

THE LAW OF POLYGRAPH EVIDENCE

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I. INTRODUCTION

Polygraph evidence has a long history of legal and scientific controversy in courts throughout the country. This paper examines the major case law in this area and illustrates the current state of the law of polygraphs.

II. POLYGRAPH EVIDENCE - OVERVIEW

The first landmark decision addressing the admissibility of polygraph evidence was *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The issue in *Frye* was the admissibility of the systolic blood pressure test, an unsophisticated precursor to the modern polygraph. The *Frye* court excluded the test, finding the evidence was not admissible unless the proponent of the evidence showed that the science involved with this test was generally accepted in the relevant scientific community from which it emerged. The *Frye* test subsequently became the primary standard for determining the admissibility of scientific evidence throughout the country. See Sevillo, Polygraph 1984: Behind The Closed Door of Admissibility, 16 U. West L.A. L. Rev. 5, 6 (1984).

Following *Frye*, for 50 years, virtually every state and federal court refused to admit polygraph evidence. In 1993, the Supreme Court replaced the *Frye* test with the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 468 (1993). Under *Daubert*, the proper inquiry concerning scientific evidence is based on Federal Rule of Evidence 702 and asks whether the scientific evidence is relevant and reliable. The pertinent factors to consider under *Daubert* included, (1) whether the theory or technique on which the testimony is based is capable of being tested; (2) whether the technique has a known rate of error in its application; (3) whether the theory or technique has been subjected to peer review and publication; (4) the level of acceptance in the relevant scientific community of the theory or technique; and (5) the extent to which there are standards to determine the acceptable use of the technique. None of the factors was considered dispositive and the test was to be applied in a flexible manner. See also *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992) (adopting a similar test under Texas Rules of Evidence).

Following *Daubert*, state and federal courts throughout the country began to re-examine the per se ban on polygraph tests. The results have ranged from a significant number of jurisdictions adhering to the per se rule against admissibility, while others relaxed their rules and began to admit polygraphs in limited circumstances. In fact, the per se exclusion of polygraph tests is now the minority view among the Federal Circuits. See *United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1134, n.4 (4th Cir. 1991) (noting that circuits that have not yet permitted evidence of polygraph results for any purpose are now in the decided minority). New Mexico has the most liberal rules and generally admits polygraph evidence in the same way as other expert evidence. See *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (N.M. 1975); New Mexico Rule of Evidence 11-707. At least fourteen states follow a standard for admissibility similar to *Daubert*. See Peeples, Exculpatory Polygraphs in the Courtroom: How the Truth May Not Set You Free, 28 Cumb. L. Rev. 77, 115, n.6 (1997-98).

In *United States v. Scheffer*, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), the U. S. Supreme Court considered the constitutionality of Military Rule of Evidence 707 which bans the use of polygraph evidence in all court martial proceedings. This rule was promulgated by the President in his capacity as Commander-in-Chief. The issue in *Scheffer* was whether the per se ban interfered with the defendant's constitutional right to present a defense under the Fifth and Sixth Amendments. See, *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1984) and *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). A four judge plurality of the Court (Thomas, Rehnquist, Scalia, Souter) upheld the rule, noting that there was no general consensus within the scientific community about the reliability of polygraph evidence and that the rule provided a safeguard against the admission of unreliable evidence. The plurality opinion also found that a jury might be unduly influenced into giving excessive weight to polygraph testimony. Additionally, the Court plurality found that collateral litigation concerning the polygraph could distract the jury from the more important issues of the trial. The court found all of these governmental interests to be necessary and legitimate and, therefore, upheld Military Rule 707 against a constitutional challenge under the Fifth and Sixth Amendment right to present a defense.

A four judge concurrence (Kennedy, O'Connor, Ginsburg, Breyer) agreed that enforcing Military Rule of Evidence 707 was not unconstitutional because there was continuing disagreement among experts and courts regarding the reliability of polygraphs. However, these four justices argued that a per se rule of exclusion was not justified. Significantly, the plurality opinion held that, "individual jurisdictions may reach differing conclusions as to whether polygraph evidence should be admitted." 523 U.S. at 312. Justice Kennedy wrote that, "I doubt, though, that the per se exclusion is wise, and some later case might present a more compelling case for introduction of the testimony than this one does." Justice Stevens, the lone dissenter in *Scheffer*, argued that there should never be a per se rule banning polygraph evidence as such rule violates the constitutional right to present a defense. Justice Stevens also noted that there is much inconsistency between the government's extensive use of polygraphs to make security determinations and the government's argument in *Scheffer* that the tests are inaccurate.

Scheffer has often been misunderstood as standing in favor of the per se exclusion of polygraph evidence. In fact, at least 5 out of 9 justices expressed views against a per se exclusion, leaving the issue very much alive in the lower courts.

III. POLYGRAPHS IN TEXAS

The existence and results of a polygraph examination are inadmissible in a criminal proceeding in Texas. See *Tennard v. State*, 802 S.W.2d 678, 683 (Tex. Crim. App. 1990) (court commits error by admitting testimony regarding a polygraph examination which "lends a witness testimony more credibility"); *Nethery v. State*, 692 S.W.2d 686, 700 (Tex. Crim. App. 1985) (not admissible even if parties agree); *Robinson v. State*, 550 S.W.2d 54, 59-61 (Tex. Crim. App. 1977); *Lee v. State*, 455 S.W.2d 316, 321 (Tex. Crim. App. 1970) (lie detector evidence not admissible on behalf of state or defense). The exclusion owes its origins to the evidence's inherent unreliability and its tendency to be unduly persuasive; at common law this rule was partially based upon the "general acceptance" doctrine announced in *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923). See *Romero v. State*, 493 S.W.2d 206, 209-11 (Tex. Crim. App. 1973); *Perkins v. State*, 902 S.W.2d 88, 92-95 (Tex. App. - El Paso 1995, pet. ref'd) (setting forth brief chronological analysis of Texas polygraph evidence law under common law and the Texas Rules of Evidence). It was also based upon the rationale that there were many potential sources of error in the test itself including the examiner's competency, the jury's tendency to accord the test too much value, the lack of standardization, as well as the difficulty evaluation of examiners' opinions posed for a jury. *Romero*, 493 S.W.2d at 210-11. The exclusion of polygraph evidence has been found not to infringe on a defendant's Sixth Amendment right to present a defense because of its questionable reliability and its tendency to replace the jurors as the triers of the facts. *Perkins*, 903 S.W.2d at 93-97. Failure to object to the introduction of a polygraph evidence has been found to be ineffective assistance based on the consistency of Texas law in finding it inadmissible. *Cardenas v. State*, 960 S.W.2d 941 (Tex. App. - Texarkana 1998, pet. ref'd.).

With the enactment of the rules of evidence, Texas Rule of Evidence 702 became the relevant governing authority. *Perkins*, 902 S.W.2d at 93. However, Rule 702 has been interpreted to likewise exclude polygraph evidence. See *id.* The courts have also refused to reconsider the ban in light of *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992). See, e.g., *Landrum v. State*, 977 S.W.2d 586 (Tex. Crim. App. 1998) (Meyers, J., dissenting, joined by Judge Price, argued that the per se ban on polygraph evidence should be reconsidered in light of *Kelly* and *Hartman v. State*, 946 S.W.2d 60 (Tex. Crim. App. 1997) which held that scientific evidence which is shown to be relevant and reliable is admissible under Tex. Rules of Evid. 702); *Hernandez v. State*, 10 S.W.3d 812, 818 (Tex. App. - Beaumont 2000, pet. ref'd) (following Court of Criminal Appeals refusal in *Landrum* to reconsider the per se ban in light of *Kelly*). Nevertheless, the intermediate courts of appeals continue to wrestle with the admissibility of polygraph results and related issues. See *Bradley v. State*, 48 S.W.3d 437, 443, n.4 (Tex. App. - Waco 2001, pet. ref'd) (collecting cases); *Hall v. State*, 970 S.W.2d 137, 142 (Tex. App.- Amarillo 1998, pet. ref'd) (noting that whether to modify the per se ban falls within the purview of the Court of Criminal Appeals).

The rule is the same whether the evidence is offered by the State or the defendant. See *Castillo v. State*, 739 S.W.2d 280, 293 (Tex. Crim. App. 1987). Nor will a stipulation render the results admissible; the rationale of the rule being that a stipulation will not render the test more reliable. *Nethery*, 692 S.W.2d at 700; *Fernandez v. State*, 564 S.W.2d 771, 773 (Tex. Crim. App. [Panel Op.] 1978); *Romero*, 493 S.W.2d at 212-13. However, the invited error doctrine applies, and so, the door may be opened to polygraph evidence.

See *Lucas v. State*, 479 S.W.2d 314, 315 (Tex. Crim. App.1972) (testifying defendant misled the jury regarding the results of a polygraph exam opening the door to rebuttal testimony); *Patterson v. State*, 633 S.W.2d 549 (Tex. App. - Houston [14th Dist.] 1982, no pet.) (defendant convinced the trial judge that polygraph results were admissible in non-jury trials and presented evidence of favorable results, opening door to the State's admission of rebuttal polygraph evidence); see also *Hoppes v. State*, 725 S.W.2d 532, 536 (Tex. App. - Houston [1 Dist.] 1987, no pet.) (noting existence of open door exception to per se ban on polygraph evidence).

The erroneous admission of polygraph evidence is error subject to harmless error analysis. Case law indicates that unless the polygraph evidence bolsters the State's key witness, the error will be deemed harmless. See *Tennard*, 802 S.W.2d 678 (finding admission of evidence that officer believed witness because witness passed a polygraph was harmless where witness was not the only witness and the matters about which he testified were not crucial; distinguishing cases where the State's key witness's testimony was bolstered by polygraph evidence); *Kugler v. State*, 902 S.W.2d 594, 597 (Tex. App. - Houston [1 Dist.]1995, pet. ref'd.) (finding trial court erred by not granting motion for mistrial because instruction to disregard could not cure harm stemming from introduction of evidence that defendant refused to submit to a polygraph examination, effectively bolstering the sole eye witness's identification of defendant as the attacker).

IV. POLYGRAPHS IN THE FEDERAL COURTS

"Circuits that have not yet permitted evidence of polygraph results for any purpose are now the decided minority." *United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1134 n.4 (4th Cir. 1991).

Fifth Circuit

In *United States v. Posado*, 57 F.3d 428 (5th Cir.1995), the Fifth Circuit overturned its per se rule against admission of polygraph evidence. The Court decided to "remove the obstacle of the per se rule" because it was based on outdated concepts about the polygraph's technical ability and legal precedent which had been overruled by the Court (namely *Daubert's* overruling of *Frye*). In its opinion, the Court also noted that in recent years its view of polygraph evidence had "expanded somewhat":

See *Bennett*, 883 F.2d at 405-06 (magistrates may consider polygraph evidence when determining whether probable cause to issue an arrest warrant exists); *United States v. Lindell*, 881 F.2d 1313, 1326 (5th Cir.1989) ("[i]mpeachment evidence includes the results of a polygraph test" for purposes of the *Brady* rule), cert. denied sub nom. *Kinnear v. United States*, 493 U.S. 1087, 110 S.Ct. 1152, 107 L.Ed.2d 1056 (1993). In 1980, twelve judges of this court agreed that whether polygraph was generally accepted would be subject to reconsideration given a proffer tending to show that polygraph technique had improved in the years since *Frye*. *United States v. Clark*, 622 F.2d 917, 917 (5th Cir.1980) (en banc) (Gee, J., concurring), cert. denied, 449 U.S. 1128, 101 S.Ct. 949, 67 L.Ed.2d 116 (1981). In 1984, we recognized the considerable controversy surrounding our circuit's continued adherence to a per se rule against polygraph evidence, but concluded that en banc consideration would be required to change our existing precedent. *Barrel of Fun, Inc. v. State Farm Fire & Cas. Co.*, 739 F.2d 1028, 1031 n. 8 (5th Cir.1984). After *Daubert*, a per se rule is not viable. Because no panel has squarely addressed the issue of polygraph admissibility since *Daubert*, en banc consideration is not required for this decision.

Id. at 433. Concerning technological advances, the Circuit further noted that modern research indicates a seventy to ninety percent accuracy rate. *Id.* at 434.

The Court prescribed a three-step inquiry: (1) the Court determines whether the evidence is relevant and reliable pursuant to *Daubert*; (2), the Court determines whether the evidence will assist the trier of fact in determining a fact at issue; and (3) the court must decide if the evidence has an unfairly prejudicial effect that would substantially outweigh its probative value under Rule 403. *Id.* at 32-35. In *United States v. Dominguez*, 902 F.Supp. 737 (S.D. Tex.1995), the Southern District promulgated several factors to consider in making this particular balance:

- 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.

Id.

Circuit cases after the *Posado* decision have both rejected and condoned admission of the polygraph. Compare *United States v. Pettigrew*, 77 F.3d 1500, 1514 (5th Cir. 1996) (finding no abuse of discretion in district court's exclusion of polygraph evidence); *United States v. Zertuche-Tobias*, 953 F. Supp. 803, 807 (S.D. Tex. 1996) (citing problems with both reliability and methodology and noting failure to comply with *Dominguez* safeguards); with *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000) (concluding that polygraph evidence was properly admitted in bench trial); *Ulmer v. State Farm Fire & Cas. Co.*, 897 F. Supp. 299 (W.D. La. 1995) (holding that polygraph tests administered by certified polygraphist at request of investigator for state fire marshal's office were admissible in jury trial on insureds' claims). The Northern District has nevertheless recently indicated that the age-old suspicion of polygraph evidence remains. See *Tittle v. Raines*, 231 F. Supp.2d 537, 552 (N.D. Tex. 2002) (noting that "[t]here is nothing sacrosanct or magical about a polygraph, and its reliability or effectiveness has not gained universal acceptance.").

First Circuit

United States v. Black, 78 F.3d 1 (1st Cir. 1996) (finding no error in admission of evidence learned during polygraph examination).

____ *United States v. Santiago-Gonzalez*, 66 F.3d 3 (1st Cir. 1995) (polygraph results used in sentencing).

Second Circuit – Dual Hurdles of 702 & 403; Admissible for Other Purposes

United States v. Kwong, 69 F.3d 663 (2d Cir. 1995) (refusing to find polygraph evidence admissible under rule 702 because it was unlikely the specific testimony at issue would assist the trier of fact; nonetheless, the Court conducted a Rule 403 analysis and concluded that even if the testimony was admissible under 702 it would be precluded under Rule 403 because the ambiguous questions posed dangers of confusing and misleading the jury); see also *Meyers v. Arcudi*, 947 F.Supp. 581, 584 (D. Conn. 1996) (analyzing admissibility of polygraph evidence under *Daubert*, finding evidence not admissible because technique employed was not reliable and also finding evidence inadmissible under Rule 403 noting that the prosecution was not notified of the polygraph aforesaid and the evidence was to be adduced before a jury and not a judge); *United States v. Lech*, 895 F. Supp. 582, 585 (S.D.N.Y. 1995) (refusing to admit polygraph evidence under Federal Rule of Evidence 403); see also *United States v. Black*, 831 F. Supp. 120, 123 (E.D.N.Y. 1993) (holding that nothing in *Daubert* affected the rationale of previous Second Circuit decisions that held polygraph tests not sufficiently reliable to warrant admissibility). But see *United States v. Messina*, 131 F.3d 36 (2d Cir. 1997) (polygraph results used at sentencing); *United States v. Bellomo*, 944 F. Supp. 1160, 1163 (S.D.N.Y. 1996) (allowing polygraph evidence in a bail hearing).

Third Circuit

United States v. Johnson, 816 F.2d 918, 923 (3rd Cir. 1987) (evidence that defendant failed polygraph test prior to confessing to the crime is admissible to rebut defendant's subsequent claim that his confession was coerced).

Fourth Circuit – Upholding the Per Se Ban

____ The Fourth Circuit, while recognizing its position in the distinct minority, has continued in recent years to reaffirm its rule of per se exclusion rigidly relying upon precedent. See *United States v. Prince-Oyibo*, 320 F.3d 494 (4th Cir. 2003); *United States v. Ruhe*, 191 F.3d 376, 388 & n.9 (4th Cir. 1999); *United States v. Sanchez*, 118 F.3d 192 (4th Cir. 1997) (maintaining per se exclusion in post-*Daubert* era in accord with

pre-*Daubert* decisions); *United States v. Toth*, 91 F.3d 136 (4th Cir. 1996) (not designated for publication) (per curiam) (stating that “circuits ‘that have not yet permitted evidence of polygraph results for any purpose are now in the decided minority.’”). *But see United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1133-35 and n.4 (4th Cir.1991) (affirming per se exclusion rule but finding polygraph evidence may be admitted to challenge credibility of expert who “must have necessarily discounted” polygraph results).

Sixth Circuit – Case by Case

United States v. Blakeney, 942 F.2d 1001, 1014 (6th Cir.1991) (holding that district court has discretion to admit polygraph evidence where its relevant and probative value outweighs its prejudicial effect):

In *Wolfel v. Holbrook*, 823 F.2d 970 (6th Cir.1987), *cert. denied*, 484 U.S. 1069, 108 S.Ct. 1035, 98 L.Ed.2d 999 (1988), we modified the per se rule stating, “[g]enerally, in the absence of an agreement and/or stipulation between the parties to the contrary, results of polygraph examinations are inadmissible into evidence.” *Id.* at 972 (citations omitted). The *Wolfel* court provided that in limited circumstances polygraph-related evidence may be admissible if it is relevant to the proof established by probative evidence. *Id.* (citing *Murphy v. Cincinnati Ins. Co.*, 772 F.2d 273 (6th Cir.1985)). In these limited circumstances, the decision to admit polygraph related evidence rests within the district court’s sound discretion. *Id.* The district court’s inquiry consists of whether the evidence is relevant and whether its probative value outweighs its prejudicial effect. *Id.* The district court in the instant case determined that the facts did not present an unusual case warranting the introduction of the results of the polygraph test.

United States v. Sherlin, 67 F.3d 1208, 1216-17 (6th Cir. 1995) (unstipulated polygraph evidence was generally inadmissible)

United States v. Scarborough, 43 F.3d 1021, 1026 (6th Cir. 1994) (polygraph evidence is generally inadmissible because of inherent unreliability but also noting that evidence of a party’s willingness to submit to a polygraph is admissible at the discretion of the trial court)

Conti v. Commissioner, 39 F.3d 658, 663 (6th Cir. 1994) (holding polygraph evidence inadmissible in a tax evasion case and applying the principle that unilaterally obtained polygraph evidence is rarely admissible under Federal Rule of Evidence 403)

United States v. Weiner, 988 F.2d 629, 633 (6th Cir. 1993) (recognizing polygraph evidence as ordinarily inadmissible, although permitting it under the circumstances of the case).

Seventh Circuit

United States v. Pulido, 69 F.3d 192, 205 (7th Cir. 1995) (adopting balancing test for admissibility).

United States v. Dillar, 43 F.3d 299 (7th Cir. 1994) (finding court did not abuse discretion in limiting cross-examination to witness’s answers to polygraph questions).

United States v. Figueroa, 15 F.3d 706 (7th Cir. 1994) (counsel not ineffective for failing to prevent admission of defendant’s failed polygraph test where counsel sought to use testimony offensively).

United States v. Pitz, 2 F.3d 723 (7th Cir. 1993) (finding reliance upon polygraph, inter alia, in sentencing was not improper).

Dillard v. Lane, No. 87 C 4633, 1991 WL 127604 at 6 (N. D.Ill. July 5, 1991) (Rovner, J.) (“it is now settled, at least in the Seventh Circuit, that polygraph examinations are admissible in prison disciplinary proceedings, and that polygraph results may be used to corroborate vital testimony or other evidence”) (citations omitted).

United States v. Smith, 869 F.2d 348, 353 (7th Cir.1989) (stating rule that admissibility of polygraph evidence lies within trial court’s discretion).

United States v. Kampiles, 609 F.2d 1233, 1245 (7th Cir.1979)(*pre-Daubert*; evidence that defendant failed polygraph test prior to confessing to the crime is admissible to rebut defendant’s subsequent claim that his confession was coerced), *cert. denied*, 446 U.S. 954, 100 S.Ct. 2923 (1980).

Eighth Circuit

The Eighth Circuit has condoned the admission of polygraph evidence, but only upon the parties’ stipulation. See *Houston v. Lockhart*, 982 F.2d 1246, 1251-52 (8th Cir.1993); *United States v. Britt*, 917 F.2d 353, 361 (8th Cir.1990), *cert. denied*, --- U.S. ---, 111 S.Ct. 971 (1991); *Anderson v. United States*, 788 F.2d

517, 519 (8th Cir.1986). *But see United States v. Williams*, 95 F.3d 723, 729-30 (8th Cir.1996) (implying that polygraph evidence that has not been stipulated to may be admissible pursuant to *Daubert* if trial court finds that such evidence satisfies rule 403 of Federal Rules of Evidence).

United States v. Weekly, 118 F.3d 576 (8th Cir. 1997) (polygraph evidence in play at sentencing).

Ninth Circuit

United States v. Stein, 127 F.3d 777 (9th Cir. 1997) (polygraph evidence used in sentencing).

United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997) (remanding to determine admissibility of polygraph in light of *Daubert*, noting per se rule inconsistent with *Daubert*).

United States v. Crumby, 895 F. Supp. 1354 (D. Ariz.1995) (allowing admission of favorable results where defendant testifies and is impeached by the Government).

Toussaint v. McCarthy, 926 F.2d 800, 802-03 (9th Cir.1990), *cert. denied*, --- U.S. ---, 112 S.Ct. 213 (1991) (admissible in prison disciplinary proceedings; prison officials may use polygraph evidence to determine if prisoners have given up gang affiliation and are eligible for release from segregation)

United States v. Miller, 874 F.2d 1255, 1261 (9th Cir.1989) (polygraph evidence might be admissible for a limited purpose unrelated to the substantive correctness of the results of the polygraph examination)

United States v. Bowen, 857 F.2d 1337, 1341 (9th Cir.1988) (polygraph evidence admissible only to establish that examination was given in cases where this fact is relevant regardless of result; evidence is not admissible to prove truth of statements made during the examination).

Tenth Circuit

United States v. Call, 129 F.3d 1402, 1405 (10th Cir. 1997) (finding per se exclusion rule inconsistent with *Daubert*).

United States v. Walters, 89 F. Supp.2d 1206, 1209 (D. Kan. 2000) (reciting in fact statement that “Ultimately, and particularly in light of the parties' stipulation, the court permitted the government to introduce evidence regarding the polygraph examinations, including the results of that examination.”).

United States v. Galbreth, 908 F. Supp. 877, 896 (D. N.M.,1995) (“[T]he Court finds that the expert opinion testimony regarding the polygraph results of Defendant Galbreth is admissible. However, because the evidentiary reliability of opinion testimony regarding the results of a particular polygraph test is dependent upon a properly conducted examination by a highly qualified, experienced, and skillful examiner, nothing in this opinion is intended to reflect the judgment that polygraph results are per se admissible. “)

United States v. Hall, 805 F.2d 1410, 1416 (10th Cir.1986) (polygraphs not admissible to show that witness was telling the truth, but only for the limited purpose of establishing why police did not conduct a more complete investigation when the thoroughness of the investigation has been questioned).

Eleventh Circuit

United States v. Tokars, 95 F.3d 1520, 1536 (11th Cir. (Ga.) 1996) (finding no error in admission of the polygraph exam where “The polygraph was not introduced to prove that Lawrence told the Secret Service the truth, but to prove that Lawrence had been deceptive and that Tokars was so informed.”).

United States v. Padilla, 908 F. Supp. 923 (S.D. Fla.1995) (holding polygraph evidence admissible at trial to support challenged defendant’s credibility).

United States v. Piccinonna, 885 F.2d 1529, 1535 (11th Cir.1989) (landmark case providing for polygraph admission under specific circumstances; polygraph admissible when both parties stipulate in advance to circumstances of test and to scope of its admissibility; stipulation must indicate parties agree on material matters such as manner in which test is conducted, nature of questions asked, and identity of examiner administering test, while stipulation as to scope of admissibility must indicate purpose or purposes for which evidence will be introduced; may be admitted to impeach or corroborate testimony of witness only if party planning to use evidence adequately notifies opposing party that it will be offered and opposing party is given reasonable opportunity to have its own polygraph expert administer test covering substantially same questions).

D.C. Circuit

____ *United States v. Cabell*, 890 F. Supp. 13 (D.D.C. 1995) (polygraph evidence used at sentencing).

V. STATE COURTS

Alabama

Ex parte Clements, 447 So.2d 695, 697-98 (Ala. 1984) (admissible with parties stipulation).

Arizona

State v. Jones, 110 Ariz. 546, 551, 521 P.2d 978 (no error when polygraph results considered by sentencing judge), cert. denied, 419 U.S. 1004, 95 S.Ct. 324, 42 L.Ed.2d 280 (1974).

State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962) (polygraph admissible on stipulation).

Arkansas

Wingfield v. State, 796 S.W.3d 574, 576 (Ark. 1990) (admissibility with stipulation).

California

Witherspoon v. Superior Court, 183 Cal. Rptr. 615 (Cal. Ct. Ap. 1982) (held there was no sound basis for per se exclusion of polygraphs). This opinion was overturned by Sect. 351.1 of the California Evidence Code which denied the admission of any polygraph evidence in criminal trials absent the stipulation of the parties.

Connecticut

State v. Porter, 698 A.2d 739, 779 (Conn. 1997) (per se rule of inadmissibility).

Georgia

Forehand v. State, 477 S.E.2d 560, 562 (Ga. 1996) (admissible with stipulation).

Illinois

People v. Fletcher, 328 Ill.App.3d 1062,1074, 768 N.E.2d 72, 82, 263 Ill.Dec.312, 322 (Ill.App. 5 Dist.,2002) (polygraph results admissible to rebut a claim by the defendant that his incriminating statement was improperly obtained).

Indiana

Majors v. State, 773 N.E. 2d 231 (Ind. 2002) (admission of polygraphs, including the mere fact of a polygraph examination, requires stipulation of the parties).

Kansas

State v. Lumley, 977 P.2d 914 (Kan. 1999) (polygraph tests admissible in probation revocation based on relaxed standard of proof; absent stipulation of the parties, not admissible in trial because considered too unreliable).

Kentucky

Morgan v. Commonwealth, 809 S.W.2d 704, 709 (Ky. 1991) (too unreliable and therefore inadmissible).

Louisiana

State v. Catanese, 368 So.2d 975, 981-83 (La.1979) (admissible in posttrial proceedings).

Maryland

State v. Hawkins, 604 A.2d 489, 492 (Md. 1992) (per se rule of inadmissibility).

Michigan

People v. Barbara, 400 Mich. 352, 359, 255 N.W.2d 171 (1977) (admissible in postconviction hearing for new trial).

Minnesota

State v. Opsahl, 513 N.W.2d 249, 253 (Minn. 1994) (per se rule of inadmissibility).

Mississippi

Conner v. State, 632 So.2d 1239, 1257-59 (Miss.1993) (evidence of willingness to take polygraph test admissible to rehabilitate impeached witness).

Missouri

Still applies *Frye* test and has per se exclusion. See *Polygraph Evidence: Where Are We Now*, 65 Mo.L.Rev. 209; *State v. Burch*, 939 S.W.2d 525, 528 (Mo. Ct. App. 1997).

Nebraska

State v. Allen, 560 N.W.2d 829, 842 (Neb. 1997) (per se rule of inadmissibility)

Nevada

Kazalyn v. State, 825 P.2d 578, 582 (Nev. 1992) (admissible with stipulation).

New Mexico

In *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (N.M. 1975), the Supreme Court of New Mexico ruled that polygraph evidence would thereafter be admissible in New Mexico without the requirement of a prior stipulation between the parties. The Court found that its previous stipulation requirement, created because of concerns about the reliability of polygraphs, was “mechanistic in nature,” “inconsistent with the concept of due process,” and “[r]epugnant to the announced purpose and construction of the New Mexico Rules of Evidence.” “These rules shall be construed to secure fairness in administration * * * and promotion of growth and development of the law of evidence . . .”

In 1983, the Supreme Court of New Mexico promulgated Rule of Evidence 11-707, which established procedural requirements for the admission of polygraph evidence. N.M.Stat. Ann. 11-707. Among other requirements, the rule requires a party wishing to admit polygraph evidence provide 30 days notice before trial and provide the opposing party with all documents related to the polygraph he or she wishes to admit, including any past polygraphs taken by the examinee. The rule also provides definitions of key polygraph terms, minimum training requirements for polygraph examiners, and procedures that must be complied with during the giving of the examination. N.M.Stat. Ann. §11-707. The purpose of the rule, other than the obvious benefit of providing uniformity, is to prevent surprise and give the opposing party an opportunity to collect rebuttal evidence. *State v. Baca*, 120 N.M. 383, 388, 902 P.2d 65, 70 (1995). Although the rule establishes requirements before polygraph results are admissible, the Supreme Court of New Mexico has refused to follow a mechanical application of the rule (such as the notice requirement). 902 P.2d at 70.

See also, *State v. Sanders*, 117 N.M. 452, 872 P.2d 870, 877 (1994) (polygraph evidence authorized by rules of evidence)

New York

People v. Angelo, 666 N.E.2d 1333, 1337 (N.Y. 1996) (defendant must demonstrate scientific acceptance of test).

Ohio

_____*State v. Souel*, 53 Ohio St.2d 123, 372 N.E.2d 1318 (Ohio 1978) (holding results of polygraph examination are admissible in evidence at a criminal trial for purposes of corroboration or impeachment, provided that prescribed conditions are observed).

State v. Heston, 675 N.E.2d 532, 540 (Ohio Ct. App. 1996) (admissible with stipulation).

Rhode Island

In re Odell, 672 A.2d 457, 459 (R.I. 1996) (per se rule of inadmissibility).

South Carolina

State v. Wright, 322 S.C. 253, 471 S.E.2d 700, 701 (1996) (polygraph admissibility at discretion of trial court, but should usually be excluded due to prejudicial effects).

Tennessee

State v. Campbell, 904 S.W.2d 608, 614-15 (Tenn. Crim. App. 1995) (per se rule of inadmissibility).

Washington

State v. Bartholomew, 101 Wash.2d 631, 646, 683 P.2d 1079 (1984) (admissible at sentencing phase of capital cases).

State v. Gregory, 910 P.2d 505, 508 (Wash. 1996) (admissible with stipulation).

West Virginia

State v. Blake, 478 S.E.2d 550, 557 (W.Va. 1996) (admissible to impeach a witness).

VI. ONCE ALLOWED BUT NOW RETREATED

In 1974, Massachusetts began to allow polygraph evidence for the limited purpose of corroborating or impeaching a defendant's trial testimony. *Commonwealth v. A Juvenile*, 365 Mass. 421, 425-26, 313 N.E.2d 120 (1974). The court held that "polygraph testing has advanced to the point where it could prove to be of significant value to the criminal trial process if its admissibility initially is limited to carefully defined circumstances designed to protect the proper and effective administration of criminal justice."

In *Commonwealth v. Mendes*, 547 N.E.2d 35 (Mass. 1989), the court changed the rule finding polygraph evidence inadmissible for substantive purposes or for corroboration or impeachment. The court concluded that polygraph evidence continued to suffer from serious shortcomings, including the subjective nature of the polygraph method; the uncertain validity of polygraph evidence; the danger of proliferating a "battle of experts"; the danger of confusing the jury; the danger of usurping the jury's role; and the burden placed on trial courts in conducting evidentiary hearings. *Id.*, at 211, 547 N.E.2d 35. The court concluded that "[f]ifteen years has been more than enough time for examination and evaluation [of polygraph evidence].... Further hope or expectation ... is no longer warranted.... Accordingly, supported by the overwhelming authority throughout the country, we announce that polygraphic evidence, with or without pretest stipulation, is inadmissible in criminal trials in this Commonwealth...."

The Wisconsin Supreme Court reinstated its per se ban after a similar seven year experiment with admissibility concluding that "the burden on the trial court to assess the reliability of stipulated polygraph evidence [outweighs] any probative value the evidence may have." *State v. Dean*, 103 Wis.2d 228, 279, 307 N.W.2d 628 (1981). In 1974, the Wisconsin Supreme Court had decided to allow polygraph evidence to corroborate or impeach a defendant's testimony under limited circumstances. *State v. Stanislawski*, 62 Wis.2d 730, 742-43, 216 N.W.2d 8 (1974). However, based on practical and logistical problems the court in *Dean* held polygraph evidence inadmissible in criminal trials, stating "Our analysis of and our experience with the *Stanislawski* rule lead us ... to conclude that the *Stanislawski* conditions are not operating satisfactorily to enhance the reliability of the polygraph evidence and to protect the integrity of the trial process as they were intended to do."

North Carolina also allowed stipulated polygraph results for a brief time, then reinstated a per se rule of inadmissibility. *State v. Grier*, 307 N.C. 628, 643, 300 S.E.2d 351 (1983) ("[W]e are forced to conclude that the administration of justice simply cannot, and should not, tolerate the incredible burdens involved in the process of ensuring that a polygraph examination has been properly administered. If a trial court were to adequately police the reliability of stipulated results, the time required to explore the innumerable factors which could affect the accuracy of a particular test would be incalculable."). In *Fulton v. State*, 541 P.2d 871, 872 (Okla. Crim. App. 1975), Oklahoma also reinstated its per se ban.

VII. VARIOUS USES OF POLYGRAPHS

Monitoring Probationers

Most jurisdictions allow requiring polygraph examinations as a condition of probation. Annot. Propriety of Conditioning Probation on Defendant's Submission to Polygraph or Other Lie Detector Testing, 86 A.L.R.

4th 709 (1991). This is most commonly used on sexual offense probation cases.

Pretrial Detention

In *United States v. Bellomo*, 944 F.Supp. 1160 (S.D.N.Y. 1996), the court held that a polygraph test could be considered by the court in determining pretrial detention.

Sentencing Issues

In *United States v. Jordan*, 256 F.3d 922, 933, n.7 (9th Cir. 2001), the court held the admission of polygraph evidence at sentencing is in the discretion of the trial judge; *United State v. Messina*, 131 F.3d 36 (2nd Cir. 1997).

The Fact That the Test was Taken

In *United States v. Pittner*, 969 F.Supp. 1246 (W.D. Wash. 1997), the fact the test was taken was admissible to show why an informant changed his story even though the results were not admissible. *Newberry v. State*, 1260 Ga. 416(3), 395 S.E.2d 813 (1990) found no error in the admission of testimony that several witnesses changed their stories after being administered polygraph tests.

Impeachment by Requirement of Taking Test

In *United States v. Lynn*, 856 F.2d 430 (1st Dist. 1988), the court held that the district court erred in foreclosing cross-examination of a government witness on the fact that his plea agreement required him to take a polygraph test.

Admission of Statements Made During Polygraph Test

United States v. Black, 78 F.3d 1 (1st Cir. 1996) held that statements made during a voluntary polygraph test are admissible even if the results are not.

For Impeachment or Corroboration

In *United States v. Padilla*, 908 F.Supp. 923, 926 (S.D.Fla. 1995), the court held that absent a stipulation of the parties, polygraph evidence may be used only for impeachment or corroboration purposes. In *United States v. Crumby*, 895 F.Supp. 1354, 1358 (D.Ariz. 1995), the court held that under specific situations, polygraph evidence may be used to impeach or corroborate a witness.

VIII. POLYGRAPHS AS EXCULPATORY EVIDENCE

In *Carter v. Rafferty*, 826 F.2d 1299 (3rd Cir. 1987), the court held that reports of polygraph tests given to important prosecution witness constituted exculpatory evidence that should be revealed to the defense. See *Wood v. Bartholonew*, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995) (because polygraphs are inadmissible even for impeachment they are not subject to *Brady*).