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**THE ADMISSIBILITY OF POLYGRAPH  
EVIDENCE IN COURT-MARTIAL  
PROCEEDINGS: DOES THE CONSTITUTION  
MANDATE THE GATEKEEPER?**

**PUBLISHED AT 43 A.F. L. REV. 1 (1997)**

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Juris Doctor  
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The Department of Defense exhibits a love-hate relationship with the polygraph machine. Although military examiners have performed over 370,000 polygraph examinations since 1981, not one was admitted into a military court-martial after 1991. At that time, the President promulgated Military Rule of Evidence 707, which declared that polygraph evidence was *per se* inadmissible in a military court-martial. However, when the United States Court of Appeals for the Armed Forces announced the decision of *United States v. Scheffer*, 44 M.J. 442 (C.A.A.F. 1996), it declared that the *per se* exclusion of polygraph evidence, offered by the accused to rebut an attack on his credibility, without providing him an opportunity to lay a foundation for admission, violated his Sixth Amendment right to present a defense. The Supreme Court granted *certiorari* to the case and should hear oral arguments in the fall of 1997.

The Court will have to decide, and this article attempts to answer, the following constitutional question: "Does the *per se* exclusion of the accused's polygraph evidence result in an arbitrary restriction on his right to present relevant and material evidence?" The article progresses in six stages. First, the two general standards for the admission of scientific evidence are reviewed. Second, the Supreme Court cases interpreting the accused's Sixth Amendment right to present a defense are examined. Third, the legal treatment of the polygraph in the military justice system from 1923 to 1996 is investigated. Fourth, the court's opinion in *United States v. Scheffer* is scrutinized and it is argued that MRE 707 does not arbitrarily limit the accused's right to present relevant and material evidence. Fifth, an effort is made to explain what remains of MRE 707 in light of the court's opinion in *Scheffer*. Finally, an appendix is included which reviews the training of DoD polygraph examiners, the procedure for requesting an examination, and a explanation of the actual testing process.

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## Foreword

We are pleased to include in this edition, in the wake of the Supreme Court's grant of certiorari in *United States v. Scheffer*, two articles discussing polygraph evidence in courts-martial. Although quite coincidental to receive two articles on the same subject at the same time, we decided to publish both because of the quality of the articles, the differences in the scope of coverage, and the timeliness of the submissions. Indeed, if one author had prepared both manuscripts, there would be little to cut.

The first article—"The Admissibility of Polygraph Evidence in Court-Martial Proceedings: Does the Constitution Mandate the Gatekeeper?"—is a comprehensive review of the current status of federal and state law regarding admissibility of polygraph evidence. The author focuses the reader's attention to these jurisdictions' treatment of polygraph evidence in light of the Sixth Amendment Compulsory Process Clause, before turning to a discussion of the military's treatment of polygraph evidence. The author then applies a constitutional analysis to Military Rule of Evidence 707. This article includes an appendix which discusses the Department of Defense polygraph program.

The second article, "Jurisprudential Myopia: Polygraphs in the Courtroom," is an article which approaches the issue of admissibility from the perspective of the helpfulness of the evidence. The authors do not debate the scientific validity of the evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* Instead, they argue there has been no showing such evidence would assist the jury in deciding credibility, a matter left to the collective wisdom of jurors under our system of justice. This article focuses on the military and federal rules of evidence, particularly the interaction between rules 702 and 608. Especially noteworthy is the authors' proposed rule of evidence. Broader than Military Rule of Evidence 707, it codifies existing caselaw prohibiting opinions concerning the believability of another witness's in-court or out-of-court statements.

The Supreme Court is scheduled to hear arguments in *Scheffer* this fall. The Court's selection of a military case to discuss the admissibility of polygraph evidence in criminal proceedings is exciting. We trust these articles will shed additional light on the debate before the Court, and that they will be as well received by our readers as they were by us in preparing them for publication.

*The Editorial Board*  
*The Air Force Law Review*

# THE ADMISSIBILITY OF POLYGRAPH EVIDENCE IN COURT-MARTIAL PROCEEDINGS: DOES THE CONSTITUTION MANDATE THE GATEKEEPER?

FIRST LIEUTENANT JOHN A. CARR\*

## I. INTRODUCTION

The Department of Defense exhibits a love-hate relationship with the polygraph machine. Since 1981, military examiners have performed 370,463 polygraph examinations.<sup>1</sup> Although 87,139 polygraph examinations were conducted during the course of criminal investigations, not one was admitted into a military court-martial after 1991. At that time, the President promulgated Military Rule of Evidence 707<sup>2</sup> which requires the trial judge to

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<sup>1</sup> Annual Polygraph Report to Congress, Department of Defense Polygraph Program, Office of the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence) Fiscal Years 1986-1996. The figure quoted represents the total number of polygraph examinations performed for both exculpatory requests and criminal investigations. The author would like to thank Mr. John R. Schwartz, former Deputy Director of the DoD Polygraph Institute, and his staff for providing these reports.

<sup>2</sup> Military Rule of Evidence 707 provides:

(a) 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.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

MANUAL FOR COURTS-MARTIAL, United States, Mil. R. Evid. 707 (1995 ed.) [hereinafter MCM]. It should be noted that pursuant to Mil. R. Evid. 1101, Mil. R. Evid. 707 would not apply to Article 32 hearings, Article 72 proceedings for vacation or suspension of a sentence, proceedings for search authorization or pre-trial restraint, or to non-judicial punishment under Article 15, UCMJ, 10 U.S.C. § 815. Mil. R. Evid. 1101.

exclude all forms of polygraph evidence.<sup>3</sup> While legal scholars, practitioners, and the courts continue to debate its merits, the *per se* exclusion of a defendant's polygraph testimony now clearly implicates the Constitution.

First articulated in 1923, the "*Frye* test" of general acceptance within the relevant scientific community effectively barred the admission of polygraph evidence in a military court-martial.<sup>4</sup> Although the President promulgated the Military Rules of Evidence (hereinafter MREs) in 1980, this common-law test continued to represent the admissibility standard for scientific evidence until 1987. In 1987, the United States Court of Military Appeals (hereinafter COMA), in *United States v. Gipson*,<sup>5</sup> held that MRE 702 superseded the "*Frye* test," thereby opening the door for the admissibility of polygraph testimony. The trial judge's determination was to be guided by the MREs, reversible only upon the showing of an abuse of discretion.

The door was only open for four years. In 1991, the President enacted MRE 707, which declared that polygraph evidence was *per se* inadmissible in a military court-martial. However, when the United States Court of Appeals for the Armed Forces (hereinafter CAAF) announced the decision of *United States v. Scheffer* in 1996,<sup>6</sup> it declared that the *per se* exclusion of polygraph evidence, offered by the accused to rebut an attack on his credibility, without providing him an opportunity to lay a foundation under MRE 702 and *Daubert v. Merrell Dow Pharmaceuticals*,<sup>7</sup> violated his Sixth Amendment right to present a defense.

The Supreme Court has granted *certiorari* to the case and should hear oral arguments in the fall of 1997. The Court will have to decide, and this article will attempt to answer, the following constitutional question: "Does the *per se* exclusion of the accused's polygraph evidence result in an arbitrary restriction on his right to present relevant and material evidence?" If polygraph evidence is found to be otherwise inadmissible under the standard rules of evidence, then MRE 707 survives this test. If polygraph evidence is found to be otherwise admissible, then it must be determined whether the

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<sup>3</sup> The testimony at issue is actually the expert opinion of the polygraph examiner, rendered after an analysis of the polygraph charts. For the purposes of discussion, however, this expert testimony will be referred to as polygraph evidence.

<sup>4</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

<sup>5</sup> *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987).

<sup>6</sup> *United States v. Scheffer*, 44 M.J. 442 (C.A.A.F. 1996), *cert. granted*, 117 S. Ct. 1817 (1997). Understanding the significance and unprecedented nature of the decision, the court was careful to limit its holding to exculpatory evidence arising from a polygraph examination of the accused, offered to rebut an attack on his credibility. The court specifically left undecided other constitutional questions such as those involving government-offered polygraph evidence or evidence of another witness' examination.

<sup>7</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

President's policy justifications are arbitrary. Only if the policy justifications are deemed arbitrary can MRE 707 be struck.

An appendix to this article reviews the training of DoD polygraph examiners, the procedure for requesting an examination, and an explanation of the actual testing process. This overview is provided as a background for those readers not acquainted with the polygraph examination. Additionally, it serves as the basis of discussion for the practical legal implications of MRE 707, and the admissibility of polygraph evidence post-*Scheffer*.

In Part II, the two general standards for the admission of scientific evidence are reviewed. The first, commonly referred to as the "*Frye* test," is still applied in a number of state jurisdictions. The second standard, having emerged from the Supreme Court decision of *Daubert v. Merrell Dow Pharmaceuticals*, consists of a determination by the trial judge of the scientific method's reliability. This approach is utilized by the federal circuits and many states that have adopted variations of Federal Rule of Evidence 702. Although these two standards typically guide the admissibility determination for scientific evidence, the overwhelming majority of both federal and state courts have chosen to either exclude the evidence outright, or permit its admission only if both parties have previously stipulated. Only three federal circuits, three district courts, and one state court have entrusted the admissibility determination to the discretion of the trial judge as directed by *Daubert*.

Part III examines Supreme Court cases interpreting the accused's Sixth Amendment right to present a defense. While the Court has not defined the accused's Sixth Amendment right to present either scientific expert testimony or polygraph evidence, the federal circuit and state courts have heard and consistently denied constitutional challenges to both the *per se* exclusion rule and the stipulation requirement.

In Part IV, the legal treatment of the polygraph in the military justice system from 1923 to 1991 is investigated, including the CAAF's decision in *United States v. Gipson* and its progeny. The President's rationale supporting the enactment of MRE 707 in 1991 is also reviewed. Finally, the CAAF holdings that directly challenged the constitutionality of MRE 707, *United States v. Williams*<sup>8</sup> and *United States v. Scheffer*, are examined.

Part V of the article scrutinizes the CAAF's analysis in *United States v. Scheffer*. The framework guiding the constitutional analysis is drawn from the Supreme Court cases interpreting the Sixth Amendment. It is then argued that polygraph evidence may be otherwise inadmissible under the standard rules of evidence. Even if polygraph is otherwise admissible, the President's rationale for the *per se* rule does not appear to be arbitrary. Consequently, it is argued

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<sup>8</sup> *United States v. Williams*, 43 M.J. 348 (C.A.A.F. 1995), *cert. denied*, 116 S. Ct. 925 (1996).

that MRE 707 does not arbitrarily limit the accused's right to present relevant and material evidence.

Finally, Part VI examines what remains of MRE 707 in light of *Scheffer*. If the accused places his credibility at issue and it is attacked by the government, then the accused has the right to lay the foundation for the admission of the polygraph expert's testimony. If the accused's exculpatory exam is *ex parte*, he may be required to submit to an exam conducted by the government. Additionally, reliability concerns based upon the "Friendly Examiner Theory" might require that an inculpatory result be admitted. While it is unclear whether the CAAF will invoke *Scheffer* to permit the introduction of a witness' exam, the court has previously held that evidence a witness refused or requested a polygraph exam is irrelevant.

Part VIII is an appendix which explains the DoD Polygraph program.

## II. THE ADMISSIBILITY OF POLYGRAPH TESTIMONY AS SCIENTIFIC EVIDENCE

Scientific evidence is subject to two admissibility standards. The first standard is the "*Frye* test" of general acceptance within the relevant scientific community<sup>9</sup> which is still applied by a number of state jurisdictions. The second standard consists of a determination by the trial judge of the reliability of the scientific methodology or technique, and has emerged from the Supreme Court decision of *Daubert v. Merrell Dow Pharmaceuticals*.<sup>10</sup> This approach is utilized by the federal circuits and many of the states that have adopted variations of Federal Rule of Evidence 702.

In applying these two standards to polygraph evidence, the vast majority of federal and state jurisdictions either exclude the evidence through a *per se* exclusion rule or permit its admission only after both parties have stipulated to it (thereby waiving any objection to otherwise inadmissible evidence). Significantly, the circuit courts of appeal, the highest state courts, and state legislatures constructed these admissibility determinations, which have the same practical effect as a rule of evidence. Only three federal circuits, three district courts, and one state jurisdiction entrust the admissibility determination to the trial judge's discretion as directed by *Daubert*.

### A. General Admissibility Requirements for Scientific Evidence

In 1923, the test governing the admissibility of polygraph evidence in both federal and state courts was first announced by the D.C. Circuit's decision

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<sup>9</sup> 293 F. 1013 (D.C. Cir. 1923).

<sup>10</sup> 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

in *Frye v. United States*.<sup>11</sup> The scientific evidence offered was a “systolic blood pressure deception test,” which simply measured the change in the individual’s blood pressure. This test was a distant forerunner of the modern polygraph.<sup>12</sup> Articulating what is now commonly referred to as the “*Frye* test,” the Court stated

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 the 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*.<sup>13</sup>

The Federal Rules of Evidence (hereinafter FRE or FREs), enacted by Congress in 1975, include FRE 702 which addresses the admissibility of expert testimony.<sup>14</sup> It was not clear, however, if the *Frye* test of general acceptance survived FRE 702, as the Advisory Notes failed to specifically address the issue. The Supreme Court finally laid to rest the *Frye* test in the case of *Daubert v. Merrell Dow Pharmaceuticals*.<sup>15</sup>

The issue in *Daubert* was whether the drug Bendectin caused birth defects. The scientific expert testimony centered on the use of a particular reanalysis of the epidemiological studies, and more importantly, the appropriate standard for the admissibility of this testimony.<sup>16</sup> The Supreme Court declared that the *Frye* test did not survive the adoption of the FREs.<sup>17</sup>

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<sup>11</sup> 293 F. 1013 (D.C. Cir. 1923).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1014 (emphasis added).

<sup>14</sup> Federal Rule of Evidence 702 provides: “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 opinion or otherwise.”

<sup>15</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

<sup>16</sup> *Id.* at 2791-2792.

<sup>17</sup> *Id.* at 2793. Many state courts, however, have declined to adopt the *Daubert* standard and continue to utilize either the *Frye* test or a variation of it. In the following cases, states have declined to adopt *Daubert*; *State v. Carter*, 246 Neb. 953 (1994); *People v. Lyons*, 907 P.2d 708 (Colo. App. 1995), *reh’g denied*, (Sep 07, 1995); *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750 (1995), *review denied*, (Feb 06, 1996); *State v. Case*, 4 Neb. App. 885, 553 N.W.2d 173 (1996); *State v. Jones*, 130 Wash. 2d 302, 922 P.2d 806 (1996). In the following cases, states have declined to follow *Daubert* on state law grounds; *State v. Alt*, 504 N.W.2d 38 (Minn. App. 1993); *People v. Wesley*, 83 N.Y.2d 417, 633 N.E.2d 451 (1994); *People v. Leahy*, 8 Cal. 4th 587, 882 P.2d 321, 34 Cal. Rptr.2d 663, (1994); *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994); *State v. Carlson*, 80 Wash. App. 116, 906 P.2d 999 (1995); *People v. Dalcollo*, 282 Ill. App. 3d 944, 669 N.E.2d 378 (1996), *reh’g denied*, (Sep 12,

The Court ruled that when a trial judge is presented with a proffer of expert testimony, she must determine at the outset, "pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."<sup>18</sup> The Court noted that this judgment "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."<sup>19</sup>

In making this judgment, the trial judge was provided with four general factors to consider. First, the judge should ordinarily consider whether the theory can and has been tested.<sup>20</sup> Second, it might be pertinent to consider "whether the theory or technique has been subjected to peer review and publication."<sup>21</sup> Third, the judge should ordinarily consider the error rate of the particular scientific technique.<sup>22</sup> Finally, the "general acceptance" of the theory or technique could still be taken into account, as a technique which has gained minimal support in the scientific community could be viewed with skepticism.<sup>23</sup>

The Court emphasized that the inquiry under FRE 702 was "a flexible one."<sup>24</sup> It also instructed the judges to be mindful of other applicable rules of evidence,<sup>25</sup> including the use of the directed verdict.<sup>26</sup> Expressing its confidence in the ability of the jury, however, the Court stated that "[v]igorous cross-examination, presentation of contrary evidence, and careful instructions on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."<sup>27</sup> The Court concluded that these devices, "rather than wholesale exclusion under an uncompromising 'general acceptance' test are the appropriate safeguards" when the basic standards of FRE 702 are met.<sup>28</sup>

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1996); *State v. Cannon*, 130 Wash. 2d 313, 922 P.2d 1293 (1996); *State v. Copeland*, 130 Wash. 2d 244, 922 P.2d 1304 (1996).

<sup>18</sup> *Id.* at 2796 (footnote omitted). The Court did note that if the theory was so firmly established that it has attained the status of scientific law, it was the proper subject of judicial notice under Fed. R. Evid. 201. *Id.* at 2796 n.11.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 2797.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (citation omitted).

<sup>25</sup> The Court specifically mentioned Fed. R. Evid. 703, Fed. R. Evid. 706 which allows for court appointed experts, and Fed. R. Evid. 403 which permits the judge to exclude the evidence if its prejudicial effect substantially outweighs its probative value. *Id.* at 2797-98.

<sup>26</sup> *Id.* at 2798 (citation omitted).

<sup>27</sup> *Id.* (citing *Rock v. Arkansas*, 483 U.S. 44, 61, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987)).

<sup>28</sup> *Id.*

## B. Polygraph Admissibility in Federal and State Courts

The federal circuits as well as the state courts are split on the treatment and admissibility of a polygraph examiner's expert opinion. Although many commentators divide the approaches into three broad categories,<sup>29</sup> a constitutional analysis requires that four categories be defined: 1) *per se* exclusion; 2) admissible if stipulated to by both parties; 3) substantive right to admit upon stipulation; and 4) admission at the trial judge's discretion. While the Supreme Court's holding in *Daubert* has prompted a number of courts to reformulate their approach toward polygraph admissibility under FRE 702, a majority of jurisdictions have maintained their pre-*Daubert* rulings.

### 1. *Per se* Exclusion

In the federal system, the Second,<sup>30</sup> Fourth,<sup>31</sup> Tenth,<sup>32</sup> and DC Circuit<sup>33</sup> maintain a *per se* exclusion of polygraph evidence. Additionally, thirty-one state jurisdictions hold that polygraph evidence is *per se* inadmissible.<sup>34</sup>

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<sup>29</sup> See, e.g., Paul C. Giannelli & Edward J. Imwinkelried, *Scientific Evidence*, 2d ed. Vol.1 at § 8-3 (1993) (dividing admissibility into three categories: 1) *per se* exclusion, § 8-3 (A); 2) by stipulation, § 8-3(B); and 3) discretionary admission, § 8-3(C)). The examination of the admissibility standards for the various jurisdictions that follows draws from this resource.

<sup>30</sup> See, e.g., *United States v. Kwong*, 69 F.3d 663, 668 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1343 (1996).

<sup>31</sup> *United States v. Walker*, 66 F.3d 318, 1995 WL 551361 at n.2 (4th Cir. 1995), *cert. denied sub nom.*, *Harris v. United States*, 116 S. Ct. 967 (1996); *United States v. A&S Council Oil Co.*, 947 F.2d 1128, 1134 (4th Cir. 1991).

<sup>32</sup> *United States v. Soundingsides*, 820 F.2d 1232, 1241 (10th Cir. 1987), *reh'g denied*, 825 F.2d 1468 (10th Cir. 1987); *United States v. Hunter*, 672 F.2d 815 (10th Cir. 1982).

<sup>33</sup> See, e.g., *Frye v. United States*, 293 F. 1013, (D.C. Cir. 1923); *United States v. Skeens*, 494 F.2d 1050, 1053, (D.C. Cir. 1974) ("[The Frye test] has been followed uniformly in this and other Circuits and there has never been any successful challenge to it in any federal court").

<sup>34</sup> Giannelli, *supra* note 29, at § 8-3(A) (Alaska, Colorado, Connecticut, Hawaii, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin) (citations omitted). See also *State v. Weston*, 912 S.W.2d 96, 100 (Mo. App. 1995); *People v. Shedrick*, 66 N.Y.2d 1015, 1018, 489 N.E.2d 1290, 499 N.Y.S.2d 388 (1985).

The Supreme Court of Vermont has not spoken on the subject. *State v. Hamlin*, 146 Vt. 97, 108, 499 A.2d 45, 53 (1985). In a hearing on the State's motion to exclude polygraph evidence, the court said:

It would be something more than a major stroke in terms of stare decisis and in terms of innovation in our criminal law if this Judge on his own decided to admit polygraph evidence. I think, if the break-through should come, it should come from the highest court and not from the trial court.

Generally, the exclusion is absolute and will be invoked by the trial judge regardless of whether the parties had previously stipulated to the admission of the evidence.<sup>35</sup> State courts have justified the common law exclusion rule on the grounds that the exams are generally unreliable and because the testimony offered infringes upon the role of the courts while subverting the adversarial process.

At least one state legislature, Montana, has passed a statutory prohibition on the admission of all polygraph evidence at all phases of the criminal process.<sup>36</sup> In interpreting this statute, the Montana Supreme Court has left little to doubt concerning its enthusiasm for polygraph evidence: "We take this opportunity to clarify the following simple rule of law for the benefit of the bench and bar of Montana: Polygraph evidence shall not be allowed in any proceeding in a court of law in Montana."<sup>37</sup>

At least three states which originally admitted polygraph evidence upon stipulation have reverted to a *per se* inadmissibility standard. The Oklahoma Criminal Appeals Court was the first to abandon the stipulation requirement, holding that the unreliability of the test required its total exclusion.<sup>38</sup> Finding that the stipulation did not enhance the reliability of the test or protect the integrity of the trial process, Wisconsin courts reverted to a *per se* exclusion in 1981.<sup>39</sup> North Carolina followed suit, reenacting its *per se* rule in 1983.<sup>40</sup>

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The State agreed that the admission of polygraph evidence is within the discretion of the trial court. We express no opinion as to the validity of this agreement.

*Id.* at 109 n.4.

<sup>35</sup> See, e.g., *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983). The Supreme Court of North Carolina limited its holding with the following statement: "We wish to make it abundantly clear, however, that this [*per se*] rule does not affect the use of the polygraph for investigatory purposes." *Id.* See also *Pulaski v. State*, 476 P.2d 474 (Alaska 1970); *Akonom v. State*, 40 Md. App. 676, 394 A.2d 1213 (1978).

<sup>36</sup> *State v. Staat*, 248 Mont. 291, 292, 811 P.2d 1261 (1991).

The Montana legislature has prohibited polygraph examination results from being introduced in evidence. This is the public policy of Montana with which we agree. Section 37-62-302, MCA, enacted in 1983, provides: Results of a polygraph examination or other test given by an examiner may not be introduced or admitted as evidence in a court of law.

*Id.*

<sup>37</sup> *Id.* at 293.

<sup>38</sup> *Fulton v. State*, 541 P.2d 871, 872 (Okla. Crim. 1975).

<sup>39</sup> *State v. Dean*, 103 Wis. 2d 228, 307 N.W.2d 628 (1981). For a compulsory process analysis of the *State v. Dean* decision, see Note, *State v. Dean: A Compulsory Process Analysis of the Inadmissibility of Polygraph Evidence*, 1984 Wis.L.Rev. 237.

<sup>40</sup> *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 356-61 (1983). In 1975, the North Carolina courts decided that if the parties stipulated and other conditions were met, the

## 2. Stipulation Requirement

The Sixth,<sup>41</sup> Eighth,<sup>42</sup> and Eleventh<sup>43</sup> Circuits permit polygraph evidence to be admitted if stipulated to by both parties before the test is administered and the trial judge determines that the requirements of the FREs are met. The Eleventh Circuit permits polygraph evidence to be used to impeach or corroborate a witness' testimony even in the absence of a stipulation. Seventeen states also allow polygraph evidence to be admitted upon the stipulation of the parties.<sup>44</sup> At least one state legislature, California,

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polygraph testimony would be admissible. This holding effectively adopted the rationale of the Arizona Supreme Court in *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962). In *Grier*, the Court held that the stipulation did not enhance the reliability of the polygraph, placed "incredible burdens" on the administration of the courts, could degenerate the trial into a trial of the polygraph machine, diverted the jury's attention for the issue of guilt or innocence, and might be unduly persuasive. *Id.* at 637-45.

However, in an unpublished opinion, a Wisconsin court of appeals judge has recently urged the State Supreme Court to reconsider the decision and permit admission at the discretion of the trial court. *State v. Steven G.B.*, 204 Wis. 2d 108, 552 N.W.2d 897, 1996 WL 426089, (Wis. Ct. App. 1996) (Sundby, J., concurring), *review denied*, 205 Wis. 2d 133, 555 N.W.2d 814 (1996), and *cert. denied sub nom.*, *Berndt v. Wisconsin*, 117 S. Ct. 959, 136 L. Ed. 2d 845, 65 U.S.L.W. 3558, 65 U.S.L.W. 3568 (1997). A Michigan judge has done likewise. *People v. Smith*, 211 Mich. App. 233, 235, 535 N.W.2d 248, 249 (1995) (Baxter, J., dissenting).

The Supreme Court of Connecticut has agreed to hear arguments challenging the *per se* rule as well as the continued applicability of the *Frye* test after *Daubert*. *State v. Hunter*, 37 Conn. App. 907, 655 A.2d 291 (1995), *cert. granted in part*, 236 Conn. 907, 670 A.2d 1307 (Conn. Feb 13, 1996).

The Colorado Court of Appeals has refused to rule that its *per se* requirement violates the Supreme Court's ruling in *Daubert*. In *People v. Lyons*, the Court explained that since *Daubert* was simply an interpretation of the federal rules of evidence, and was not decided on constitutional grounds, it was not binding on the Colorado courts. *People v. Lyons*, 907 P.2d 708, 712 (Colo. App. 1995), *reh'g denied*, (1995); *reaff'g* *People v. Anderson*, 637 P.2d 354 (Colo. 1981). As such, Colorado would continue to apply the *Frye* test to polygraph testimony, while other scientific evidence would be evaluated under Colo. R. Evid. 702. *Id.* at 712 (citing *Fishback v. People*, 851 P.2d 884 (Colo. 1993); *Campbell v. People*, 814 P.2d 1 (Colo. 1991); *People v. Hampton*, 746 P.2d 947 (Colo. 1987)).

<sup>41</sup> See, e.g., *United States v. Sherlin* 67 F.3d 1208, 1217 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 795 (1996); *United States v. Scarborough* 43 F.3d 1021 (6th Cir. 1994); *Poole v. Perini*, 659 F.2d 730, 735 (6th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982).

<sup>42</sup> See, e.g., *Anderson v. United States*, 788 F.2d 517, 519 n.1 (8th Cir. 1986); *United States v. Alexander*, 526 F.2d 161, 163-70 (8th Cir. 1975).

<sup>43</sup> See, e.g., *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989), *aff'd*, 925 F.2d 1474 (11th Cir. 1991).

<sup>44</sup> Giannelli, *supra* note 29, at § 8-3(B) (Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Idaho, Iowa, Kansas, Nevada, New Jersey, Ohio, Utah, Washington, Wyoming) (citations omitted). See also *Sanchez v. State*, 675 N.E.2d 306, 1996 WL 715432, \*1 (Ind. 1996).

has enacted a specific rule of evidence governing the admissibility determination, which is identical to MRE 707 with the addition of the stipulation requirement.<sup>45</sup>

Two arguments are commonly advanced to defend the requirement of a mutual stipulation. The first argument is that the stipulation acts as a waiver or consent to the introduction of otherwise inadmissible evidence. The court will enforce the agreement out of "fairness" to both parties, since although the accused failed the test and objects to its introduction, undoubtedly he would have moved to admit the result had it been favorable.<sup>46</sup> The second argument is that the stipulation, by outlining the testing procedures and the identity of the particular examiner, enhances the reliability of the polygraph results.<sup>47</sup>

Regardless of which argument is forwarded by the court, the stipulation requirement highlights the unique place of polygraph testimony in the court system. Before the trial judge in any of the respective jurisdictions will consider the admission of the polygraph evidence, both parties must have stipulated to the admissibility of the evidence.<sup>48</sup> Therefore, *ex parte* exams are

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A few state courts which currently abide by the stipulation requirement have expressed a willingness to reconsider its underlying logic. For example, a Florida district court, which still follows the *Frye* test, has agreed to review whether the results of polygraph tests are inadmissible as a matter of law. *State v. Santiago*, 679 So. 2d 861, 863 (Fla. Dist. Ct. App. 1996). Additionally, the Supreme Court of Utah rejected a defendant's argument that she should be permitted to introduce polygraph results absent a stipulation because the proper foundation was not laid, but noted that it might be willing to reexamine the issue. *State v. Crosby*, 927 P.2d 638, 643 (Utah 1996) ("While we would be willing to reexamine the issue, we note that a future proponent of polygraph evidence should make a more detailed foundational showing, specifically demonstrating how research or recent developments have made the polygraph more reliable").

<sup>45</sup> California Evidence Code § 351.1 provides:

(a) 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 in any criminal proceeding. . . unless all parties stipulate to admission of such results.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

<sup>46</sup> See, e.g., *Cullin v. State*, 565 P.2d 445, 457 (Wyo. 1977).

<sup>47</sup> See, e.g., *State v. Souel*, 53 Ohio St. 2d 123, 133, 372 N.E.2d 1318, 1323 (1978) ("The requirement. . . will insure control over what is generally recognized as the single most important variable affecting the accuracy of the polygraph test results, viz. the polygraph examiner."); *Accord Corbett v. State*, 94 Nev. 643, 646-47, 584 P.2d 704, 706 (1978).

<sup>48</sup> Many states follow the stipulation requirements set forth in *State v. Valdez*, 91 Ariz. 274, 283-84, 371 P.2d 894, 900-01 (1962). The requirements provide that: 1) all parties sign a written stipulation that the defendant will submit to the test and that the graphs and the

still *per se* excluded. More importantly, the prosecution can refuse to stipulate for *any* reason. In this manner, it is the prosecution that effectively acts as the “gatekeeper” to the admission of the scientific evidence in question. Without a stipulation, the trial judge’s discretion is limited.

Once the trial judge determines that a valid stipulation exists, the jurisdictions are also split on whether any further requirements are necessary. A few state courts do not impose any further “gatekeeping” function on the trial judge other than to make this initial determination.<sup>49</sup> On the other hand, the federal circuits require that the district judge ensure that the additional requirements of the FREs are met.<sup>50</sup> Many state courts also require the trial judge to determine that the test was conducted under the “proper conditions.”<sup>51</sup>

Given that courts have justified the stipulation requirement on the grounds that the polygraph is generally unreliable, it is difficult to imagine what standards the judge should use in discerning if “proper conditions” were met. For example, suppose the evidence was not a polygraph exam, but the testimony of a palm reader. The accused contends that the palm reader examined the right hand and not the left, which is the typical procedure used by the majority of palm readers. Should the judge admit the evidence? If the palm reader had read the left hand, it would seem that the “general acceptance” test of *Frye* would have been met and the evidence admissible regardless of the stipulation. Either the evidence meets the necessary requirements of the FREs and should be admitted, or it does not meet the requirements and should be excluded.<sup>52</sup> The FREs do not provide for a middle ground.

The paradox of a stipulation requirement is further illustrated by the rulings of the Eighth Circuit. The court has rejected arguments that polygraph

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examiner’s opinion will be admissible by either party at trial; 2) admission remains at the discretion of the trial judge (e.g., if he is not convinced that the examiner is qualified or the test was conducted under the proper conditions he may refuse); 3) the opposing party has the right to cross-examine; and 4) the judge may provide limiting instructions to the jury.

<sup>49</sup> See, e.g., *State v. Marti*, 290 N.W.2d 570, 586-87 (Iowa 1980); *State v. Green*, 245 Kan. 398, 405, 781 P.2d 678 (1989).

<sup>50</sup> See, e.g., *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989), *aff’d*, 925 F.2d 1474 (11th Cir. 1991).

<sup>51</sup> See, e.g., *State v. Valdez*, 91 Ariz. 274, 283-84, 371 P.2d 894, 900-01 (1962); *State v. Souel*, 53 Ohio St. 2d 123, 133, 372 N.E.2d 1318, 1323 (1978); *Corbett v. State*, 94 Nev. 643, 646-47, 584 P.2d 704, 706 (1978).

<sup>52</sup> The Supreme Court of Wyoming’s opinion in *Cullin v. State*, 565 P.2d 445 (Wyo. 1977) illustrates this double standard. In adopting a stipulation requirement, the court stated that in addition to the stipulation “[t]here should be some test of reasonable reliability before final admission by the judge . . . We see no real or unusual problem in that regard and believe that it can be accomplished through existing, accepted rules of evidence.” *Id.* at 457. Arguably, if the evidence meets the requirements of the “existing, accepted rules of evidence” then it should be admitted regardless of whether the stipulation was signed by both parties. The Court acknowledged this argument, and stated that it would consider the admissibility of the polygraph absent stipulation “when we come to it.” *Id.* at 459 n.14.

results should be admitted absent stipulation, holding that the requirement did not amount to a denial of due process<sup>53</sup> and that "there is still no evidence that a 'lie detector' has any scientific reliability."<sup>54</sup> Alternately, the Eighth Circuit does not blindly admit stipulated examinations. Instead, the proffering party must also establish an adequate foundation, which can be "construed through testimony showing a sufficient degree of acceptance of the science of polygraphy by experienced practitioners in polygraphy and other related experts."<sup>55</sup> When this showing is met, the court has ruled that "[w]e cannot conclude that the stipulated or consented to polygraph is so unreliable as to be inadmissible in this particular case."<sup>56</sup>

Thus, the Eighth Circuit has differentiated between the standard of "sufficient degree of acceptance in the science" and "sufficient 'general scientific acceptance.'" However, the question becomes "why does it matter if the parties stipulated to the results?" The evidence should be admissible under either *Frye* or FRE 702 regardless of whether the other party consented to its admission.

The Sixth Circuit has also refused to hold that unilaterally obtained polygraph examinations are admissible, but not on FRE 702 grounds. Instead, the district court may exclude the evidence under FRE 403 regardless of the admissibility of the evidence under FRE 702. The general rule in the Circuit is "that unilaterally obtained polygraph evidence is almost never admissible under [FRE] 403" because the probative value of the exam is "substantially less" since the accused does not have an adverse interest in a deceptive result.<sup>57</sup> Additionally, this circuit has held that "the use of a polygraph solely to bolster

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<sup>53</sup> *United States v. Gordon*, 688 F.2d 42, 44 (8th Cir. 1982) (citing *United States v. Bohr*, 581 F.2d 1294, 1303 (8th Cir.), *cert. denied*, 439 U.S. 958 (1978)).

<sup>54</sup> *Id.* at 45. However, in *United States v. Williams*, 95 F.3d 723, 728-29 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 750 (1997), the court entertained the notion that *Daubert* may permit the introduction of the evidence absent stipulation, but found that the trial testimony was insufficient to permit the court to conduct a *Daubert* analysis and the examination was more prejudicial than probative under Fed. R. Evid. 403.

<sup>55</sup> *United States v. Oliver*, 525 F.2d 731, 736 (8th Cir. 1975) (citing *Frye v. United States*, 293 F. 1013, 1014 (1923)), *cert. denied*, 424 U.S. 973 (1976).

<sup>56</sup> *Id.* at 737.

<sup>57</sup> *United States v. Sherlin*, 67 F.3d 1208, 1216-17 (6th Cir. 1995) (citing *Conti v. Commissioner*, 39 F.3d 658, 663 (6th Cir. 1994), *cert. denied*, 115 U.S. 1793, 115 S. Ct. 1793, 131 L. Ed. 2d 722 (1995)), *cert. denied*, 116 S. Ct. 795 (1996). The court has indicated that in limited circumstances, polygraph-related evidence may be admissible "if it is relevant to the proof developed by the probative evidence." *United States v. Blakeney*, 942 F.2d 1001, 1014 (6th Cir. 1991), *cert. denied*, 502 U.S. 1035 (1992). The basis of the Sixth Circuit's opinion is the "Friendly Examiner Theory." For a discussion of the "Friendly Examiner Theory," see Appendix notes 561-62 and accompanying text.

a witness' credibility is 'highly prejudicial,' especially where credibility issues are central to the verdict."<sup>58</sup>

The Eleventh Circuit maintains a hybrid approach to the admissibility of polygraph evidence. The court modified its *per se* rule excluding polygraph evidence in *United States v. Piccinonna*.<sup>59</sup> After reviewing the current literature and rules followed by the federal and state jurisdictions, the court concluded that polygraph examinations met *Frye's* "general acceptance" test.<sup>60</sup> However, the court was unable to locate any case in which a court admitted, absent stipulation, polygraph expert testimony offered to prove the substantive truth of the statement made at the time of the exam.<sup>61</sup>

The court in *United States v. Piccinonna* outlined two circumstances in which polygraph evidence may be admitted at trial. First, polygraph expert testimony would be admissible if "both parties stipulate in advance as to the circumstances of the test and the scope of its admissibility."<sup>62</sup> The parties must agree to the material matters, such as the testing procedures, the nature of the questions asked, and the identity of the examiner.<sup>63</sup> In making the admissibility determination under FRE 702, the court instructed trial judges to consider if the examiner's qualifications are acceptable, the test procedure was administered fairly, and whether the test questions were relevant and proper.<sup>64</sup>

The court also held that polygraph expert testimony could be admitted to impeach or corroborate a witness' testimony.<sup>65</sup> However, the party who wishes to utilize the evidence must provide adequate notice to the opposing party of his intention. The opposing party must also be given a "reasonable opportunity" to administer its own polygraph test covering "substantially the same questions."<sup>66</sup> Finally, the court made clear that all the applicable FREs still apply. For example, the court pointed out that under FRE 608, "evidence that a witness passed a polygraph examination, used to corroborate that

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<sup>58</sup> *United States v. Sherlin*, 67 F.3d at 1217 (citing *Barnier v. Szentmiklosi*, 810 F.2d 594, 597 (6th Cir. 1987)).

<sup>59</sup> *United States v. Piccinonna* 885 F.2d 1529 (11th Cir. 1989), *aff'd*, 925 F.2d 1474 (11th Cir. 1991). See generally W. Thomas Halbeib, *United States v. Piccinonna: The Eleventh Circuit Adds Another Approach to Polygraph Evidence in the Federal System*, 80 Ky. L.J. 225 (1991); Note, *Reexamining Polygraph Admissibility*, *United States v. Piccinonna*, *Underwood v. Colonial Penn Insurance Co.*, 56 Mo. L. Rev. 143 (1991).

<sup>60</sup> *Id.* at 1535 ("There is no question that in recent years polygraph testing has gained increasingly widespread acceptance as a useful and reliable scientific tool").

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1536.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1537.

<sup>65</sup> *Id.* at 1536.

<sup>66</sup> *Id.*

witness's in-court testimony" would not be admissible unless the credibility of that witness was attacked.<sup>67</sup>

### 3. Substantive Right To Admit Upon Stipulation

The Seventh Circuit has held that the accused had a substantive right to admit the results of a polygraph examination previously stipulated to by the prosecutor.<sup>68</sup> The court was interpreting Wisconsin's stipulation requirement, which the court concluded had created a general right to introduce polygraph evidence unless the prosecutor refused to stipulate. After finding the state rule was based on reliability considerations rather than the consent and waiver arguments, the court ruled that the polygraph evidence is "materially exculpatory" for due process purposes in cases where the accused's credibility is crucial.<sup>69</sup> Therefore, the prosecutor must give a reason for the refusal to stipulate which goes to the reliability of the exam or the accused's constitutional right to due process would be implicated. It should be noted that Justice Rehnquist expressed his opinion that this was a "dubious constitutional holding."<sup>70</sup> The value of this holding as precedent is unclear, and Wisconsin soon reverted to a *per se* exclusion rule.<sup>71</sup>

### 4. Admissible at the Trial Judge's Discretion

Finally, the Fifth,<sup>72</sup> Seventh,<sup>73</sup> and Ninth<sup>74</sup> Circuits commit the admissibility determination under the FRE to the sole discretion of the trial judge. The state legislature of New Mexico permits the trial judge to make the

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<sup>67</sup> *Id.* Five judges dissented from the Court's finding that polygraph testing had gained "general acceptance" and the majority's decision concerning admissibility of these results under Fed. R. Evid. 608. After reviewing the basic theory underlying the polygraph and the studies offered in its support, Circuit Judge Johnson explained that the statistics are misleading and a number of extrinsic factors affect the accuracy of the results. Relying heavily upon the reasoning of the Ninth Circuit opinion in *Brown v. Darcy*, 783 F.2d 1389 (9th Cir. 1986), which has since been overruled, CJ Johnson concluded that the Fed. R. Evid. 403 balancing test should preclude admission of the evidence even if the requirements of Fed. R. Evid. 608 were met. *Id.* at 1537-1541.

<sup>68</sup> *McMorris v. Israel*, 643 F.2d 458, 466 (7th Cir. 1981), *cert. denied*, 455 U.S. 967 (1982).

<sup>69</sup> *Id.* at 462.

<sup>70</sup> *Id.* at 970 (Rehnquist and O'Connor, JJ., dissenting from the denial of cert.).

<sup>71</sup> *State v. Dean* 103 Wis. 2d 228, 307 N.W.2d 628 (Wis. 1981).

<sup>72</sup> *See, e.g., United States v. Posado*, 57 F.3d 428, 436 (5th Cir. 1995).

<sup>73</sup> *See, e.g., United States v. Pulido*, 69 F.3d 192, 205 (7th Cir. 1995).

<sup>74</sup> *See, e.g., United States v. Cordoba*, 104 F.3d 225, 1997 WL 3317 (9th Cir. 1997), *modified*, \_\_\_ F.3d \_\_\_, 1997 WL 54578 (1997).

determination subject to specific conditions.<sup>75</sup> Two Ninth Circuit district courts<sup>76</sup> and the District Court for the Eastern District of Michigan<sup>77</sup> have also permitted the introduction of polygraph evidence at the discretion of the trial judge. However, the courts have not based their holdings on the Constitution, but have merely re-examined their interpretation of the FREs in light of *Daubert*.

The Fifth Circuit has abandoned its *per se* rule against the admission of polygraph evidence, holding that under certain circumstances, the evidence may be admissible under *Daubert*. In *United States v. Posado*,<sup>78</sup> the accuseds were indicted for drug trafficking after 44 kilograms of cocaine were recovered from their luggage during an airport search.<sup>79</sup> The government argued that the accuseds consented to the luggage search prior to their arrest. The accuseds contended that at the time of the search they had been placed under arrest and were unaware that they had a right to refuse consent until after the fact.

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<sup>75</sup> See *State v. Sanders*, 117 N.M. 452, 459, 872 P.2d 870, 877 (1994) ("In New Mexico, the trial court has discretion to admit results of polygraph tests into evidence if certain conditions, designed to ensure the accuracy and reliability of the test results, are met.").

New Mexico Rule of Evidence, Rule 11-707 outlines the following conditions which the proponent of the evidence must show: the polygraph examiner must meet the minimum qualifications to testify as an expert, 11-707(B); the examiner is qualified as an expert witness and the proper testing procedures were used in the specific tests, 11-707(C); the examinee was fit to be tested, 11-707(C); at least two relevant questions were asked and three charts produced, 11-707(C); both the pretest interview and examination were either video or audio recorded, 11-707(E). Any party intending to use polygraph test evidence must also give written notice to the other party of his or her intention at least thirty days before trial, and provide a list of all previous polygraph examinations taken by the examinee; 11-707(D). No witness may be compelled to take a polygraph; 11-707(G). However, upon a showing of good cause, the court may compel a witness who seeks to introduce the results of a previously taken polygraph to submit to yet another test. 11-707(G). If the witness refuses, "opinions of other polygraph examiners as to the truthfulness of the witness shall be inadmissible as evidence;" 11-707 (G).

<sup>76</sup> Both cases involved polygraph examinations given by Dr. David Raskin. See Appendix note 512. The United States District Court for the District of New Mexico, in *United States v. Galbreth*, 908 F. Supp 877, 890-95 (D.N.M. 1995), permitted the introduction of Dr. Raskin's testimony after finding that the DLCQ technique has been tested, subject to peer review and publication, has a known or potential error rate, is subject to existing standards controlling the technique's operation, is generally accepted within the relevant scientific community, was properly applied in this specific case, and would assist the trier of fact in deciding an issue in dispute.

Utilizing a similar analysis, the District Court for the District of Arizona, in *United States v. Crumby*, 895 F. Supp.1354 (D. Ariz. 1995), also found that the *Daubert* test for admission of scientific evidence was met and permitted the introduction of the polygraph results. See generally Case Note, *United States v. Crumby: A Potential Revolution in the Admission of Polygraph Evidence*, 23 Am. J. Crim. L. 479 (1996).

<sup>77</sup> *United States v. Ridling*, 350 F. Supp. 90 (E.D. Mich. 1972).

<sup>78</sup> *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995).

<sup>79</sup> 57 F.3d at 429.

Realizing that it would be their word against those of the federal agents at trial, the accuseds arranged for a polygraph.<sup>80</sup> They invited the prosecution to participate in the exam and agreed to stipulate that the government could utilize the results in any way, to include admission at trial.<sup>81</sup> The government refused to agree to the stipulation. At the hearing to suppress the cocaine, the District Court refused to consider the polygraph evidence and denied the defense motion to suppress.

On appeal, the Fifth Circuit held that the trial court's failure to conduct a *Daubert* hearing was reversible error, and remanded the case. Acknowledging that the "flexible inquiry" standard for the admissibility of scientific evidence which the Supreme Court enumerated in *Daubert* superseded the "general acceptance" test of *Frye*, the Court of Appeals held that the trial court must consider the "evidentiary reliability and relevance of the polygraph evidence proffered by the defendants under the principles embodied in the Federal Rules of Evidence and *Daubert*."<sup>82</sup> Significantly, the court refused to hold that polygraph examinations are scientifically valid, will always assist the trier of fact as required by FRE 702, or will survive the balancing test of FRE 403. However, it did "remove the obstacle of the *per se* rule against admissibility," concluding it was based on antiquated concepts of the technical ability of polygraph and legal precepts that have been expressly overruled by the Supreme Court.<sup>83</sup>

Like the Fifth Circuit, the Ninth Circuit Court of Appeals had initially held in *Brown v. Darcy*<sup>84</sup> that polygraph evidence offered to establish the truth of statements made during the exam<sup>85</sup> were inadmissible absent stipulation. The court stated that polygraph evidence has an "overwhelmingly prejudicial effect when it is inaccurate, interferes with the jury's authority to determine credibility, and imposes a burden on district courts to review the reliability of polygraph evidence in each case."<sup>86</sup> Once the parties had stipulated to the admission of the polygraph exam and it was actually administered, the court still had to be satisfied that the examination was administered in a reliable manner under the FREs.<sup>87</sup> However, the court carefully distinguished

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<sup>80</sup> *Id.* at 430.

<sup>81</sup> *Id.* at 431.

<sup>82</sup> *Id.* at 434.

<sup>83</sup> *Id.*

<sup>84</sup> *Brown v. Darcy*, 783 F.2d 1389 (9<sup>th</sup> Cir. 1986).

<sup>85</sup> The polygraph examiner in this case, Gy Gilson, was trained at the Bachelor School of Lie Detection, and testified that he had conducted approximately 6,000 examinations. *Brown v. Darcy*, 783 F.2d 1389, 1393 n.3 (9<sup>th</sup> Cir. 1986), *overruled by* *United States v. Cordoba*, 1997 WL 3317 (9<sup>th</sup> Cir. 1997). Despite his extensive experience, one of the main issues at trial was whether the control questions were appropriately worded. 783 F.2d at 1392.

<sup>86</sup> *Id.* at 1391.

<sup>87</sup> *Id.*

polygraph evidence that is admissible as an operative fact, introduced either because it is relevant that a polygraph was administered regardless of the results,<sup>88</sup> or because the examination was the basis of the cause of action.<sup>89</sup>

In a surprisingly brief opinion announced in early 1997, the Ninth Circuit in *United States v. Cordoba*<sup>90</sup> abandoned the *per se* inadmissibility rule announced in *Brown*. Cordoba was charged with possession of cocaine with intent to distribute, and took an unstipulated polygraph.<sup>91</sup> The examiner concluded that Cordoba was truthful when he answered "no" to questions regarding his awareness of the cocaine in his van.<sup>92</sup> The government moved to exclude the polygraph and Cordoba argued that the polygraph should be admissible to rehabilitate his credibility if it was attacked by the government.<sup>93</sup>

Reinterpreting its standard of admissibility under FRE 702 and FRE 401-403 in light of *Daubert*,<sup>94</sup> the Ninth Circuit vacated Cordoba's conviction and remanded the case to the district court. Citing *United States v. Rincon*,<sup>95</sup> the court held that the district court must strike the appropriate balance under FRE 702 between admitting reliable, helpful expert testimony and excluding misleading or confusing testimony to achieve the flexible inquiry mandated by *Daubert*.<sup>96</sup> The court also concluded that it was the trial judge's task to conduct the initial weighing of probative value against the prejudicial effect as outlined in FRE 403.<sup>97</sup>

Quoting from the Fifth Circuit's ruling in *United States v. Posado*, the court made clear that it was "not expressing new enthusiasm for admission of unstipulated polygraph evidence," and acknowledged that "polygraph evidence has grave potential for interfering with the deliberative process."<sup>98</sup> However, the court stressed that the ultimate determination of admissibility was to be left to the sound discretion of the trial judge.<sup>99</sup>

The recent reversals in the Fifth and Ninth Circuits, undoubtedly a reconsideration of their earlier precedents in light of *Daubert*, highlight at least three points. First, courts have realized that the stipulation requirement is

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<sup>88</sup> For example, if the defendant attempted to admit the polygraph examination to establish that he was questioned after invoking his right to counsel.

<sup>89</sup> 783 F.2d at 1397.

<sup>90</sup> *United States v. Cordoba*, 1997 WL 3317 (9th Cir. 1997). It also may be noted that the Ninth Circuit accepted submission of the case without oral argument.

<sup>91</sup> *Id.* at \*4.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at \*3.

<sup>95</sup> *United States v. Rincon*, 28 F.3d 921, 926 (9th Cir. 1994), *cert. denied*, 513 U.S. 1029 (1994).

<sup>96</sup> *United States v. Cordoba*, 1997 WL 3317 at \*2.

<sup>97</sup> *Id.* at 3.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

either unworkable or unsound, or both. While it may have been hoped that the stipulation requirement would ensure agreement over the test's reliability and the examiner's qualifications while minimizing court room disagreement and battling, recurring prosecutorial "abuses" may have prompted the Circuits to reclaim the "gatekeeper" role as mandated by *Daubert*.

Second, the circuit courts based their decisions on an application of the FREs as interpreted by *Daubert*, not on the accused's constitutional rights. In fact, the *Rock* holding was not mentioned in any of these opinions. That no constitutional holding was invoked may not be surprising since the issues could be adequately addressed through an analysis of the FREs, which did not include a FRE similar to MRE 707.

Finally, it must be realized that, in weighing the judicial burden against the rights of the accused, the circuits faced a much different legal landscape than that encountered by the military courts. As one member of the Court of Appeals for the Armed Forces has stated, "the federal courts have not faced the same issue of a rule precluding admissibility of polygraph evidence in a world-wide system of justice."<sup>100</sup>

<sup>100</sup> United States v. Scheffer, 44 M.J. 442, 451 (C.A.A.F. 1996) (Crawford, J., dissenting), cert. granted, 117 U.S. 1817 (1997).

In order to compare the number of criminal cases filed in each state with the respective polygraph admissibility rule, the following table is provided. This data was reported in Brain J. Ostrom & Neal B. Kauder, *Examining the Work of State Courts*, 1995, National Center for State Courts, Criminal Caseloads in State Trial Courts, p. 53.

**Table 1.** Number of Criminal Filings for State Courts, 1995

| STATE          | Criminal Filings | Polygraph Rule   | Type of Court        |
|----------------|------------------|------------------|----------------------|
| Illinois       | 595,257          | Per Se Exclusion | Unified              |
| Massachusetts  | 344,561          | Per Se Exclusion | Unified              |
| Minnesota      | 226,097          | Per Se Exclusion | Unified              |
| Florida        | 188,682          | Stipulation      | General Jurisdiction |
| California     | 162,177          | Stipulation      | General Jurisdiction |
| Missouri       | 157,816          | Per Se Exclusion | Unified              |
| Texas          | 155,641          | Per Se Exclusion | General Jurisdiction |
| Connecticut    | 139,953          | Per Se Exclusion | Unified              |
| Indiana        | 132,252          | Stipulation      | General Jurisdiction |
| Wisconsin      | 127,914          | Per Se Exclusion | Unified              |
| Virginia       | 125,234          | Per Se Exclusion | General Jurisdiction |
| North Carolina | 123,681          | Per Se Exclusion | General Jurisdiction |
| Louisiana      | 121,166          | Per Se Exclusion | General Jurisdiction |
| South Carolina | 109,419          | Per Se Exclusion | General Jurisdiction |
| Oklahoma       | 91,239           | Per Se Exclusion | General Jurisdiction |
| Iowa           | 89,156           | Stipulation      | Unified              |
| Michigan       | 69,508           | Per Se Exclusion | General Jurisdiction |
| New York       | 68,326           | Per Se Exclusion | General Jurisdiction |
| Maryland       | 68,321           | Per Se Exclusion | General Jurisdiction |

### III. THE SIXTH AMENDMENT AND THE POLYGRAPH

The primary constitutional arguments surrounding the admission of polygraph testimony involve the accused's Sixth Amendment right to present a defense. The Sixth Amendment to the United States Constitution provides in pertinent part that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ."<sup>101</sup> Although a historical examination of the early interpretation of the clause is

|               |        |                          |                      |
|---------------|--------|--------------------------|----------------------|
| Ohio          | 67,266 | Stipulation              | General Jurisdiction |
| Tennessee     | 61,977 | Per Se Exclusion         | General Jurisdiction |
| Alabama       | 54,672 | Stipulation              | General Jurisdiction |
| New Jersey    | 49,107 | Stipulation              | General Jurisdiction |
| Arkansas      | 48,389 | Stipulation              | General Jurisdiction |
| Oregon        | 44,977 | Per Se Exclusion         | General Jurisdiction |
| Kansas        | 44,811 | Stipulation              | Unified              |
| Washington    | 33,965 | Stipulation              | General Jurisdiction |
| Arizona       | 32,520 | Stipulation              | General Jurisdiction |
| North Dakota  | 28,555 | Per Se Exclusion         | General Jurisdiction |
| Colorado      | 28,172 | Per Se Exclusion         | General Jurisdiction |
| South Dakota  | 27,522 | Per Se Exclusion         | Unified              |
| Kentucky      | 19,275 | Per Se Exclusion         | General Jurisdiction |
| Vermont       | 17,633 | Not Clear                | General Jurisdiction |
| New Mexico    | 15,723 | Trial Judge's Discretion | General Jurisdiction |
| New Hampshire | 15,352 | Per Se Exclusion         | General Jurisdiction |
| Idaho         | 11,357 | Stipulation              | Unified              |
| Utah          | 11,076 | Stipulation              | General Jurisdiction |
| Hawaii        | 10,120 | Per Se Exclusion         | General Jurisdiction |
| Maine         | 9,785  | Per Se Exclusion         | General Jurisdiction |
| West Virginia | 7,975  | Per Se Exclusion         | General Jurisdiction |
| Nebraska      | 7,943  | Per Se Exclusion         | General Jurisdiction |
| Delaware      | 7,253  | Stipulation              | General Jurisdiction |
| Rhode Island  | 6,779  | Per Se Exclusion         | General Jurisdiction |
| Montana       | 5,025  | Per Se Exclusion         | General Jurisdiction |
| Alaska        | 2,778  | Per Se Exclusion         | General Jurisdiction |
| Wyoming       | 1,958  | Stipulation              | General Jurisdiction |
| Georgia       | N/A    | Stipulation              |                      |
| Mississippi   | N/A    | Per Se Exclusion         |                      |
| Nevada        | N/A    | Stipulation              |                      |
| Pennsylvania  | N/A    | Per Se Exclusion         |                      |

<sup>101</sup> U.S. CONST. amend. VI.

beyond the scope of this paper,<sup>102</sup> the Supreme Court has expanded its application during the last thirty years in three fundamental cases.

The Court has not defined the accused's Sixth Amendment to present either scientific expert testimony or polygraph evidence. However, the federal circuit and state courts have heard challenges to both the *per se* exclusion rule and the stipulation requirement. With few exceptions, the courts have rejected these constitutional arguments.

### A. The Supreme Court's Interpretation of the Compulsory Process Clause

The Supreme Court has outlined the accused's Sixth Amendment right to present a defense in three fundamental cases. In *Washington v. Texas*,<sup>103</sup> the Court for the first time held that the Sixth Amendment was applicable to the states through the Fourteenth Amendment. In *Chambers v. Mississippi*,<sup>104</sup> the Court ruled that the application of a state hearsay rule which prevented the accused from calling certain witnesses infringed upon his constitutional rights, holding that the state's interest must be balanced against an accused's right to present a defense. Finally, the Court in *Rock v. Arkansas*<sup>105</sup> declared that a *per se* rule against hypnotically refreshed testimony was unconstitutional because it prevented the accused from presenting her version of the events surrounding the crime.

#### 1. *Washington v. Texas*

The Supreme Court first addressed whether the Fourteenth Amendment incorporates the Sixth Amendment's compulsory process clause in *Washington v. Texas*.<sup>106</sup> Washington was convicted of murder with malice and sentenced to 50 years in prison.<sup>107</sup> At trial, Washington attempted to call Charles Fuller, who had been convicted as a co-participant in the same murder and also sentenced to confinement for 50 years.<sup>108</sup> The record indicated that Fuller would have testified that Washington tried to persuade him to leave, and that Washington had ran before Fuller shot the victim.<sup>109</sup> It was undisputed that

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<sup>102</sup> For a thorough discussion of the early history of the compulsory process clause see Peter Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71 (1974).

<sup>103</sup> *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

<sup>104</sup> *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

<sup>105</sup> *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

<sup>106</sup> 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

<sup>107</sup> *Id.* at 15.

<sup>108</sup> *Id.* at 16.

<sup>109</sup> *Id.*

"Fuller's testimony would have been relevant and material, and vital to the defense."<sup>110</sup>

Two Texas statutes prevented Fuller from testifying on Washington's behalf even though the same prohibition did not apply to the prosecution.<sup>111</sup> Apparently, the statutes were intended to prevent co-defendants from testifying in each other's behalf since each would have an incentive to exonerate the other. The Court held that Washington was denied his right to compulsory process because "the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events he had personally observed, and whose testimony would have been relevant and material, and that it was vital to the defense."<sup>112</sup>

In applying the holding of *Washington* to polygraph evidence, it is important to analyze the specific deficiencies of the Texas statutes. The Court emphasized that the statutes applied only to the defense, thereby excluding a whole category of defense witnesses from testifying. Although the statutes' purpose was to prevent witnesses from committing perjury, the Court noted the "absurdity of the rule," since witnesses often have a greater interest in lying for the prosecution, especially if still awaiting trial or sentencing.<sup>113</sup> Additionally, if the co-defendant was acquitted, the statute permitted the witness to testify despite the fact that he still had an incentive to lie since he was protected from double jeopardy.<sup>114</sup>

In his concurring opinion, Justice Harlan stressed the lack of justification for such a one-handed rule. He noted that the state, by allowing the same witness to testify on behalf of the state, had recognized the testimony as "relevant and competent," yet had arbitrarily denied its use to the accused.<sup>115</sup> He further commented that the state had not determined, "as a matter of valid state evidentiary law, on the basis of general experience with a particular class of persons . . . that the pursuit of the truth is best served by an across-the-board disqualification as witnesses persons of that class."<sup>116</sup>

## 2. *Chambers v. Mississippi*

In *Chambers v. Mississippi*, the Supreme Court invalidated an application of the state's hearsay rule on the grounds that it abridged the accused's right to "present witnesses in his defense."<sup>117</sup> Leon Chambers was

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 23.

<sup>113</sup> *Id.* at 22.

<sup>114</sup> *Id.* at 23.

<sup>115</sup> *Id.* at 25 (Harlan, J., concurring).

<sup>116</sup> *Id.* at 24-25 (Harlan, J., concurring) (footnotes omitted).

<sup>117</sup> *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

charged in the shooting death of a deputy sheriff.<sup>118</sup> However, another man, Gable McDonald, had confessed to three different people that he had committed the crime, though he repudiated these confessions after being arrested.<sup>119</sup> The prosecutor proceeded to trial against Chambers and refused to call McDonald as a witness.<sup>120</sup> Chambers called McDonald to testify for the defense, and admitted into evidence McDonald's sworn confession.<sup>121</sup> Upon cross-examination, the State elicited McDonald's testimony explaining the circumstances surrounding the confession as well as his whereabouts at the time of the crime.<sup>122</sup>

The trial court denied Chambers' motion to treat McDonald as an adverse witness. The trial judge agreed that the witness was "hostile" but not "adverse" because "nowhere did he point the finger at Chambers."<sup>123</sup> Chambers then sought to introduce the testimony of the three individuals to whom McDonald had confessed.<sup>124</sup> The state objected on the grounds that the testimony was hearsay, and the trial judge sustained each objection.<sup>125</sup> Consequently, Chambers was prevented by the state's "voucher rule" from cross-examining McDonald, and was prevented by the hearsay rule from presenting witnesses who would have attacked McDonald's reputation.<sup>126</sup> Chambers was convicted and sentenced to life imprisonment, and the conviction was affirmed by the Mississippi Supreme Court.

The Supreme Court reversed, finding that the combination of the two limitations constituted a denial of due process.<sup>127</sup> Recognizing that the right to confront and cross-examine witnesses has long been recognized as fundamental to due process, the Court reiterated that it is "implicit in the constitutional right to confrontation, and helps assure the 'accuracy of the

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<sup>118</sup> *Id.* at 288.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 291.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 292 (internal quotation omitted).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 293. Mississippi did not recognize the declaration against penal interest exception to the hearsay rule. *Id.* at 299.

<sup>126</sup> *Id.* at 294. The common-law "voucher rule" in Mississippi prevented a party from impeaching his own witness because it was presumed that the calling party vouched for the witness' credibility. *Id.* at 295.

<sup>127</sup> *Id.* at 302. Justice White filed a concurring opinion which addressed whether the case was properly before the Court. *Id.* at 303. Then Justice Rehnquist dissented, arguing that the case was not. Addressing the merits, however, he stated that "I would have considerable difficulty in subscribing to the Court's further constitutionalization of the intricacies of the common law evidence." *Id.* at 308.

truth-determining process.”<sup>128</sup> This right, however, “may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.”<sup>129</sup> Finding that the right to cross-examine does not depend on which party calls the witness to the stand, the Court concluded that the voucher rule, as applied, interfered with Chambers’ right to present a defense.<sup>130</sup>

The Court then turned to the state’s application of the hearsay rule to the witnesses’ testimony. While acknowledging that the hearsay rule is “grounded in the notion that untrustworthy evidence should not be presented to the triers of fact,” the Court concluded that the specific hearsay statements were made under circumstances that “provided considerable assurances for their reliability.”<sup>131</sup> The Court explained that in exercising the right to present witnesses, “the accused, as is required of the State, must comply with the established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.”<sup>132</sup> The Court found this testimony was “well within the basic rationale of the exception for declarations against interest,” and was critical to Chambers’ defense.<sup>133</sup> Consequently, “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.”<sup>134</sup>

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<sup>128</sup> *Id.* at 295 (quoting *Dutton v. Evans*, 400 U.S. 74, 89, 91 S. Ct. 210, 220, 27 L. Ed. 2d 213 (1970); *Bruton v. United States*, 391 U.S. 123, 135-37, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)).

<sup>129</sup> *Id.* at 295.

<sup>130</sup> *Id.* at 298.

<sup>131</sup> *Id.* at 298-300. The Court listed four reasons for its conclusion: 1) McDonald made the statements to close friends shortly after the murder; 2) the statements were corroborated by other evidence; 3) the confessions were against McDonald’s interest; and 4) McDonald was present in court, could be cross-examined and his demeanor weighed by the jury. *Id.* at 300-01.

<sup>132</sup> *Id.* at 302.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* The Court also relied upon this principle in *Green v. Georgia*, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979). Roosevelt Green and Carzell Moore were both charged but tried separately for rape and murder. Both received capital sentences. *Id.* at 95. During the sentencing phase, Green sought to introduce the testimony of a witness to whom Moore had confessed that he shot the victim. Although the witness had previously testified for the state at Moore’s trial, the trial court ruled that the witness’ statement was inadmissible hearsay. *Id.* at 97 (citation omitted).

The Supreme Court found that under the facts of the case the exclusion of the testimony was a violation of due process. Despite Georgia’s hearsay rule, the testimony was “highly relevant to a critical issue in the punishment phase of the trial” and “substantial reasons existed to assume its reliability.” *Id.* In fact, it was so reliable that the state used the testimony against Moore and based a death sentence upon it. *Id.* at 96. The Court concluded that “[I]n these unique circumstances, ‘the hearsay rule may not be applied mechanistically to defeat the ends of justice.’” *Id.* (citing *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

The Court stressed that "we establish no new principles of constitutional law,"<sup>135</sup> and cautioned that its holding was not a signal of "any diminution in the respect traditionally accorded to the states in the establishment and implementation of their own criminal trial rules and procedures."<sup>136</sup> The holding was limited to the facts and circumstances of the particular case.<sup>137</sup>

### 3. *Rock v. Arkansas*

The issue in *Rock v. Arkansas* was whether the state could prohibit an accused from giving hypnotically refreshed testimony.<sup>138</sup> Vickie Rock was convicted of manslaughter in the death of her husband.<sup>139</sup> Seeking to refresh her memory concerning the exact details of the shooting, she underwent two hypnotic sessions. Afterwards, Rock was able to recall that her finger was not on the trigger when the gun went off.<sup>140</sup> Upon learning of the hypnosis sessions, the prosecution filed a motion to exclude Rock's testimony.<sup>141</sup>

After a pre-trial hearing on the matter, the trial judge limited Rock's testimony to the sketchy notes which the examiner had taken prior to the hypnosis since it was nearly impossible to discern what she had remembered before the session. The Supreme Court of Arkansas affirmed, following a *per se* exclusion rule for all hypnotically refreshed witness testimony. The Supreme Court disagreed, vacated the conviction, and remanded the case.

The Court in a 5-4 decision, per Justice Blackmun, held that the Arkansas prohibition unconstitutionally infringed upon Rock's ability to testify in her own defense.<sup>142</sup> Speaking to the compulsory process clause of the Sixth Amendment, the Court noted that included "in the accused's right to call witnesses whose testimony is material and favorable to [her] defense" is the

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Justice Rehnquist dissented, stating that the Court "takes another step toward embalming the law of evidence in the Due Process Clause . . . I think it impossible to find any justification in the Constitution for today's ruling." *Id.* at 98 (Rehnquist, J., dissenting). Furthermore, he concluded that "[n]othing in the [Constitution] gives this Court any authority to supersede a State's code of evidence because its application in a particular situation would defeat what this Court conceives to be 'the ends of justice.'" *Id.*

<sup>135</sup> 410 U.S. at 302.

<sup>136</sup> *Id.* at 302-303.

<sup>137</sup> *Id.* at 303.

<sup>138</sup> *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

<sup>139</sup> *Id.* at 45.

<sup>140</sup> *Id.* at 47. An inspection of the gun revealed that it was defective and prone to misfire.

<sup>141</sup> *Id.* Individuals may have one of three inaccurate reactions to hypnosis: suggestibility, confabulation, or memory hardening. *Id.* at 59-60.

<sup>142</sup> *Id.* at 62.

right to testify on her own behalf.<sup>143</sup> Significantly, the Court further stated that cross-examination could adequately test the truthfulness and veracity of the witness' testimony.<sup>144</sup>

The *Rock* opinion is often cited for the following statement. "A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case."<sup>145</sup> The Court's choice of the word "reliable" should be contrasted with the word "accurate." Reliability is defined as "trustworthy" or "dependable."<sup>146</sup> Any testimony may be correct or accurate in a particular case, if for no other reason than pure chance. However, even if the testimony is accurate, it may not be reliable. For example, suppose that one flips a coin and asks a stranger to guess the result. The stranger guesses heads, which is correct. While the guess is accurate, it is nevertheless untrustworthy, and therefore, unreliable.

Regardless of the language, once the sentence is placed into context, it is clear that the Court was referring to limitations which the state places on the accused's ability to testify on her own behalf.<sup>147</sup> The Court, reiterating that the right to present relevant testimony may bow to other legitimate state interests, explained that a state must evaluate "whether the interest served by a rule justify the limitation imposed on the constitutional right to testify."<sup>148</sup> In fact, the Supreme Court of Arkansas has explained that "*Rock* applies to testimony of the defendant, not to witness testimony."<sup>149</sup>

Furthermore, noting that many states prohibit only the testimony of a witness but not the accused, the Court found that the Supreme Court of Arkansas had "failed to perform the constitutional analysis that is necessary when a defendant's right to testify is at stake."<sup>150</sup> Again emphasizing the accused's right to testify, the Court stated that Arkansas had not demonstrated that the testimony was "so untrustworthy and so immune to the traditional

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<sup>143</sup> *Id.* at 52 (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 3446, 73 L. Ed. 2d 1193 (1982)).

<sup>144</sup> *Id.* at 52 (citing *Westen*, *supra* note 102, at 119-120).

<sup>145</sup> *Id.* at 61.

<sup>146</sup> AMERICAN HERITAGE DICTIONARY 1044 (2d College ed. 1985).

<sup>147</sup> However, one commentator has argued that *Rock* is "logically read to establish a Sixth Amendment right to call exculpatory witnesses whose testimony may be subject to a known, but manageable, risk of inaccuracy." James R. McCall, *Misconceptions and Reevaluation—Polygraph Admissibility After Rock and Daubert*, U. Ill. L. Rev. 1996, at 408, No.2 (1996).

<sup>148</sup> 483 U.S. at 56.

<sup>149</sup> *Misskelley v. State*, 323 Ark. 449, 474 (1996).

<sup>150</sup> 483 U.S. at 57-58. ("Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections") (emphasis added). *Id.* at 61.

means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial.”<sup>151</sup>

A thorough analysis of the possible constitutional standards for scientific evidence and the polygraph are presented in Part V. A few initial observations may be made from the Court’s holdings, however, before the state and federal applications of the Sixth Amendment to the polygraph evidence are examined. First, *Washington v. Texas* proclaims that a state may not arbitrarily limit the accused’s right to present relevant and material testimony. If the state determines that the witness’ testimony is reliable enough for it to rely upon, it cannot limit the accused’s right to call the witness without a valid justification.

*Chambers v. Mississippi* supports the proposition that a state cannot prevent an accused from presenting critical testimony that complies with the established rules of procedure and evidence—i.e., those that ensure that the testimony is reliable—without the state establishing a valid reason for excluding the testimony. Without explaining why the testimony was unreliable, the state had prevented the accused from presenting critical testimony through the application of two separate rules of evidence. This exclusion was deemed to be arbitrary. Therefore, according to at least four Justices, the holding in *Chambers* was not that the accused is “denied ‘a fair opportunity to defend against the State’s accusations’ whenever ‘critical evidence’ favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to a level of a due process violation.”<sup>152</sup>

Finally, the holding in *Rock v. Arkansas* makes abundantly clear that the state may not prevent an accused from presenting her own version of the crime, unless the state can forward legitimate interests justifying the exclusion. At least five Justices found the state’s interests lacking, and concluded that the credibility of the accused’s account could be tested through cross-examination. Whether the Court will similarly reject the state justifications for the exclusion of scientific expert testimony is uncertain.

## **B. Federal and State Applications of the Compulsory Process Clause**

Accuseds have challenged the federal and state treatment of polygraph evidence, arguing that both the *per se* exclusion rule and the stipulation requirement violate the constitutional right to present a defense. These arguments have been rejected by the respective jurisdictions with few exceptions. Only two state courts, New Mexico<sup>153</sup> and Ohio,<sup>154</sup> have held that

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<sup>151</sup> *Id.* at 61.

<sup>152</sup> *Montana v. Egelhoff*, 116 S. Ct. 2013, 2022, 135 L. Ed. 2d 361, 64 U.S.L.W. 4500 (1996).

<sup>153</sup> The Court of Appeals of New Mexico, in *State v. Dorsey*, 87 N.M. 323, 532 P.2d 912 (1975), *aff’d*, 88 N.M. 184 (1975), held that the polygraph was reliable and critical to the defense, and therefore met the requirements of *Chambers*.

the exclusion of a reliable polygraph examination which was critical to the accused's case violated the Due Process Clause.

Courts have invoked two primary rationales in defending the *per se* or stipulation admissibility standards: 1) polygraph tests are deemed unreliable by either the state legislature, the state's highest court, or the Circuit Court of Appeals; and 2) the polygraph testimony infringes upon the province of the jury. This second objection has been raised in many other expert testimony contexts, including evidence of rape trauma syndrome. Concern about the role of the jury supports exclusion of the polygraph evidence either to protect the integrity of the process or because the evidence has little probative value and tends to confuse the jury.

The Ninth Circuit and the state courts of Connecticut, Michigan, Oklahoma, and Texas have upheld their *per se* exclusion rules against compulsory process arguments. The Fourth and Eighth Circuits as well as the state courts of California, Indiana, Iowa, and Washington have also held that the requirement to stipulate does not violate the accused's right to present a defense.

### 1. *Per se* Jurisdictions

The Ninth Circuit addressed an accused's right to present a defense while denying a *habeas* petition in *Bashor v. Risley*.<sup>155</sup> The accused was prevented by a Montana trial judge from introducing the results of a witness' polygraph examination. Montana excludes polygraph evidence on grounds that it is unreliable and invades the province of the jury when used to bolster the credibility of a witness. The court adopted a balancing test to weigh the state's interest in reliable and efficient trials against the accused's right to present a defense.<sup>156</sup> Finding that the polygraph would only serve to bolster the witness' testimony, the Ninth Circuit concluded that the jury could hear the witness' testimony and determine his "credibility from his demeanor as a

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<sup>154</sup> The Cuyahoga Court of Common Pleas of Ohio, in *State v. Sims*, 52 Ohio Misc. 31, 369 N.E.2d 24 (Ohio Com. Pl. 1977) held that the defendant's right to compulsory process had been violated. Sims was denied the presence of a material witness and a polygraph examination. The Court held that the defendant was denied compulsory process "for witnesses in his favor [because the witness did not appear] and/or the testimony of a qualified polygraph examiner. . ." *Id.* at 42 (emphasis added). In light of the fact that Ohio currently admits only stipulated polygraphs, it appears that the exclusion of the polygraph evidence by itself would not have violated the defendant's rights. See *supra* note 100.

<sup>155</sup> 730 F.2d 1228, 1238 (9th Cir. 1984), *cert. denied*, 469 U.S. 838 (1984).

<sup>156</sup> *Id.* (citing *Perry v. Rushen*, 713 F.2d 1447, 1449-52 (9th Cir. 1983), *cert. denied*, 469 U.S. 838 (1984)).

witness.”<sup>157</sup> Consequently, the exclusion of the evidence did not deprive the accused of a fair trial.

The Appellate Court of Connecticut has also addressed the constitutional implications of that state’s *per se* exclusionary rule. In *State v. Porter*, the court refused to hold that *Chambers* or *Washington* mandated that the constitutional right to present a defense included the “opportunity to make an offer of proof regarding the polygraph evidence.”<sup>158</sup> Likewise, the Court of Criminal Appeals of Oklahoma has refused to find that the *per se* exclusion rule adversely affected the accused’s right to present mitigating evidence in violation of *Rock*.<sup>159</sup>

Actually relying on *Washington* and *Chambers*, the Michigan Court of Appeals has concluded that it is precisely because polygraph results are so untrustworthy that the application of the state’s *per se* rule did not deny the accused due process.<sup>160</sup>

The Texas Court of Appeals has also rejected such arguments, claiming that the accused’s right to present evidence as outlined in *Rock v. Arkansas* “may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.”<sup>161</sup> The court adopted the *Rock* framework to guide the determination, stating that

[r]ules for the admission and exclusion of evidence should be found offensive to notions of fundamental fairness embodied in the United States Constitution only when, (1) without a rational basis, they disadvantage the accused more severely than they do the State, or (2) arbitrarily exclude reliable defensive evidence without achieving a superior social benefit.<sup>162</sup>

In applying the *Rock* guidelines to polygraph examinations, the court explained that

we first observe that there is no evidence that the exclusion of polygraph evidence disadvantages the defendant more severely than the State. In fact, the State would be greatly benefited if it could bolster the credibility of its witnesses at trial through the use of expert testimony. Second, there is no

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<sup>157</sup> *Id.*

<sup>158</sup> 39 Conn. App. 800, 802, 668 A.2d 725, 727 (1995) (“The trial court, like this court, is bound by the Connecticut precedent which bars the admission of polygraph results.” *Id.* at 803), *cert. granted in part*, 236 Conn. 908 (1996); *See also* *State v. Mitchell*, 169 Conn. 161, 170, 362 A.2d 808 (1975).

<sup>159</sup> *Paxton v. State*, 867 P.2d 1309, 1323-24 (Okla. Crim. App. 1994), *cert. denied*, 513 U.S. 886 (1984).

<sup>160</sup> *People v. Williams*, 123 Mich. App. 752, 758, 333 N.W.2d 577, 580 (1983); *But see* *People v. Paquette*, 114 Mich. App. 773, 776-79, 319 N.W.2d 390 (1982).

<sup>161</sup> *Perkins v. State*, 902 S.W.2d 88 (Tex. App. 1995).

<sup>162</sup> *Id.* at 94.

showing that the rule arbitrarily excludes reliable defensive evidence without achieving a superior social benefit.<sup>163</sup>

The court was careful to note that the decision to exclude the evidence was not based primarily on the evidence's unreliability. Instead, the decision was based on the conclusion that polygraph evidence "impermissibly decides the issues of credibility and guilt for the trier of fact and supplants the jury's function."<sup>164</sup>

## 2. *Stipulation Jurisdictions*

In interpreting North Carolina's stipulation requirement, the Fourth Circuit has held that the restrictions are "matter(s) of state law and procedure not involving federal constitutional issues."<sup>165</sup> The court further held that "[t]he exclusion of polygraph evidence did not negate the fundamental fairness of the petitioner's trial or violate a specific constitutional right."<sup>166</sup>

In denying a habeas petition, the Eighth Circuit also refused to find that Iowa's stipulation requirement deprived the accused of a fair trial.<sup>167</sup> Relying on *Chambers*, the accused claimed that the polygraph results were critical to his defense and asserted a constitutional right to introduce the evidence absent a stipulation, based on either due process or the right to compulsory process.<sup>168</sup> The Circuit held that, given the "lack of agreement in the scientific community as to the accuracy of polygraph techniques we cannot say that the trial court's exclusion of the unstipulated polygraph evidence deprived Conner of a fair trial."<sup>169</sup>

California's Evidence Code §351.1,<sup>170</sup> which is identical to MRE 707 except for the stipulation requirement, has also been upheld against Sixth

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Jackson v. Garrison*, 677 F.2d 371, 373 (4th Cir. 1981) (citing *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir. 1960), *cert. denied*, 454 U.S. 1036 (1981)); *Milano v. Garrison*, 677 F.2d 374, 375 (4th Cir. 1981).

<sup>166</sup> 677 F.2d at 373.

<sup>167</sup> *Conner v. Auger*, 595 F.2d 407, 411 (8th Cir.), *cert. denied*, 444 U.S. 851 (1979). *See also* *United States v. Bohr*, 581 F.2d 1294, 1303 (8th Cir. 1978), *cert. denied*, 439 U.S. 958 (1978).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* (citing *United States v. Alexander*, 526 F.2d 161, 166 (8th Cir. 1975)). The Iowa rule was based on both fairness and reliability considerations. On appeal, the Iowa Supreme Court had concluded "that Conner's right to present evidence in his defense cannot override such an evidentiary rule." *Id.* (citing *State v. Conner*, 241 N.W.2d 447, 458 (Iowa 1976)).

<sup>170</sup> California Evidence Code § 351.1 provides:

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any

Amendment attacks. The leading case from the California Court of Appeals is *People v. Kegler*,<sup>171</sup> which held that the accused did not have a right to present exculpatory polygraph evidence. The decision, however, did not address whether the rule was facially unconstitutional, because the court acknowledged that neither *Washington* nor *Chambers* held the respective evidentiary rules facially unconstitutional. Instead, the court limited its task to deciding the constitutionality of the rule as applied to the case before it.<sup>172</sup> In making this determination, the court balanced the significance of the exculpatory evidence to the accused against the state interest in maintaining the stipulation requirement.

Noting that the right of the accused to present relevant and competent evidence may be overcome if the competing state interest is "substantial," the court first determined the exculpatory significance of the polygraph test.<sup>173</sup> It concluded that the polygraph was cumulative and not pertinent to the other evidence in the case, and therefore not "critical" to the defense.<sup>174</sup> Next, it turned to a review of the state interests in excluding the polygraph testimony, which closely parallel the rationale contained in the Drafters' Analysis to MRE 707.<sup>175</sup> The court concluded that the statute "rests on considerations of reliability and integrity" and that it could not conclude the state's interest were not "legitimate or compelling."<sup>176</sup> Given that the policy considerations are more compelling than those advanced in *Chambers*, coupled with the weak significance of the evidence to the accused, the court concluded that the accused was not denied his due process or compulsory process rights.<sup>177</sup> Other state courts have agreed.

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reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding. . . unless all parties stipulate to admission of such results.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

<sup>171</sup> *People v. Kegler*, 197 Cal. App. 3d 72, 242 Cal. Rptr. 897, 905-09 (1987). See also *People v. Price*, 1 Cal. 4th 324, 419, 821 P.2d 610, 663, 3 Cal. Rptr. 2d 106, 159 (1991) ([W]e reject defendant's contention that excluding evidence of the polygraph test results denied him his due process right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution. A party has no due process right to present evidence of test results if the tests used scientific techniques not generally accepted as reliable in the scientific community), cert. denied, 506 U.S. 851 (1992).

<sup>172</sup> 242 Cal. Rptr. at 906.

<sup>173</sup> *Id.* at 905-906.

<sup>174</sup> *Id.* at 906.

<sup>175</sup> See *infra* notes 259-68 and accompanying text.

<sup>176</sup> 242 Cal. Rptr. at 909.

<sup>177</sup> *Id.*

The Supreme Court of Iowa summarily dismissed the accused's arguments that his constitutional right to compulsory process and due process were violated by the stipulation rule.<sup>178</sup> The Supreme Court of Indiana has also distinguished *Rock* and refused to find a constitutional violation when the trial court refused to admit polygraph evidence absent stipulation.<sup>179</sup>

Finally, the Washington Court of Appeals has rejected arguments that the court's stipulation requirement violates the accused's Sixth Amendment right to present a defense.<sup>180</sup> After acknowledging the Supreme Court's ruling in *Rock* and *Chambers*, the Court of Appeals noted that the stipulation requirement did not prevent the accused from taking the stand "to deny his guilt and fully present his version of the facts."<sup>181</sup> Therefore, the polygraph testimony would have only served to bolster his testimony on the ultimate issue before the court. While such evidence is admissible, the "underlying basis for that opinion must be sound."<sup>182</sup> Finding that polygraph testimony was not generally accepted in the scientific community as reliable and trustworthy, the court ruled "the defendant's right to present relevant polygraph evidence must bow to accommodate the State's legitimate interest in excluding inherently unreliable testimony."<sup>183</sup>

#### IV. THE POLYGRAPH AND THE MILITARY COURT-MARTIAL

Consistent with the federal courts, the military initially adopted the common law "*Frye* test" to govern the admissibility of scientific evidence.<sup>184</sup> The *Frye* test effectively barred the introduction of polygraphs in military courts-martial until the introduction of paragraph 142e, Manual for Courts-Martial, 1969 (Rev.).<sup>185</sup> Departing from the general scientific standard of *Frye*, paragraph 142e specifically prohibited the admissibility of polygraph

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<sup>178</sup> *State v. Marti*, 290 N.W.2d 570, 586 (Iowa 1980), *reaff'g*, *State v. Conner*, 241 N.W.2d 447, 457-58 (Iowa 1976).

<sup>179</sup> *Perry v. State*, 541 N.E.2d 913, 915 (Ind. 1989).

<sup>180</sup> *State v. Ahlfinger*, 50 Wash. App. 466, 749 P.2d 190 (1988).

<sup>181</sup> *Id.* at 472.

<sup>182</sup> *Id.* (citing *State v. Black*, 109 Wash. 2d 336, 346-47, 745 P.2d 12 (1987) (in a rape prosecution where the defense is consent, testimony regarding "rape trauma syndrome" was held inadmissible because it is not "scientifically reliable" and therefore not probative on the issue of whether the victim was raped)).

<sup>183</sup> *Id.*

<sup>184</sup> *United States v. Gipson*, 24 M.J. 246, 250 (C.M.A. 1987) (citing *United States v. Hulen*, 3 M.J. 275, 276 (C.M.A. 1977); *United States v. Ford*, 4 U.S.C.M.A. 611, 16 C.M.R. 185 (1954)).

<sup>185</sup> Donald F. O'Conner, Jr., *The Polygraph: Scientific Evidence at Trial*, 37 Naval L. Rev. 97, 99 (1988).

evidence.<sup>186</sup> Finding that the Manual for Courts-Martial was a proper and valid exercise of executive authority, trial judges repeatedly denied the defense's request to lay the foundation for expert testimony based on the results of polygraph examinations.<sup>187</sup> However, paragraph 142(e) was superseded by the Presidential enactment of the Military Rules of Evidence, effective 1 April 1981.<sup>188</sup>

The adoption of the MREs in 1980 provided little guidance for the courts in deciding the admissibility of polygraph evidence.<sup>189</sup> Noting the advisory committee had stated only that MRE 702 "may be broader and may supersede *Frye v. United States*,"<sup>190</sup> many military judges nevertheless resurrected the former common law standard of "general acceptance" and refused to admit polygraph evidence.<sup>191</sup> Meanwhile, both counsel and scholars debated the conflicting standards of the *Frye* test and the "helpfulness" standard of MRE 702.<sup>192</sup>

#### A. *United States v. Gipson*

In a decision that pre-dated *Daubert* by six years, the COMA in *United States v. Gipson*<sup>193</sup> concluded that "*Frye* has been superseded and 'should be rejected as an independent controlling standard of admissibility.'"<sup>194</sup> Speaking to the specific facts before it, the court held that the accused was entitled to lay the foundation for admission of favorable polygraph evidence. The court did not invoke a constitutional argument as the basis of its holding. Instead, it merely clarified the application of MREs 401-403 and MRE 702.

Boiler Technician Second Class Gipson was charged with three specifications of possession, transfer, and sale of lysergic acid diethylamide

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<sup>186</sup> *United States v. Gipson*, 24 M.J. at 250 (citing *United States v. Ledlow*, 11 U.S.C.M.A. 659, 663, 29 C.M.R. 475, 479 (1960)). Paragraph 142e provided: "The conclusions based upon or graphically represented by a polygraph test . . . are inadmissible in evidence in a trial by court-martial." 24 M.J. at 250.

<sup>187</sup> See O'Connor, Jr., *supra* note 186, at 98-99 n.6, 8 (1988) (citing *United States v. Helton*, 10 M.J. 820 (A.F.C.M.R. 1981) and *United States v. Martin*, 9 M.J. 731 (N.M.C.M.R. 1979), *aff'd*, 13 M.J. 66 (1982)).

<sup>188</sup> *Id.* at 99 n.13 (citing *United States v. Bothwell*, 17 M.J. 684, 686 n.2 (A.C.M.R. 1983).

<sup>189</sup> 24 M.J. at 250-51.

<sup>190</sup> *Id.* at 251 (quoting MANUAL FOR COURTS-MARTIAL, United States, Drafters' Analysis, A18-93, (1969 ed. Rev.)).

<sup>191</sup> O'Connor, Jr., *supra* note 185, at 102.

<sup>192</sup> Mil. R. Evid. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence 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." MCM, *supra* note 2, Mil. R. Evid. 702.

<sup>193</sup> *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987).

<sup>194</sup> *Id.* at 251 (quoting *United States v. Downing*, 753 F.2d 1224, 1233-37 (3rd Cir. 1985)).

(LSD).<sup>195</sup> The Government's evidence included the testimony of two servicemen who claimed that they had purchased the drugs from the accused.<sup>196</sup> Gipson was subjected to two polygraphs, one *ex parte* and one conducted by the Naval Investigative Service.<sup>197</sup> The *ex parte* examination which Gipson secured at his own initiative and expense indicated that his denial of the charge was truthful.<sup>198</sup> Conversely, the Naval Investigative Service (NIS) examiner conducted a separate polygraph examination and concluded that Gipson was deceptive in answering the relevant questions.<sup>199</sup>

At trial, Gipson made a motion *in limine* to admit the "exculpatory" polygraph evidence.<sup>200</sup> While the Government was willing to stipulate to the examiner's expertise, it objected to the defense's attempt to lay the foundation arguing "that case law . . . points out that such evidence is not reliable at this—at least has not been shown to be reliable and scientifically acceptable."<sup>201</sup> The judge ruled that neither party would be permitted to lay the foundation to admit the polygraph evidence, reasoning that the polygraph field was insufficiently developed in the scientific community and that an examination "more or less, takes that function from the fact finder."<sup>202</sup>

After being affirmed by the Navy-Marine Court of Military Review (hereinafter NCMR), the COMA reversed and remanded. The court concluded that "depending on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and such other factors as may arise" polygraph evidence was as reliable and helpful as other evidence routinely admitted in criminal trials.<sup>203</sup> Additionally, the court was not convinced that the evidence was so collateral, confusing, time-consuming, or prejudicial that it required exclusion.<sup>204</sup>

The court divided scientific evidence into three levels. The highest level constituted evidence for which "the principles underlying the expertise are so judicially recognized that it is unnecessary to reestablish those principles in each case."<sup>205</sup> It was therefore possible to take judicial notice of the general principles supporting this category of evidence, in which the court included "fingerprints, ballistics, or x-ray evidence."<sup>206</sup> The lowest level, commonly

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<sup>195</sup> *Id.* at 247.

<sup>196</sup> *Id.* at 248.

<sup>197</sup> *Id.* at 247. The record does not indicate which test was administered first.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 253.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 249.

<sup>206</sup> *Id.* (quoting *United States v. Downing*, 753 F.2d 1224, 1234 (3d Cir. 1985)).

termed "junk science," is composed of "contraptions, practices, techniques, etc." which are so discredited that a trial judge may as a matter of law decline to consider them."<sup>207</sup> In this category the court placed phrenology, astrology, and voodoo.<sup>208</sup> To the middle level, composed of "scientific and technical endeavor that can neither be accepted nor rejected out of hand," the court assigned polygraph evidence.<sup>209</sup>

Acknowledging the scientific arguments on both sides of the polygraph debate, the court noted that "the consensus of experts seems to be that, under the best of conditions, and especially in the criminal context, competent operators can identify truth and deception at rates significantly better than chance, i.e., 50 percent."<sup>210</sup> Addressing the reliability of the evidence, the court endorsed claims that *ex parte* examinations may have higher rates of false negatives; because the suspect knows deceptive results will be discarded "he has little to fear."<sup>211</sup>

The court next reviewed the four pertinent rules of evidence, concluding that "[t]aken together, the rules seem to describe a comprehensive scheme for processing expert testimony."<sup>212</sup> The first three, MRE 401,<sup>213</sup> MRE 402,<sup>214</sup> and MRE 403,<sup>215</sup> are referred to as "legal relevance."<sup>216</sup> Experts are also

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<sup>207</sup> *Id.* at 249.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 248.

<sup>211</sup> *Id.* at 249. This concern, commonly referred to as the "Friendly Examiner Hypothesis," has not been supported by any study. See Appendix notes 561-62 and accompanying text.

<sup>212</sup> *Id.* at 251.

<sup>213</sup> Mil. R. Evid. 401 provides:

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.

MCM, *supra* note 2, Mil. R. Evid. 401.

<sup>214</sup> Mil. R. Evid. 402 provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

MCM *supra* note 2, Mil. R. Evid. 402.

<sup>215</sup> Mil. R. Evid. 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

permitted by MRE 702 to testify in the form of an opinion or otherwise . . . if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.<sup>217</sup> In deciding whether the testimony would be “helpful” under MRE 702, the COMA cited the balancing test utilized in *United States v. Downing*:

(1) the soundness and reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proffered connection between the scientific research or test result to be presented, and particular disputed factual issues in the case.<sup>218</sup>

The court made clear that it placed little weight on the argument that factfinders will be overwhelmed by polygraph testimony.<sup>219</sup> While citing a “number of recent studies” that concluded juries are generally capable of evaluating and giving due weight to the evidence,<sup>220</sup> the court conceded that if the polygraph evidence was admitted, the jury may be provided a “range of accuracy that a qualified operator might be able to attain.”<sup>221</sup>

The court further acknowledged that some degree of reliability is implicit in the logical relevance determination and that the “helpfulness” standard of MRE 702 requires an additional “quantum of reliability.” However, the court failed to provide trial judges with specific guidelines to use in making the MRE 702 determination. Instead, the court stated that the *Frye* test was but one factor to be considered, and a judge should use his “own experience, his general knowledge, and his understanding of human conduct and motivation” to determine if the scientific evidence has a tendency to prove a fact or will assist the factfinder.<sup>222</sup> In essence, the trial judge was given considerable latitude in making this judgment.<sup>223</sup>

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issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

MCM *supra* note 2, Mil. R. Evid. 403.

<sup>216</sup> Chief Justice Everett lists the following factors which he would take into account in the reliability determination: acceptance of the relied upon theories in the scientific community; the training, experience, and skill of the operator; whether the polygraph was the first one taken; and whether the adverse party was permitted to observe the examination. 24 M.J. at 255 (Everett, C.J., concurring).

<sup>217</sup> *Id.* at 251.

<sup>218</sup> *Id.* (citing 753 F.2d at 1237).

<sup>219</sup> *Id.* at 253 n.11.

<sup>220</sup> *Id.* (citing Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique From the Perspective of Juror Psychology*, 100 Mil. L. Rev. 99, 114-15 (1983)).

<sup>221</sup> 24 M.J. at 253 n.11.

<sup>222</sup> *Id.* at 251-52 (citing McCormick on Evidence (E. Cleary, 3d ed. 1984) at 544).

<sup>223</sup> *Id.* at 251.

After analyzing the applicable MREs, the court addressed the due process arguments supporting an independent constitutional right to present favorable polygraph evidence. After discussing the underlying rationale and Supreme Court decisions cited in its support,<sup>224</sup> the court expressly rejected this theory by reasoning that "there can be no right to present evidence—however much it purports to exonerate an accused—unless it is shown to be relevant and helpful."<sup>225</sup> This statement should not be over emphasized, as it merely reasons that all evidence, including exculpatory scientific evidence, must comply with the minimum requirements of the MREs. However, although the basic relevancy and helpfulness requirements apply to both the prosecution and defense evidence, the court did note that due process might suggest military judges give the accused the benefit of the doubt.<sup>226</sup>

The *Gipson* court next outlined the permissible uses of polygraph evidence at trial. First, concluding that polygraph evidence goes to the examinee's credibility but not character,<sup>227</sup> the court stated that at best the expert can provide an opinion regarding the deceptiveness of the examinee in making a particular assertion at the time of the exam.<sup>228</sup> Any inference concerning the truthfulness of the examinee's in-court testimony is left to the fact-finder.<sup>229</sup>

Second, assuming that the examinee's statement is offered as a basis for the polygraph examiner's opinion and not for the truth of the matter asserted,<sup>230</sup> the court reasoned that an expert's opinion as to the truthfulness of statements made during an exam could support a direct inference of guilt or innocence. However, in order to preserve the role of the fact-finder, the declarant would have to provide consistent testimony.<sup>231</sup>

Writing in dissent, Judge Sullivan concluded that the court had failed to address the particular issue before the court: whether the military judge abused his discretion by refusing the defense an opportunity to lay the foundation for

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<sup>224</sup> See *supra* notes 103-134 and accompanying text.

<sup>225</sup> 24 M.J. at 252.

<sup>226</sup> *Id.*

<sup>227</sup> This distinction is relevant to the Mil. R. Evid. 608 argument presented by the Government in both *Gipson* and *Scheffer*. The Government argued that Mil. R. Evid. 608(a) and (b) bars the admission of polygraph evidence because it is "evidence of truthful character" and the character of the witness was not attacked. However, the Court concluded that since polygraph results do not reveal character, the rule is inapposite and one must continue an analysis under Mil. R. Evid. 401-403 and Mil. R. Evid. 702.

<sup>228</sup> 24 M.J. at 253.

<sup>229</sup> *Id.* at 253.

<sup>230</sup> *Id.* (citing Mil. R. Evid. 703 and 801(c)).

<sup>231</sup> *Id.* In a final footnote, the Court noted that under Mil. R. Evid. 302(d), the declarant may be required to submit to a government administered polygraph. Any refusal to do so could be interpreted as a refusal to cooperate, and provide grounds for the exclusion of the defense proffered polygraph. *Id.* at 253 n.12.

the polygraph evidence to be admitted.<sup>232</sup> Expressing misgivings about the general reliability of the polygraph evidence and understanding the potential for confusion that would result from a battle of the opposing counsels' experts, Judge Sullivan concluded that the judge's use of a pre-emptive strike as authorized by MRE 403 was justified.<sup>233</sup>

As one might expect, the *Gipson* opinion sparked a great deal of debate in both the academic and legal communities.<sup>234</sup> The court was aware of the battle raging in the scientific community over the reliability of polygraph examinations and the limited number of forums which would entertain the debate. Invoking the spirit of the adversarial process, the court provided the experts with a forum to proffer the competing arguments before the trial judges. In light of the recent failures of similar state experiments,<sup>235</sup> at least one commentator suggested as an alternative that the Rules for Courts-Martial be amended to forbid the introduction of polygraph examinations into evidence.<sup>236</sup> In the words of that author, the military should "[I]et [the battle] rage somewhere else."<sup>237</sup>

## B. Post-*Gipson* Decisions

The so-called battle over the admissibility of the polygraph was a rout. Even though the gatekeeping function was placed back in the hands of the trial judge during the post-*Gipson* period, the ultimate admissibility determinations remained the same. While DoD conducted over 30,000 polygraph examinations during this period,<sup>238</sup> only six reported cases came before the military appeal courts in which the trial judge had refused the admission of potentially exculpatory results. Not once did the trial judge's refusal to admit

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<sup>232</sup> *Id.* at 255.

<sup>233</sup> *Id.* But see O'Conner, Jr., *supra* note 185, at 113 (arguing that "whether the pre-emptive strike is the result of a *per se* prohibition or patently absurd evidence, the strike is authorized by rule 702, not rule 403.").

<sup>234</sup> See generally O'Conner, Jr., *supra* note 186; Randy V. Cargill, *United States v. Gipson: A Leap Forward or Impetus For A Step Back*, *Army Law.*, November 1988 at 27; Ronald J. Simon, *Adopting A Military Approach to Polygraph Evidence Admissibility: Why Federal Evidentiary Protections Will Suffice*, 25 *Tex. Tech L. Rev.* 1055 (1994).

<sup>235</sup> Cargill, *supra* note 234, at 31 (noting that in 1981 Wisconsin ended its seven year experiment that allowed for the admission of stipulated polygraph evidence. The Wisconsin Supreme Court stated that the "burden on the trial court to assess the reliability of stipulated polygraph evidence may outweigh any probative value the evidence may have.") (citing *State v. Dean*, 103 Wis. 2d 228, 307 N.W.2d 628, 653 (1981)).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Annual Polygraph Report to Congress*, Department of Defense Polygraph Program, Office of the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence) Fiscal Years 1987-1991.

the results of an exculpatory polygraph examination constitute an abuse of discretion. Likewise, in the two cases in which the trial judge did permit the introduction of testimony that the accused had failed a polygraph, the court found reversible error.

### *1. Exculpatory Polygraph Results*

Six cases came before military appeal courts in which the trial judge refused to admit potentially exculpatory polygraph results. In the first two cases, the court found that the testimony was irrelevant because the accused did not testify.<sup>239</sup> In the third, *United States v. McKinnie*, the Army Court of Military Review (hereinafter ACMR) refused to find an abuse of discretion when the trial judge permitted the laying of a foundation but ultimately denied the introduction of a potentially exculpatory polygraph examination.<sup>240</sup> On review, COMA held that the relevancy requirements of MRE 401 and 402 were met despite the fact that the accused did not take the stand.<sup>241</sup> Citing its holding in *Abyeta*,<sup>242</sup> the court noted that unless the accused takes the stand and places his credibility in issue, polygraph evidence showing lack of deception is usually not relevant. However, the charges against McKinnie included false swearing. Because it tended to prove that the statements either were not false or were not believed to be false, the polygraph evidence showing a lack of deception was considered relevant.<sup>243</sup>

The court also found that since the defense polygraph examiner was "highly qualified and used accepted polygraph techniques and reliable equipment," his expert testimony regarding the appellant's lack of deception met the requirements of MRE 702.<sup>244</sup> However, the court refused to find that the trial judge's MRE 403 balancing test constituted an abuse of discretion. The judge provided four reasons for his decision: 1) lack of reliability of an *ex parte* exam, 2) the likelihood of misleading or confusing the court members, 3) wasting time, and 4) delaying the trial. The court only explicitly agreed with

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<sup>239</sup> *United States v. Abeyta*, 25 M.J. 97, 98 (C.M.A. 1987), *cert. denied*, 484 U.S. 1027 (1988); *United States v. Berg*, 44 M.J. 79, 80 (C.A.A.F. 1996) ("Since [Berg] elected not to testify at the re-hearing, it is not apparent what rule of evidence would permit the receipt of these out-of-court statements offered presumably to prove the truth of the matters asserted.").

<sup>240</sup> *United States v. McKinnie*, 29 M.J. 825, 826 (A.C.M.R. 1989), *aff'd*, 32 M.J. 141 (C.M.A. 1991).

<sup>241</sup> *Id.* at 827.

<sup>242</sup> 25 M.J. 97 (C.M.A. 1987).

<sup>243</sup> 29 M.J. at 827.

<sup>244</sup> *Id.*

the first reason, citing the unreliability of *ex parte* examinations and the declining reliability of subsequent tests.<sup>245</sup>

In the fourth case, *United States v. Howard*, the Coast Guard Court of Military Review also found that the judge did not err by denying the admission of appellant's exculpatory polygraph examination after permitting an opportunity for a foundation to be laid. The judge stated, with respect to the ambiguous wording of the polygraph questions, "I am not satisfied as to the soundness and reliability of the polygraph process,"<sup>246</sup> and concluded that "the helpfulness test under MRE 702 is not met and that under MRE 403 confusion would be created and the [m]embers would be misled."<sup>247</sup>

The final two cases were decided on similar grounds. In *United States v. Jensen*, the COMA simply stated that the exclusion was within the discretion of the trial judge.<sup>248</sup> In *United States v. Pope*, the COMA also determined that the trial judge had met the mandate of *Gipson* and had, therefore, exercised proper judicial discretion.<sup>249</sup>

## 2. Inculpatory Polygraph Results

In the two cases involving inculpatory examinations, the COMA found reversible error. In *United States v. Rodriguez*, the COMA held that the Government had failed to lay the proper foundation needed to satisfy the reliability components of MREs 401-403 and MRE 702.<sup>250</sup> In the second case, *United States v. Baldwin*, the military judge allowed the Government to elicit

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<sup>245</sup> *Id.* at 828. While the polygraph examination was *ex parte*, the defendant was willing to undergo a second test conducted by the Government. However, the Government refused to provide the exam because of the previous postponements of the trial date. *Id.*

<sup>246</sup> *United States v. Howard*, 24 M.J. 897, 905 (C.G.C.M.R. 1987), *review denied*, 26 M.J. 231 (C.M.A. 1988).

<sup>247</sup> *Id.* at 906.

<sup>248</sup> *United States v. Jensen*, 25 M.J. 284, 289 (C.M.A. 1987).

<sup>249</sup> *United States v. Pope*, 30 M.J. 1188, 1193 (A.F.C.M.R. 1990), *review denied*, 32 M.J. 249 (C.M.A. 1990). The trial judge had concluded that "in light of the controversy regarding the validity of the test, the *ex parte* nature of the test results, the lack of stipulations by the parties as to the test results, the lack of independent quality control, the absence of fear of detection on the part of the accused, and the dearth of evidence as to the acceptance of polygraph evidence in the scientific community, I will not admit the proffered defense polygraph evidence." *Id.*

<sup>250</sup> *United States v. Rodriguez*, 37 M.J. 448, 452 (C.M.A. 1993). The COMA found that the foundation was lacking for three reasons. First, the polygraph examiner included questions which did not address the criminal conduct in question, preventing the examiner to identify the source of deception. Second, although the examiner testified that it was "normally required," no post-test interview was conducted. Third, the examiner had committed a typographical error in marking one of the control questions, which did "nothing to prop up the reliability of this examination." *Id.* at 452-453.

testimony from the accused that he had failed a polygraph examination.<sup>251</sup> This testimony was presented after the jury had deliberated and recalled the accused to the stand, although the member's questions did not include inquiries into the existence of the polygraph examination.<sup>252</sup> The COMA held under these circumstances the testimony was unduly prejudicial and constituted reversible error.<sup>253</sup>

### C. Military Rule of Evidence 707

After almost four years, the "battle of the polygraph" was ended. In 1991, President Bush promulgated MRE 707, which adopted "a bright-line rule that polygraph evidence is not admissible by any party to a court-martial even if stipulated to by the parties."<sup>254</sup> The President acted pursuant to the power delegated by Congress under Article 36(a), UCMJ, the authority to prescribe the modes of proof before trial by courts-martial, "in regulations, which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [the UCMJ]."<sup>255</sup> The CAAF has held such action by the President to be a lawful delegation of power.<sup>256</sup> The question remained, however, whether this particular *per se* exclusion violated the accused's constitutional right to due process or Sixth Amendment right to present a defense.

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<sup>251</sup> United States v. Baldwin, 25 M.J. 54 (C.M.A. 1987).

<sup>252</sup> *Id.* at 55-56.

<sup>253</sup> *Id.* at 56.

<sup>254</sup> Mil. R. Evid. 707 provides:

(a) 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.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

MCM, *supra* note 2, Mil. R. Evid. 707.

Mil. R. Evid. 707 did not prohibit the use of the results at the pre-trial or post-trial stages of the criminal trial, nor to Article 15 proceedings. See United States v. Rodriguez, 37 M.J. 448, 454 (C.M.A. 1993) (Crawford, J., concurring in the result).

<sup>255</sup> Article 36 (a), UCMJ, 10 U.S.C. § 836(a) (1994).

<sup>256</sup> United States v. Scheffer, 41 M.J. 683, 686 (citing United States v. Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105, 118-19, 1962 WL 4459 (1962); United States v. Weiss, 36 M.J. 224, 238 (C.M.A. 1992) (Crawford, J., concurring in the result), *aff'd*, 510 U.S. 163 (1994)), *rev'd*, 44 M.J. 442 (C.A.A.F. 1996), *cert. granted*, 117 S. Ct. 1817 (1997).

With the promulgation of MRE 707, the COMA holding in *Gipson* was specifically overruled as it applied to polygraph evidence. In the Drafters' Analysis<sup>257</sup> accompanying the rule, the Drafters were careful to note that MRE 707 was not intended to accept or reject the applicability of *Gipson* toward the admissibility of any other evidence under MRE 702.<sup>258</sup>

The Drafters' analysis provided four policy grounds for the new rule, which have been repeatedly invoked and endorsed independently by a majority of federal and state courts.<sup>259</sup> The first concern is the "real danger that court members will be misled by polygraph evidence that 'is likely to be shrouded with an aura of near infallibility,'"<sup>260</sup> and relatedly, that "to the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members' 'traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted.'"<sup>261</sup> The Drafters' rationale is in stark contrast to the court's rationale in *Gipson*, which placed little weight in this argument in analyzing the helpfulness of MRE 702.<sup>262</sup>

The trial judge typically considers whether the jury will treat the evidence as dispositive, or alternatively, assign the evidence "undue weight" while conducting the balancing test of MRE 403. However, it has been argued that the "prejudicial effect" language of FRE 403 applies only to "the arousal of impulses leading the trier of fact to decide factual issues on an irrelevant, usually highly emotional, basis."<sup>263</sup> Therefore, it is arguable whether the trial judge may properly exclude the evidence under MRE 403 because of the "undue weight" which the jury may give it. Instead, the "undue weight" argument may be persuasive in the determination of helpfulness under MRE 702, as outlined by the *Gipson* court's balancing test utilized first in *United States v. Downing*. For the purposes of a constitutional analysis, this analysis must be qualified. Even if there is no specific MRE which the judge can invoke as a ground to exclude the evidence based on the members' ability to objectively evaluate it, the Constitution may not preclude the President from promulgating such a rule.

Second, the Drafters were concerned that polygraph evidence would confuse the trial issues, diverting the members' attention away from the

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<sup>257</sup> The introduction to the Drafters' Analysis indicates that Military Rules of Evidence were drafted by the Evidence Working Group of the Joint-Service Committee on Military Justice. MCM *supra* note 2, Drafters' Analysis, at A22-1.

<sup>258</sup> *Id.* at A22-48 (1995).

<sup>259</sup> See *supra* notes 30-67, 155-183, and accompanying text.

<sup>260</sup> MCM *supra* note 2, Drafters' Analysis, at A22-48 (quoting *United States v. Alexander*, 526 F.2d 161, 168-69 (8th Cir. 1975).

<sup>261</sup> *Id.*

<sup>262</sup> See *supra* notes 219-21 and accompanying text.

<sup>263</sup> McCall, *supra* note 147, at 376 (citing the Fed. R. Evid. 403 advisory committee notes).

ultimate determination of guilt or innocence, resulting in "the court-martial degenerating into a trial of the polygraph machine."<sup>264</sup> This concern is closely related to the Drafters' third policy rationale; the "substantial waste of time" involved in litigating the "reliability of the particular test and qualifications of the specific examiner . . . in every case."<sup>265</sup> This concern is also inherently ruled upon by the trial judge under the balancing test of MRE 403. If the evidence's probative value is substantially outweighed by the potential for "misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence,"<sup>266</sup> the court is free to reject it.

Finally, the Drafters stated that the "reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system."<sup>267</sup> The first segment of this rationale is an argument against admissibility under the "helpfulness" test of MRE 702, as it relates to the "soundness and reliability of the technique used in generating the evidence."<sup>268</sup> The second segment highlights a recurring theme in the debate about the polygraph; that the determination of a witness' credibility is within the sole province of the jury.

It may be argued that the practical effect of MRE 707 was to relegate polygraph evidence to *Gipson's* third category composed of "junk science" which the trial judge may reject as a matter of law. However, the ultimate question is whether the President may exclude evidence which is assigned to the middle category of evidence. In enacting MRE 707, the President acted pursuant to the power delegated him by Congress, and the determination of the MRE's constitutionality should not be determined solely by an analysis of evidence under any one rule. In other words, whether the evidence would be admissible absent MRE 707 is not determinative of the rule's validity under the Constitution. Instead, the President was directed to promulgate the MREs as he saw "practical," which involves a determination not only of the accused's constitutional right to present evidence but also the compelling interest weighing against admissibility.

It is clear that MRE 707 applies equally to the Government and an accused. While many have focused on the limitation the rule imposed on the accused's right to present evidence, the same limitation is imposed on the Government. MRE 707 does not prevent the accused from testifying in his defense. Instead, it prevents both the Government and the defense from

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<sup>264</sup> MCM *supra* note 2, Drafters' Analysis, at A22-48 (citing *State v. Grier*, 300 S.E.2d 351 (N.C. 1983)).

<sup>265</sup> *Id.*

<sup>266</sup> See Mil. R. Evid. 403.

<sup>267</sup> MCM *supra* note 2, Drafters' Analysis, at A22-48 (citing *People v. Kegler*, 242 Cal. Rptr. 897, 197 Cal. App. 3d 72 (1987)).

<sup>268</sup> See *supra* notes 217-18 and accompanying text.

presenting expert evidence concerning the accused's belief in his innocence at the time of the polygraph examination. The accused is still afforded the other means of rebutting attacks on his credibility, including cross-examination of the Government's witnesses.

A number of commentators immediately questioned the Drafters' stated policy justifications for the new rule, as well as the potential constitutional concerns it presented.<sup>269</sup> Specifically, one writer has stated that in order to accept the Drafters' rationale, the assumptions must be made that "the adversarial process is a failure and the competent use of pre-trial preparation and effective cross-examination pales in comparison to the testimony of the polygraph examiner," that the members are incapable of following or understanding the judge's instructions in this area, and that the military judge is "incapable of applying long-established evidentiary rules to polygraph evidence."<sup>270</sup> In short, many felt the new rule displayed a lack of confidence in the military justice system and the individuals who are vital to its efficient functioning.

#### D. Constitutional Challenges to MRE 707

While military trial judges consistently invoked MRE 707 to preclude any attempt by an accused to lay the foundation for the admission of polygraph evidence, by 1995 it was clear that the CAAF would address the constitutionality of the new rule. The CAAF was provided its first opportunity when the case of *United States v. Williams*<sup>271</sup> was appealed from the Army Court of Military Review.

##### 1. *United States v. Williams*

Specialist James Williams was a Chaplains' Funds Clerk who, with others, was responsible for collecting and disbursing funds.<sup>272</sup> During the time period of August 1991 to February 1992, eighteen unauthorized disbursements were made from the fund account.<sup>273</sup> Williams admitted to three of the

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<sup>269</sup> See, e.g., John J. Canham, Jr., *Military Rule Of Evidence 707: A Bright-Line Rule That Needs to Be Dimmed*, 140 Mil. L. Rev. 65 (1993); Mark D. Maxwell, et. al., *Recent Developments Concerning The Constitutionality of Military Rule of Evidence 707*, Army Law. 13 (Dec. 1994); Major Andrew M. Warner, *The New Rule Against Polygraphs*, Army Law., September 1991, at 31.

<sup>270</sup> Canham, Jr., *supra* note 269, at 74.

<sup>271</sup> *United States v. Williams*, 43 M.J. 348 (C.A.A.F. 1995), *cert. denied*, 116 S. Ct. 925 (1996).

<sup>272</sup> *Id.* at 349.

<sup>273</sup> *Id.*

unauthorized disbursements but denied stealing the rest.<sup>274</sup> In July 1992, Williams consented to taking a polygraph examination conducted by the Army's Criminal Investigation Command (CID).<sup>275</sup> The examiner's relevant questions focused on whether Williams stole from the fund. In the opinion of the examiner, no deception was indicated.<sup>276</sup> When the polygraph charts were sent to the CID quality control center, the reviewing examiner concluded the tests were inconclusive.<sup>277</sup>

At Williams' request, he was re-tested in August 1992 by the original CID examiner. Again the examiner opined that no deception was indicated to the relevant questions.<sup>278</sup> After the charts were read by the examiner's immediate supervisor, they were forwarded to quality control. Quality control concluded that the non-deceptive result was "strong."<sup>279</sup>

At his court-martial, Williams filed a motion asking that he be permitted to lay the foundation for the admission of the two exculpatory examinations.<sup>280</sup> The military judge denied his request, finding that MRE 707 was a proper exercise of the President's rule-making authority and violated neither the Fifth or Sixth Amendments. Williams did not testify at trial, and claimed that the denial of the motion "impacted greatly" on his decision.<sup>281</sup> A general court-martial convicted Williams of all charges and specifications.<sup>282</sup> The ACMR remanded and ordered an additional hearing on the admissibility of the polygraph evidence.<sup>283</sup>

The CAAF set the decision of the ACMR aside, holding that before it was necessary to answer the constitutionality of MRE 707, some exception to the hearsay rule under the MREs must be present.<sup>284</sup> The court ruled that Williams had "no right to introduce the polygraph evidence without taking the stand and testifying consistently, or without offering some other plausible evidentiary basis."<sup>285</sup>

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<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 350. Despite the polygraph results, Williams was charged with forging checks in violation of Article 123, UCMJ, and one charge of stealing the cumulative value of the checks in violation of Article 121, UCMJ. He pleaded guilty to a lesser offense of wrongful appropriation, but plead not guilty to the forgery and larceny specifications. *Id.* at 349.

<sup>280</sup> *Id.* at 350.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 349.

<sup>283</sup> *Id.* (citing 39 M.J. 555, 559 (1994)).

<sup>284</sup> *Id.* at 355.

<sup>285</sup> *Id.*

After citing the rationale of its prior holding in *Gipson*, the CAAF noted that neither *Gipson* nor *Daubert*<sup>286</sup> governed the admissibility of polygraph evidence post MRE 707.<sup>287</sup> In both cases, the legal analysis began with the relevancy determination outlined in MRE 402, and then moved to the helpfulness determination of MRE 702. However, the court noted that with the promulgation of MRE 707, the operation of MRE 402's exclusionary clause now expressly bars the introduction of the polygraph evidence.<sup>288</sup> Consequently, the court stated that the federal cases applying the *Daubert* holding to polygraph evidence were "not germane to our inquiry."<sup>289</sup>

Having held that the MREs effectively precluded the admission of the polygraph evidence, the court re-focused the analysis to the question of "whether, and under what circumstances, the *per se* prohibition of polygraph evidence in courts-martial might violate servicemembers' constitutional rights."<sup>290</sup> The court simply determined that the case before it did not require it to answer this question.<sup>291</sup>

The court reviewed the potential applicability of the two primary Supreme Court decisions which have addressed an accused's Sixth Amendment right to present evidence in his defense,<sup>292</sup> *Washington*<sup>293</sup> and *Chambers*.<sup>294</sup> However, the court observed that since Williams did not take the stand and "submit himself to the crucible of cross-examination" the polygraph evidence was "not just hearsay, but super-enriched hearsay."<sup>295</sup> The court further reasoned that by allowing the accused to "testify by proxy" through the polygraph examiner, "without at the same time allowing the opposition an opportunity to cross-examine or the fact-finder an opportunity to observe and make its own evaluation of the party's credibility," the adversarial process would be subverted.<sup>296</sup> In the end, the court concluded that the case before it did not require an answer to the constitutional question.

While Williams' conviction was ultimately upheld, the court made clear that "in the appropriate case" it would rule "whether the proffered polygraph evidence is sufficiently reliable and necessary that its automatic

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<sup>286</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

<sup>287</sup> 43 M.J. at 351.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 352.

<sup>291</sup> *Id.* at 355.

<sup>292</sup> *Id.* at 352.

<sup>293</sup> See *supra* notes 106-16 and accompanying text.

<sup>294</sup> See *supra* notes 117-37 and accompanying text.

<sup>295</sup> 43 M.J. at 354.

<sup>296</sup> *Id.* Judge Wiss reserved the question of whether a non-testifying defendant, after having lost a motion *in limine* to admit the expert testimony, may preserve the issue for appellate review. *Id.* at 355 (Wiss, J., concurring).

exclusion [under MRE 707] violates the accused's constitutional trial rights."<sup>297</sup> The court was finally presented with such a case in *United States v. Scheffer*.

## 2. *United States v. Scheffer*

Airman Scheffer began working as an AFOSI informant in March of 1992. He was advised that informants were subject to periodic urinalysis and polygraph testing.<sup>298</sup> On 7 April 1992, Scheffer was asked to provide a urine sample.<sup>299</sup> He asked to submit the sample the next day. On 10 April 1992, appellant submitted to an AFOSI polygraph examination concerning his use of illegal drugs and his status as an informant.<sup>300</sup> After evaluating the charts, the examiner concluded that deception was not indicated in Scheffer's negative responses to the relevant questions.<sup>301</sup> Four days later, AFOSI agent's learned that Scheffer's urine sample had tested positive for methamphetamine.<sup>302</sup>

Scheffer moved at trial to admit the results of the potentially exculpatory polygraph.<sup>303</sup> The prosecution objected. As in *Williams*, the military judge denied the request and declared that the Constitution did not preclude the President from promulgating MRE 707.<sup>304</sup>

The Air Force Court of Criminal Appeals (hereinafter AFCCA), *en banc*, found the military judge had not abused his discretion, and affirmed the findings and sentence as modified.<sup>305</sup> Reviewing the source of executive authority to promulgate MRE 707, the court concluded that it could not declare MRE 707 unconstitutional absent "a clear showing that the President exceeded the discretionary powers conferred upon him by Article 36 (a)."<sup>306</sup>

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<sup>297</sup> *Id.* at 353.

<sup>298</sup> *United States v. Scheffer*, 41 M.J. 683 (A.F.Ct.Crim.App. 1995), *rev'd*, 44 M.J. 442, 443 (C.A.A.F. 1996), *cert. granted*, 117 S. Ct. 1817 (1997).

<sup>299</sup> 41 M.J. at 685.

<sup>300</sup> *Id.*

<sup>301</sup> The relevant questions were: "1) Since you've been in the Air Force, have you used any illegal drugs?; 2) Have you lied about any of the drug information you've given to OSI?; 3) Besides your parents, have you told anyone else you're assisting OSI?" *Id.* at 685. Note that since the third question does not implicate the criminal conduct for which Scheffer was charged, if the results had indicated deception the examiner would not be able to differentiate the source of the deception because an examiner's opinion is based upon the entire test, not a specific question. See Appendix note 491.

<sup>302</sup> 41 M.J. at 686.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> The modification to Scheffer's sentence was a day of pretrial confinement credit. *Id.* at 694.

<sup>306</sup> *Id.* at 687 (citing *United States v. White*, 14 C.M.R. 84, 88, 3 U.S.C.M.A. 666, 1954 WL 2095 (1954)).

After reviewing *Washington*, *Chambers*, and *Rock*, as well as the CAAF case law, the court outlined the framework to guide its constitutional analysis. This framework closely follows the criterion utilized by the federal and state courts in applying the compulsory process clause to their polygraph rules.<sup>307</sup> In order for MRE 707 to survive constitutional scrutiny, AFCCA asserted that:

1) *The expert testimony must meet the relevancy requirements of MRE 401 and 402 and be vital to the defense "when evaluated in the context of the entire record."*<sup>308</sup> Acknowledging that polygraph evidence may be relevant to the credibility of the accused, the court stated that "we do not believe presentation of polygraph evidence was vital to the court member's assessment of appellant's credibility."<sup>309</sup>

2) *The MRE must not "arbitrarily limit the accused's ability to present reliable evidence."*<sup>310</sup> The court ruled that MRE 707 did not arbitrarily limit this ability for five reasons:

- the President's decision was based on sound policy grounds, given the uncertainty as to the polygraph's general reliability,<sup>311</sup> and the potential battle of experts which would outweigh the evidence's probative value;<sup>312</sup>
- MRE 707 applies a rule of evidence generally recognized, since the majority of federal circuit courts of appeal hold that polygraph evidence may not be introduced to "prove the truth of statements made during the polygraph examination";<sup>313</sup>
- the fact that military judges typically resolve issues similar to those provided as rationale for MRE 707 "does not bar the President from determining that the probative value of polygraph evidence is substantially outweighed by more compelling factors";<sup>314</sup>
- the court did not believe it was arbitrary for the President to prohibit scientific techniques which fall into the middle or lower level as announced in *Gipson*;<sup>315</sup>
- the court could not locate any federal case, before or after enactment of the FREs, which suggests that MRE 707, or any similar state rule,

<sup>307</sup> See *supra* notes 155-83 and accompanying text.

<sup>308</sup> 41 M.J. at 690.

<sup>309</sup> *Id.* at 691.

<sup>310</sup> *Id.*

<sup>311</sup> This rationale is supported by the COMA's decision in *Gipson* to place polygraph evidence in the middle category of scientific evidence. Note this is a Mil. R. Evid. 401-402 reliability argument.

<sup>312</sup> Note this is a Mil. R. Evid. 403 argument.

<sup>313</sup> 41 M.J. at 691 (citing *United States v. Bounds*, 985 F.2d 188, 192 n.2 (5th Cir. 1993), *cert. denied*, 510 U.S. 845 (1993)).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 692.

"unconstitutionally interferes with an accused's right to due process or to present a defense."<sup>316</sup>

3) "[I]f the rule permits the admission of the evidence for some purpose but not others," it may not limit admission by the defense more than the prosecution.<sup>317</sup> The court found that MRE 707's comprehensive prohibition was equally applicable to both defense and prosecution.<sup>318</sup>

4) *The rule of evidence may not arbitrarily infringe upon the defendant's right to testify on his own behalf.*<sup>319</sup> The court found nothing in MRE 707 which would infringe on this right.<sup>320</sup>

The AFCCA's, finding that MRE 707 met this four factor test, concluded that MRE 707 "is a permissible rule 'designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'"<sup>321</sup>

Upon review, the CAAF held that the "*per se* exclusion of polygraph evidence, offered by an accused to rebut an attack on his credibility, without giving him an opportunity to lay a foundation under MRE 702 and *Daubert*, violates his Sixth Amendment right to present a defense."<sup>322</sup> The record was returned for a hearing at which time the accused would be permitted to lay the foundation for the admission of the polygraph evidence. The court's debate did not focus on whether polygraph evidence has obtained a level of reliability which would permit its admissibility. Instead, the issue became whether the President has the authority to promulgate a *per se* exclusion rule for evidence assigned to the middle level of the *Gipson* framework.

In the majority opinion, the court quickly distinguished between the case's statutory and constitutional dimensions. The statutory question was whether the President complied with Article 36 in promulgating the rule.<sup>323</sup> Noting that the issue was neither briefed nor argued, the court assumed that the President acted in accordance with the article when he "determined that the prevailing federal rule is not 'practicable' for courts-martial."<sup>324</sup> The court's language deserves comment. Apparently, the court equated the Article 36

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<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 691.

<sup>318</sup> *Id.* at 692.

<sup>319</sup> *Id.* at 691.

<sup>320</sup> *Id.* at 692.

<sup>321</sup> *Id.* (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973)).

<sup>322</sup> 44 M.J. at 686.

<sup>323</sup> 44 M.J. at 444. The Court also remanded two additional cases because the defendant was not provided the opportunity to lay the foundation for the exculpatory polygraph. See *United States v. Mobley*, 44 M.J. 453 (C.A.A.F. 1996), *petition for cert. filed*, 65 U.S.L.W. 3518 (Jan 16, 1997) (NO. 96-1134); *United States v. Nash*, 44 M.J. 456 (C.A.A.F. 1996), *petition for cert. filed*, 65 U.S.L.W. 3518 (Jan 16, 1997) (NO. 96-1134).

<sup>324</sup> 44 M.J. at 445.

phrase “generally recognized in the trial of criminal cases in the United States district courts” with the practice of the “majority” of federal jurisdictions. It is not clear that this is a fair reading of the Article. Arguably, since six of the thirteen federal circuits and forty-eight state courts still adhere to a *per se* exclusion rule absent stipulation,<sup>325</sup> no “generally recognized” rule exists.

Turning to the constitutional issue, the CAAF reviewed the Supreme Court decisions that address the accused’s Sixth Amendment right to present a defense. The court quoted the Supreme Court’s language in *Rock* that a “legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in a particular case.”<sup>326</sup> While the exclusion in *Rock* concerned the ability of the accused to testify in her own defense, the court perceived “no significant constitutional difference” between this type of testimony and the presentation of polygraph evidence to support an accused’s testimony.<sup>327</sup> Given the unprecedented nature of the holding, it is disappointing that the CAAF provides no further analysis or explanation for why MRE 707 violates the accused’s Sixth Amendment right to present a defense.

The court then turned to a brief restatement of the applicable rules of evidence. Quoting from MRE 702, the court reiterated that expert testimony is subject to the “relevance requirements of MRE 401 and MRE 402 and the balancing requirements of MRE 403.”<sup>328</sup> It then noted that in *Daubert* the Supreme Court entrusted the gatekeeper function for the admissibility of scientific evidence to the trial judge.<sup>329</sup>

The court also addressed the proper scope of the polygraph examiner’s testimony. The expert may not testify that the accused was telling the truth.<sup>330</sup> Instead, the court held that “a properly qualified expert, relying on a properly administered examination, may be able to opine that an accused’s physiological responses to certain questions did not indicate deception.”<sup>331</sup>

Like the Fifth Circuit in *Posado*, the court did not hold that polygraph examinations would always, or ever, be admissible. However, the accused must be permitted the opportunity to lay the foundation for the admission of the evidence. In laying this foundation, the court provided the accused some guidance. First, it must be established that “the underlying theory—that a deceptive answer will produce a measurable physiological response—is

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<sup>325</sup> See *supra* notes 30-67 and accompanying text.

<sup>326</sup> 44 M.J. at 446 (citing *Rock v. Arkansas*, 483 U.S. 44, 61 (1987)).

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

scientifically valid.”<sup>332</sup> Second, evidence should be presented that the theory can be applied to the specific examination, which must include “evidence that the examiner is qualified, that the equipment worked properly and was properly used, and that the examiner used valid questioning techniques.”<sup>333</sup>

The court read *Daubert* to require that the military judge act as the evidentiary gatekeeper, who must weigh probative value against prejudicial impact in accordance with MRE 403.<sup>334</sup> The trial judge is to have wide discretion in the ruling on admissibility, which will not be reversed unless a clear abuse of discretion is shown.<sup>335</sup>

The court specifically rejected the argument that the accused’s ability to lay the foundation for the admission would “generate an unreasonable burden on the services.”<sup>336</sup> Instead, it claimed that the introduction of polygraph evidence might actually prevent “needless litigation” by avoiding both mistaken prosecutions as well as “bogus claims of innocent [drug] ingestion.”<sup>337</sup> Additionally, the court stated that it was unaware of any such dramatic increase in the number of polygraph cases following *Gipson*.<sup>338</sup> Finally, the court exclaimed that “our measure should be the scales of justice, not the cash register.”<sup>339</sup>

Judge Sullivan dissented for reasons stated in his concurring opinion in *United States v. Williams*.<sup>340</sup> In that opinion, he provided his framework for addressing the constitutionality of MRE 707. First, he explained that the Fifth and Sixth Amendments apply to the military, and require “admission of relevant and reliable evidence as long as it applies to the crime, the witnesses, and the legal defenses to the crime.”<sup>341</sup> However, Judge Sullivan explained that the Constitution “does not require admission of machine-generated evidence that only shows whether the defendant believes that his claim of innocence is truthful.”<sup>342</sup> While it is uncertain whether he objected to either the reliability or relevance of the test, Judge Sullivan did state that polygraph testimony infringes upon the jury’s role in determining credibility as well as

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<sup>332</sup> *Id.* at 446-47 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)).

<sup>333</sup> *Id.* at 447.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* (quoting *United States v. Piccinonna*, 885 F.2d 1529, 1537 (11th Cir. 1989), *aff’d*, 925 F.2d 1474 (11th Cir. 1991)).

<sup>336</sup> *Id.* at 448.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 449 (Sullivan, C.J., dissenting) (citing to *United States v. Williams*, 43 M.J. 348, 356 (C.A.A.F. 1995), *cert. denied*, 116 S. Ct. 925 (1996) (Sullivan, C.J., concurring in the result)).

<sup>341</sup> 43 M.J. at 356 (Sullivan, C.J., concurring in the result).

<sup>342</sup> *Id.*

raising "serious questions under MRE 608."<sup>343</sup> It should be noted in supporting the first contention, he quoted from the Ninth Circuit's opinion in *Brown v. Darcy*,<sup>344</sup> which has since been overruled.<sup>345</sup>

In her dissent, Judge Crawford did not specifically argue that polygraph evidence is no longer reliable or relevant.<sup>346</sup> Instead, she noted that an accused has a right to present legally and logically relevant evidence at trial, but that this right is not absolute and may yield to valid policy considerations.<sup>347</sup> Even assuming that polygraph evidence is relevant and reliable, Judge Crawford opined that "there is ample justification for [MRE 707]."<sup>348</sup>

In support of her conclusion, Judge Crawford stated that the policy justifications for MRE 707 contained in the Drafters' Analysis, which in her opinion were not exclusive, satisfy the provisions set forth in Article 36(a), UCMJ.<sup>349</sup> To this list, she added the "practical consequences" of such a rule on the world-wide military justice system.<sup>350</sup> Citing statistics which reveal that the services annually conduct 4,000 court-martials and 100,000 criminal actions, 20% of which are drug cases, Judge Crawford reasoned that a "concomitant right of presenting evidence is the right to demand a polygraph examination during the investigative stage."<sup>351</sup> This burden may well prove to be a "practical impossibility on the services."<sup>352</sup> After noting that the federal courts are split on the issue, these considerations led her to conclude that a valid governmental interest, in light of the discretion delegated to the President by Article 36(a), validate MRE 707.<sup>353</sup> In fact, if the majority's logic is correct, Judge Crawford noted that it calls into question the viability of MRE 502-12 and 803(6).

## V. THE SIXTH AMENDMENT AND MILITARY RULE OF EVIDENCE 707

Is the CAAF correct that an accused has a constitutional right to lay the foundation for the admission of an exculpatory polygraph examination in order to rebut an attack on his credibility? As Parts II and III of this article indicate,

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<sup>343</sup> *Id.*

<sup>344</sup> *Brown v. Darcy*, 783 F.2d 1389 (9th Cir. 1986), *overruled by* *United States v. Cordoba*, 1997 WL 3317 (9th Cir. 1997).

<sup>345</sup> See *supra* notes 90-99 and accompanying text.

<sup>346</sup> 44 M.J. at 449 (Crawford, J., dissenting).

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 451. See *supra* notes 259-68 and accompanying text.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 452.

<sup>353</sup> *Id.*

six federal circuits and forty-eight state jurisdictions that employ a *per se* exclusion rule absent stipulation do not think so, since the accused is not provided an opportunity to lay the foundation for the evidence before the trial judge in these jurisdictions.<sup>354</sup> It is entirely possible, of course, that the CAAF's logic is correct and the Constitution requires a wholesale alteration in the treatment of polygraph evidence, and perhaps scientific evidence in general.

The issue is now before the Supreme Court. Although the Court has not articulated the applicability of the compulsory process clause to either polygraph evidence or scientific expert testimony, as early as 1977 members of the Court expressed their growing concern about the inconsistent treatment of the evidence amongst the circuits.<sup>355</sup> In 1982, then Justice Rehnquist opined that "[i]n a given case, this Court's decisions may require that exculpatory evidence be admitted into evidence despite state evidentiary rules to the contrary."<sup>356</sup>

The constitutional analysis of MRE 707 begins and ends with the following question: "Does the exclusion of an accused's polygraph evidence result in an arbitrary restriction on his right to present relevant and material evidence?" Consequently, to support the holding in *Scheffer*, the CAAF must have made two findings. First, the polygraph evidence must be relevant and material. Second, the President's justifications for the exclusion of the evidence are arbitrary.

It is indisputable that Congress, and by delegation the President, may impose limitations upon an accused's right to present exculpatory evidence.<sup>357</sup>

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<sup>354</sup> See *supra* notes 30-67 and accompanying text.

<sup>355</sup> *United States v. Masri*, 434 U.S. 907, 98 S. Ct. 309, 54 L. Ed. 2d 195 (1977) (White and Marshall, JJ., dissenting from the denial of cert.).

<sup>356</sup> *McMorris v. Israel*, 455 U.S. 967, 969, 102 S. Ct. 1479, 1480, 71 L. Ed. 2d 684 (1982) (Rehnquist and O'Connor, JJ., dissenting from the denial of cert.).

<sup>357</sup> Compare Prof. Westen's conclusion that the language and purpose of the compulsory process clause mandates that "[t]he defendant has a constitutional right to call any material 'witness,' including himself." Westen, *supra* note 102, at 120. In analyzing the rules of evidence which disqualify witnesses to avoid untrustworthy testimony, Prof. Westen concludes that "the defendant has a right to present any witness whose credibility is genuinely at issue, and that witnesses cannot be barred from testifying on his behalf unless they are so untrustworthy as to provide no basis short of pure speculation for evaluating their testimony." *Id.* at 136. After examining the requirements of competency, relevancy, materiality, and favorableness, Prof. Westen also concluded that "the constitutional standard that governs the timely request of a nonindigent defendant to subpoena available witnesses from within the jurisdiction" is "the right to produce, and thus implicitly present, any witness who is capable of giving testimony that could reasonably tend to persuade a jury to return a verdict in the defendant's favor." Peter Westen, *Compulsory Process II*, 74 Mich. L. Rev. 191, 234 (1974).

Announcing the judgment of the Court in *Montana v. Egelhoff*,<sup>358</sup> Justice Scalia, joined by Chief Justice Rehnquist, Justice Kennedy and Justice Thomas, explained that an accused “does not have an unfettered right to offer [evidence] that is incompetent, privileged, or *otherwise inadmissible under standard rules of evidence*.”<sup>359</sup> Although much of the controversy surrounding MRE 707 has focused on whether the evidence is otherwise inadmissible under the MREs, this statement does not necessarily imply that the accused *has* an unfettered right to offer evidence that is otherwise *admissible* under standard rules of evidence. The MREs may prevent the accused from presenting certain evidence or may afford him special privileges. However, whether the accused has a constitutional right from or to such treatment is a separate analysis.

Consequently, if the results of the accused’s polygraph exam are otherwise inadmissible under the standard rules of evidence, then MRE 707 cannot violate the accused’s right to present a defense. If, on the other hand, the polygraph evidence is otherwise admissible, then it becomes necessary to consider whether the President has advanced “good and traditional policy support,”<sup>360</sup> i.e. non-arbitrary reasons, for excluding the evidence.

In *Scheffer*, the CAAF concluded that MRE 707 was unconstitutional as applied to the accused because it prevented the trial judge from applying MRE 401-403 and MRE 702. However, if polygraph evidence is inadmissible under the remaining rules of evidence, then it is immaterial whether the requirements of MRE 702 are met. Additionally, even assuming that the trial judge would determine that polygraph evidence meets the standard of MRE 702, the President may still exclude the evidence if legitimate interests are advanced.<sup>361</sup>

### A. Is Polygraph Evidence Otherwise Inadmissible?

The first requirement under the standard rules of evidence is that the evidence must be relevant as defined by MRE 401. For the purposes of this article, it will be assumed that the polygraph evidenced offer by the accused is

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<sup>358</sup> *Montana v. Egelhoff*, 116 S. Ct. 2013, 135 L. Ed. 2d 361, 64 U.S.L.W. 4500 (1996). Both the majority’s opinion and J. Crawford’s dissent in *Scheffer* discussed the proper interpretation of this case.

<sup>359</sup> *Id.* at 2017 (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988), *reh’g denied*, 485 U.S. 983 (1988)) (emphasis added). Although dissenting from the Court’s holding, Justice O’Connor, Justice Stevens, Justice Souter and Justice Breyer agree with this position. *Id.* at 2026.

<sup>360</sup> *Id.* at 2017 n.1.

<sup>361</sup> This reasoning is true unless the CAAF has determined that the Sixth Amendment incorporates the remaining military rules of evidence, thereby “embalming the law of evidence in the Due Process Clause.” *Green v. Georgia*, 442 U.S. 95, 98, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979) (Rehnquist, J., dissenting). See *supra* note 134.

relevant.<sup>362</sup> Once the evidence is determined to be relevant, then it is generally admissible under MRE 402. However, an accused does not have a right to present all relevant evidence. MRE 402 provides that relevant evidence is "admissible, except as otherwise provided by the Constitution. . . , the [UCMJ], these rules, this Manual, or any Act of Congress applicable to members of the armed forces."<sup>363</sup> As Justice Scalia has further noted, "the proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible."<sup>364</sup>

Justice Scalia highlighted two "familiar and unquestionably constitutional evidentiary rules" which exclude relevant evidence.<sup>365</sup> The first rule is FRE 403 (and MRE 403), which permits the trial judge to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>366</sup> The second example is the hearsay rules, which exclude relevant evidence which is "deemed insufficiently reliable."<sup>367</sup>

If MRE 403 is "unquestionably constitutional," then the accused can not have a "right to call exculpatory witnesses whose testimony may be subject to a known, but manageable, risk of inaccuracy."<sup>368</sup> The witness' testimony, even if subject to a known risk of inaccuracy, may still be excluded under MRE 403, MRE 802 or any other standard rule of evidence. At least two other military rules of evidence, MRE 702 and MRE 608, present a serious challenge to the admissibility of polygraph evidence.<sup>369</sup>

*Military Rule of Evidence 702:* Before examining whether polygraph evidence is otherwise inadmissible under MRE 702, it is necessary to examine whether it is a standard rule of evidence. Since the CAAF held that the accused had a right to lay the foundation for admission under *Daubert's* interpretation of MRE 702, it appears the court implicitly determined that MRE 702 is a standard rule. However, one could argue that since the *Frye* test

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<sup>362</sup> One commentator has questioned how the defendant's credibility at the time of the exam becomes a disputed fact at issue. Canham, *supra* note 269, at 88.

<sup>363</sup> MCM *supra* note 2, Mil. R. Evid. 402.

<sup>364</sup> 116 S. Ct. at 2017.

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* (emphasis omitted). *Accord*, United States v. Lech, 895 F. Supp. 582, 586 (S.D.N.Y. 1995) ("Lech has no [Sixth Amendment] right to introduce evidence whose probative value is substantially outweighed by its tendency to confuse and mislead a jury.")

<sup>367</sup> *Id.*

<sup>368</sup> McCall, *supra* note 147, at 408.

<sup>369</sup> Because the application of these to rules to the polygraph are considered extensively in a companion article in this issue of the Air Force Law Review, only a brief examination will be conducted here. See J. Jeremiah Mahoney & Christopher C. vanNatta, *Jurisprudential Myopia: Polygraphs in the Courtroom*, 43 A.F. L. Rev. 95 (1997).

has historically controlled the admission of expert testimony since 1923, MRE 702 is not a standard rule of evidence.

Additionally, the polygraph does not appear to meet at least one of *Daubert's* criteria. The underlying theory does not have an error rate. This shortcoming has been obscured in the literature as well as the applicable court opinions.<sup>370</sup> Recall that the polygraph examiner does not opine, nor does the machine indicate, whether the examinee is innocent or guilty. Instead, the examiner interprets the charts produced by the polygraph machine and forms an opinion as to whether the examinee either is or is not indicating deception.

It is critical, therefore, to distinguish between evidence which supports the scientific conclusion that the examinee is practicing deception in responding to questions concerning the alleged conduct and evidence which supports the scientific conclusion that the examinee actually committed the crime. In support of the polygraph's reliability, studies are cited that confirm the examinee was guilty or innocent of the crime, either through subsequent confessions or mock lab experiments.<sup>371</sup> However, the underlying assumption that guilt or innocence is correlated to this physiological reaction appears to remain untested, and possibly, untestable.

Finally, while it is conceivable that a military judge could find the polygraph admissible under MRE 702, a strong argument can be made that the President is as competent as the trial judge to make the admissibility determination under *Daubert's* guidance. Under MRE 104(a), the trial judge is not bound by the rules of evidence on preliminary matters and may consult whatever sources he deems appropriate.<sup>372</sup> But unlike many case-specific circumstances the trial judge encounters when applying MRE 403, the *Daubert* interpretation of FRE 702 calls for an estimation of the scientific validity of the

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<sup>370</sup> See, e.g., *United States v. Galbreth*, 908 F. Supp. 877 (D.N.M. 1995). The district court in *Galbreth* found that the offered polygraph met the *Daubert* reliability threshold.

<sup>371</sup> *Id.* at 886-89. For example, examining the error rate for the CQT polygraph technique, the court relied upon field studies that indicated that the polygraph was 94-95% accurate at identifying guilty accuseds. Guilt was confirmed either through subsequent confessions or physical evidence. *Id.* at 887. The study seems to confirm not that 94-95% of the individuals were practicing deception at the time of the exam, but instead that the polygraph was able to detect the guilty 94-95% of the time. Consequently, it appears that the polygraph expert might be qualified to express an opinion about the accuseds ultimate guilt or innocence, but not whether the accused was deceptive or non-deceptive.

<sup>372</sup> Mil. R. Evid. 104(a) provides in pertinent part:

Preliminary questions concerning the qualifications of a person to be a witness . . . the admissibility of evidence . . . shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence except those with respect to privileges.

MCM *supra* note 2, Mil. R. Evid. 104.

underlying methodology This determination is not fact specific, and the trial judge was actually instructed not to consider the ultimate test results.<sup>373</sup> Consequently, it appears that the trial judge, President, circuit court of appeals, state court, or state legislature are each qualified to make the admissibility determination.<sup>374</sup>

*Military Rule of Evidence 608:* Assuming that MRE 608 is a standard rule of evidence, MRE 608(a) provides that credibility evidence which supports the accused's character for truthfulness is admissible only after the accused's character has been attacked. Consequently, if an attack never occurs, this evidence is inadmissible, no matter how "helpful" it would be in bolstering the accused's credibility. On the other hand, the CAAF has clearly stated that the polygraph examiner's opinion "relates to the credibility of a certain statement . . . not . . . to the declarant's character."<sup>375</sup> The court therefore concluded that since the evidence does not reveal character, it is not subject to MRE 608.<sup>376</sup> However, since no other MRE provides for the admission of credibility evidence which does not relate to the accused's character for truthfulness, it could be argued that such polygraph testimony is inadmissible.<sup>377</sup>

Even if the court finds that the polygraph evidence supports the accused's character for truthfulness, significant evidentiary problems still remain. For instance, the rules require an opinion, rather than testimony on specific instances of conduct.<sup>378</sup> Moreover, extrinsic evidence, i.e., the polygraph results or the examiner's report, is inadmissible under MRE 608(b).<sup>379</sup> Consequently, whether polygraph evidence is otherwise inadmissible under MRE 608 is debatable.

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<sup>373</sup> "The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." 113 S. Ct. at 2797.

<sup>374</sup> One could imagine Congress constructing a list of unreliable scientific methodologies and enacting a *per se* ban of the evidence into a Fed. R. Evid..

<sup>375</sup> 24 M.J. at 252.

<sup>376</sup> *Id.* at 253 n.8.

<sup>377</sup> Despite its characterization of polygraph evidence, the Court's holding in *Scheffer* is consistent with the rationale of Mil. R. Evid. 608(a). The character evidence is not admissible unless the defendant's character for truthfulness is attacked, and the defendant is not permitted the opportunity to lay the foundation for admission of the polygraph until his credibility is attacked.

<sup>378</sup> See Mil. R. Evid. 608(a).

<sup>379</sup> Mil. R. Evid. 608(b), "specific instances of conduct," provides in pertinent part:

Specific instances of conduct of a witness, for the purposes of attacking or supporting the credibility of the witness . . . may not be proved by extrinsic evidence.

MCM *supra* note 2, Mil. R. Evid. 608.

## B. If Admissible, Has the President Justified Exclusion?

If it is determined that polygraph evidence is otherwise admissible under the standard rules of evidence, then it is necessary to consider whether the President has articulated legitimate interests to justify its exclusion. In order to find MRE 707 unconstitutional as applied to the accused, the CAAF must find that the President's policy rationales are arbitrary, not simply that the court disagrees or would reach an opposite conclusion. Furthermore, it must be realized that unlike the federal circuits, the President administers a worldwide system of military justice that "requires far more stability than civilian law."<sup>380</sup>

The Supreme Court cases examined in Part II provide examples of state justifications that were deemed arbitrary. In *Washington*,<sup>381</sup> the state had prevented a whole category of defense witnesses from taking the stand because it felt the testimony was unreliable. However, since it found that the testimony was reliable enough to support its own case, the state had failed to explain why it could not be used by the accused. Of course, MRE 707 prohibits both the government and the accused from introducing polygraph evidence.

In *Chambers*,<sup>382</sup> the state prevented the accused from presenting critical testimony through the application of two rules of evidence without explaining why the testimony was unreliable. At least four Justices have stressed critical evidence may be excluded, but a combination of erroneous evidentiary rulings may violate the accused's Sixth Amendment rights.<sup>383</sup> Finally, in *Rock*,<sup>384</sup> the

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<sup>380</sup> The unique nature of the military justice system is highlighted in the Drafters' Analysis to Mil. R. Evid. 501, General Rule for Privileges:

The Committee deemed the approach taken by Congress in the Federal Rules impracticable within the armed forces. Unlike the Article III court system, which is conducted almost entirely by attorneys functioning in conjunction with permanent courts in fixed locations, the military criminal legal system is characterized by its dependence upon large numbers of laymen, temporary courts, and inherent geographical and personnel instability due to the worldwide deployment of military personnel. Consequently, military law requires far more stability than civilian law. This is particularly true because of the significant number of non-lawyers involved in the military criminal legal system. Commanders, convening authorities, non-lawyers, investigating officers, summary court-martial officers, or law enforcement personnel need specific guidance as to what material is privileged and what is not.

MCM, *supra* note 2, Drafters' Analysis, at A22-36.

<sup>381</sup> See *supra* notes 106-16 and accompanying text.

<sup>382</sup> See *supra* notes 117-37 and accompanying text.

<sup>383</sup> See *supra* note 152.

<sup>384</sup> See *supra* notes 138-51 and accompanying text.

state had successfully prevented the accused from presenting her version of the crime. The Court concluded that this was an impermissible limitation on her Sixth Amendment right to testify in her own defense. MRE 707 does not prevent the accused from testifying in his defense.

### 1. *Reliability of the Polygraph*

The President undoubtedly has an interest in ensuring that only reliable evidence is admitted during a court-martial proceeding. This interest justifies both MRE 802 and MRE 702. However, assuming that polygraph evidence meets the reliability requirements of MRE 702, the President may require that certain forms of evidence meet a higher reliability standard so long as legitimate interests are advanced.

This contention is true unless MRE 702 is the constitutional standard for scientific evidence; meaning that if the evidence is admissible under MRE 702 then the Constitution requires that it be admitted. At least three reasons suggest that MRE 702 is not the constitutional standard. First, a significant number of states have refused to adopt the *Daubert* holding or any equivalent standard.<sup>385</sup> Second, the *Daubert* standard is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>386</sup> Since the traditional standard for the admission of scientific evidence is the *Frye* test, it can be argued that this test represents the constitutional standard. If correct, then federal and state jurisdictions can maintain a *per se* exclusion rule, or a stipulation requirement, until the polygraph technique is generally accepted within the relevant scientific community.

Finally, there is evidence that the Supreme Court does not believe the Constitution requires the trial judge to apply the *Daubert* analysis to scientific evidence. Speaking for the four dissenters in *Rock*,<sup>387</sup> Chief Judge Rehnquist argued that, although the majority had recognized the "inherently unreliable nature of [hypnotically refreshed testimony]," it "nevertheless concludes that a state trial court must attempt to make its own scientific assessment of reliability in each case it is confronted with a request for the admission of [this] testimony. I find no justification in the Constitution for such a ruling."<sup>388</sup> Understanding that the "sole motivation" behind the Arkansas rule was to facilitate the truth-seeking process, the dissenters believed that the *per se* exclusion rule was "an entirely permissible response to a novel and difficult

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<sup>385</sup> See *supra* note 17.

<sup>386</sup> *Patterson v. New York*, 432 U.S. 197, 202 (1977).

<sup>387</sup> *Rock v. Arkansas*, 483 U.S. 44, 62, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). Chief Justice Rehnquist, joined by Justice White, Justice O'Connor, and Justice Scalia dissented from the Court's holding.

<sup>388</sup> *Id.* at 62-63.

question.”<sup>389</sup> Finally, the dissenters cited the “serious administrative difficulties” that would arise if every trial judge had to consider the matter *res nova* in every trial and concluded that “until there is much more of a consensus on the use of hypnosis than there is now, the Constitution does not warrant this Court’s mandating its own view of how to deal with the issue.”<sup>390</sup>

Of course, *Daubert* instructs the trial judge to make an individual determination of a scientific method’s reliability. The majority in *Rock* concluded that the state must make an individual determination when the accused’s right to testify is implicated, but the *per se* exclusion is still applied to witness testimony.<sup>391</sup> If, instead, the President advances legitimate interests for the exclusion of the polygraph expert’s testimony, then it is uncertain whether the Court would have reached the same conclusion.

Therefore, the question is not only what the reliability standard is, but which actor is permitted to make the reliability determination. In *Scheffer*, the CAAF expressed concern that trial judges would be unable to discern whether significant advances had been made in the field of polygraph examinations unless accuseds were provided the opportunity to lay the foundation for the admission of the polygraph evidence. However, it is the President’s responsibility to make this determination under the power delegated by Congress to promulgate the MREs. Like any of the other federal or state jurisdictions that follow a *per se* rule, when the President determines that the concerns expressed in the Drafters’ Analysis are no longer present, MRE 707 may be rescinded.<sup>392</sup>

It is important to realize who has the authority to determine that hearsay is insufficiently reliable, thereby effectively eliminating judicial discretion.<sup>393</sup>

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<sup>389</sup> *Id.* at 65.

<sup>390</sup> *Id.*

<sup>391</sup> *Misskelley v. State*, 323 Ark. 449, 474 (1996).

<sup>392</sup> The introduction to the Analysis of the Rules for Courts-Martial states:

Subsequent modification of [civilian sector] sources of law may provide useful guidance in interpreting the rules . . . . At the same time, the user is reminded that the amendment of the Manual is the province of the President. Developments in the civilian sector that affect the underlying rationale for a rule do not affect the validity of the rule except to the extent otherwise required as a matter of statutory or constitutional law. . . . Once incorporated into the Executive Order, such matters have an independent source of authority and are not dependent upon continued support from the judiciary.

MCM, *supra* note 2, Analysis of Rules for Courts-Martial, at A21-3 (1995).

<sup>393</sup> However, if the statement is not covered by any of the hearsay exceptions but has “equivalent circumstantial guarantees of trustworthiness” and is offered to prove a material fact, then it may be admissible if the other requirements of Mil. R. Evid. 802(24) are met. Finding that the opinion of the polygraph examiner had a “high degree of trustworthiness,” a

Although the rule has common law origins, Congress made the determination when it enacted FRE 802. While dictum, Justice Scalia's statement that the hearsay rule was "unquestionably constitutional" is significant.<sup>394</sup> Recall that it was the application of Mississippi's hearsay rule to a specific fact pattern which was disputed in the case of *Chambers v. Mississippi*.<sup>395</sup> In *Chambers*, the Court held that the application of the hearsay rule to a situation within the basic rationale of a hearsay exception, combined with the refusal of the trial court to allow Chambers to treat McDonald as an adverse witness, constituted a denial of due process. If the hearsay rule is unquestionably constitutional, then, as in *Chambers*, only when the effect of the rule is combined with a second evidentiary restriction does the potential for a constitutional violation arise.

Moreover, the CAAF's concern that trial judges would be unable to discern whether significant advances had been made in the field holds true for any scientific evidence which the court placed in the category of "junk science," even though a trial judge may reject it as a matter of law.<sup>396</sup> If the CAAF's logic is correct, then any blanket exclusionary rule is inappropriate; even one barring admission of "junk science."<sup>397</sup> For example, if the accused is not permitted the opportunity to lay the foundation for admission of astrological evidence, then the trial judge cannot determine if significant advances have been made in this field. Consequently, if a significant number of accuseds sought to introduce the results of an astrological prediction as exculpatory evidence, the Government would be required to provide testimony which refutes the underlying methodology of astrology. Regardless of the burden on the services, or the consistent rejection of the arguments by the trial judge, the accused must be provided the opportunity in each instance to lay the proper foundation.<sup>398</sup>

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district court has held that the exception is applicable to rebut a charge of perjury. *United States v. Ridling*, 350 F. Supp. 90, 99 (E.D. Mich. 1972).

<sup>394</sup> 116 S. Ct. at 2017.

<sup>395</sup> See *supra* notes 117-37 and accompanying text.

<sup>396</sup> *United States v. Gipson*, 24 M.J.246, 249 (C.M.A. 1987).

<sup>397</sup> It may be argued that since in most federal and state jurisdictions the *per se* or stipulation rules have been established by common law rather than a statutory rule of evidence, judges maintain a closer proximity to the scientific developments within the field. This contact would permit the rule to be adapted in the appropriate circumstances.

<sup>398</sup> The Court may respond to this argument by stating that the defendant only has a constitutional right to lay the foundation for scientific evidence that lies in the middle category of reliability. However, this response would not answer the question of why the Court rather than the President may determine in which category the evidence should be placed.

## 2. Integrity of the Criminal Justice System

If MRE 702 is not the constitutional standard for admission, then it becomes necessary to consider whether the President has a legitimate interest in requiring a higher degree of reliability for polygraph evidence. There are at least two reasons why the President may require this higher level of reliability. First, polygraph evidence occupies a unique category of scientific evidence offered solely to bolster the accused's credibility. Second, it is questionable whether the information conveyed by the expert to the members significantly supplements their ability to judge the accused's credibility.

In response to the first argument, the CAAF stated in *Scheffer* that it could not perceive "any significant Constitutional difference" between the exclusion of the accused's testimony and the "exclusion of evidence supporting the truthfulness of a defendant's testimony."<sup>399</sup> As the Supreme Court has explained, though, the defendant's "opportunity to testify is . . . a necessary corollary to the Fifth Amendment's guarantee against compelled testimony"<sup>400</sup> and is an "exercise of the constitutional privilege."<sup>401</sup> Furthermore, the Court has often "proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right."<sup>402</sup> Although the Supreme Court in *Rock* found that a *per se* exclusion of the defendant's testimony violated the Constitution, this holding has not been applied to witness testimony.<sup>403</sup> Additionally, while the case law indicates that the accused's right to present a defense may reach the right to call material and relevant witnesses, it is unclear that this right extends to scientific evidence which merely bolsters the accused's credibility for truthfulness. The accuseds

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<sup>399</sup> 44 M.J. at 446. It is clear that Mil. R. Evid. 707 does not, in any way, prevent the defendant from testifying. To the contrary, *Scheffer* actually took the stand. The CAAF has held that if the defendant does not take the stand and his credibility is not disputed, then the polygraph evidence is irrelevant. See *United States v. Abeyta*, 25 M.J. 97 (C.M.A. 1987), *cert. denied*, 484 U.S. 1027 (1988).

<sup>400</sup> 483 U.S. at 52.

<sup>401</sup> *Id.* at 53 (quoting *Harris v. New York*, 410 U.S. 222, 230, 91 S. Ct. 643, 35 L. Ed. 2d 201 (1971) (emphasis removed)).

<sup>402</sup> *Id.* at 53 n.10.

<sup>403</sup> The Supreme Court consistently emphasized that the Arkansas rule impermissibly limited the defendant's ability to testify on her behalf. 483 U.S. at 61. See *supra* notes 138-51 and accompanying text. Only if *Rock* sought to have the doctor testify as an expert witness would the testimony have to meet the requirements of Fed. R. Evid. 702. See also *Haakanson v. State* 760 P.2d 1030, 1034 n.3 (Alaska Ct. App. 1988) ("In contrast [to *Rock*], *Haakanson* was not prohibited from presenting his own version of the facts through his testimony. He was merely precluded from presenting evidence of his polygraph examination. Unlike the defendant in *Rock*, *Haakanson's* right to testify was not abridged") (citations omitted). Arkansas still applies a *per se* exclusion rule to hypnotically refreshed testimony of a witness. *Misskelley v. State*, 323 Ark. 449, 474 (1996).

in *Washington*<sup>404</sup> and *Chambers* sought to admit the testimony of defense witnesses. In both instances, however, a lay-witness was prevented from testifying to events which he *physically observed*, and which was material and relevant to the defense. Ultimately, the constitutional analysis depends upon the state interests that are advanced by the exclusion of the evidence.

A number of courts have concluded that polygraph evidence should be treated like any other type of scientific testimony. After all, urinalysis results are routinely admitted to prove a material fact even if the accused testifies that he did not ingest drugs. Although the jury may judge the credibility of the accused while he is on the stand, they are also permitted to hear material scientific evidence which indirectly implicates the accused's credibility. The Supreme Court of Wyoming has invoked a similar argument, stating that because "the polygraph deals with mind and body reactions should not subject it to exclusion from consideration any more than other testimony of a scientific nature."<sup>405</sup>

Although overruled, the District Court for Western District of North Carolina has also analogized the polygraph machine to other forms of evidence. In *Jackson v. Garrison*, the court addressed the constitutionality of North Carolina's stipulation requirement.<sup>406</sup> Finding polygraph machines are like other instruments which are not completely reliable but are encountered everyday, the court concluded that the shortcomings of the machines "affect the weight we give to the enlightenment we receive from machines, but they do not move us to reject such mechanical aids out of hand."<sup>407</sup> Since courts permit witnesses "to testify as to reputation, shiftiness of eyes or clarity of gaze, it is unfair to prohibit the introduction of the more reliable method of measuring

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<sup>404</sup> The Court's holding in *Washington v. Texas* may not be applicable to an analysis of Mil. R. Evid. 707. The rule does not "prevent whole categories of defense witnesses from testifying," but prohibits both the prosecution and defense from presenting polygraph testimony. As such, it is even-handed. Concededly, if empirical evidence existed which illustrated that the majority, or perhaps vast majority, of polygraph evidence was offered by the defendant, then the rule might be found offensive in practice. However, there is no evidence that this situation, in fact, exists.

Additionally, the policy concerns articulated in the Drafters' Analysis coupled with the post-*Gipson* court decisions might lend credence to the conclusion that based on the "general experience with a particular class of person," namely polygraph examiners, "the truth is best served by an across the board disqualification." *Washington v. Texas*, 388 U.S. 14, 24-25, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (Harlan, J., concurring) (footnotes omitted).

<sup>405</sup> *Cullin v. State*, 565 P.2d 445, 458 (Wyo. 1977).

<sup>406</sup> *Jackson v. Garrison*, 495 F. Supp. 9 (W.D.N.C. 1979), *rev'd*, 677 F.2d 371 (4th Cir.), *and cert. denied*, 454 U.S. 1036 (1981).

<sup>407</sup> *Id.* at 11.

external responses which the polygraph represents.”<sup>408</sup> Therefore, polygraph evidence should be presented to the jury with the proper jury instructions.<sup>409</sup>

Other courts, however, have concluded that polygraph evidence is unique not because of its form but because of the limited purpose for which it is offered. The Supreme Court of Oregon, *en banc*, has stated that

[p]olygraph evidence is not just another form of scientific evidence presented by experts such as ballistics analysis, fingerprint and handwriting comparisons, blood typing and neutron analysis. These other tests do not purport to indicate with any degree of certainty that the witness was or was not credible. By its very nature the polygraph purports to measure truthfulness and deception, the very essence of the jury’s role.<sup>410</sup>

Much of the disagreement appears to turn on whether juries or polygraph examiners are considered experts in determining the credibility of the witnesses. An Ohio court has concluded that the polygraph examination “is far superior to any other technique now known in determining deception or lack of it in the testimony of a witness.”<sup>411</sup> Other courts disagree and have determined that the members of the jury are the only “credibility experts.” For example, the Supreme Court of Montana has distinguished the unique place of polygraph testimony in the trial setting. The court has stated that “[t]he only acceptable lie detection methods in Montana court proceedings reside with the court in bench trials, the jury in jury trials, and the skill of counsel in cross-examination in all trials.”<sup>412</sup>

The Texas Court has given strong indication that the nature of the polygraph testimony will prohibit its introduction at trial regardless of the level of reliability which it obtains. Commenting on society’s interest in excluding the evidence, it stated that

society has a legitimate interest in insuring that the credibility of witnesses, and ultimately, the guilt of an accused person, is decided only after the trier

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<sup>408</sup> *Id.* The Court of Common Pleas of Ohio, Cuyahoga County has also favorably compared polygraph evidence to eyewitness testimony. In *State v. Sims*, 52 Ohio Misc. 31, 47, 369 N.E.2d 24, 34 (1977), the court stated that it did not know of “a single intelligent person, who has seriously investigated the polygraph technique, who has not concluded that a qualified examiner’s opinion, after examination. . .is many times more credible. . .than much eyewitness testimony to the contrary given in court or elsewhere.”

<sup>409</sup> The Fourth Circuit Court of Appeals summarily rejected the district courts ruling and held that North Carolina’s stipulation requirement did not involve federal constitutional issues and did not violate a specific constitutional right of the defendant. *Jackson v. Garrison*, 495 F. Supp. 9 (W.D.N.C. 1979), *rev’d*, 677 F.2d 371 (4th Cir. 1981), *and cert. denied*, 454 U.S. 1036 (1981).

<sup>410</sup> *State v. Brown*, 297 Or. 440-41, 687 P.2d 751 (1987).

<sup>411</sup> 52 Ohio Misc. at 49.

<sup>412</sup> *State v. Staat*, 248 Mont. 291, 293, 811 P.2d 1261 (1991).

of fact has given due consideration to *all the evidence* in a case. Until such time that polygraph evidence is so reliable that we are willing to allow it to take the place of the trier of fact, then this exclusion of polygraph evidence under Rule 702 should remain intact.<sup>413</sup>

The Missouri Supreme Court has also endorsed this view of the role of the jury:

[I]t has long been the law in Missouri that "opinion testimony of expert witnesses should never be admitted *unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to draw correct conclusions from the facts proved.*" The exclusion of the interpretation and results of polygraph tests would be in keeping with this principle, for it cannot be said that the jury is incapable of performing its duty to weigh the facts, consider the credibility of witnesses, and determine guilt or innocence. We will not be a party to doing anything to displace the jury in its constitutional role of determining whether or not the accused is guilty. We have always relied on the jury, made up of individuals with diverse backgrounds, viewpoints and knowledge, by use of its common sense and collective wisdom and judgment, to determine who is telling the truth and what the facts are. There is no place in our jury system for a machine or an expert to tell the jury who is lying and who is not.<sup>414</sup>

The language of the Missouri court is significant. The argument is often raised that allowing experts to testify that an individual exhibits the typical characteristics of a rape or child abuse victim is analogous to the testimony provided by the polygraph examiner.<sup>415</sup> However, at least two responses to this argument are possible. First, if the President could advance legitimate reasons to exclude both rape trauma evidence and polygraph evidence, then it is not arbitrary for the President to allow for the introduction of one but not the other. Second, a properly qualified expert may provide testimony in a child abuse case that significantly supplements the members' understanding of the testimony provided by the other witnesses. It is not clear that a similar supplement is provided by a polygraph expert.

Under this rationale, the controlling distinction should be the relative expertise of the jury members. A juror is not an expert in the behavioral patterns of a rape victim, and this testimony might serve to dispel otherwise prejudicial concerns, i.e., why the victim did not report the rape for a week, that might contradict common experience. In *United States v. Snipes*, the COMA stated:

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<sup>413</sup> Perkins v. State 902 S.W.2d 88, 94 (Tex. App. 1995) (emphasis added).

<sup>414</sup> State v. Biddle, 599 S.W.2d 182, 191 (Mo. 1980) (quoting Sampson v. Missouri Pacific R. Co., 560 S.W.2d 573, 586 (Mo. 1978) (en banc) (internal quotes omitted) (emphasis added)).

<sup>415</sup> See, e.g., United States v. Snipes, 18 M.J. 172, 176 (C.M.A. 1984).

[b]ecause the jurors said they had no experience with victims of child abuse, we assume they would not have been exposed to the contention that it is common for children to report familial sexual abuse and then retract the story. Such evidence might well help a jury make a more informed decision in evaluating the credibility of a testifying child.<sup>416</sup>

As this example illustrates, the expert in a child abuse case provides testimony concerning whether the witness exhibits the characteristics of a victim. The polygraph expert, on the other hand, provides testimony addressing whether the accused exhibits the characteristics of a deceptive individual. Absent a specific condition which contradicts common experience, a juror is expected to be able to evaluate the credibility of the accused's testimony while he is on the stand. In his concurrence, then Chief Judge Everett echoed this position, realizing that "hearing a purported expert give his opinion about the credibility of a witness may hinder the factfinder by distracting him from using his own experience and common sense, which provide the best means for him to determine the truthfulness of the testimony he has heard."<sup>417</sup> If this conclusion is correct, then the President may advance a legitimate interest in excluding the results of a scientific test which provide no information other than the examiner's interpretation of the physiological reactions of the accused when he denies the crime.

### 3. *Ability of Members to Weigh Scientific Evidence*

Numerous courts have refused to admit polygraph evidence for fear that the jury will attach it either "undue weight" or will defer arbitrarily to the expert's opinion. The Drafters' Analysis echoes this concern, citing the Eighth Circuit opinion of *United States v. Alexander*.<sup>418</sup> In that opinion, the court explained:

[w]hen polygraph evidence is offered in evidence at trial, it is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi. . . . [P]resent day jurors, despite their sophistication and increased educational levels and intellectual capacities, are still likely to give significant, if not conclusive, weight to the polygraphist's opinion . . . [T]he juror's traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted.<sup>419</sup>

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<sup>416</sup> 18 M.J. at 178.

<sup>417</sup> *Id.* at 179 (Everett, C.J., concurring in the result).

<sup>418</sup> *United States v. Alexander*, 526 F.2d 161 (8th Cir.1975).

<sup>419</sup> *Id.* at 168.

In *Gipson*, the COMA clearly stated that it placed little weight on the argument that factfinders will be overwhelmed by polygraph testimony.<sup>420</sup> It supported this statement by citing a "number of recent studies" that concluded that juries are generally capable of evaluating and giving due weight to the evidence.<sup>421</sup> The "number of recent studies" were cited in an article by Professor Edward Imwinkelried.<sup>422</sup>

In a paper presented to the members of the COMA four years before the *Gipson* decision was announced, Imwinkelried refutes the proposition that jurors are incapable of objectively evaluating the proper weight of scientific evidence.<sup>423</sup> He acknowledges the critics who claim that "lay people sitting in the jury and the lay person presiding as judge are not sophisticated enough to detect the errors in the scientific analysis."<sup>424</sup> In response, Imwinkelried advances two arguments. First, errors rate in lay witness eyewitness testimony are as high and less controllable than those of scientific evidence. Second, there is little to no empirical evidence that jurors are incapable of evaluating scientific evidence.

In support of his first argument, Imwinkelried cites "hundreds of studies" from the United States, Germany and Japan which have found high levels of error in eye-witness identifications.<sup>425</sup> For example, a study by Doctor Buckout discovered that only 15 percent of observers in a mock crime experiment were able to correctly identify the perpetrator a few days later.<sup>426</sup> Additionally, Imwinkelried points out that the primary cause of these inaccuracies is the "inherent weaknesses in the human processes of perception and memory."<sup>427</sup>

To support his second argument, Imwinkelried also cites a number of studies. The first was conducted by Robert Peters of the Crime Laboratory Bureau, Wisconsin Department of Justice. Eleven trials were examined in which polygraph evidence had been admitted. Seventeen of the nineteen lawyers who responded to the survey concluded that the polygraph evidence

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<sup>420</sup> 24 M.J. at 253 n.11.

<sup>421</sup> *Id.* at 253 (citing Imwinkelried, *supra* note 220, at 114-15).

<sup>422</sup> Prof. Imwinkelried is published extensively in the area of scientific evidence. He is a Professor at the University of California, at Davis, and served as a Judge Advocate in the United States Army.

<sup>423</sup> Imwinkelried, *supra* note 220, at 113.

<sup>424</sup> *Id.* at 109.

<sup>425</sup> *Id.* at 112..

<sup>426</sup> *Id.* (citing Buckout & Greenwald, *Witness Psychology*, in *Scientific & Expert Evidence* 1291 (2d ed. 1981).

<sup>427</sup> *Id.* (citation omitted).

was "reasonable and intelligible." Only four believed that the jury "disregarded significant evidence because of the polygraph testimony."<sup>428</sup>

At least two experimental tests using mock juries have also been conducted. In the first study, conducted at Yale, "only 14.5 percent of the mock jurors reported that they thought the polygraph evidence was more significant than the lay testimony in the case."<sup>429</sup> The second study cited, conducted in Canada, reported that sixty-one percent of the mock jurors surveyed thought that the polygraph evidence was less persuasive than the remaining scientific evidence.<sup>430</sup>

Upon close examination, the evidence cited by Imwinkelried's does not provide any support, much less compelling justification, for the proposition that jurors are capable of objectively evaluating scientific evidence. He may be correct that eye-witness testimony is unreliable. If this is true, then the jury may not be justified in deferring to the lay witness testimony. Yet one is at a loss to understand what significance this discovery has in determining whether the jury can properly weigh scientific evidence.<sup>431</sup>

Professor Imwinkelried's second argument is even more puzzling. The cited studies do not support the belief that jurors are capable of objectively evaluating scientific evidence. Admittedly, the studies also do not indicate that they can not. The studies do indicate that jurors may not consistently defer to the conclusions of scientific experts. But this observation supports two conclusions. First, jurors are critically evaluating the evidence. The COMA accepted this conclusion, although it is unclear why. The second conclusion is that the jurors are arbitrarily assigning weight to the scientific evidence. The studies do not provide an basis for choosing between these two possible conclusions. Consequently, it does not appear that studies support the contention that juries can evaluate scientific evidence.

One further proposition advanced by Prof. Imwinkelried must be investigated. He suggests that "the court-martial is more likely to have better educated, sophisticated jurors."<sup>432</sup> Consequently, Imwinkelried posits that the

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<sup>428</sup> *Id.* (citing Peter Roberts, *A Survey of Polygraphic Evidence in Criminal Trials*, 68 A.B.A.J. 162, 164-65 (1981)). It is unclear how the lawyers were able to discover what the jury disregarded.

<sup>429</sup> Imwinkelried, *supra* note 220, at 115 (citing Carlson, et al., *The Effect of Lie-Detector Evidence on Jury Deliberations: An Empirical Study*, 5 J. POL. SCI. & ADMIN. 148, 153 (1977)).

<sup>430</sup> *Id.* (citing Markwart & Lynch, *The Effect of Polygraph Evidence on Mock Jury Decision-making*, 7 J. POL. SCI. & ADM. 324, 333 (1979)).

<sup>431</sup> Perhaps Imwinkelried's contention is that if jurors regularly consider unreliable lay witness testimony, then they should be permitted to consider unreliable scientific testimony. This conclusion may be sound as a practical matter, but does not support the contention that jurors are epistemically competent to objectively weigh such scientific evidence.

<sup>432</sup> Imwinkelried, *supra* note 220, at 117.

members should be competent in evaluating the scientific evidence. At least one commentator has also concluded that "[a] military jury is a sophisticated group of individuals that is more able to understand and properly use polygraph evidence as it applies to a case than a typical jury."<sup>433</sup>

It is not clear that a high level of education is pertinent to the member's ability to weigh scientific evidence. This argument does not imply that the members suffer from "certain intellectual infirmities."<sup>434</sup> Instead, the member cannot distinguish between the testimony of competing polygraph experts because he is not an expert in the science of forensic psychophysiology. Without a thorough understanding of the scientific technique underlying the polygraph, that itself rises to the level of expertise, how can the member choose one explanation over another when the experts in the relevant field do not agree? A distinction may be made based upon the expert's credentials or demeanor on the stand, but not on the scientific validity of the expert's opinion. If credentials and demeanor are highly correlated to the reliability of the expert's opinion, then this deference is not a concern. Regardless of their level of education, however, unless the members are themselves experts it is arguable whether they can adequately evaluate scientific evidence.

#### 4. *Practical Effect on the Military Justice System*

In analyzing the military's interest in maintaining a *per se* exclusion rule, it is necessary to consider the practical effects of a "concomitant right of presenting evidence [that becomes] the right to demand a polygraph examination during the investigative stage."<sup>435</sup> While any prediction of the practical effect of the holding in *Scheffer* on the military justice system is uncertain, if the analysis in Part V is correct the military should witness a dramatic increase in the number of exculpatory requests. Since the admissibility standards have varied over the last decade, an examination of the statistics permit general observations. First, the number of courts-martial conducted by DoD has decreased significantly and steadily since 1984.<sup>436</sup>

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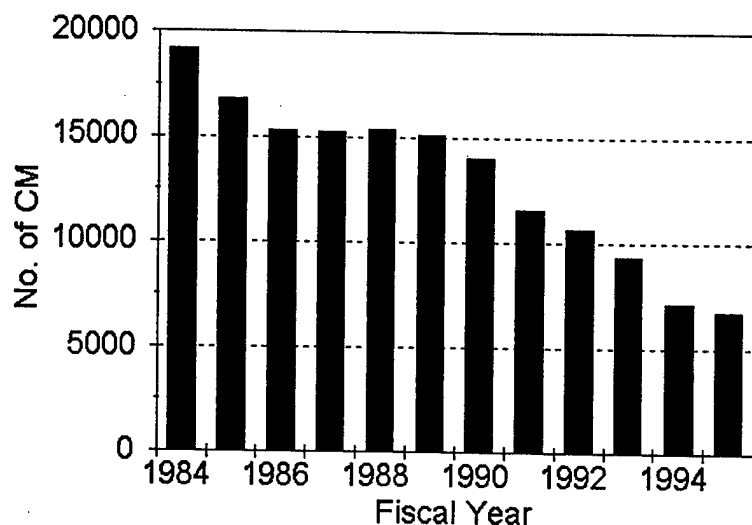
<sup>433</sup> Canham, *supra* note 269, at 88.

<sup>434</sup> Michael S. Jacobs, *Testing the Assumptions Underlying the Debate About Scientific Evidence: A Closer Look at Juror "Incompetence" and Scientific "Objectivity,"* 25 Conn. L. Rev. 1083 (1993). Prof. Jacobs refutes the argument that "[j]udges and juror . . . suffer from certain intellectual infirmities that critically compromise their utility as fact finders in matters of complex science." *Id.* at 1084.

<sup>435</sup> 44 M.J. at 449 (Crawford, J., dissenting).

<sup>436</sup> The total annual number of courts-martial conducted by DoD was calculated from the Annual Reports of each service as reprinted in the Military Justice Reporter. The total number of general courts-martial, special courts-martial, and summary courts-martial for each service were summed. The results are contained in Table 2:

## Total No. of DoD Court-Martials



**Graph 1—Number of DoD Courts-Martial**

While the number of court-martials has decreased, it is still substantial when compared to the number of trials conducted in state courts. Of course, the military must confront the additional burdens of administering a “world-wide system of justice.”<sup>437</sup> In order to place the numbers in perspective, Table 3 ranks the number of trials in the military justice system in comparison to the number of criminal trials in state systems.

| Year | Number of Courts-martial |
|------|--------------------------|
| 1984 | 19,011                   |
| 1985 | 16,641                   |
| 1986 | 15,208                   |
| 1987 | 15,152                   |
| 1988 | 15,260                   |
| 1989 | 15,034                   |
| 1990 | 13,908                   |
| 1991 | 11,471                   |
| 1992 | 10,552                   |
| 1993 | 9,258                    |
| 1994 | 7,055                    |
| 1995 | 6,705                    |

<sup>437</sup> 44 M.J. at 451 (Crawford, J., dissenting).

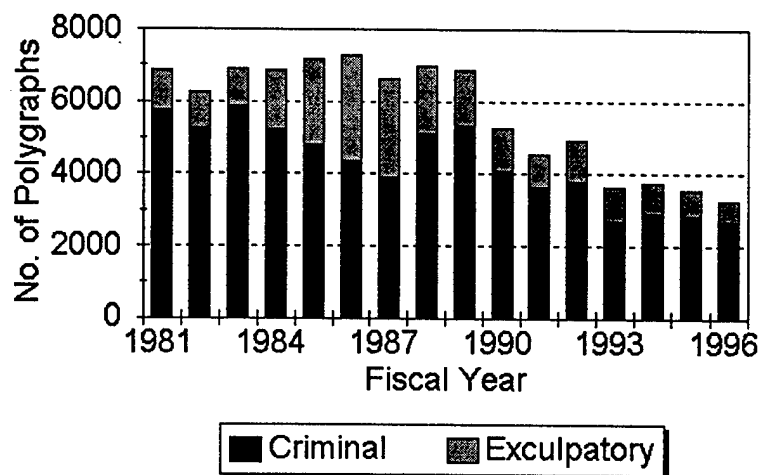
| STATE           | No. of Criminal Trials | Polygraph Rule           |
|-----------------|------------------------|--------------------------|
| Indiana         | 8534                   | Stipulation              |
| California      | 7413                   | Stipulation              |
| Oklahoma        | 6361                   | Per Se Exclusion         |
| <b>Military</b> | <b>6705</b>            | Trial Judge's Discretion |
| Texas           | 5469                   | Per Se Exclusion         |
| New York        | 4741                   | Per Se Exclusion         |
| Florida         | 4570                   | Stipulation              |
| Michigan        | 4383                   | Per Se Exclusion         |
| Iowa            | 3266                   | Stipulation              |
| Missouri        | 2988                   | Per Se Exclusion         |
| North Carolina  | 2952                   | Per Se Exclusion         |
| Ohio            | 2691                   | Stipulation              |
| Washington      | 2194                   | Stipulation              |
| New Jersey      | 2155                   | Stipulation              |
| Arkansas        | 2128                   | Stipulation              |
| Kansas          | 1952                   | Stipulation              |
| New Mexico      | 980                    | Trial Judge Discretion   |
| Maine           | 456                    | Per Se Exclusion         |
| South Dakota    | 443                    | Per Se Exclusion         |
| Hawaii          | 340                    | Per Se Exclusion         |
| Vermont         | 269                    | Not Clear                |
| Delaware        | 175                    | Stipulation              |
| Alaska          | 173                    | Per Se Exclusion         |

**Table 3. Number of Criminal Trials in State Courts, 1995<sup>438</sup>**

<sup>438</sup> The number of criminal trials for each state was calculated for each state by taking the number of cases disposed multiplied by the percentage of cases that went to either a bench or jury trial. The data was reported in Brain J. Ostrom and Neal B. Kauder, *Examining the Work of State Courts, 1995*, National Center for State Courts, Criminal Caseloads in State Trial Courts, p. 57.

The data does not indicate that the number of DoD polygraphs administered in the course of criminal investigations is highly correlated to the number of court-martials conducted. As illustrated by Graph 2, the number of combined criminal and exculpatory polygraph tests administered prior to the *Gipson* decision in 1987 remained fairly constant. Except for a brief increase in 1988, and again in 1992, the number has steadily decreased. Of course, the increase in 1988 followed the *Gipson* decision, and the increase in 1992 followed the passage of MRE 707.

## DoD Polygraph Program



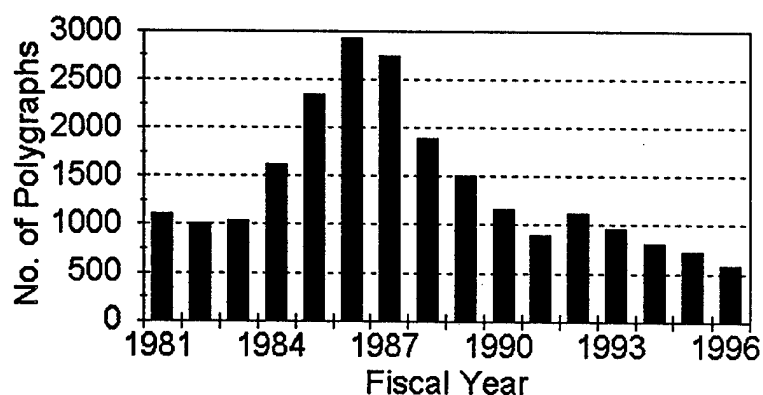
Graph 2—Total Number of Criminal and Exculpation Requests<sup>439</sup>

<sup>439</sup> DoD Polygraph Program, *Annual Polygraph Report to Congress*, Fiscal Years 1986-1996.

As illustrated by Graph 3, the number of exculpatory requests increased sharply from 1981 until the *Gipson* decision. Then, from 1987 until 1991, during the time period when polygraphs were admissible, the number decreased just as sharply. This observation appears to support the theory that neither innocent nor guilty accuseds were eager to obtain a polygraph examination for fear that it would be admissible.

## DoD Polygraph Program

### Exculpation Requests



Graph 3—Number of Exculpation Requests<sup>440</sup>

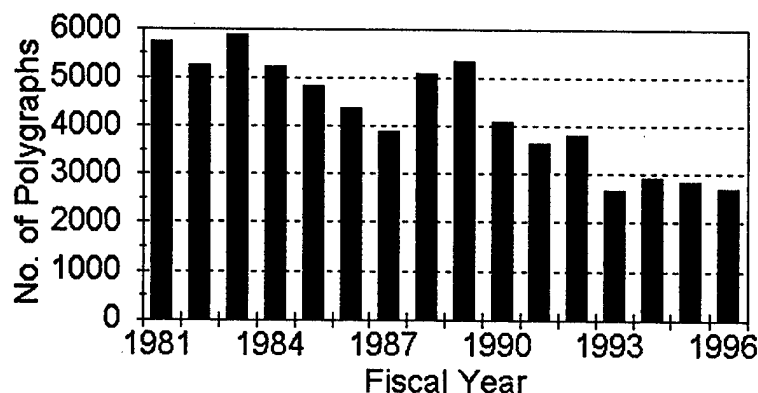
Finally, Graph 4 shows that the number of polygraphs conducted during criminal investigations similarly increased significantly after 1987 and decreased in 1990.

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<sup>440</sup> *Id.*

# DoD Polygraph Program

## Criminal Investigations



**Graph 4—Number of Criminal Requests<sup>441</sup>**

In conclusion, strong arguments can be made that MRE 707 does not represent an arbitrary restriction on the defendant's right to present relevant and material testimony. First, polygraph testimony may not be otherwise admissible under the standard rules of evidence. Second, even if the testimony is otherwise admissible, the President appears to advance a number of legitimate interests that justify exclusion of the evidence. Federal and state jurisdictions have relied upon similar interests to justify their respective polygraph rules. When the President's interest in the consistent administration of the military justice system is added to this list, MRE 707 should pass constitutional muster.

### VI. WHAT REMAINS OF MILITARY RULE OF EVIDENCE 707?

Unless reversed by the Supreme Court, the *Scheffer* requirements for the admission of polygraph evidence represent the controlling law. While a comprehensive examination of the questions left unresolved by the opinion are beyond the scope of this article, a number of initial comments may be provided.

<sup>441</sup> *Id.*

### A. Admissibility of an Accused's Exculpatory Polygraph Examination

The plain language of the CAAF's holding in *Scheffer* indicates that three requirements must be met before the accused may lay the foundation for the admission of a polygraph examination: 1) the examination must be exculpatory, meaning that the relevant questions directly address the criminal conduct for which he is charged; 2) the accused must place his credibility at issue by taking the stand and proclaiming his innocence; and 3) the Government must attack his credibility.

It is, of course, significant that the court limited its ruling to the presentation of "exculpatory" test results. Exculpatory is defined as "acting or tending to clear of guilt or blame."<sup>442</sup> Therefore, to be admissible, the polygraph examination must focus on the specific criminal conduct with which the accused is charged. For instance, in *Scheffer*, the polygraph addressed the accused's use of methamphetamines. In both *Nash* and *Mobley*, the questions concerned the accuseds' use of cocaine.<sup>443</sup>

A subsequent case follows this reasoning. In *United States v. Baker*,<sup>444</sup> the accused attempted to introduce the results of two *ex parte* examinations in support of two motions to suppress urinalysis results. The testimony would support his contention that he had asked for an attorney when questioned by AFOSI and had not voluntarily consented to a urinalysis.<sup>445</sup> The AFCCA ruled that since Baker did not testify as to his guilt or innocence, but only that he did not consent to the chemical test, the results were not exculpatory. Unaware of any case law which established a constitutional right to present evidence in support of a preliminary ruling, the court found no basis for allowing the accused to lay the foundation for the admission of the polygraph results.<sup>446</sup>

When analyzed in light of the above discussion, the second requirement essentially becomes that the accused must place his credibility at issue by denying the charge on the stand. The CAAF has held that if he does not testify at all, the expert's opinion concerning the polygraph examination is irrelevant.<sup>447</sup> However, since the examination is only considered "exculpatory" if it addresses the ultimate issue of the accused's guilt or innocence, the accused must also testify as to his guilt or innocence. As the AFCCA indicated

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<sup>442</sup> AMERICAN HERITAGE DICTIONARY 473 (2d College ed. 1985).

<sup>443</sup> *United States v. Mobley*, 44 M.J. 453 (C.A.A.F. 1996), *petition for cert. filed*, 65 U.S.L.W. 3518 (Jan. 16, 1997) (NO. 96-1134); *United States v. Nash*, 44 M.J. 456 (C.A.A.F. 1996), *petition for cert. filed*, 65 U.S.L.W. 3518 (Jan. 16, 1997) (NO. 96-1134). Both cases were handed down with the CAAF's decision in *Scheffer*.

<sup>444</sup> *United States v. Baker*, 45 M.J. 538 (A.F.Ct.Crim.App. 1996).

<sup>445</sup> *Id.* at 541.

<sup>446</sup> *Id.* at 542.

<sup>447</sup> See *supra* note 239 and accompanying text.

in *Baker*, if the accused does not deny the crime while on the stand, then he has not placed his credibility as to truthfulness at issue.<sup>448</sup>

The third requirement is that the Government must specifically attack the accused's credibility. The attack on Scheffer's credibility was unmistakable. Trial counsel's cross-examination focused on previous inconsistent statements and the lack of symptoms normally associated with the innocent ingestion of methamphetamine.<sup>449</sup> Trial counsel demonstrated squarely the role of credibility in the case when he argued in closing, "He lies. He is a liar. He lies at every opportunity he gets and he has no credibility. Don't believe him. He knowingly used methamphetamine."<sup>450</sup>

The two cases handed down with *Scheffer* present similar scenarios. In *United States v. Mobley*, trial counsel conducted an extensive cross-examination of the accused, confronted him with the testimony against him, and argued during the closing argument that Mobley lied "because he's got everything at stake in this court-martial."<sup>451</sup> In *United States v. Nash*, trial counsel offered evidence during rebuttal that Nash had a motive to lie in order to protect a separation bonus totaling approximately \$24,000.00.<sup>452</sup> Trial counsel argued during the closing argument this motive evidence supported the conclusion that Nash had lied on the stand.

## **B. Admissibility of an Accused's Inculpatory Polygraph Examination**

Assuming the accused has successfully laid the foundation for the admission of his exculpatory polygraph exam, the next issue concerns the Government's use of an inculpatory polygraph results. The court stated in *Mobley* that since the accused's polygraph was *ex parte*, the military judge could require as a condition of its admission that the accused submit to a test by a government examiner.<sup>453</sup> The accused's polygraph examination will be considered *ex parte* unless the government examiner conducts the test in his official capacity.<sup>454</sup> Since this condition would be meaningless unless the Government was permitted to introduce the results of this examination, it

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<sup>448</sup> 45 M.J. at 542.

<sup>449</sup> 44 M.J. at 444.

<sup>450</sup> *Id.*

<sup>451</sup> 44 M.J. at 454. Mobley submitted to three separate *ex parte* polygraph examinations conducted by a private examiner. *Id.*

<sup>452</sup> 44 M.J. at 457.

<sup>453</sup> 44 M.J. at 455 (citing *United States v. Piccinonna*, 885 F.2d 1529, 1536 (11th Cir. 1989). The Court appears to base this recommendation on Mil. R. Evid. 302(d), which it first noted in *Gipson*. See *supra* note 231.

<sup>454</sup> See, e.g., *United States v. Hall*, 45 M.J. 255, 1996 WL 790772, \*2 (C.A.A.F. 1996).

seems that the court is implicitly authorizing the admission of an inculpatory result offered to rebut the accused's exculpatory examination.<sup>455</sup>

Whether the Government can introduce an inculpatory result in the absence of a defense offered exculpatory test remains unanswered.<sup>456</sup> Nonetheless, a strong argument based upon the "Friendly Examiner Theory" can be made that unless the inculpatory result is admitted, the reliability of the exculpatory result is seriously undermined. The argument follows this logic. If the accused passes an *ex parte* exam, then the trial judge may require the accused to submit to a government test. However, if the accused initially submits to a government exam, then the government is precluded from admitting the results if deception is indicated. Consequently, the suspect knows that when he submits to a government exam that deceptive results will be discarded, and "he has little to fear."<sup>457</sup> If he has little to fear, then the "Friendly Examiner Theory" suggests that the accused's level of apprehension toward the relevant questions will be reduced, and the exam is unreliable.

### C. Admissibility of a Polygraph Examination of a Witness

If an accused has a constitutional right to lay the foundation for the admission of his exculpatory polygraph examination, then does it follow that he has a constitutional right to impeach a prosecution witness with the deceptive results of an exam? An argument can be made that if a witness takes the stand and challenges the accused's denial of the crime, then the accused should be permitted to lay the foundation for the admission of the witness' deceptive polygraph test.

For instance, assume that the witness testifies that he saw the accused remove money from the squadron fund, place it into a duffel bag, and leave the room. However, the accused takes the stand and denies taking any money from the fund. The accused has testified, thereby placing his credibility at issue. The testimony of the witness appears to challenge his credibility, and

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<sup>455</sup> However, the Court's decision in *Nash* is not consistent with this line of reasoning. 44 M.J. at 457. The decision indicates that Nash submitted to an *ex parte* exam conducted by the same examiner in *Mobley* with results indicating non-deception, and then underwent an AFOSI exam which indicated deception. The Court's instructions to the trial judge on remand makes no mention of the possibility that the AFOSI exam may be admitted. The absence of such an instruction may be due to the court granting review on the admissibility of the *exculpatory* exam, only. But, the review granted in *Mobley* was limited to the same issue. See *Mobley*, 44 M.J. at 454.

<sup>456</sup> Since the Sixth Amendment protects the rights of the defendant but not the Government, it does not appear that any constitutional argument can be made which would allow for the unilateral introduction of a polygraph examination by the prosecution.

<sup>457</sup> *United States v. Gipson*, 24 M.J. 246, 249 (C.M.A. 1987). For an explanation of the "Friendly Examiner Theory," see *infra* notes 562-63 and accompanying text.

has a direct bearing on the guilt or innocence of the accused. It is unclear, however, if the CAAF would extend the holding in *Scheffer* and allow the credibility of the witness to be challenged by this type of evidence.

#### **D. Evidence a Witness Refused or Requested a Polygraph Examination**

The military courts of review have consistently held that both refusals and requests to take polygraph examinations are irrelevant. The Air Force Court of Military Review denied admission of evidence that the accused refused to take a polygraph examination in *United States v. Jackson*.<sup>458</sup> Likewise, in *United States v. Tyler*, the accused sought to introduce evidence that government informant refused to take a polygraph examination. The AFMCR held that neither the willingness nor the unwillingness of a witness to take a polygraph test is admissible because it has no bearing upon the guilt or innocence of the accused.<sup>459</sup> The COMA has also held that testimony that the accused was willing to take a polygraph on the condition that the charges be dismissed if he passed is inadmissible because it is irrelevant.<sup>460</sup> However, the court reserved the question of whether an accused would be able to testify that he made an unconditional offer, agreeing to the admissibility of the result regardless of the outcome, and the Government refused to provide the exam.<sup>461</sup>

This last reservation is especially troublesome if Judge Crawford's observation in *United States v. Scheffer* that the accused has a right to request a polygraph examination is correct. It would *always* be in the accused's interest to request an exam. If it is not provided, he may be able to testify that he requested one but was refused. Conversely, if the military provides an examiner, the accused can refuse to take the exam at any time before it is actually completed, and the Government is barred from making any reference to the fact that the accused refused to take the exam even though he initially requested it. The burdens this scenario would create on the military services are obvious.

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<sup>458</sup> 23 M.J. 841, 842 (A.F.C.M.R. 1987).

<sup>459</sup> *United States v. Tyler*, 26 M.J. 680 (A.F.C.M.R. 1987) ("There may be many reasons entirely consistent with truthfulness as to why a witness may not submit to an examination with the aid of a 'lie detector'") (citing *United States v. Cloyd*, 25 C.M.R. 908 (A.F.B.R. 1958) (Error for police officer to testify that prosecution witness had submitted to a lie detector examination but that the accused refused to do so), *aff'd*, 28 M.J. 253 (C.M.A. 1989), and *cert. denied*, 493 U.S. 814 (1989). *But, cf.*, *State v. Hoffman*, 106 Wis. 2d 185, 217, 316 N.W.2d 143, 160 (1982) (offer to take polygraph examination relevant to assessment of the offeror's credibility and may be admissible for that purpose).

<sup>460</sup> *United States v. West*, 27 M.J. 223, 225 (C.M.A. 1988).

<sup>461</sup> *Id.* at 225 ("Such an assertion may well be probative depending upon the state of the evidence").

## VII. CONCLUSION

One can easily understand why both court observers and practitioners have characterized the admissibility of polygraph evidence as a legal Pandora's box. Fierce debate still rages among the relevant scientific communities over the reliability of the once called "lie detector." While the debate continues, polygraph evidence presents unique challenges to the administration of our criminal justice system. Whether this evidence should be admitted and weighed by the jury implicates not only the reliability of the theory and technique, but also which actor in the criminal justice system should make the decision.

The majority of state and federal courts—as well as those state legislatures that have addressed the issue—have determined that polygraph evidence may be excluded without violating the accused's constitutional right to present a defense. The decisions have rested on the unreliability of the exam, the effect on the trial process, the probative value of the evidence, and the amount of court time needed to present the evidence. These concerns may have an added measure of legitimacy within the military's world-wide criminal justice system.

The CAAF may agree with these concerns when applied to a specific case. In *Gipson*, the court rejected arguments that the jury could not adequately evaluate the scientific testimony. However, the post-*Gipson* decisions indicate that military courts remain skeptical about the reliability and evidentiary value of polygraph evidence. But in each case, a trial judge applied the MREs to a specific fact pattern. It's important to remember that the effect of the court's decision in *Scheffer* was to remove MRE 707 as an impediment to the admissibility of polygraph evidence. The court did not rule on the ultimate admissibility decision.

The fate of MRE 707 is now in the hands of the Supreme Court. In order to affirm the CAAF's holding in *Scheffer*, the Court will first have to find that the policy rationales relied upon by the President are arbitrary. If the Court does so find that the President acted arbitrarily, then secondly, the Court will have to hold that polygraph evidence is otherwise admissible under the standard rules of evidence. Given these hurdles, it is questionable whether the Court can uphold *Scheffer*.

If the Court does uphold the decision in *United States v. Scheffer*, similar constitutional challenges to the state and federal treatment of polygraph testimony will undoubtedly follow. The courts may decide that the accused has a constitutional right to lay the foundation for the admission of the polygraph evidence in each case, making the trial judge the sole "gatekeeper" to the admission of this scientific evidence. The CAAF has certainly reached this conclusion. The larger question, however, is who will determine whether

the gate should be open at all? If during this debate, the President has lost the ability to establish the standards to guide the trial judge in opening the gate, the balance of judicial power in the military justice system has shifted and the proper constitutional roles brought into question.

## **APPENDIX—DoD Use of Polygraph Examinations<sup>462</sup>**

Agents from the Air Force Office of Special Investigations (AFOSI) are assigned to support Air Force installations within a specific geographic region, and are authorized to use the polygraph during three types of investigations: counterintelligence, personal security clearance, and criminal.<sup>463</sup> AFOSI is also authorized to conduct polygraph examinations upon a suspect's request for the purposes of exculpation.

### **A. Training of DoD Examiners**

AFOSI agents are responsible for administering polygraph examinations for the Air Force.<sup>464</sup> The agents are trained at the Department of Defense Polygraph Institute (hereinafter DoDPI), which provides instructional and research support for all federal agencies. DoDPI is officially funded and maintained by the Army at Fort McClellan, Alabama.<sup>465</sup> Each potential candidate must meet a series of minimum requirements including: a degree from an accredited 4-year college, completion of a DoD-approved course of instruction, and two years as an investigator with a recognized U.S. Government or other law enforcement agency.<sup>466</sup>

The course of instruction at the DoDPI is at the graduate level. During the 12 to 14 weeks of instruction, examiners complete 15 hours of graduate

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<sup>462</sup> The author would like to thank Mr. John R. Schwartz, former Deputy Director of the DoD Polygraph Institute and Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysiologicalist, for their assistance in completing this appendix. All opinions remain those of the author unless otherwise noted. Where possible, the actual language of the Department of Defense Directives and Air Force Instructions cited within this appendix is provided.

<sup>463</sup> Department of Defense Directive 5210.48, *Department of Defense Polygraph Program*, Ch 1(B) (Dec. 24, 1984) [hereinafter DoD Directive 5210.48].

<sup>464</sup> Air Force Instruction 71-101, *Special Investigations*, Vol. 1 § 4.2 (July 22, 1994) [hereinafter AFI 71-101].

<sup>465</sup> Department of Defense Directive 5210.78, *Department of Defense Polygraph Institute (DoDPI)* (Sept. 18, 1991). The Central Intelligence Agency's training program was terminated following the Ames spy case, and those agents are now trained by DoD. Telephone Interview with John R. Schwartz, Deputy Director of the DoD Polygraph Institute (Jan. 7, 1997). With the closing of Fort McClellan, DoDPI will be moving to Fort Jackson, South Carolina in the future.

<sup>466</sup> DoD Directive 5210.48, *supra* note 463, at Ch 3(A)(1)(c).

credit in Psychology, Physiology, Ethics, Psychometric Reliability and Validation, and Research Design. Training also includes the administration of exams and interpretation of charts, as well as the detection of the examinee's use of countermeasures.<sup>467</sup> This coursework represents the academic requirements for DoD Certification.

Upon graduation from the DoDPI, the examiner enters a six-month to a year probationary period under the supervision of a certified examiner, during which she must conduct at least 25 polygraph examinations.<sup>468</sup> Thereafter, the examiner must conduct 18 examinations semiannually,<sup>469</sup> and obtain refresher training every two years.<sup>470</sup> Active duty DoD polygraph examiners are prohibited from performing or participating in polygraph-related activities in connection with non-duty employment without Air Force approval.<sup>471</sup>

## B. Training of Private Examiners

Although the DoDPI training program and standards for federal agents are uniform, the regulation and training of private examiners varies substantially among state jurisdictions. Twenty-nine states require that polygraph examiners be licensed,<sup>472</sup> with fewer requiring a formal course of study at a professional school specializing in polygraph training.<sup>473</sup> Many commentators have questioned the average field examiner's training and competency,<sup>474</sup> emphasizing that an examiner should be questioned concerning

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<sup>467</sup> Telephone Interview with John R. Schwartz, Deputy Director of the DoD Polygraph Institute (Jan. 7, 1997).

<sup>468</sup> DoD Directive 5210.48, *supra* note 462, at Ch 3(B)(2).

<sup>469</sup> *Id.* at Ch 3(C)(1).

<sup>470</sup> *Id.* at Ch 3(B)(2).

<sup>471</sup> *Id.* at Ch 3(D)(4).

<sup>472</sup> Matthew Mariani, *You're a What? Forensic psychophysiology*. 3/1/96 Occupational Outlook Q. 46, 1996 WL 11849952. For example, Virginia license requirements include: 5 years of investigative experience (college education in criminal justice or psychology can substitute), specialized training in conducting exams, an internship of 6 months, a clean police record, and successful completion of a licensing test. *Id.* According to a list provided by the American Polygraph Association, the following states maintain licensing boards: Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia (list on file with the author).

<sup>473</sup> In addition to the DoDPI, eleven American Polygraph Association (APA) accredited polygraph schools existed as of January 16, 1996. James Allan Matte, Ph.D., *Forensic Psychophysiology: Using the Polygraph*, app. P at 679 (1996).

<sup>474</sup> Charles R. Honts & Mary V. Perry, *Polygraph Admissibility: Changes and Challenges*, 16 LAW & HUM. BEHAV. 357, 369 (1992). See also Paul C. Giannelli & Edward J. Imwinkelried, *Scientific Evidence*, 2ed. Vol.1 at § 8-2(A) (1993) ("Others have observed that 'polygraph

his basic knowledge of psychology, psychophysiological measurement, and validation problems.<sup>475</sup> In particular, it has been stressed that the competence of an examiner unfamiliar with the specific scientific literature concerning polygraph testing should be suspect.<sup>476</sup>

While the exact number of private examiners is unknown, the American Polygraph Association reports 1,800 professional members, the American Association of Police Polygraphists 650, and the National Polygraph Association, 500.<sup>477</sup>

### C. Requesting a Polygraph Examination

Air Force organizations responsible for security, law enforcement, or criminal justice administration may request polygraph examinations by contacting the nearest AFOSI unit.<sup>478</sup> AFOSI then forwards the request to AFOSI Investigative Operations Center, Polygraph Office (IOC/PLG) for approval.<sup>479</sup>

For the purposes of a criminal investigation, AFOSI may authorize a polygraph examination for an offense punishable under Federal law, to include the UCMJ, by death or confinement for a term of a year or more.<sup>480</sup> This requirement may be waived by the Commander, AFOSI.<sup>481</sup> Additionally, the subject must have been interviewed and reasonable cause established that he has knowledge of, or was involved in, the crime.<sup>482</sup> Finally, authorities are directed to utilize examinations when investigation by other means has been as thorough as circumstances permit;<sup>483</sup> and as a supplement to, and not a substitute for, other forms of investigation that may be required.<sup>484</sup>

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examiners in the United States, as a whole, are poorly trained”) (quoting Honts and Perry, *Polygraph Admissibility*, 16 LAW & HUM. BEHAV. 357, 375 (1992).

<sup>475</sup> *Id.* at 371.

<sup>476</sup> Charles R. Honts & Bruce D. Quick, *The Polygraph in 1995: Progress in Science and the Law*, 71 N.D. L. Rev. 987, 999 (1995). Likewise, in *United States v. Williams*, 95 F.3d 723, 728-29 (8th Cir. 1996), the FBI examiner was unable to answer questions concerning the current literature in the field and did not recognize the name of a leading polygraph expert. The district court found that the examiner was qualified as a polygraph examiner, but not an expert in the field of forensic psychophysiology capable of providing testimony to the elements of *Daubert*.

<sup>477</sup> Mariani, *supra* note 472.

<sup>478</sup> AFI 71-101, *supra* note 464, at 4.2.

<sup>479</sup> *Id.* at 4.2.1.2 (containing a list of the pertinent information which should be included in the request).

<sup>480</sup> DoD Directive 5210.48, *supra* note 463, at Ch 1(4)(B)(1)(a)

<sup>481</sup> AFI 71-101, *supra* note 464, at Ch 4.2.2.

<sup>482</sup> DoD Directive 5210.48, *supra* note 463, at Ch 1(B)(1)(b).

<sup>483</sup> *Id.* at Ch 1(B)(1)(b).

<sup>484</sup> *Id.* at Ch 1(A)(3).

The subject of a criminal investigation may also request to undergo a polygraph examination for the purposes of exculpation.<sup>485</sup> Authorization may be granted if the examination is determined to be "essential to the just and equitable resolution of the matter under investigation."<sup>486</sup> The Area Defense Counsel may request the examination using the same procedures as the government. While the regulation does not stipulate that the accused must be represented by counsel, he would not qualify as an "Air Force organization" and it would appear that a waiver to the polygraph program must be submitted to the Commander, AFOSI.<sup>487</sup>

Finally, the accused must consent in writing to the polygraph examination and be advised of his right to consult with legal counsel.<sup>488</sup> Legal counsel may also be available for consultation during the examination.<sup>489</sup> Once the accused has exercised his right to counsel, the Government is not permitted to ask the accused to consent to a polygraph examination.<sup>490</sup> If the examinee refuses to submit to a polygraph examination, no unfavorable administration action may be taken based upon the refusal.<sup>491</sup> However, the threat of administering the polygraph may be used to encourage a confession.<sup>492</sup>

#### **D. The Control Question Technique and the Directed Lie Control Question Technique**

Arguably, the most critical decision impacting the validity and reliability of the polygraph examination is the formulation of the test questions.<sup>493</sup> The AFOSI examiner, who is usually not the investigative

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<sup>485</sup> *Id.* at Ch 1(B)(5).

<sup>486</sup> *Id.* at Ch 1(B)(5).

<sup>487</sup> AFI 71-101, *supra* note 464, at Ch 4.2.2.

<sup>488</sup> DoD Directive 5210.48, *supra* note 463, at Ch 2(A)(2)(a).

<sup>489</sup> *Id.* at Ch 1(A)(2).

<sup>490</sup> *United States v. Applewhite*, 23 M.J. 196 (C.M.A. 1987) (government asked to consent five days after accused exercised right to counsel).

<sup>491</sup> DoD Directive 5210.48, *supra* note 463, at Ch 1(A)(7) (privileged against self-incrimination under the Fifth Amendment or Article 31(b), UCMJ, if a member of the U.S. Armed Forces). *See also Id.* at Ch 1(D)(4) (Mention of refusal to submit to an exam is not permitted in the person's official evaluation report; nor is it considered in determining eligibility for promotion or awards.).

<sup>492</sup> *United States v. Bostic*, 35 C.M.R. 511 (A.B.R. 1964). *But see* DoD Directive 5210.48, *supra* note 463, at Ch 1(A)(5) (The Government is authorized to deny access, employment, assignment, or detail upon refusal to undergo a polygraph examination for special access programs.).

<sup>493</sup> *See, e.g., United States v. Pope*, 30 M.J. 1188, 1190 (A.F.C.M.R. 1990) (Experts criticized the polygraph examiner, *inter alia*, for "significant flaws in the critical formulation of 'control' and 'relevant' questions for the exam"); *United States v. Rodriguez*, 37 M.J. 448, 452 (C.M.A. 1993) (Relevant questions, which focused on knowledge of both criminal and innocent

officer, reviews the report of investigation and formulates the questions to be asked during the exam. The Control Question Technique (hereinafter CQT) is the primary testing technique utilized by AFOSI in criminal investigations.<sup>494</sup> A second technique, the Directed Lie Control Question Technique (hereinafter DLCQ), is used solely for Counterintelligence Security Polygraph examinations. Both techniques consist of up to ten questions which are designed to elicit a "yes" or "no" response.<sup>495</sup>

Using either technique, the examiner will ask three types of questions: irrelevant or neutral, control, and relevant. Irrelevant questions are those to which the examinee would normally tell the truth, for example "Is your name John Smith?" If the CQT is used, a control question will address a topic similar to the matter under investigation and is designed to be used as the baseline for comparison to relevant questions.<sup>496</sup> An example of a control question is: "Before January 4, 1994, did you ever hit anyone with your fist?" The control questions are formulated so that the examinee is either uncertain about the truthfulness of the "no" answer or outright deceptive.<sup>497</sup> Finally, relevant questions specifically address the matter under investigation and for which the examinee is being tested, although questions calling for a legal conclusion should be avoided.<sup>498</sup> An example of a relevant question is: "On January 4, 1996, did you hit John Doe in the face with your fist?"<sup>499</sup>

The CQT is premised upon the Psychological Set theory. The rationale of this theory is two-fold. The Psychological Set theory posits that the results of the examination are dependent upon the attention factor of the examinee. First, it is theorized that the guilty examinee will focus his attention on the relevant questions, thereby exhibiting a more pronounced physiological response when presented with the relevant questions than the control questions.<sup>500</sup> Alternately, the innocent person will focus his attention on the

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conduct, did not permit the examiner to differentiate source of deception and undermined the reliability of the evidence.).

<sup>494</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysiolgist (Jan. 8, 1997).

<sup>495</sup> *Id.*

<sup>496</sup> Honts & Quick, *supra* note 476, at 991.

<sup>497</sup> Charles R. Honts & David C. Raskin, *A Field Study of the Validity of the Directed Lie Control Question*, JOURNAL OF POLICE SCIENCE AND ADMINISTRATION, Vol. 19 n.1 at 56 (March 1988).

<sup>498</sup> An example is "Did you steal X?" Not only is "steal" a legal term, it is also easy for the suspect to rationalize that he did not steal. Instead, the question should focus on physical conduct, such as "Did you remove X from the safe?" Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysiolgist (Jan. 8, 1997). *See also* United States v. Cato, 44 M.J. 82, 83 (C.A.A.F. 1996) (military judge faulted examiner's use of the legal term "steal" in two of the four questions because it involved legal implications).

<sup>499</sup> Honts & Quick, *supra* note 476, at 992.

<sup>500</sup> *Id.* at 991.

control questions rather than the relevant questions.<sup>501</sup> Why? Because although the innocent individual will be steered into answering the control question "no," he will actually be uncertain about the answer, possibly remembering someone that he did "hit" and display a pronounced physiological reaction. When presented with the relevant question, however, the innocent individual will display a less severe reaction to the relevant question since the answer "no" is truthful.

The underlying theory of the polygraph technique may strike one as problematic. From the proceeding discussion, it appears that the physiological results are more dependent upon apprehension than on the truthfulness of the response. For example, while the Psychological Set theory states that the innocent person will focus more attention on the control questions than the relevant questions, this proposition seems strange. If an innocent individual is a suspect in a murder case and faces a death sentence, it is difficult to imagine how the control questions could ever be formulated in such a way to distract his attention from the question which he knows is about to be posed: "Did you insert a knife in John Doe's back?" Conversely, if a crafty criminal has committed the perfect crime, so that he knows there is no evidence, he may have little if any concern for the relevant questions.

Consequently, the rationale of the CQT has been criticized by a number of commentators who doubt the competency of field examiners to properly draft and administer the control questions.<sup>502</sup> First, a guilty suspect may be more threatened by the control questions if they are not properly formulated, allowing him to respond more severely and resulting in a false negative.<sup>503</sup> Additionally, innocent individuals may find the control questions offensive and refuse to answer.<sup>504</sup> In response to these criticisms, the DLCQ technique was developed.

The DLCQ is similar to the CQT, and the rationale still rests on a comparison of the control questions to the relevant questions. However, the individual's reaction to the control question is controlled by direct manipulation of the response.<sup>505</sup> During the pre-test interview the examinee is instructed to lie to the control question, which can be nearly any question which the individual agrees to answer deceptively.<sup>506</sup> The subject is told that if the reaction to the control question is not sufficiently strong, the test will be inconclusive. It is reasoned that the innocent individual, who is concerned about a false positive or an inconclusive result, will be more threatened by the

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<sup>501</sup> *Id.*

<sup>502</sup> Honts & Raskin, *supra* note 497, at 56 (citing D.T. Lykken, *A Tremor in the Blood* (1981)).

<sup>503</sup> *Id.*

<sup>504</sup> *Id.*

<sup>505</sup> *Id.* at 57.

<sup>506</sup> *Id.*

control question. Conversely, guilty subjects are expected to remain focused on the relevant questions.<sup>507</sup>

## **E. Administering the Polygraph Examination**

The polygraph examination has five distinct phases: 1) the pre-test; 2) in-test or data collection; 3) data analysis; 4) post-test; and 5) quality control. While the first three phases usually last from 1 ½ to 2 ½ hours, the post-test may last many hours.<sup>508</sup>

### *1. Pre-test Phase*

During the pre-test interview, the examinee completes a written form affirming voluntary consent to the exam and acknowledging that he or she is privileged against self-incrimination.<sup>509</sup> The examinee is also advised that he or she has the right to obtain legal counsel which may be available for consultation during any phase of the examination.<sup>510</sup> While the examinee may terminate the exam either at his own initiative or upon advice of counsel,<sup>511</sup> defense counsel is typically not allowed in the room while the test is being administered.<sup>512</sup>

The examiner then explains how the subject will be physically connected to the polygraph machine and the procedures to be followed during the test.<sup>513</sup> Perhaps most importantly, the AFOSI examiner reviews with the examinee all questions which will be asked during the test. Since, in theory, the accuracy of the polygraph is dependent upon the focus of the examinee's attention to either the relevant or control questions, familiarity with these questions will only magnify the effect.

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<sup>507</sup> *Id.*

<sup>508</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysiology (Jan. 8, 1997). *See also* United States v. Martinez, 38 M.J. 82, 83 (C.M.A. 1993) (Polygraph pre-test lasted 1 hour and 50 minutes, with 5 minute break. Test phase lasted 40 minutes. Post-test phase lasted "many hours").

<sup>509</sup> DoD Directive 5210.48, *supra* note 463, at Ch 2(A)(2).

<sup>510</sup> *Id.* at Ch 2(A)(2)(4).

<sup>511</sup> *Id.* at Ch 2(A)(2)(4).

<sup>512</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysiology (Jan. 8, 1997). Apparently this prohibition is justified on the grounds that it affects the reliability of the test. However, if evidence indicates that the "Friendly Examiner Theory" is unfounded, then the defense attorney's presence should also not impact the test's reliability. *See supra* notes 563-64 and accompanying text. As a practical point, defense counsel should request to be in the room or behind a one-way mirror, and have the examination taped, preferably with a video camera to allow other experts to accurately opine on the validity of the procedures.

<sup>513</sup> DoD Directive 5210.48, *supra* note 463, at Ch 2(A)(2)(c)(1).

Finally, the polygraph examiner conducts a visual evaluation and questions the subject to ensure that he or she is fit to be tested.<sup>514</sup> The examiner looks for evidence that the examinee is mentally or emotionally fatigued, known to be addicted to narcotics, suffers from a mental disorder, or is experiencing physical discomfort or disabilities which would cause abnormal responses.<sup>515</sup> Once the examiner is satisfied that none of the aforementioned conditions exists, the examiner will begin to attach the individual to the polygraph machine.

A number of sensors link the individual to the polygraph machine: two pneumatic sensors are attached to the upper and lower thoracic area to record respiration, galvanic skin resistance sensors are placed on the finger tips to record changes in electrodermal activity, and a standard blood pressure cuff is placed around the upper arm to measure blood volume changes.<sup>516</sup> The examinee is seated facing the opposite direction of the examiner, and is therefore unable to view the polygraph chart as it exits the machine.<sup>517</sup> The machine is then turned on and the questioning begins.

## 2. Data Collection

The test phase of the polygraph examination lasts approximately twenty minutes.<sup>518</sup> The polygraph examiner will ask the same set of questions at least three times, producing at least three separate charts.<sup>519</sup> If the examinee

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<sup>514</sup> This determination includes not only the mental and physical state of the examinee, but also his age. For example, Dr. Raskin, a Professor of Psychology at the University of Utah and a leading expert on the conduct of polygraph examinations, has stated that he would not perform a test on a child of 12 years or younger because it is contrary to the prevailing practice in the field. Nancy Hollander & David Raskin, *Using the Polygraph to Avoid Prosecution*, presented at the ATLA's National College of Advocacy and the National Association of Criminal Defense Lawyers Conference "The Deadliest Accusation: Child Abuse in the 90s" (May 21-22, 1993) (on file with the author). Consequently, it would not be possible to conduct polygraph examinations on children who allege child abuse, although the test may be available for an accused adult. The author would like to thank Dr. Charles Honts, Psychology professor, Boise State University, for providing copies of this and other relevant resources.

<sup>515</sup> DoD Directive 5210.48, *supra* note 463, at Ch 3(D)(6). *See also* United States v. Berg, 44 M.J. 79, 80 (C.A.A.F. 1996) (Government polygraph expert criticized private examiner's decision to conduct "the test without medical or psychological clearance, given [Berg's] admission during the pretest interview that he had been suffering from depression and had taken sleeping pills several hours earlier").

<sup>516</sup> *Id.*

<sup>517</sup> *Id.*

<sup>518</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysicologist (Jan. 8, 1997).

<sup>519</sup> *Id.* The most compelling reason that the questions are asked three times is to ensure the responses are consistent. If the physiological responses are consistent and specific for each chart, then it is possible to classify the responses as reliable. *Id.*

terminates the test before the three charts are completed, the examiner's evaluation will be "No Opinion."<sup>520</sup> Once the three charts are completed, the test portion of the exam is finished and the equipment is removed from the examinee. An opinion regarding the examinee's physiological reaction can now be rendered regardless of whether a post-test interview is conducted.<sup>521</sup>

### 3. Data Analysis

The next step for the AFOSI examiner is to "read" or evaluate the charts. Requiring the exercise of subjective judgment, the examinee's responses to the relevant and control questions are measured and compared on each of the three charts. The scale utilized for the evaluation of versions of the Modified General Question Test<sup>522</sup> dictates that responses greater than -3 are "Deception Indicated," -3 to 3 are "Inconclusive," and greater than 3 are "No Deception Indicated." The final score is a cumulative total of all charts on all components.<sup>523</sup>

<sup>520</sup> *Id.* See also New Mexico Rule of Evidence, Rule 11-707(C) (expert opinion of polygraph examiner admissible only if, *inter alia*, at least three charts were taken of the examinee).

<sup>521</sup> *Id.* See also Honts & Quick, *supra* note 476, at 990.

<sup>522</sup> *Id.* Both the Zone Comparison Test and the Bi-Zone Question Technique have a different scale.

<sup>523</sup> *Id.* For example, consider the following scoring of four relevant questions:

|                | Question #1 | Question #2 | Question #3 | Question #4 |
|----------------|-------------|-------------|-------------|-------------|
| <b>CHART 1</b> |             |             |             |             |
| Respiration    | +1          | 0           | +1          | 0           |
| Perspiration   | +1          | -1          | +1          | +1          |
| Blood Volume   | -1          | -2          | -1          | +1          |
| <b>Total</b>   | <b>+1</b>   | <b>-3</b>   | <b>+1</b>   | <b>+2</b>   |
| <b>CHART 2</b> |             |             |             |             |
| Respiration    | +1          | +1          | +1          | -1          |
| Perspiration   | +1          | -1          | +1          | -1          |
| Blood Volume   | +1          | +1          | +1          | +1          |
| <b>Total</b>   | <b>+3</b>   | <b>+1</b>   | <b>+3</b>   | <b>-1</b>   |
| <b>CHART 3</b> |             |             |             |             |
| Respiration    | +1          | 0           | +1          | 0           |
| Perspiration   | +1          | +1          | +1          | +1          |
| Blood Volume   | -1          | +1          | 0           | +1          |
| <b>Total</b>   | <b>+1</b>   | <b>+2</b>   | <b>+2</b>   | <b>+2</b>   |
| <b>TOTALS</b>  | <b>+5</b>   | <b>0</b>    | <b>+6</b>   | <b>+3</b>   |

If in the examiner's opinion the test is inconclusive, a re-test with different questions is usually considered.<sup>524</sup> The re-test may be conducted by the original examiner without obtaining additional approval from the official who granted the first request.<sup>525</sup> Of course, the examinee may choose not to participate in the subsequent examination, and the requirements for physical and mental astuteness still apply.

In an effort to remove the polygraph examiner's subjective evaluation in the interpretation of the polygraph charts, both DoD and private sector specialists have developed computer algorithms to analyze the data. DoDPI's version, developed in conjunction with John Hopkins University Applied Physics Laboratory, is currently utilized by AFOSI and is in its fourth version.<sup>526</sup> Three hundred sets of confirmed NDI and confirmed DI charts were used to standardize the algorithm. While AFOSI maintains a high concurrence rate between the algorithm and evaluator field data,<sup>527</sup> many in the scientific community claim the algorithm has not been subjected to the intense peer review normally required for acceptance in the scientific community.

In addition to the DoDPI algorithm, John Kircher<sup>528</sup> has developed a computer program which matches the examinee's physiological responses to those of a convicted murderer.<sup>529</sup> Dr. Charles Honts<sup>530</sup> claims that the program can conclude with approximately 90 percent accuracy whether the test subject is telling the truth, while the accuracy rate for regular polygraph tests is approximately 80 percent.<sup>531</sup> The research which formed the basis for the program has been subjected to extensive peer review, and has been published

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Because the scoring of question #2 is between -3 and +3, the examiner would render an "inconclusive" opinion concerning the entire test. Absent this result, questions #1, #3, and #4 would lead to an opinion of "No Deception Indicated" on this test.

<sup>524</sup> *Id.*

<sup>525</sup> DoD Directive 5210.48, *supra* note 463, at Ch 3(C)(6).

<sup>526</sup> Telephone Interview with John R. Schwartz, Deputy Director of the DoD Polygraph Institute (Jan. 7, 1997); *Polygraph Data Evaluation Program SOL DABT02-96-R-0010*, 6/10/96 Com. Bus. Daily, 1996 WL 10514611.

<sup>527</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysiolgologist (Jan. 8, 1997).

<sup>528</sup> Mr. Kircher is a computer programmer at the University of Utah. Dan Gallagher, *Software Will Make Lies More Detectable*, 3/24/96 Idaho Statesman, 1996 WL 9218090.

<sup>529</sup> *Id.*

<sup>530</sup> Psychology professor, Boise State University. Prof. Honts teaches classes annually at the Canadian Police College in Ottawa, Canada, and was a staff member for DoDPI from 1988-1990. He has worked closely with defense attorneys on the John DeLorean cocaine trial and the Mark Hoffman bombing case in Salt Lake City.

<sup>531</sup> Dan Gallagher, *Software Will Make Lies More Detectable*, 3/24/96 Idaho Statesman, 1996 WL 9218090.

in scientific journals.<sup>532</sup> Undoubtedly, the accuracy and utility of computer models will continue to be contested, both in the courtroom and the scientific community.

#### 4. Post-test Interview

If the examiner reads the charts "NDI," the examinee is so informed and the session is usually terminated.<sup>533</sup> If on the other hand the charts indicate deception, the AFOSI agent will attempt to gain an explanation for the deceptive result during a post-test interview. The interview provides the examinee an opportunity to explain past events which might have affected the test but were not conveyed during the pre-test interview. Many have claimed that this interview takes the form of an interrogation.<sup>534</sup> Regardless of the actual form of the interview, it often results in the accused confessing to the crime.<sup>535</sup>

If the accused is represented by counsel, the post-test interview will rarely occur.<sup>536</sup> Defense counsel has the opportunity to speak with the suspect after the test, and will simply advise the client to withdraw consent and terminate the interview. The defense counsel may also enter into an agreement before the test is taken that if a deceptive result is indicated, no post-test interview will occur.<sup>537</sup>

The significance of the post-test interview is disputed. While the examiner can typically render an opinion after three charts are made, the post-test interview may be "helpful to differentiate the basis for the [examinee's] deception to the relevant questions."<sup>538</sup> Consequently, if testimony is elicited during the court-martial that the interview is "normally required," then it will be "incumbent on the proffering party to demonstrate that the omission does not undermine the examination's reliability."<sup>539</sup>

If the examinee chooses to continue with a post-test interview, then any subsequent confession is admissible regardless of the polygraph examiner's

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<sup>532</sup> See Kircher & Raskin, *Human Versus Computerized Evaluations of Polygraph Data in a Laboratory Setting*, 73 J. Applied Psychol. 291 (1988).

<sup>533</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysiolgologist (Jan. 8, 1997).

<sup>534</sup> *Id.* Special Agent Fisher strongly disagreed with this contention.

<sup>535</sup> See *Annual Polygraph Report to Congress*, Department of Defense Polygraph Program, Office of the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence) Fiscal Years 1986-1996.

<sup>536</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysiolgologist (Jan. 8, 1997).

<sup>537</sup> See, e.g., *United States v. Rodriguez*, 37 M.J. 448, 453 (C.M.A. 1993) (interview omitted under agreement between the defense counsel and the polygraph examiner).

<sup>538</sup> *Id.* at 453.

<sup>539</sup> *Id.*

accuracy in interpreting the charts. The highest military court has long ruled that the use of the polygraph does not render subsequent confessions involuntary.<sup>540</sup> Additionally, it is permissible for AFOSI to use phony polygraph results during an interrogation.<sup>541</sup>

### 5. *Quality Control*

A misinterpretation of the polygraph results can, of course, be either intentional or unintentional. Both professional ethics and the DoD Directive<sup>542</sup> prevents the intentional misuse of polygraph results. Additionally, the Quality Control procedure utilized by AFOSI guards against the possibility of unintentional errors in the interpretation of the charts.<sup>543</sup> Once the field examiner has analyzed the charts, they are forwarded to the Regional Polygraph Chief and then HQ AFOSI Quality Control for independent readings.<sup>544</sup> While the number of field examiners who are overruled is small,<sup>545</sup> the three step quality control procedure provides an important check to the continued credibility of AFOSI examiners. Alternatively, private examiners rarely employ quality control procedures, which may call into question the reliability of their results.<sup>546</sup>

### F. **How Reliable is the Polygraph and the CQT?**

As one member of the CAAF has penned, "Few subjects in the law have generated as much controversy as the polygraph."<sup>547</sup> After being labeled "lie detectors" and peddled by a cottage industry of untrained examiners, many claim polygraphs are making a comeback in the public eye.<sup>548</sup> However, horror stories of honorable men and women falsely implicated by a polygraph

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<sup>540</sup> United States v. Lane, 34 C.M.R. 744 (C.G.B.R. 1964).

<sup>541</sup> United States v. Bostic, 35 C.M.R. 511 (A.B.R. 1964). The author in no way implies that this type of action is either presently practiced or condoned. Instead, it is merely noted that a subsequent confession could be admissible.

<sup>542</sup> DoD Directive 5210.48, *supra* note 463, at Ch 2(D)(4) ("The polygraph instrument shall not be utilized as a psychological prop in conducting interrogations").

<sup>543</sup> Unless recanted or challenged as involuntary, once the signed confession is obtained from the accused, the results of the polygraph are no longer needed as evidence.

<sup>544</sup> Interview with Special Agent Charles E. Fisher, Jr., AFOSI Forensic Psychophysicologist (Jan. 8, 1997).

<sup>545</sup> *Id.*

<sup>546</sup> See, e.g., United States v. Pope 30 M.J. 1188, 1190 (A.F.C.M.R. 1990) (Government rebuttal expert attacked reliability of polygraph exam, *inter alia*, for lack of quality control of testing procedures and results).

<sup>547</sup> United States v. Gipson, 24 M.J. 246, 248 (C.M.A. 1987).

<sup>548</sup> Anthony Flint, *Polygraph Come Back in Search of the Truth*, 2/11/96 Com. Appeal, 1996 WL 3203398.

examination are repeated on the floor of the Congress,<sup>549</sup> and former polygraph examiners sell thousands of books that purport to teach the guilty how to "beat the machine."<sup>550</sup> Consequently, both prosecution and defense attorneys need to have a basic understanding of: 1) the scientific estimations of the general reliability of the polygraph; 2) the specific effectiveness of countermeasures employed during the examination; and 3) the existence of the "friendly examiner" hypothesis.

Fierce debate continues amongst the scientific community over the reliability and validity of the polygraph.<sup>551</sup> The two present means of scientific testing, field studies and mock crime experiments, both have significant drawbacks.<sup>552</sup> While field studies using actual cases present the most realistic testing conditions, it is difficult to verify the accuracy of the test result; i.e., whether the examinee was actually deceptive or not.<sup>553</sup> Alternatively, while the results of the controlled laboratory experiments are easily verified, a realistic testing environment may not be replicated.<sup>554</sup>

Despite these limitations, scientific studies claim to give some indication of the general reliability and accuracy of the polygraph. First, the Control Question Technique appears to result in more false positives than false negatives;<sup>555</sup> "more accurate at detecting the deception of the guilty person than detecting the truthfulness of the innocent person."<sup>556</sup> Second, studies indicate that false positives are more frequent if the examinee is the victim rather than a

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<sup>549</sup> 131 Cong.Rec. H5953-01 (daily ed. July, 18, 1985) (statement of Rep. Neal). Mr. Neal quotes from George Wilson, *I Know the Polygraph Lied*, 6/18/85 Washington Post, and acknowledges the deterrent effect of polygraph examinations, but noting that with only a 90% accuracy rate, "[w]e also would humiliate, embarrass, and possibly ruin the careers and lives of perfectly innocent people." The cited Washington Post editorial discusses the case of John Tillson, a civilian executive in the defense manpower and logistics office of the Pentagon and a decorated Army combat officer. Tillson submitted to a polygraph examination during a Pentagon investigation of the source of a news leak. Tillson's exam indicated deception, although George Wilson claimed Tillson neither gave him information nor spoke to him, and that he did not even know Tillson was in attendance at the meeting.

<sup>550</sup> John Dorschner, *To Tell the Truth? Polygraph is very popular and very controversial*, 5/6/86 Dallas Morning News 1C, 1986 WL 4317384. (Doug Williams, a former Oklahoma City police polygraph examiner, is the author of "How to Sting the Polygraph." He is quoted as saying, "It's not that I'm interested in cheating. But it's this: If I can prove it can be manipulated, controlled at will by the subject, then it shows that polygraph is worthless").

<sup>551</sup> For an extensive review of the history and current scientific status of the polygraph, see James Allan Matte, Ph.D., *Forensic Psychophysiology: Using the Polygraph*, (1996).

<sup>552</sup> Giannelli, *supra* note 13, at § 8-2(C).

<sup>553</sup> *Id.* at 226.

<sup>554</sup> *Id.*

<sup>555</sup> *Id.* at 222 (citing Bull, "What is the Lie-Detection Test?," in *The Polygraph Test: Lies, Truth and Science* 14 (A. Gale ed. 1988)).

<sup>556</sup> *Id.* at 227 (quoting Barland, "The Polygraph Test in the USA and Elsewhere," in *The Polygraph Test: Lies, Truth and Science* 73 (A. Gale ed. 1988)).

suspect.<sup>557</sup> Finally, examinations which involve “specific issues produce more valid results than those involving mental state issues.”<sup>558</sup>

A second important concern in both the eyes of the court and the public involves the use of countermeasures during the examination. Countermeasures can be divided into three categories: mental imagery, physical, and pharmaceutical. Mental imagery and physical countermeasures appear to be the most frequently encountered. Mental imagery involves the redirection of concentration and reaction from the relevant questions to the control questions. Physical countermeasures included such tactics as a suspect pressing his toes against the floor or clenching his biceps. One study has concluded that using this technique during the neutral questions reduced the rate of detection from 75% to 10%.<sup>559</sup> Another study concluded that countermeasures were ineffective.<sup>560</sup> Regardless, many examiners attach motion sensors to the testing chair to indicate if the examinee is attempting to employ physical countermeasures.

AFOSI examiners are specifically instructed in countermeasure detection and identification in the curriculum at the DoDPI.<sup>561</sup> Additionally, one expert has noted that the computer algorithms currently employed “identify few countermeasures,” while the examiner who “manually analyzes and quantifies the physiological data is capable of identifying most known countermeasures.”<sup>562</sup>

Finally, both courts and prosecutors frequently cite the “Friendly Examiner Theory” to support claims that *ex parte* polygraphs are inherently unreliable. Recall that the underlying theory of the polygraph rests on the examinee’s fear of detection which prompts different reactions to the control and relevant questions. Hence, Dr. Martin Orne first suggested that when the examinee knows that a “failed” test will not be admissible, the fear of detection

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<sup>557</sup> Giannelli, *supra* note 13, at §8-2(C) (quoting Barland, “The Polygraph test in the USA and Elsewhere,” in *The Polygraph Test: Lies, Truth and Science* 73, 83 (A. Gale ed. 1988)).

<sup>558</sup> *Id.* (quoting *Id.* at 83-84)).

<sup>559</sup> See *United States v. Piccinonna*, 885 F.2d 1529, 1538 n.3 (11th Cir. 1989) (Johnson, C.J., concurring in part and dissenting in part) (citing Gudjonsson, *How to Defeat the Polygraph Tests*, in *The Polygraph Test*, at 129 (citing Kubis, *Studies in Lie Detection: Computer Feasibility Considerations* (Technical Report 62-205, prepared for Air Force Systems Command) (1962))).

<sup>560</sup> *Id.* (citing *Id.*) (citing More, *Polygraph Research and the University*, 14 *Law and Order* 73-78 (1996)).

<sup>561</sup> Telephone Interview with John R. Schwartz, Deputy Director of the DoD Polygraph Institute (Jan. 7, 1997). See also *United States v. Berg*, 44 M.J. 79, 80 (C.A.A.F. 1996) (Government polygraph experts detected evidence in private examiner’s charts that Berg was employing countermeasures).

<sup>562</sup> James Allan Matte, Ph.D., *Forensic Psychophysiology: Using the Polygraph*, at 576 (1996).

is not realistic and the test is unreliable.<sup>563</sup> Similar to the use of countermeasures, this theory would result in an increased number of false negatives. Although still advanced, the claim has been made that "the only research bearing upon this hypothesis does not support it."<sup>564</sup>

Despite the arguable reliability and accuracy of the polygraph examination, it remains an important and effective investigative tool.<sup>565</sup> Regardless of the test results, AFOSI may draw a logical inference from either a suspect's request to take or refusal to submit to a polygraph examination which permits it to concentrate organizational effort and resources. For example, suppose that money has been taken from a certain fund to which five individuals have regular access. If four contact AFOSI and request an exculpatory polygraph examination, then an inference may be drawn concerning upon whom the investigation should focus. Of course, the examinations given to the four individuals may have different degrees of reliability. However, since the DoD Directive clearly states that the examination is to serve as a supplement to and not a substitute for other forms of investigation, this tool would still serve as a valuable aid.

Once the test is taken and the suspect is informed that the results indicate deception, the next question is why would the suspect confess to the crime during the post-test interview? This question is especially compelling since the law is clear that the suspect may terminate the interview at any time and the results may not be admitted at trial. An innocent suspect may feel pressured to confess to the crime, or a guilty suspect may just feel that it is best to end the charade at this point and try to arrange a plea bargain. At this stage of the investigation, however, it is important to note that it is the suspect's estimation of the exam's reliability which is determinative, not the opinion of AFOSI, the court, or a jury. If the suspect concludes that the exam is 100% accurate, then it may seem pointless to continue denying the crime.

One further reason for submitting to a polygraph exam must be addressed.<sup>566</sup> If the investigators ask a guilty suspect during the course of the

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<sup>563</sup> Giannelli, *supra* note 474, at § 8-2(C), (citing Orne, "Implications of Laboratory Research for the Detection of Deception," in *Legal Admissibility of the Polygraph* 94, 96 (N. Ansley ed. 1975)). It may be noted that Dr. Orne's study outlining the use and misuse of hypnosis in court is also cited in *Rock v. Arkansas*.

<sup>564</sup> Giannelli, *supra* note 474, at § 8-2(C), (quoting Barland, *Standards for the Admissibility of Polygraph Results as Evidence*, 16 U. West L.A. L. Rev. at 49).

<sup>565</sup> See, e.g., *State v. Dean*, 103 Wis. 2d 228, 280, 307 N.W.2d 628, 654 (1981) ("[T]he minority concludes that polygraphy in its present state may be useful as an investigative tool, but that its limitations and potential for misleading factfinders are such that it should not be part of evidentiary system.") (Day, J., concurring) (quoting *McLemore v. State*, 87 Wis. 2d 739, 751, 275 N.W.2d 692 (1979)).

<sup>566</sup> If the test is 100% accurate, then it would always be rationale for an innocent suspect to submit to or request a polygraph examination, regardless of whether it may be used at trial. The test would always indicate that he was non-deceptive in his responses, and, consequently

interrogation whether he is willing to submit to a polygraph, the suspect may feel he is "caught between a rock and a hard place." It is likely that he does not have the familiarity with either the legal implications of refusing to submit to the exam, or the scientific arguments concerning the reliability of the test. Furthermore, the suspect may believe that submitting to the exam will provide a temporary respite from intense questioning which he is currently enduring.

### G. Conclusion

The department of defense continues to rely upon polygraph examinations as an investigative tool despite prohibiting its use as evidence during court-martial proceedings. After completing a rigorous training program, OSI agents perform the five-phase examination primarily utilizing the control question technique. The reliability of the expert opinions of both DOD and private examiners continues to be debated with much of the attention focused upon the underlying rationale of the psychological set theory, the effectiveness of countermeasures, and the validity of the friendly examiner hypothesis. Although the scientific and legal communities may long discuss the merits of these objections with respect to admissibility of polygraph results and expert opinion evidence, it is settled that the polygraph will continue to serve as a valuable tool in both criminal and counterintelligence investigations.

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would always exonerate him from the crime. Likewise, a guilty suspect would never agree to take the test.

However, if the polygraph examination is only 95% accurate, then the innocent suspect must now take into account the 5% chance of a false positive result. If the results could not be used at trial and the suspect knows that there is no other circumstantial or material evidence which would incriminate him, then it would appear that he should submit to or request the test. However, if the results can be used at trial, then his decision is uncertain. Even if no other evidence exists, the prosecution may admit the incriminating polygraph results. The decision would then seem to turn on the weight which the suspect thinks that the jury will place on the polygraph results. This weight would be balanced against the suspect's ability to refute the test results on the stand as well as attacking the testing procedures through cross-examination of the examiner.

If the suspect is guilty, then it would appear that the same result as just discussed would be reached. However, the suspect would be weighing the discovery of other incriminating evidence against the 5% chance that the test would show he was non-deceptive. Of course, the person might wish to be caught but he can not forthrightly admit to the offense. Alternatively, the individual may know that the police will inevitably discover enough evidence to convict so he has nothing to lose by taking the test and hoping it is a false negative. The false negative might forestall the investigation and impede the discovery of additional incriminating evidence. Finally, the person may simply believe that although the test is generally 95% accurate, he can somehow "beat" the test.