to relevant questions are influenced by individual difference variables that are not a function of the subject's guilt or innocence, e.g., the effect of mental abberration or instability of the subject, the effect of the subject's taking depressant drugs, and the effect of the subject's physical health. Comment, *supra* note 36, at 36. *See also* Abbell, *supra* note 36, at 49.

38. 599 S.W.2d at 190. Proponents contend that most of the polygraph's problems can be solved, or at least minimized, by having the polygraph examination conducted by a properly trained examiner. It also has been acknowledged that

The *Biddle* court stated that polygraph examination reliability also is affected detrimentally by its inherent inability to detect honest misstatements of fact[39] or the pathological liar.[40] Because of these inadequacies, the court feared that at least two unacceptable situations might occur if polygraph results were admitted:

> [A] guilty party who recognizes no responsibility to tell the truth might "beat the machine" and offer the erroneous results as proof of innocence. . . . [A]n innocent party might submit to a polygraph examination with the hope of proving his innocence and obviating the rigors of a trial, only to find that erroneous results constitute the heart of the state's case against him.[41]

Because of the possibility of erroneous polygraph findings and the resulting potential for injustice, the court saw no alternative but absolute exclusion of polygraph evidence.[42]

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judicial acceptance of the polygraph test will not be complete until there is a substantial improvement in the level of examiner competence. Even proponents of the polygraph admit that there are few adequately trained polygraph examiners. J. REID & F. INBAU, *supra* note 3, at 234; Comment, *supra* note 36, at 135; Note, *supra* note 36, at 1124; Note, *The Polygraphic Technique, A Selective Analysis*, 20 DRAKE L. REV. 330, 352 (1971).

Some states require that polygraph examiners be licensed to practice and require varying degrees of experience and training. *See* ARK. STAT. ANN. § 71-2206 (1979); GA. CODE ANN. § 84-5005 (1979); KY. REV. STAT. § 329.030 (Cum. Supp. 1980); MICH. COMP. LAWS ANN. § 338.1708 (1976); MISS. CODE ANN. § 73-29-11 (Cum. Supp. 1981); NEV. REV. STAT. § 648A-100 (1979); N.M. STAT. ANN. § 61-26-4 (Pamphlet 1978); N.D. CENT. CODE § 43-31-07 (Supp. 1981); OKLA. STAT. ANN. tit. 59, § 1457 (West Cum. Supp. 1981-1982).

39. 599 S.W.2d at 190. A polygraph examination measures the conscious conflict between the answer given to the examiner and the facts as believed by the accused. Essentially, the polygraph "discloses whether the subject believes what he is saying." Skolnick, *supra* note 3, at 725.

40. 599 S.W.2d at 190. Because concern over possible detection is the principal factor accounting for physiological changes recorded by the polygraph, the person who lies, but has no compunction about lying, is unlikely to be detected. J. REID & F. INBAU, *supra* note 3, at 50; Abbell, *supra* note 36, at 33.

41. 599 S.W.2d at 191. Polygraph studies have shown that polygraph examiners' errors generally favor the guilty subject; the erroneous examiner is more likely to find a guilty subject innocent than to find an innocent subject guilty. Abbell, *supra* note 36, at 35; Horvath & Reid, *supra* note 36, at 278.

The polygraph examination is used extensively in other areas, as well as by the prosecutor in deciding whether to charge an individual. *See* Note, *supra* note 38, at 343-47. An indirect result of the *Biddle* decision might be an unwillingness on the part of the prosecutor to agree to drop charges against an accused person who passes a polygraph test. Because polygraph evidence is inadmissible at trial, the incentive to make such an agreement is reduced.

42. 599 S.W.2d at 191. In *Biddle*, the defendant gave a truthful answer to the question, "Do you live in the United States?", but the polygraph indicated decep-

Although the *Biddle* court reached its conclusion without citing *Frye*, it applied the *Frye* test of general scientific acceptance[43] to determine the admissibility of polygraph results. Under the *Frye* test, the court assumes that polygraph evidence must be excluded, regardless of probative value, unless the polygraph technique is shown to have received general scientific acceptance.[44] To meet the strict requirement of general scientific acceptance, the polygraph must be accepted not only by polygraphy experts but also by physiology and psychology experts.[45] In finding that the polygraph had not received wide scientific approval, the *Biddle* court did not expressly require the polygraph to receive approval from scientific experts other than polygraphy experts. Nevertheless, the court's reliance on *Frazier* and *Monigan*, both of which used the *Frye* test, impliedly requires such broad approval.[46]

It has been suggested that the most important consideration against the admissibility of polygraph evidence is not reliability but its potential for confusing and misleading the jury.[47] The *Biddle* court was extremely concerned about the impact of polygraph examination results not only on the jury[48] but on the jury system.[49] The court felt the jury would tend to consider the

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tion. The court found this error to be indicative of the polygraph's unreliability. *Id.* at 190.

43. *Id.* at 191. The *Frye* test of general scientific acceptance has been much criticized. Many critics point out that the general standard enunciated in *Frye* is a proper test for taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence. A failure to meet the *Frye* test of general scientific acceptance should merely preclude admissibility as a fact judicially noticed; it should not preclude admission entirely. C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 203 (2d ed. 1972). *See also* Kaplan, *The Lie Detector: An Analysis of its Place in the Law of Evidence*, 10 WAYNE L. REV. 381, 386 (1964); Tarlow, *supra* note 30, at 938 n.107; Comment, *supra* note 36, at 138; Comment, *Compulsory Process and Polygraph Evidence: Does Exclusion Violate a Criminal Defendant's Due Process Rights?*, 12 CONN. L. REV. 324, 339 (1980). Other commentators criticize the *Frye* test as either outdated or too stringent when compared with the admission standards for other scientific evidence. *See* Abbell, *supra* note 36, at 32; Note, *supra* note 36, at 1139.

It has been suggested that polygraph evidence should be treated like other types of scientific evidence, where the only requirement is that the evidence be an aid to the jury or be reliable enough to be probative. Kadish, *The Polygraph, Hypnosis, Truth Drugs and the Psychological Stress Evaluator: Admissibility in a Criminal Trial*, 4 AM. J. TRIAL ADVOC. 593, 595 (1981). *Contra* United States v. Alexander, 526 F.2d 161, 167 (8th Cir. 1975); Skolnick, *supra* note 3, at 695.

44. Kaplan, *supra* note 43, at 394. *See also* Note, *supra* note 38, at 336.

45. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

46. People v. Monigan, 72 Ill. App. 3d 87, 95-96, 390 N.E.2d 562, 567-68 (1979); State v. Frazier, 252 S.E.2d 39, 43-45 (W. Va. 1979).

47. 15 NEW ENG. L. REV., *supra* note 28, at 850. *See also* Abbell, *supra* note 36, at 62; 63 MARQ. L. REV., *supra* note 30, at 158.

48. 599 S.W.2d at 191.

49. *Id.*

polygraph evidence unimpeachable.[50] As a result, the polygraph would usurp the jury's traditional function, thus depriving the defendant "of the common sense and judgment of his peers."[51] This is a common fear and may be the nemesis of the courtroom use of polygraph results.[52] If the underlying reason for opposition to the polygraph is that the machine would invade the traditional and constitutional province of the jury,[53] admissibility of polygraph evidence cannot be gained merely by increasing its reliability.[54] The more reliable the polygraph becomes, the more persuasive is the argument to admit polygraph evidence because of probative value. But as the polygraph becomes more reliable, there is a greater likelihood of it displacing the role of the jury.

As if in anticipation of the day when polygraph evidence is deemed to have general scientific acceptance, the *Biddle* court suggested another justification for the inadmissibility of polygraph examination results. The court found that exclusion of polygraph results conforms with Missouri law that opinion testimony of expert witnesses should not be admitted when the jurors are competent to reach correct conclusions from the facts presented.[55] The court believed that the jury is capable of performing this function and concluded emphatically that "[t]here is no place in our jury system for a machine or an expert to tell the jury who is lying and who is not."[56] Perhaps recognizing the logical dilemma that will arise once the polygraph is deemed reliable, the *Biddle* court seemingly created a reserve argument against admissibility.

By deciding that polygraph test results are inadmissible, with or without a stipulation, Missouri aligned itself with a majority of the other states.[57]

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50. *Id.* It has been suggested that limiting instructions could be used to inform the jury of the polygraph's proper role and thus avoid any displacement or misleading of the jury. *See* United States v. Zeiger, 350 F. Supp. 685, 691 (D.D.C.), *rev'd per curiam*, 475 F.2d 1280 (D.C. Cir. 1972); Comment, *supra* note 36, at 146. *But see Confessions, Habeas Corpus and the* Stein *Case*, 8 STAN. L. REV. 451, 456 (1956); 15 NEW ENG. L. REV., *supra* note 28, at 850.

51. 599 S.W.2d at 191. *See also* Abbell, *supra* note 36, at 53.

52. *See* United States v. Stromberg, 179 F. Supp. 278, 280 (S.D.N.Y. 1959).

53. *See* Tarlow, *supra* note 30, at 938 n.107.

54. *See* Kaplan, *supra* note 43, at 413.

55. 599 S.W.2d at 191. *See also* Sampson v. Missouri Pac. R.R., 560 S.W.2d 573, 586 (Mo. 1978).

56. 599 S.W.2d at 191.

57. *See* Pulakis v. State, 476 P.2d 474, 479 (Alaska 1970); People v. Monigan, 72 Ill. App. 3d 87, 100, 390 N.E.2d 562, 571 (1979); Conley v. Commonwealth, 382 S.W.2d 865, 867 (Ky. 1964); State v. Corbin, 285 So. 2d 234, 239 (La. 1973); Akonom v. State, 40 Md. App. 676, 686, 394 A.2d 1213, 1219 (1978); People v. Liddell, 63 Mich. App. 491, 495, 234 N.W.2d 669, 672 (1975); Jordan v. State, 365 So. 2d 1198, 1204 (Miss. 1978); State v. McClean, 587 P.2d 20, 22 (Mont. 1978); State v. LaForest, 106 N.H. 159, 161, 207 A.2d 429, 431 (1964); Fulton v. State, 541 P.2d 871, 872 (Okla. Crim. App. 1975); Romero v. State, 493 S.W.2d 206, 213 (Tex. Crim. App. 1973); State v. Frazier, 252 S.E.2d 39, 49 (W. Va.

There is, however, a definite trend in both state and federal courts toward admitting polygraph results.[58]

Several states permit the results of polygraph tests to be admitted in evidence if there is a prior stipulation and certain qualifications are met.[59] In adopting the restrictive position regarding the admissibility of polygraph test results, Missouri expressly rejected this approach.[60] Some states allow unstipulated polygraph results to be admitted in evidence for limited purposes at the discretion of the trial judge.[61] Other states simply decline to follow the *Frye* test of admissibility and find polygraph results admissible on the basis that such results are relevant[62] and reliable.[63]

Several federal courts have recognized that polygraph evidence may be

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1979); State v. Dean, 103 Wis. 2d 228, 279, 307 N.W.2d 628, 653 (1981). For a more complete discussion of states' policies on the admissibility of polygraph evidence, see 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 999 (1970 & Supp. 1981); Annot., 53 A.L.R.3d 1005 (1973 & Supp. 1981).

58. *See* Tarlow, *supra* note 30, at 947.

59. State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962), is the leading case on stipulations for the admissibility of polygraph evidence. In *Valdez*, the Arizona Supreme Court held that stipulated polygraph evidence is admissible for purposes of corroboration and impeachment under certain conditions. *Id.* at 283-84, 371 P.2d at 900-01. Several states follow the *Valdez* approach. *See* Williams v. State, 378 A.2d 117, 120 (Del. 1977); Owens v. State, 176 Ind. App. 1, 3, 373 N.E.2d 913, 914-15 (1978); Commonwealth v. Allen, 377 Mass. 674, 677, 387 N.E.2d 553, 555 (1979); Corbett v. State, 584 P.2d 704, 707 (Nev. 1978); State v. McDavitt, 62 N.J. 36, 46, 297 A.2d 849, 855 (1972); State v. Milano, 297 N.C. 485, 499, 256 S.E.2d 154, 162 (1979); State v. Souel, 53 Ohio St. 2d 123, 132, 372 N.E.2d 1318, 1323 (1978); State v. Ross, 7 Wash. App. 62, 69, 497 P.2d 1343, 1347 (1972); Cullin v. State, 565 P.2d 445, 457 (Wyo. 1977). For a complete discussion concerning the states that admit stipulated polygraph evidence, see 3A J. WIGMORE, *supra* note 57, § 999; Annot., *supra* note 57.

60. 599 S.W.2d at 188. *See also* note 28 *supra*.

61. *See* State v. Catanese, 368 So. 2d 975, 983 (La. 1979) (polygraph evidence admissible at discretion of trial judge in post-trial proceeding); People v. Barbara, 400 Mich. 352, 412, 255 N.W.2d 171, 197 (1974) (same). *See generally* United States v. Ridling, 350 F. Supp. 90, 96 (E.D. Mich. 1972); Note, *supra* note 36, at 1142.

62. State v. Dorsey, 88 N.M. 184, 185, 539 P.2d 204, 205 (1975) (court stated that polygraph evidence is admissible when it satisfies normal requirements of relevancy under the state rules of evidence, which are patterned on the Federal Rules of Evidence). The court applied the state's counterpart to FED. R. EVID. 401 & 402 in conjunction with the state's counterpart to FED. R. EVID. 702 & 703. 88 N.M. at 185, 539 P.2d at 205. Admissibility based on relevance is an easier standard to meet than the *Frye* general acceptance text. To be relevant, there must be *some* acceptance in the scientific community, but not the more extensive general acceptance of *Frye*. 15 NEW ENG. L. REV., *supra* note 28, at 844.

63. Walther v. O'Connell, 72 Misc. 2d 316, 318, 339 N.Y.S.2d 386, 387 (Queens County Civ. Ct. 1972); *In re* Stenzel, 71 Misc. 2d 719, 723, 336 N.Y.S.2d 839, 844 (Fam. Ct. 1972).

admitted on a case-by-case basis if a proper foundation has been established.[64] In *United States v. Ridling*,[65] the United States District Court for the Eastern District of Michigan conducted a review of the polygraph's utility in the courtroom[66] and held that unstipulated polygraph evidence is admissible in a perjury trial.[67] The court found that the underlying theory of the polygraph technique was sound and that the polygraph evidence was relevant.[68] The court denounced, as lacking merit, the argument that the polygraph will overwhelm the jury or endanger the jury's status.[69]

In *United States v. Alexander*,[70] the United States Court of Appeals for the Eighth Circuit declined to adopt the rationale of *Ridling* to the extent of permitting the admission of unstipulated polygraph evidence.[71] Other eighth circuit court of appeals decisions, however, indicated an inclination to leave the admissibility of polygraph evidence to the trial judge's discretion, at least when there is a prior stipulation, rather than applying a per se rule of exclusion.[72]

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64. *See, e.g.*, United States v. Flores, 540 F.2d 432, 436-37 (9th Cir. 1976); United States v. Wainwright, 413 F.2d 796, 803 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970). *See also* Tarlow, *supra* note 30, at 947.

65. 350 F. Supp. 90 (E.D. Mich. 1972). Other federal district courts have favorably reviewed the polygraph technique. *See, e.g.*, United States v. Zeiger, 350 F. Supp. 685, 687 (D.D.C.), *rev'd per curiam*, 475 F.2d 1280 (D.C. Cir. 1972); United States v. DeBetham, 348 F. Supp. 1377, 1380 (S.D. Cal.), *aff'd*, 470 F.2d 1367 (9th Cir. 1972), *cert. denied*, 412 U.S. 90 (1973); United States v. Hart, 344 F. Supp. 522, 524 (E.D.N.Y. 1971).

66. 350 F. Supp. at 92-95.

67. *Id.* at 99. The court held that evidence of polygraph experts pertaining to the polygraph examination of the defendant and their opinions were to be admitted subject to certain conditions. *Id.*

68. *Id.* at 95. The court stressed that a perjury case is ideal for the admission of polygraph evidence because the polygraph is particularly useful in detecting whether a person acted willfully or knowingly. *Id.* at 98.

69. *Id.* at 98.

70. 526 F.2d 161 (8th Cir. 1975).

71. *Id.* at 167.

72. *See* United States v. Smith, 552 F.2d 257, 260 n.3 (8th Cir. 1977); United States v. Oliver, 525 F.2d 731, 736 (8th Cir. 1975).

Four circuits of the federal courts of appeals have given discretion to the trial judge to admit polygraph evidence. *See* United States v. Fife, 573 F.2d 369, 373 (6th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977); United States v. Bursten, 560 F.2d 779, 785 (7th Cir. 1977); United States v. Smith, 552 F.2d 257, 260 n.3 (8th Cir. 1977); United States v. Flores, 540 F.2d 432, 436-37 (9th Cir. 1976). Three circuits of the federal courts of appeals follow a per se rule of exclusion in relation to polygraph evidence. *See* United States v. Fay, 284 F.2d 426, 427 (2d Cir. 1960), *cert. denied*, 365 U.S. 850 (1961); United States v. Clark, 598 F.2d 994, 995 (5th Cir. 1979), *cert. denied*, 449 U.S. 1128 (1981); United States v. Skeens, 494 F.2d 1050, 1053 (D.C. Cir. 1974). The United States Court of Appeals for the Tenth Circuit indicated that polygraph evidence could be admitted if a proper founda-

Missouri's absolute prohibition against admissions of polygraph evidence, notwithstanding a prior stipulation[73] and regardless of who attempts to introduce the evidence,[74] may violate the defendant's right to a fair trial. In *Washington v. Texas*[75] and *Chambers v. Mississippi*,[76] the United States Supreme Court held that the compulsory process clause of the sixth amendment[77] entitles a criminal defendant to call witnesses and have the testimony of those witnesses heard at trial, despite contrary state rules of evidence.[78] In both decisions, the Court found that if courts apply state rules of evidence arbitrarily and mechanistically to prohibit the defendant from calling witnesses, the defendant's compulsory process rights are infringed.[79]

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tion was presented. *See* United States v. Russo, 527 F.2d 1051, 1058-59 (10th Cir. 1975), *cert. denied*, 426 U.S. 906 (1976); United States v. Wainwright, 413 F.2d 796, 803 (10th Cir. 1969) (dictum), *cert. denied*, 396 U.S. 1009 (1970).

For a more detailed analysis of the federal courts' treatment of polygraph evidence, see Abbell, *supra* note 36, at 39-43; Note, *supra* note 36, at 1129-34; Annot., 43 A.L.R. Fed. 68 (1979 & Supp. 1981).

73. *See* note 28 and accompanying text *supra*.

74. In at least two cases since *Biddle*, Missouri appellate courts relied on *Biddle* to exclude polygraph evidence tendered by defendants. *See* State v. Lieberknecht, 608 S.W.2d 93, 101 (Mo. App., E.D. 1980); State v. Shives, 601 S.W.2d 22, 27 (Mo. App., W.D. 1980).

75. 388 U.S. 14 (1967).

76. 410 U.S. 284 (1973).

77. U.S. CONST. amend. VI provides, in part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining Witnesses in his favor . . . ." The sixth amendment applies to the states by incorporation in the due process clause of the fourteenth amendment. Washington v. Texas, 388 U.S. 14, 17-18 (1967).

78. Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973); Washington v. Texas, 388 U.S. 14, 23 (1967).

79. In *Washington*, the defendant was charged with murder. At his trial he sought to have his co-participant in the shooting testify on his behalf. On the basis of two Texas statutes preventing a participant accused of a crime from testifying for his co-participant, the trial court refused to allow the co-participant's testimony, and the defendant was convicted. The United States Supreme Court held that the state had arbitrarily denied the defendant the right to present testimony material to his defense; thus, his right to compulsory process was infringed. 388 U.S. at 22-23.

In *Chambers*, the defendant was charged with the murder of a policeman. At trial, Chambers was prevented from cross-examining a witness because he had called the witness, and under Mississippi's voucher rule, a party may not impeach his own witness. Also, Chambers was not allowed to introduce the testimony of three persons to whom the witness had confessed because the trial court ruled their testimony inadmissible as hearsay. Chambers was convicted of the murder. The Supreme Court stated that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. The Court held that the exclusion of evidence critical to the defendant, coupled with the state's refusal to permit Chambers to cross-examine the witness, deprived the defendant of a fair trial. *Id.*

The doctrine of *Washington* and *Chambers* has seldom been invoked in relation to the admissibility of polygraph evidence offered by a defendant.[80] The chances of application of the doctrine to Missouri decisions, however, seems to be increased by *Biddle* because its absolute rule of exclusion admits of no exceptions nor provides for any judicial discretion, increasing the likelihood the rule will be considered arbitrary or mechanistic. Under *Washington* and *Chambers*, unless the Missouri courts can establish that an absolute prohibition against the admission of polygraph evidence is necessary for the protection of a legitimate state interest, the *Biddle* rule of complete exclusion could be held to impair a defendant's constitutional right to compulsory process.[81]

Biddle held the results of polygraph examinations to be absolutely prohibited as evidence in Missouri courts.[82] The reasons given for the exclusion of polygraph evidence were that the evidence is unreliable and that admission of the evidence invades the province of the jury. The results of polygraph tests, however, do not merit a rule of complete exclusion merely because of a degree of unreliability. The reliability of polygraph results is comparable to other scientific evidence that is admissible. Additionally, the court's concern that a machine will displace the jury does not warrant the restrictive approach taken. If treated like other scientific evidence, the polygraph examination results will merely aid the jury to reach their own conclusions about the truth. Finally, the court's holding overlooked the possibility that an absolute prohibition of polygraph evidence may impair the defendant's right to present evidence favorable to his defense. In its endeavor to exclude unreliable evidence and protect the province of the jury, the *Biddle* court may have jeopardized defendants' constitutional right to a fair trial.

DEANNA A. BURNS

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80. *See* State v. Dorsey, 87 N.M. 323, 325-26, 532 P.2d 912, 914-15 (Ct. App. 1975) (defendant denied compulsory process when polygraph evidence excluded); State v. Levert, 58 Ohio St. 2d 213, 215, 389 N.E.2d 848, 850 (1979) (exclusion of polygraph expert's testimony on defendant's behalf did not violate compulsory process clause); State v. Sims, 52 Ohio Misc. 31, 42, 369 N.E.2d 24, 46 (C.P. Cuyahoga County 1977) (defendant denied compulsory process when his request for polygraph examination denied).

81. Note, *Admission of Polygraph Results: A Due Process Perspective*, 55 IND. L.J. 157, 188 (1979). *See also* Comment, *supra* note 43, at 351.

82. The rule in *Biddle* is prospective in application. State v. Walker, 616 S.W.2d 48, 49 (Mo. En Banc 1981). There is a possibility that even under Missouri's rule of absolute prohibition, polygraph evidence may be admissible to prove the voluntariness of a confession made after, during, or in anticipation of a polygraph examination. *See* United States v. McDevitt, 328 F.2d 282, 284 (6th Cir. 1964); Tyler v. United States, 193 F.2d 24, 31 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 908 (1952); J. REID & F. INBAU, *supra* note 3, at 252-54.