

**CALCULATING CREDIBILITY: *STATE V. SHARMA* AND
THE FUTURE OF POLYGRAPH ADMISSIBILITY IN OHIO
AND BEYOND**

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“Guilt carries Fear always about with it; there is a Tremor in the Blood of a Thief, that, if attended to, would effectually discover him . . . It is true some are so hardened in Crime that they will boldly hold their Faces to it, carry it off with an Air of Contempt, and outface even a Pursuer; but take hold of his Wrist and feel his Pulse, there you will find his Guilt; . . . a fluttering Heart, an unequal Pulse, a sudden Palpitation shall eventually confess he is the Man, in spite of a bold Countenance or a false Tongue.”

- Daniel Defoe, 1730

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I. INTRODUCTION

Almost a century after its inception, the polygraph test remains one of the most fascinating forms of evidence.¹ Firmly entrenched in popular mythology, the polygraph offers the promise of calculating truth and credibility with scientific certainty, a proposition that continues to capture the public's imagination.² At the same time, the polygraph has also been viewed with great trepidation as a flawed and dangerous instrument of oppression.³ Commonly called a "lie detector," the polygraph does not actually detect lying; it measures subtle changes in blood pressure, pulse, respiration, and the skin's resistance to electricity that are thought to result from the effort to deceive.⁴ These physical reactions constitute the automatic "fight or flight" response produced by the human body when it is faced with a situation of threat or stress.⁵

In Ohio courts and in courts across America, polygraph evidence has been perhaps the most controversial of all scientific evidence. In fact, critics assert that polygraph tests are not "scientific" at all.⁶ Radar, ballistics, breath intoxication devices, and even psychiatric testimony have been far more willingly accepted in our legal system.⁷ Whether the polygraph is adequately "reliable" or "scientific" to merit expert testimony in court has been a heated national debate for decades and one that remains largely unresolved today.⁸

1. See STANLEY ABRAMS, *A POLYGRAPH HANDBOOK FOR ATTORNEYS* at xi-xii (1977).

2. *Id.*

3. See GEORGE W. MASCHKE & GINO J. SCALABRINI, *THE LIE BEHIND THE LIE DETECTOR* 16-17 (4th digital ed. 2005), available at <http://www.antipolygraph.org/lie-behind-the-lie-detector.pdf>.

4. ABRAMS, *supra* note 1, at 5-6.

5. *Id.* The theory that physiological changes measured by the polygraph result from the effort to deceive remains controversial, lying at the heart of the debate over the polygraph's validity. See *infra* notes 149-154.

6. See, e.g., MASCHKE & SCALABRINI, *supra* note 3, at 18-21 (arguing that "[p]olygraphy is not science . . . [I]t is codified conjecture masquerading as science").

7. ABRAMS, *supra* note 1, at 121.

8. See *United States v. Scheffer*, 523 U.S. 303, 309-11 (1998) (stating that "[t]o this day, the scientific community remains extremely polarized about the reliability of polygraph techniques This lack of scientific consensus is reflected in the disagreement among state and federal courts concerning both the admissibility and the reliability of polygraph evidence."); see generally American Polygraph Association, <http://www.polygraph.org> (last visited October 9, 2008);

This Note considers the current state of polygraph admissibility law in Ohio and nationwide, and examines the recent Ohio case of *State v. Sharma*,⁹ where one judge contradicted state precedent by admitting into evidence the results of a defendant's three passed polygraphs without the prosecutor's stipulation.¹⁰ Major arguments for and against expanded polygraph admissibility will be examined. This Note ultimately argues that stipulation should remain the fundamental guideline for Ohio judges, but argues that judges should have the discretion to admit reliable polygraphs without stipulation in exceptional cases. However, in those cases, the opposing party should always have the opportunity to rebut that evidence by retesting the person and presenting its own reliable polygraph evidence. Because polygraph evidence differs significantly from other forms of scientific evidence,¹¹ this Note suggests that a separate rule of evidence dealing specifically with polygraphs may be useful. In approaching Ohio's current system of polygraph admissibility with an eye to improvement, it is important to understand Ohio's current polygraph admissibility law and the evolution of polygraph policy both state and nationwide.

II. BACKGROUND

A. The History and Evolution of Polygraph Admissibility Nationwide

1. Early Polygraphs and the *Frye* Test

Dr. William Marston is credited as the inventor of modern lie detection.¹² In 1915, he found systolic blood pressure changes to be associated with deception and developed a systolic blood pressure deception test.¹³ An avid publicist, Dr. Marston either coined the phrase "lie detector" himself or adopted it from a reporter to whom he described the wonders of his device.¹⁴ However, the courts approached Dr.

AntiPolygraph.org, <http://www.antipolygraph.org> (last visited October 9, 2008) (representing opposite sides of the argument).

9. 875 N.E.2d 1002 (Ohio Ct. Com. Pl. 2007).

10. *Id.* at 1010.

11. *See, e.g., infra* note 168 and accompanying text.

12. DAVID T. LYKKEN, A TREMOR IN THE BLOOD: USES AND ABUSES OF THE LIE DETECTOR 27 (1981).

13. Gordon H. Barland, *The Polygraph Test in the USA and Elsewhere*, in THE POLYGRAPH TEST: LIES, TRUTH AND SCIENCE 75 (Anthony Gale ed., 1988).

14. LYKKEN, *supra* note 12, at 27.

Marston's new device with caution and apprehension.¹⁵ In *Frye v. United States*,¹⁶ the Federal Court of Appeals for the District of Columbia denied admission of Dr. Marston's polygraph results that indicated the defendant, Frye, was innocent of murder.¹⁷ The court's rationale was that Dr. Marston's test had "not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made."¹⁸

More importantly, the *Frye* court set out its famous "general acceptance" test for determining the admissibility of novel scientific evidence, which would almost exclusively govern the admission of such evidence for the next seventy years.¹⁹ The court articulated its "general acceptance" test as follows:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.²⁰

Dr. Marston and his test results were vindicated when Frye was later exonerated and released.²¹ However, despite Frye's innocence and improvements in polygraph technology over the years, the *Frye* test proved a strong barrier to polygraph admissibility over the next several decades and remains so today.²²

15. *See id.* at 218.

16. 293 F. 1013 (D.C. Cir. 1923).

17. *Id.* at 1014. Frye had confessed to second-degree murder, but later recanted his confession and claimed it was the result of coercion. LYKKEN, *supra* note 12, at 218. To support this claim, Frye sought to introduce the testimony of Dr. Marston, who had administered his deception test to Frye and concluded that Frye was telling the truth about the coerced confession. *Id.*

18. *Frye*, 293 F. at 1014.

19. The *Frye* test governed the admission of expert testimony until the landmark case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which dramatically altered the standard for admitting scientific evidence. *See infra* Part II(A)(2).

20. *Frye*, 293 F. at 1014.

21. LYKKEN, *supra* note 12, at 218.

22. *See* Jay P. Kesan, *An Autopsy of Scientific Evidence in a Post-Daubert World*, 84 GEO. L.J. 1985, 1990 n.26 (1996) (noting that when the Supreme Court finally overruled *Frye* with *Daubert* in 1993, ten out of thirteen federal circuits adhered to *Frye*, while the three other circuits

2. *Daubert* Changes the Landscape

The U.S. Supreme Court finally rejected *Frye*'s general acceptance test in the landmark 1993 case of *Daubert v. Merrell Dow Pharmaceuticals*.²³ The Court held that the Federal Rules of Evidence, particularly Rule 702, superseded the *Frye* test, and the Court went on to outline the appropriate modern analysis for the admissibility of scientific evidence.²⁴ The Court held that there is no "definitive checklist" or "test" that a trial judge should use in deciding the admissibility of scientific evidence.²⁵ However, the Court did suggest a non-exhaustive list of factors that a trial court should consider, including:

- (1) Whether the theory or technique can be and has been tested;
- (2) Whether the theory or technique has been subjected to peer review and publication;
- (3) The theory or technique's known or potential rate of error; and
- (4) Whether the theory or technique has been generally accepted within the relevant scientific community.²⁶

The trial judge has a much larger role in deciding the admissibility of scientific evidence under *Daubert* regime than was the case under *Frye*.²⁷ Under *Frye*, the judge's only job was to decide if enough experts in the relevant scientific community thought the technique was reliable, while under *Daubert* the judge *herself* must make the reliability determination, perhaps *despite* the technique's lack of general acceptance.²⁸ The Supreme Court of Ohio has yet to address the reliability and admissibility of polygraphs under the *Daubert* standard and revised Ohio Rule of Evidence 702.²⁹

had previously held *Frye* did not survive the enactment of the Federal Rules of Evidence in 1975); see also *State v. Valdez*, 371 P.2d 894, 896-900 (Ariz. 1962) (tracing the evolution (or lack thereof) of polygraph admissibility law in the decades following *Frye*).

23. 509 U.S. 579, 586-87 (1993).

24. *Id.* at 587-95.

25. *Id.* at 593.

26. *Id.* at 593-94.

27. Lloyd C. Peeples, III, Stephen P. Bell, Jr. & T. Michael Guiffre, *Exculpatory Polygraphs in the Courtroom: How the Truth May Not Set You Free*, 28 CUMB. L. REV. 77, 85 (1997-98).

28. *Id.*

29. Ohio Rule of Evidence 702 currently reads as follows:

Evid.R. 702. Testimony by Experts

A witness may testify as an expert if all of the following apply:

3. *Per Se* Inadmissibility Remains the Majority Approach among the States

Despite the U.S. Supreme Court overturning *Frye*'s "general acceptance" test in favor of a much broader standard for admitting scientific evidence, the majority approach to polygraphs among the states remains *per se* inadmissibility, that is, a total ban on all polygraph evidence.³⁰ Because it has been the most popular approach over the last century, the *per se* inadmissible rule has been termed the "traditional approach" to polygraph admissibility.³¹ As their basis for exclusion, state courts have argued mainly that polygraph evidence is unreliable and not generally accepted in the scientific community, that admitting polygraphs would lead to time-consuming, confusing, and tangential debates, and that polygraphs tend to prejudice juries.³²

The traditional rule of *per se* inadmissibility has received a great deal of scholarly criticism in the states where it remains.³³ Critics of the

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

30. Peeples, Bell & Guiffre, *supra* note 27, at 96 n.135; *see also* State v. Domicz, 907 A.2d 395, 411 (N.J. 2006) (summarizing polygraph admissibility law among the states).

31. *See* United States v. Piccinonna, 885 F.2d 1529, 1533 (11th Cir. 1989) (stating that "the traditional approach holds polygraph evidence inadmissible when offered by either party, either as substantive evidence or as relating to the credibility of a witness."); *see also* Mark W. Brennan, Note, *Reexamining Polygraph Admissibility: United States v. Piccinonna Underwood v. Colonial Penn Insurance Co.*, 56 MO. L. REV. 143, 149 (1991).

32. *See* James R. McCall, *Misconceptions and Reevaluation – Polygraph Admissibility after Rock and Daubert*, 1996 U. ILL. L. REV. 363, 369 (1996).

33. *See, e.g.*, Doran D. Peters, Comment, *Per Se Prohibitions of the Admission of Polygraph Evidence as Upheld in Scheffer are Both Violative of the Constitution and the Federal Rules of Evidence as Applied by Daubert*, 27 AM. J. CRIM. L. 249, 272-78 (2000); Kevin Muenster, Notes and Comments, *The Re-Lie-Ability of Polygraph Evidence: An Evaluation of Whether Texas's Per*

traditional rule argue that it runs contrary to the Supreme Court's *Daubert* standard, the Federal Rules of Evidence, the states' Rules of Evidence, and a defendant's Sixth Amendment right to present a defense.³⁴ Nevertheless, in 1998's *United States v. Scheffer*,³⁵ the U.S. Supreme Court upheld as constitutional a military rule of evidence banning all polygraph evidence in courts-martial.³⁶ The Court held that Military Rule of Evidence 707³⁷ did not unconstitutionally abridge the right to present a defense.³⁸ The Court reasoned that a criminal defendant's right to present a defense may be subject to reasonable restrictions in order to uphold other legitimate and countervailing interests in the criminal trial process.³⁹

Se Rule Against the Admissibility of Polygraph Evidence is Violative of the Texas Rules of Evidence, 58 BAYLOR L. REV. 265, 279-84, 288 (2006).

34. See Peters, *supra* note 33, at 277 (stating that “[n]ot only are *per se* rules prohibiting polygraph evidence from admission into trial proceedings violative of the Federal Rules of Evidence and *Daubert*, but also of the United States Constitution. By denying a trial judge the ability to determine whether or not certain evidence should be admitted, these *per se* rules are denying the judge his role as ‘gatekeeper.’ This role was envisioned by both the Federal Rules of Evidence and *Daubert*.”); see also Muenster, *supra* note 33, at 288 (noting that “[t]he abandonment of Texas's *per se* rule against the admissibility of polygraph evidence is necessary to bring Texas jurisprudence in accordance with the procedural requirements of the Texas Rules of Evidence.”).

35. 523 U.S. 303 (1998).

36. *Id.* at 303-04, 317. A polygraph test of Airman Scheffer indicated, in the opinion of the Air Force examiner administering the test, that there was “no deception” in his denial that he had used drugs since enlisting. *Id.* at 303. Urinalysis, however, revealed the presence of methamphetamine, and Scheffer was tried by general court-martial for using that drug and for other offenses. *Id.* The military judge relied on Military Rule of Evidence 707 in denying Scheffer's motion to admit the polygraph evidence. *Id.* Scheffer was convicted on all counts, and the Air Force Court of Criminal Appeals affirmed. *Id.* The Court of Appeals for the Armed Forces reversed, holding that a *per se* exclusion of polygraph evidence offered by an accused to support his credibility violates his Sixth Amendment right to present a defense. *Id.* The Supreme Court reversed, upholding as constitutional the *per se* ban on polygraph evidence in military courts. *Id.*

37. Military Rule of Evidence 707 provides, in relevant part: “(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.” UNITED STATES MANUAL FOR COURTS-MARTIAL, at III-39 (2008).

38. *United States v. Scheffer*, 523 U.S. 303, 317 (1998).

39. *Id.* at 303. The Court explained: “Rule 707 serves several legitimate interests in the criminal trial process. These interests include ensuring that only reliable evidence is introduced at trial, preserving the court members' role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial.” *Id.* at 309. The Court held that “[t]he Rule is neither arbitrary nor disproportionate in promoting these ends. Nor does it implicate a sufficiently weighty interest of the defendant to raise a constitutional concern under our precedents.” *Id.*

4. New Mexico's Unique System of General Polygraph Admissibility

New Mexico employs a one-of-a-kind system of polygraph admissibility that has attracted significant attention since its inception.⁴⁰ With its 1975 decision in *State v. Dorsey*,⁴¹ the Supreme Court of New Mexico made New Mexico the only state that allows polygraph evidence to be admitted without both parties' stipulation.⁴² The *Dorsey* court flatly rejected two of New Mexico's previous requirements for polygraph admissibility, the stipulation requirement and the requirement that there be no objection offered at trial.⁴³ The court called these two requirements "(1) [m]echanistic in nature; (2) [i]nconsistent with the concept of due process; (3) [r]epugnant to the announced purpose and construction of the New Mexico Rules of Evidence⁴⁴ . . . ; and (4) [p]articularly incompatible with the purposes and scope of Rules 401, 402, 702, and 703 of the New Mexico Rules of Evidence."⁴⁵ The general requirements for polygraph admissibility in New Mexico that remained were: (1) a qualified polygraph operator, (2) reliable testing procedures, and (3) valid tests.⁴⁶

In 1983, the Supreme Court of New Mexico enacted New Mexico Rule of Evidence 11-707, a rule completely separate from the state's expert testimony rule that established a detailed and comprehensive system for admitting polygraph evidence.⁴⁷ Rule 11-707 permits admission of polygraph evidence to prove the truthfulness of any witness, provided that the evidence meets certain reliability requirements.⁴⁸ Because this rule applies only to polygraphs of

40. See, e.g., 1 PAUL C. GIANNELLI & EDWARD L. IMWINKELREID, SCIENTIFIC EVIDENCE § 8.02(d), at 421 (4th ed. 2007).

41. 539 P.2d 204 (N.M. 1975).

42. Peeples, Bell & Guiffre, *supra* note 27, at 100.

43. *Dorsey*, 539 P.2d at 204-05.

44. The "purpose and construction" of the New Mexico Rules of Evidence reads as follows: "These rules shall be construed to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." *Id.* at 205.

45. *Id.*

46. *Id.*

47. N.M. R. EVID. 11-707; Peeples, Bell & Guiffre, *supra* note 27, at 100.

48. Peeples, Bell & Guiffre, *supra* note 27, at 100. New Mexico Rule of Evidence 11-707 reads:

Rule 11-707. Polygraph Examinations

A. Definitions. As used in this rule:

witnesses, a criminal defendant who wishes to admit his own exculpatory polygraph must take the stand in his own defense, thus exposing himself to cross-examination.⁴⁹ Because it includes no

(1) “chart” means the record of bodily reactions by a polygraph instrument that is attached to the human body during a series of questions;

(2) “polygraph examination” means a test using a polygraph instrument which at a minimum simultaneously graphically records on a chart the physiological changes in human respiration, cardiovascular activity, galvanic skin resistance or reflex for the purpose of lie detection;

(3) “polygraph examiner” means any person who is qualified to administer or interpret a polygraph examination; and

(4) “relevant question” means a clear and concise question which refers to specific objective facts directly related to the purpose of the examination and does not allow rationalization in the answer.

B. Minimum Qualifications of Polygraph Examiner. To be qualified as an expert witness on the truthfulness of a witness, a polygraph examiner must have at least the following minimum qualifications:

(1) at least five (5) years’ experience in administration or interpretation of polygraph examinations or equivalent academic training;

(2) conducted or reviewed the examination in accordance with the provisions of this rule; and

(3) successfully completed at least twenty (20) hours of continuing education in the field of polygraph examinations during the twelve (12) month period immediately prior to the date of the examination.

C. Admissibility of Results. Subject to the provisions of these rules, the opinion of a polygraph examiner may in the discretion of the trial judge be admitted as evidence as to the truthfulness of any person called as a witness if the examination was performed by a person who is qualified as an expert polygraph examiner pursuant to the provisions of this rule and if:

(1) the polygraph examination was conducted in accordance with the provisions of this rule;

(2) the polygraph examination was quantitatively scored in a manner that is generally accepted as reliable by polygraph experts;

(3) prior to conducting the polygraph examination the polygraph examiner was informed as to the examinee’s background, health, education and other relevant information;

(4) at least two (2) relevant questions were asked during the examination; and

(5) at least three (3) charts were taken of the examinee

E. Recording of Tests. The pretest interview and actual testing shall be recorded in full on an audio or video recording device

G. Compelled polygraph examinations. No witness shall be compelled to take a polygraph examination over objection. However, for good cause shown, the court may compel the taking of a polygraph examination by a witness who has previously voluntarily taken an examination and has given notice pursuant to Paragraph D that the party intends to use the polygraph examination. If a witness refuses to take a polygraph examination ordered by the court under this paragraph, opinions of other polygraph examiners as to the truthfulness of the witness shall be inadmissible as evidence.

49. See N.M. R. EVID. 11-707(B), (C), (G).

stipulation requirement, New Mexico's novel approach to polygraph evidence remains America's most liberal.⁵⁰

At the same time, New Mexico's approach includes substantial reliability standards for both the polygraph test and examiner.⁵¹ The polygraph examiner must have had at least five years of experience in giving and interpreting polygraphs at the time of the test, along with at least twenty hours of continuing polygraph education in the year before the test.⁵² The test itself must be scored in a generally accepted manner, the examiner must have been briefed on the subject's background before the test, and the test must include at least two relevant questions and produce three charts.⁵³ The pretest interview and the test itself must both be audio or video recorded.⁵⁴ Even if these requirements are met, New Mexico judges may, in their discretion, refuse to admit any polygraph evidence.⁵⁵

B. Stipulation: The Law of Polygraph Admissibility in Ohio and About 20 Other States

1. The Stipulation Approach: *Valdez* and *Souel*

In 1962, the tide began to turn in favor of polygraph admissibility with the Arizona case of *State v. Valdez*.⁵⁶ In *Valdez*, the Arizona

50. See Peeples, Bell & Guiffre, *supra* note 27, at 101.

51. See N.M. R. EVID. 11-707(B), (C), (E).

52. N.M. R. EVID. 11-707(B)(1), (3).

53. N.M. R. EVID. 11-707(C)(2), (3), (4), (5).

54. N.M. R. EVID. 11-707(E). This requirement is a particularly good one. Recording the test allows the judge to view or hear the test to aid in his decision to admit it. Recording the test also potentially allows a jury to view or hear the test in open court so it may observe how the test was conducted and better interpret its results.

55. N.M. R. EVID. 11-707(C).

56. 371 P.2d 894 (Ariz. 1962). Valdez was tried for and convicted of possession of narcotics. *Id.* at 895. Pursuant to a written stipulation agreement entered into by Valdez, his counsel, and the prosecutor before trial, Valdez took a polygraph test. *Id.* The stipulation agreement provided that the results of the polygraph would be admissible at trial. *Id.* The polygraph operator was then permitted, over Valdez's objection, to testify at trial as to the results of the polygraph (which were unfavorable to Valdez). *Id.* After the guilty verdict and before sentencing, the trial court certified a question to the Arizona Supreme Court asking if this stipulation procedure was permissible. *Id.* The Court held:

[S]ubject to the qualifications announced herein, we hold that polygraphs and expert testimony relating thereto are admissible upon stipulation in Arizona criminal cases. And in such cases the lie-detector evidence is admissible to corroborate other evidence of a defendant's participation in the crime charged. If he takes the stand such evidence is admissible to corroborate or impeach his own testimony.

Supreme Court held that the polygraph had finally achieved the state of acceptability necessary to be admissible as scientific evidence.⁵⁷ However, the court further held that for polygraphs to be admissible, four requirements first had to be met.⁵⁸ The most important requirement was that both parties stipulate in writing to the admissibility of polygraph results prior to any tests.⁵⁹

Ohio did not begin to reassess its policy barring polygraph evidence until the mid-1970s.⁶⁰ In 1978, the Ohio Supreme Court decided the state's seminal polygraph case, *State v. Souel*,⁶¹ where it adopted the *Valdez* system of stipulated polygraph admissibility.⁶²

In *Souel*, the Court held that polygraphs should be admissible into evidence at trial for purposes of corroboration or impeachment, provided that the *Valdez* qualifications were met.⁶³ The Court justified its new standard with the following explanation:

Id. at 900.

57. *Valdez*, 371 P.2d at 900 (stating that “[a]lthough much remains to be done to perfect the lie-detector as a means of determining credibility, we think it has been developed to a state in which its results are probative enough to warrant admissibility upon stipulation.”).

58. *Id.* at 900-01. These four requirements, called “qualifications” by the *Valdez* court, are set out *infra* at note 63, as the Ohio Supreme Court adopted them sixteen years later.

59. *Id.* at 900.

60. See *State v. Towns*, 301 N.E.2d 700, 705-07 (Ohio Ct. App. 1973) (upholding the admission of a polygraph exam where an accused murderer failed the test but had stipulated with the prosecution to admissibility before the test was conducted); *State v. Sims*, 369 N.E.2d 24, 26, 44-47 (Ohio Ct. Com. Pl. 1977) (sharing *Towns*' view that once the defendant and prosecution agree to the admissibility of a polygraph expert, neither can bar the testimony based on the results).

61. 372 N.E.2d 1318 (Ohio 1978).

62. *Id.* at 1323.

63. The *Souel* Court adopted the four *Valdez* requirements almost verbatim. These requirements are set out in *Souel*'s syllabus as follows:

(1) The prosecuting attorney, defendant and his counsel must sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.

(2) Notwithstanding the stipulation, the admissibility of the test results is subject to the discretion of the trial judge, and if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.

(3) If the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:

- (a) the examiner's qualifications and training;
- (b) the conditions under which the test was administered;
- (c) the limitations of and possibilities for error in the technique of polygraphic interrogation; and,

We adopt the *Valdez* qualifications because these requisites respond to the major objections to the admission of polygraph evidence. The requirement of mutual agreement to a written stipulation, and the supervisory power of the trial judge, 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 In addition, the opportunity for cross-examination of the operator by opposing counsel and the delivery of a limiting instruction by the trial court will help to prevent encroachment upon the jury function by undue reliance on this expert testimony.⁶⁴

The *Souel* Court also expressed its agreement with a statement of the Supreme Court of Wyoming from the previous year: “We see no reason why the polygraph expert should be treated in any more restrictive manner than other experts.”⁶⁵

The strongest barrier to polygraph admissibility among *Souel*'s safeguards remains the stipulation requirement. The stipulation requirement was intended to be a practical solution to the difficulty a trial judge faced in assuring a competent polygrapher along with a scientifically reliable examination.⁶⁶ There were and remain today various questioning techniques, devices, and scoring methods used in

(d) at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.

(4) If such evidence is admitted the trial judge should instruct the jury to the effect that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, and that it is for the jurors to determine what weight and effect such testimony should be given.

Id. at 1318-19.

64. *Id.* at 1323 (citation omitted).

65. *Id.* at 1324 (quoting *Cullin v. State*, 565 P.2d 445, 458 (Wyo. 1977)). The rest of the *Cullin* court's statement quoted approvingly by the Ohio Supreme Court in *Souel* read as follows:

That 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. We have long utilized the expertise of psychiatrists and psychologists to furnish advice and assistance to the jury to explore the mysteries of the mind with respect to mental illness as a defense. Medical doctors are regularly called upon to testify as to intricate workings of the body in sensitive questions of a complex physical condition or cause of death. It is the normal obligation of the trial judge to protect the jurors from exposure to evidence which might mislead them, regardless of whatever kind of scientific evidence is under scrutiny. The device of cross-examination soon smokes out the inept, the unlearned, the inadequate self-styled expert.

Id. (quoting *Cullin*, 565 P.2d at 458).

66. Michael D. Morgan, *Lying in the Heartland: Problems and Solutions Regarding Polygraph Evidence in Ohio Criminal Procedure*, 26 OHIO N.U. L. REV. 89, 94 (2000).

polygraph examinations.⁶⁷ The distinctions between these techniques were, and to an extent remain, technical and unresolved among polygraphers.⁶⁸ A major problem with the *Frye* test was that it forced judges to make complex distinctions between different polygraph techniques and figure out which, if any, was generally accepted as reliable in the field of polygraphy.⁶⁹ This prompted jurisdictions wishing to move toward limited polygraph admissibility to do so via stipulation agreements, which served to eliminate time consuming and tangential debates about the general acceptance of a particular method of polygraphy.⁷⁰ Besides Ohio, about twenty other states have stipulation requirements to admit polygraph results.⁷¹

2. *Davis* Creates Some Confusion

In 1991's *State v. Davis*,⁷² the Ohio Supreme Court declined to expand *Souel* to require prosecutors, through discovery, to produce the results of polygraph examinations administered to state witnesses under Ohio Rule of Criminal Procedure 16(B)(1)(d).⁷³ While upholding *Souel*'s rule of stipulated polygraph admission, the *Davis* Court stated:

67. *Id.* at 93. *See also id.* at 104-12 (describing and explaining different polygraph techniques and methods of scoring and interpretation). A detailed analysis of the different methods of polygraphy is beyond the scope of this Note.

68. *Id.* at 93.

69. *Id.* The larger problem with *Frye*'s general acceptance test was that it failed to get to the heart of the matter: reliability. Just because a scientific test is new and not yet generally accepted in the scientific community does not necessarily mean that the test is not *reliable*. Novel scientific tests can take decades to become generally accepted. Under Federal Rule of Evidence 702, *reliability*, not general acceptance, is the main concern in dealing with scientific expert testimony. *Daubert* recognized this, pointing out that general acceptance should be only one of many factors considered in determining a test's reliability. *See supra* Part II(A)(2).

70. Morgan, *supra* note 66, at 93.

71. Other states with a stipulation rule include: Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Nevada, New Jersey, North Dakota, Utah, Washington, and Wyoming. *See* Peeples, Bell & Guiffre, *supra* note 27, at 97 n.140. *See also* *State v. Domicz*, 907 A.2d 395, 411 (N.J. 2006) (summarizing polygraph admissibility law among the states).

72. 581 N.E.2d 1362 (Ohio 1991).

73. *Id.* at 1376. Ohio Rule of Criminal Procedure 16(B)(1)(d) reads, in pertinent part, as follows:

(B) Disclosure of evidence by the prosecuting attorney

(1) Information subject to disclosure

(d) Reports of examination and tests. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or

The nature of polygraphs is different from traditional scientific tests. Most, if not all, scientific tests involve objective measurements, such as blood or genetic typing or gunshot residue. In a polygraph test, the bodily response of the examinee to his answers is dependant upon the subjective interpretation thereof by the examiner. Inasmuch as the test is not perceived by the profession to be reasonably reliable, its admissibility is limited to situations where the parties stipulate to its admission.⁷⁴

This view of polygraphs as unreliable or outright unscientific is inconsistent with the more favorable view of polygraphs expressed by the Ohio Supreme Court in *Souel*.⁷⁵ Because *Davis* involved the narrow issue of polygraph discoverability, the court's view of the unreliability of polygraphs and its interpretation of *Souel*'s purpose appear to be mere dicta.⁷⁶

If the *Davis* court intended to limit *Souel* in any way,⁷⁷ the continued reliance on *Souel* by Ohio's lower courts signifies that this has

copies thereof, available to or within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney.

With its holding, the *Davis* Court expressed its view that polygraph tests do not qualify as "physical or mental examinations" or "scientific tests." *Davis*, 581 N.E.2d at 1376.

74. *Id.*

75. In *Souel*, the Ohio Supreme Court did *not* mention polygraphs being unscientific or unreliable as a reason for adopting the stipulation requirement. What the *Souel* court said was the following:

Despite the ongoing controversy concerning the degree of accuracy of the polygraph device, it is our opinion that observance of the *Valdez* qualifications establishes a proper foundation for the admission of polygraph test results, and that these results have probative value in the determination of whether the examinee has been deceptive during interrogation.

State v. Souel, 372 N.E.2d 1318, 1323-24 (Ohio 1978).

76. See *Morgan*, *supra* note 66, at 102-04.

77. See *Davis*, 581 N.E.2d at 1376 (stating "*Souel* held that, regardless of the admission of the polygraph test results, that particular case contained sufficient evidence to justify the conviction."). It is hard to say what the *Davis* Court's intentions really were, but it is worth noting that the polygraph issue took up a very small portion of a very lengthy opinion involving many other issues and twenty-four assignments of error. The author suggests that the *Davis* Court did not intend to bring about any sort of sea change in Ohio polygraph admissibility law, but was simply attempting to resolve a narrow discovery issue. In its very brief discussion of *Souel* and the purpose of *Souel*'s stipulation requirement, the *Davis* Court seems to have completely misinterpreted *Souel*. In introducing the *Valdez* stipulation rule, the *Souel* Court was providing a way to admit polygraph evidence where none had previously existed. See *supra* Part II(B)(1). The *Souel* Court did this because of its belief in the polygraph's *increasing* reliability, not because it thought polygraph evidence was inherently unreliable.

not been acknowledged or understood.⁷⁸ *Souel* remains controlling law and stipulated admissibility remains Ohio's approach to polygraph evidence.⁷⁹ As noted above, with both *Souel* and *Davis* predating *Daubert*, the Ohio Supreme Court has yet to address the reliability and admissibility of polygraph results under the *Daubert* standard and Ohio Rule of Evidence 702.⁸⁰

III. STATEMENT OF THE CASE

A. *State v. Sharma*

In August 2006, Sahil Sharma, then a 25-year-old third-year law student from New York, traveled to Cuyahoga Falls, Ohio, for his cousin's wedding.⁸¹ On the night before the wedding, Sharma and other members of the wedding party made their way to the bar at Sharma's hotel, and one of Sharma's cousins brought along a female friend.⁸² Sharma and the woman became acquainted, and both had quite a bit to drink.⁸³ The woman had asked earlier that day if there would be a place to rest before driving home, and Sharma's cousin said his room would be fine.⁸⁴ By the early morning hours, the woman asked to lie down and made her way to the suite Sharma was sharing with his cousin.⁸⁵ What exactly happened next would be the subject of bitter dispute over the next year.

The next morning the woman claimed she had been raped, and Sharma woke up to the sound of police pounding on his door.⁸⁶ Sharma was arrested and ultimately indicted on one count of sexual battery, a third-degree felony.⁸⁷ From the beginning he vigorously asserted his

78. See Morgan, *supra* note 66, at 103. See also *id.* at 103 n.81 (providing a sample of lower court cases ignoring the *Davis* interpretation of *Souel*).

79. *Id.* at 103.

80. See *supra* note 29 and accompanying text.

81. Rebecca Meiser, *Duke Comes to Akron: Is an Overzealous Prosecutor Hunting an Innocent Man?*, CLEVELAND SCENE, June 20, 2007, <http://www.newtimesjobs.com/2007-06-20/news/duke-comes-to-akron>.

82. *Id.*

83. *Id.* See also Ed Meyer, *Polygraph Tests OK'd for Trial; Evidence Supports Law Student Charged with Sexual Battery*, AKRON BEACON JOURNAL, May 16, 2007, http://www.lieassurance.com/html/LieAssurance_OhioCase.html.

84. Meiser, *supra* note 81.

85. *Id.*

86. *Id.*

87. *State v. Sharma*, 875 N.E.2d 1002, 1003 (Ohio Ct. Com. Pl. 2007). As noted *infra*, this citation is to Judge Judy Hunter's pre-trial order admitting the unstipulated polygraph evidence

innocence and maintained that his sexual contact with the woman was consensual.⁸⁸ For help, Sharma retained long-time Akron defense attorney Kirk Migdal.⁸⁹ Sexual assault cases are notoriously difficult to defend, as they often involve “he said/she said” situations clouded by alcohol, tend to be forcefully prosecuted, and entail significant stigmatization.⁹⁰ This case was no exception. Nonetheless, Sharma remained persistent in asserting his innocence.⁹¹

Migdal proceeded to do what he had often done with clients: he took Sharma to William Evans, an experienced and highly regarded local polygraph examiner, for a polygraph test.⁹² In the test, Evans asked Sharma specific questions about disputed facts.⁹³ According to Evans, the test indicated that Sharma was not being deceptive in his answers.⁹⁴ After he was indicted, Sharma took and “passed” two more polygraphs administered by two other examiners, Steven Stechschulte and Dr. Louis Rovner.⁹⁵ Both Stechschulte and Rovner are also experienced and highly regarded polygraph experts.⁹⁶

Shortly after the indictment, Migdal and the prosecutor’s office explored the possibility of using a stipulated polygraph to help resolve the case, but the prosecutor’s office ultimately declined to stipulate to polygraph testing.⁹⁷ Sharma and Migdal then filed a motion to admit the polygraph evidence, and Judge Judy Hunter set a hearing on the matter.⁹⁸

proffered by the defense. It did *not* announce the final disposition in the case, which came three months later when Judge Hunter acquitted Sharma in a bench trial.

88. See Meiser, *supra* note 81.

89. *Id.*

90. *Id.* See also Online Lawyer Source, *Defending a Sexual Assault*, http://www.onlinelawyersource.com/criminal_law/sexual_assault.html (last visited Sept. 10, 2008) (noting that “[b]ecause the media and politics play such large roles in sexual assault cases, there is significant potential for immediate personal, social, and professional damage to the accused, even before trial proceedings begin. In addition, sexual assault cases tend to be aggressively prosecuted and often come with harsh penalties.”).

91. Meiser, *supra* note 81.

92. *Id.*; See *Sharma*, 875 N.E.2d at 1006-07 (describing William Evans’ extensive credentials and 30 years’ experience with polygraphs, and noting that Evans had been used by the prosecutor’s office on numerous occasions for investigatory purposes and by stipulation). Sharma’s initial polygraph with William Evans took place before he was indicted. Meiser, *supra* note 81.

93. Meiser, *supra* note 81.

94. *Id.* In common parlance, Sharma “passed.”

95. *Sharma*, 875 N.E.2d at 1007.

96. See *id.* (describing in detail Stechschulte’s and Rovner’s extensive credentials and experience, including Stechschulte’s 14 years’ experience and over 2,700 polygraph tests performed and Rovner’s doctorate in psychophysiology along with his 21 years’ experience). Dr. Rovner is considered among the nation’s foremost polygraph experts. Meiser, *supra* note 81.

97. *Sharma*, 875 N.E.2d at 1003.

98. *Id.*

At the hearing, the three experts who administered Sharma's polygraphs testified.⁹⁹

On May 11, 2007, Judge Hunter issued an order that sent shockwaves through the legal community. She agreed to admit Sharma's unstipulated polygraph evidence, an unprecedented ruling outside the state of New Mexico.¹⁰⁰ The prosecutors were not happy, charging that Judge Hunter disregarded Ohio law.¹⁰¹ In the order, Judge Hunter summarized her rationale as follows:

Given the advancements in polygraph technology since 1978, this court finds that the Sixth Amendment and Fourteenth Amendment warrant the admission of nonstipulated polygraph evidence in this limited situation in which the trial court has independently found that the proffered polygraph is reliable under Evid.R. 702 and only when the polygraphist is subject to cross-examination and where limited jury instructions are utilized, as required by *Souel* Under the unique circumstances of this case, where this Court has conducted an evidentiary hearing to evaluate the reliability of the instant polygraph evidence, where all three polygraphists have testified as to the general acceptance of polygraph use and methodology, and where all three testified that the defendant was not being deceptive in his answers to their questions pertaining to the charge of sexual battery, this Court finds that the polygraph evidence is admissible at trial.¹⁰²

Judge Hunter acknowledged that she was not following Ohio precedent by discarding *Souel's* stipulation requirement and admitting unstipulated polygraphs.¹⁰³ However, she twice used the words "unique circumstances" in describing the *Sharma* case, and she gave great weight to the polygraphers' testimony regarding improvements in polygraph technology and accuracy.¹⁰⁴

99. *Id.* At the hearing, four exhibits were admitted into evidence: the polygraph reports of Mr. Evans, Mr. Stechschulte, and Dr. Rovner, and a published research article by Dr. Rovner titled "The Accuracy of Physiological Detection of Deception for Subjects with Prior Knowledge." *Id.* The state cross-examined the polygraph examiners but did not put on any evidence of its own. *Id.*

100. *Id.* at 1003, 1006, 1010. *See supra* notes 27-67 and accompanying text.

101. Meiser, *supra* note 81.

102. *State v. Sharma*, 875 N.E.2d 1002, 1010 (Ohio Ct. Com. Pl. 2007).

103. *Id.* (stating that "[w]ith this ruling, the court recognizes that it is not following established state precedent regarding the requirement that the parties stipulate concerning the admissibility of the polygraph tests in order to present polygraph evidence at trial.").

104. *Id.* at 1010-11 (stating that "based upon the unique circumstances of this case and the great advancements in the technology of polygraph examinations and greater consensus by the scientific community as to its accuracy, this court will admit the polygraph tests and testimony over the state's objection to its admissibility without prior stipulation.").

Judge Hunter began her analysis by noting that the Ohio Supreme Court has not addressed the issue of polygraph relevancy and reliability since *Souel* in 1978 and *Davis* in 1991.¹⁰⁵ Judge Hunter found this significant because, as previously indicated, both *Souel* and *Davis* predate the Supreme Court's *Daubert* standard, adopted in 1993, and the amended version of the Ohio Rules of Evidence, which took effect in 1994.¹⁰⁶ After setting out Ohio Rule of Evidence 702,¹⁰⁷ Judge Hunter applied each of the Rule's three main requirements to the *Sharma* case.¹⁰⁸

The prosecution did not call into question the requirements of Ohio Rule of Evidence 702(A) and (B), and Judge Hunter had little difficulty finding that those requirements were met.¹⁰⁹ As for Rule 702(A), Judge Hunter said that "the use of polygraph tests and the interpretation of the test results relate to matters beyond the knowledge or experience possessed by laypersons. . . . Polygraph tests . . . are science-related matters beyond the knowledge of a layperson."¹¹⁰ Judge Hunter also found all three of Sharma's polygraph examiners to be "eminently qualified as experts in the field of polygraph testing based

105. *Id.* at 1005.

106. *Id.* at 1005-06.

107. Evid.R. 702. Testimony by Experts

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

108. *Sharma*, 875 N.E.2d at 1006-10.

109. *Id.* at 1006-07.

110. *Id.* at 1006.

upon their individual knowledge, skill, experience, training, and education,”¹¹¹ thus fulfilling Rule 702(B)’s requirement.

Not surprisingly, Judge Hunter’s Rule 702(C) reliability analysis occupied the largest portion of her order.¹¹² Reliability has been a constant point of controversy since the polygraph’s inception, and reliability concerns remain the major rationale for the rules banning polygraph evidence in the majority of states.¹¹³ Judge Hunter described in detail much of Dr. Rovner’s testimony, in which he invoked a number of studies indicating the polygraph’s reliability as a scientific testing method.¹¹⁴ At the hearing, Dr. Rovner also testified that polygraphs are generally accepted in the scientific community and regularly used throughout the United States and the world.¹¹⁵ Judge Hunter described the particular testing procedures used by each of the three examiners and

111. *Id.* at 1007.

112. *Id.* at 1007-10.

113. *See supra* notes 30-32 and accompanying text.

114. *State v. Sharma*, 875 N.E.2d 1002, 1007-08 (Ohio Ct. Com. Pl. 2007). Judge Hunter’s description read as follows:

Dr. Rovner testified that his doctoral thesis was on the validity of the use of the Utah Zone Comparison Polygraph Test to determine a participant’s truthfulness. This two-year controlled study was presented to the Society for Psycho-physiological Research in 1979 and published in the *Journal of Polygraph* for the American Polygraph Association. Based upon this objective study, the overall accuracy for polygraphs was 95.5 percent for the standard noninformational group (no prior knowledge of polygraph testing procedures), 95.5 percent for the informational group (knowledge of polygraph testing procedures), and 71 percent for the informational practice group (knowledge of polygraph testing procedures and previous experience in taking polygraphs).

Dr. Rovner further testified that the results of his study are consistent with subsequent studies on the subject. In fact, he indicated that his testing procedures and results were recently replicated in a new study that is to appear in the *Journal of British Psychological Society* later this year.

Id.

115. *Id.* at 1008. Judge Hunter continued:

In mid 1980, the Gallup Organization surveyed the members from the Society for Psychological Research regarding the acceptance rate for polygraph tests. The survey indicated an 83 percent approval rating for polygraph tests as a viable and valid technique. A second survey was done in 1990 duplicating the 83 percent acceptance rate.

Dr. Rovner also indicated that polygraphs are used on a regular basis throughout the United States and the world. In fact, he indicated that in the United States, polygraphs are used by the Department of Defense, the FBI, CIA, NSA, DEA, and Secret Service; all branches of the military; and numerous state and local law-enforcement agencies in Ohio and throughout the country. He estimated that the annual budget for the Department of Defense for polygraph testing alone is approximately \$50 million.

Id.

explained why she felt those procedures were reliable.¹¹⁶ Judge Hunter noted Dr. Rovner's remark that "even if all three polygraph tests had a ten percent error rate, the probability that all three examiners made the exact same mistake is probably one out of one thousand."¹¹⁷

Judge Hunter attempted to dispel any concerns about Sharma's possible use of countermeasures to "beat" the tests or the possibility of multiple tests skewing the results. In making this argument, she again relied on the examiners' testimonies that these were not concerns.¹¹⁸ The effect of multiple testing is a particularly interesting question. Might someone with recent experience taking a polygraph and a basic knowledge of testing procedures be better equipped to manipulate the results? Not only did this not concern Judge Hunter, but she took the fact that Sharma passed three polygraphs as an indicator of reliability.¹¹⁹ Judge Hunter acknowledged the *Davis* Court's concern that the polygraph is open to the examiner's subjective interpretation.¹²⁰ She answered that concern by noting that all three of Sharma's examiners conclusively determined he was not deceptive, and that two of the examiners had their tests peer-reviewed specifically to alleviate any subjectivity concerns.¹²¹

116. *Id.* Judge Hunter explained:

Mr. Evans and Mr. Stechsulte performed different variations of the Modified General Question Test ("MGQT") on Mr. Sharma. Dr. Rovner performed the Utah Zone of Comparison Test. The MGQT and Utah Test are similar in their implementation, except they use a different order of questions asked of the participant. Both tests are widely used in the polygraph community. All three polygraphists used the most advanced computerized polygraph machines. All three individuals independently found that Mr. Sharma was not being deceitful during the examination concerning questions asked. Both Mr. Evans and Mr. Stechsulte had their polygraph tests independently peer-reviewed prior to issuing a final report.

Id.

117. *Id.* at 1008 n.2.

118. *Id.* at 1008-09 (stating that "all three [examiners] believed that Mr. Sharma did not use any countermeasures to skew the test results and further, that the fact that he had more than one polygraph test did not have an adverse effect on the test results. Concerning the contention that the defendant may have been overtested, both Mr. Evans and Dr. Rovner were of the opinion that multiple testing posed no legitimate concern.").

119. *Id.* at 1010.

120. *State v. Sharma*, 875 N.E.2d 1002, 1010 (Ohio Ct. Com. Pl. 2007). *See State v. Davis*, 581 N.E.2d 1362, 1376 (Ohio 1991) (stating that "[t]he nature of polygraphs is different from traditional scientific tests. Most, if not all, scientific tests involve objective measurements, such as blood or genetic typing or gunshot residue. In a polygraph test, the bodily response of the examinee to his answers is dependant upon the subjective interpretation thereof by the examiner.").

121. *Sharma*, 875 N.E.2d at 1010.

Judge Hunter then outlined a policy argument for why it was fair to admit Sharma's unstipulated polygraph results.¹²² She reasoned that because the prosecutor's office itself regularly relies upon polygraphs to resolve cases, the office must accept the validity and reliability of polygraph testing.¹²³ In fact, the prosecutor's office had itself used William Evans, Sharma's pre-indictment examiner, on numerous occasions for investigatory purposes and by stipulation.¹²⁴ Yet, Judge Hunter observed that, "perhaps for policy or strategic reasons," in some cases the prosecutor's office chooses not to utilize polygraph testing.¹²⁵ Under *Souel's* stipulation rule, Judge Hunter argued that the prosecutor's office has "unfettered discretion . . . to pick and choose in which case a polygraph will be used."¹²⁶ In contrast, defendants wishing to introduce exculpatory polygraphs have "limited choice" in that they are not permitted to present polygraph evidence without the prosecution's approval.¹²⁷ In light of what she perceived as reliable polygraph evidence before her, Judge Hunter ultimately decided that to apply a strict stipulation requirement would unfairly curtail Sharma's Sixth Amendment right to present a defense.¹²⁸

B. Questions Arising from State v. Sharma

Unfortunately for interested observers, Judge Hunter's order was not ultimately appealed. The prosecutor's office attempted to file an interlocutory appeal immediately following the order admitting the

122. *Id.* at 1009-10.

123. *Id.* at 1009 (stating that "[t]his court notes that the Summit County Prosecutor's Office routinely uses polygraphs as a means to clear defendants after indictment. In fact, one of the top five reasons for the prosecutor's office dismissing an indictment during the year 2004 was because the polygraph or other test result cleared the defendant Furthermore, the prosecutor's office has used polygraphs as a means to resolve at least two sexual-offense cases since 2005. Thus the prosecutor's office regularly relies on the test to resolve certain cases. In doing so, the office apparently accepts the validity and reliability of the polygraph test process.").

124. *Id.* at 1007.

125. *Id.* at 1009.

126. *Id.*

127. *State v. Sharma*, 875 N.E.2d 1002, 1009-10 (Ohio Ct. Com. Pl. 2007) (stating that "[c]urrently, under the holding in *Souel*, the prosecutor's office has the right to refuse to stipulate to a polygraph test. This unfettered discretion gives the prosecutor the ability to pick and choose in which case a polygraph will be utilized. On the other hand, a defendant who wishes to utilize polygraph test results has limited choice and cannot present expert polygraph evidence in his defense unless the state consents.").

128. *Id.* at 1010 (stating that "[g]iven the quality of the polygraph examiners and the demonstrated reliability of the polygraph evidence, the overall advancements in polygraph testing, and the defendant's right to subpoena witnesses to assist in presenting a defense, this court finds that the polygraph test results shall be admitted.").

polygraphs, but the Ohio Ninth District Court of Appeals rejected the appeal as not ripe since it was a pre-trial evidentiary issue.¹²⁹ During the bench trial three months later, the prosecution itself ironically introduced some of the polygraph evidence in an attempt to show that Sharma made some contradictory statements.¹³⁰ Judge Hunter, however, was not swayed, and she ultimately found Sharma not guilty.¹³¹ After Sharma was acquitted, the prosecutor's office did not appeal Judge Hunter's admission of the unstipulated polygraph evidence.

The *Sharma* case raises a number of questions about the future of polygraph admissibility law and particularly unstipulated polygraphs. Some observers felt that the admission of unstipulated polygraphs in *Sharma* ultimately achieved equity, while others were bothered by Judge Hunter's lack of adherence to precedent and willingness to accept evidence that remains very controversial.¹³² Even assuming Judge Hunter came to a just decision in *Sharma*'s "unique circumstances," how far should the notion of admitting unstipulated polygraphs be extended?

That general question inevitably raises several more questions: If a defendant has taken and passed a private polygraph, should the prosecution at least have the right to retest the defendant with its own

129. *State v. Sharma*, No. 23747 (Ohio Ct. App. June 26, 2007) (order denying interlocutory appeal). The Ninth District's rejection of the state's appeal read:

R.C. 2945.67 permits the state to appeal certain trial court orders in a criminal matter. Depending upon the order, such an appeal may be taken as a matter of right or may require leave of court. Upon review of appellant's motion, we decline to grant leave to appeal the May 11, 2007 order. The May 11, 2007 order is an interlocutory, pre-trial evidentiary issue. Therefore, the issue is not yet ripe for appeal and the matter is premature.

Id.

130. Ed Meyer, *Man Found Not Guilty in Sexual Battery Case*, AKRON BEACON JOURNAL, Aug. 21, 2007, <https://antipolygraph.org/blog/?p=160> (stating that "[i]n [Judge] Hunter's pretrial decision allowing the three polygraphs, she set the condition that the evidence could be used only if Sharma testify [sic] and, in turn, subject himself to cross-examination. But as the prosecution's case was winding down . . . , the state played a 2 ½-hour DVD of one of the polygraph tests by Dr. Louis Rovner of Los Angeles in an apparent attempt to show how Sharma allegedly made contradictory statements to investigators [A]fter the prosecution opened the door to the polygraph evidence, defense lawyer Kirk A. Migdal decided there was no need for Sharma to testify, so he never took the stand in his own defense.").

131. *Id.*

132. Those who continue to view polygraphy as an oppressive "pseudo-science," like those at Antipolygraph.org, expressed their disappointment at Judge Hunter's decision to admit unstipulated polygraphs. See Antipolygraph.org, <https://antipolygraph.org/blog/?p=146> (last visited October 9, 2008) (noting that "[r]egardless of the merits of the case at hand, the outcomes of pseudo-scientific polygraph 'tests' should never be admitted as evidence in any court of law, or be relied upon in any way when it comes to the dispensing of justice."). This is anything but a fringe viewpoint, as it remains the view of a majority of states and courts throughout America. See *supra* Part II(A)(3).

examiner as a prerequisite to admission?¹³³ Should a defendant introducing unstipulated polygraph evidence always be required to testify in his own defense? Further, should it matter that a defendant has passed more than one polygraph? Should it matter whether the trier of fact will be a judge, as in *Sharma*, or a jury?¹³⁴ Should any of this be applicable in the civil context?

Perhaps the most important question is what impact, if any, *Sharma* will have on polygraph admissibility law in Ohio and nationwide. Was *Sharma* an aberration confined to these facts and this judge, or will the decision ultimately be seen as pioneering significant change? When change does eventually occur, what should that change look like?

IV. ANALYSIS

A. The Case against Polygraph Admissibility

Despite unquestionable advances in polygraph technology over the years, there remains a very strong case against polygraph admissibility.¹³⁵ The case against wider polygraph admissibility includes reliability/validity concerns, concern that polygraph evidence usurps the jury function, concern that polygraph evidence creates time-consuming collateral litigation, and even concern that widespread polygraph admission will place an unfair burden on a criminal defendant's Fifth Amendment rights.

1. Reliability and Validity Concerns

The polygraph's lie-detection procedure is fundamentally a psychological test.¹³⁶ As such, the scientific community evaluates

133. Stipulation alleviates this concern because it provides a mutually agreed polygraph examiner that uses methods and asks questions both parties have agreed to beforehand.

134. See *infra* notes 165-170 for the argument that polygraph evidence tends to usurp the jury function because juries give the evidence too much weight. This leads to the question: Would Judge Hunter have admitted the polygraph evidence if the case was to be tried to a jury?

135. New Mexico is the only state that generally allows admission of polygraph evidence without the parties' stipulation. See *supra* Part II(A)(4). New Mexico has also adopted a unique, separate rule of evidence dealing solely with polygraphs and providing specific procedures and reliability requirements. *Id.* Several other states have a stipulation requirement, and a majority of states ban polygraph evidence altogether. See *supra* notes 30, 71, and accompanying text.

136. Benjamin Kleinmuntz & Julian J. Szucko, *On the Fallibility of Lie Detection*, 17 LAW & SOC'Y REV. 85, 86 (1982). More specifically, the polygraph is "a psychometric device in the sense that it is a standardized instrument or systematic procedure designed to obtain a measure of a sample of psychological behavior." *Id.*

polygraph tests by the same standards required of all scientific tests, the most important being *reliability* and *validity*.¹³⁷ “Accuracy” is the common term for a type of validity known as criterion validity.¹³⁸

Reliability evaluates a test’s consistency in measuring its subject matter.¹³⁹ This consistency can be evaluated by measuring the extent of agreement in scores among individuals between test and retest, or by measuring the level of consensus attained among examiners who score their polygraph charts the same way.¹⁴⁰ Validity, on the other hand, evaluates the extent to which a test actually measures what it claims to measure.¹⁴¹ Thus, while a test may be *reliable* because it produces similar scores when given on different occasions or by different examiners, these scores will not be *valid* if they are not actually associated with the behavior in question.¹⁴² Simply stated, the validity question with respect to polygraphs is: Does the lie-detector actually detect lying?

Regarding polygraph reliability/validity, the Supreme Court illustrated the ongoing debate in 1998’s *United States v. Scheffer*,¹⁴³ where a plurality of the Court upheld the military rule of evidence banning all polygraph evidence in courts-martial.¹⁴⁴ The plurality did so

137. *Id.*

138. COMMITTEE TO REVIEW THE SCIENTIFIC EVIDENCE ON THE POLYGRAPH, THE NATIONAL ACADEMY OF SCIENCES, THE POLYGRAPH AND LIE DETECTION 31 (2003), http://books.nap.edu/openbook.php?record_id=10420&page=R1 [hereinafter POLYGRAPH REPORT]. The other type of validity is known as *construct validity*. *Id.* at 31-32. The difference between these two terms will be explained *infra* at note 141.

139. Kleinmuntz & Szucko, *supra* note 136, at 86.

140. *Id.*

141. *Id.* at 87. There are two types of validity, “criterion validity” (or accuracy) and “construct validity.” Criterion validity is an empirical concept, while construct validity is a theoretical concept. POLYGRAPH REPORT, *supra* note 138, at 31. Criterion validity (“accuracy”) refers to how well a measure, like polygraph results that purport to indicate deception/nondeception, match the phenomenon that the test is intended to capture, like the *actual* deceptiveness or truthfulness of the subject. *Id.* The proportion of correct judgments made by the polygraph examiner is a commonly used measure of “accuracy” for the polygraph test. *Id.* Construct validity, on the other hand, refers to how well explanatory theories and concepts account for performance of a test. *Id.* at 32. For example, the controversial theory behind polygraphs is that lying leads to psychological arousal, which in turn creates physiological arousal; the polygraph measures physiological responses that correspond to this arousal, like galvanic skin response, respiration, heart rate, and blood pressure; the polygraph’s measurements are processed, combined, and scored to compute an overall index, which is used to make a judgment about the subject’s truthfulness. *Id.* The construct validity of a polygraph test depends upon validity at every step of this theoretical chain. *Id.*

142. POLYGRAPH REPORT, *supra* note 138, at 32.

143. 523 U.S. 303 (1998). For a more complete discussion of this important case, see *supra* notes 35-39 and accompanying text.

144. *Id.* at 303, 312, 317. Military Rule of Evidence 707(a) provides:

over the defendant's Sixth Amendment right to present a defense argument largely because of its concern that "there is simply no consensus that polygraph evidence is reliable."¹⁴⁵ The Court added: "To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques."¹⁴⁶ In addition, the Court pointed out that even if polygraph technology was ultimately agreed to be reliable, questions would remain about the possible use of countermeasures to "fool" or "beat" the test.¹⁴⁷ The Court concluded that Military Rule of Evidence 707 is a "rational and proportionate" way of protecting against unreliable evidence, and suggested that individual jurisdictions might reasonably differ on the question of polygraph reliability and admissibility.¹⁴⁸

"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."

145. *Scheffer*, 523 U.S. at 309.

146. *Id.* The Court substantiated this statement with the following:

Some studies have concluded that polygraph tests overall are accurate and reliable. *See, e.g.*, S. ABRAMS, *THE COMPLETE POLYGRAPH HANDBOOK* 190-191 (1989) (reporting the overall accuracy rate from laboratory studies involving the common "control question technique" polygraph to be "in the range of 87 percent"). Others have found that polygraph tests assess truthfulness significantly less accurately - that scientific field studies suggest the accuracy rate of the "control question technique" polygraph is "little better than could be obtained by the toss of a coin," that is, 50 percent. *See* Iaono & Lykken, "The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests," in 1 *Modern Scientific Evidence*, § 14-5.3, at 629.

Id. at 310.

147. *Id.* at 310 n.6 (stating that "[e]ven if the basic debate about the reliability of polygraph technology itself were resolved, however, there would still be controversy over the efficacy of countermeasures, or deliberately adopted strategies that a polygraph examinee can employ to provoke physiological responses that will obscure accurate readings and thus 'fool' the polygraph machine and the examiner."); *see also* MCCORMICK ON EVIDENCE 319 (John W. Strong ed., 5th ed. 1999) (noting that "there are numerous countermeasures that a suspect can use to mislead the [polygraph examiner], some of which are said to be effective and difficult to detect. It is feared that if the polygraph came into widespread use in court cases, these could cause the rate of false negatives - saying that the suspect is telling the truth when he is lying - to become intolerably high.").

148. *Scheffer*, 523 U.S. at 312 (stating that "[t]he approach taken by the President in adopting Rule 707 - excluding polygraph evidence in all military trials - is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence. Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams. Individual jurisdictions therefore may reasonably reach differing conclusions as to whether polygraph evidence should be admitted. We cannot say, then, that presented with such widespread uncertainty, the President acted arbitrarily or disproportionately in promulgating a *per se* rule excluding all polygraph evidence.").

Validity is the more serious issue for polygraphs because those concerns strike at the fundamental assumptions forming the foundation of polygraph theory. Critics of polygraph validity argue that there is no reason to believe lying produces distinctive physiological changes characterizing it exclusively.¹⁴⁹ They argue that, at best, the polygraph registers physiological indicators of *anxiety*, which is not the same as consciousness of guilt or lying.¹⁵⁰ Kleinmuntz and Szucko illustrate the point:

No doubt when we tell a lie many of us experience an inner turmoil, but we experience a similar turmoil when we are falsely accused of a crime, when we are anxious about having to defend ourselves against accusations, when we are questioned about sensitive topics – and, for that matter, when we are elated or otherwise emotionally stirred.¹⁵¹

In 2003, the National Academy of Sciences released its landmark report, *The Polygraph and Lie Detection*, which focused largely on the question of polygraph validity.¹⁵² The report raised serious doubts about both the criterion and construct validity of polygraph testing.¹⁵³ The report also criticized research progress in the field of polygraphy and

149. Kleinmuntz & Szucko, *supra* note 136, at 87.

150. MCCORMICK ON EVIDENCE, *supra* note 147, at 319.

151. Kleinmuntz & Szucko, *supra* note 136, at 87.

152. POLYGRAPH REPORT, *supra* note 138, at 2 (noting that “[t]he committee’s charge was specifically ‘to conduct a scientific review of the research on polygraph examinations that pertains to their validity and reliability’ We have focused mainly on validity because a test that is reliable (i.e., produces consistent outcomes) has little use unless it is also valid (i.e., measures what it is supposed to measure).”).

153. *Id.* at 32, 212-14. The Academy summarized some of its findings on polygraph validity as follows:

Polygraph Accuracy: Almost a century of research in scientific psychology and physiology provides little basis for the expectation that a polygraph test could have extremely high accuracy. The physiological responses measured by the polygraph are not uniquely related to deception. That is, the responses measured by the polygraph do not all reflect a single underlying process: a variety of psychological and physiological processes, including some that can be consciously controlled, can affect polygraph measures and test results. Moreover, most polygraph testing procedures allow for uncontrolled variation in test administration (e.g., creation of the emotional climate, selecting questions) that can be expected to result in variations in accuracy and that limit the level of accuracy that can be consistently achieved.

Theoretical Basis: The theoretical rationale for the polygraph is quite weak, especially in terms of differential fear, arousal, or other emotional states that are triggered in response to relevant or comparison questions. We have not found any serious effort at construct validation of polygraph testing.

Id. at 212-213.

expressed a bleak view of the polygraph's potential for greater accuracy in the future.¹⁵⁴

a. Subjectivity and Multiple Variable Concerns

In *State v. Souel*,¹⁵⁵ the Ohio Supreme Court acknowledged that “the single most important variable affecting the accuracy of polygraph test results [is] the polygraph examiner.”¹⁵⁶ Even polygraph proponents agree that the examiner, not the machine, is the most crucial factor in achieving reliable results.¹⁵⁷ Critics have consistently charged that polygraph testing procedures require the examiner to inject a high degree of subjectivity into the examination.¹⁵⁸ A number of organizations, including the American Polygraph Association (APA) and the American Association of Police Polygraphists, conduct specialized and annual courses, but these organizations cannot compel attendance.¹⁵⁹ Most states require polygraph examiners to be licensed, but no uniform training standards or testing procedures exist.¹⁶⁰ The polygraph

154. *Id.* at 213. Regarding polygraph research progress and future potential, the Academy made the following conclusions:

Research Progress: Research on the polygraph has not progressed over time in the manner of a typical scientific field. It has not accumulated knowledge or strengthened its scientific underpinnings in any significant manner. Polygraph research has proceeded in relative isolation from related fields of basic science and has benefited little from conceptual, theoretical, and technological advances in those fields that are relevant to the psycho-physiological detection of deception.

Future Potential: The inherent ambiguity of the physiological measures used in the polygraph suggest that further investments in improving polygraph technique and interpretation will bring only modest improvements in accuracy.

Id.

155. 372 N.E.2d 1318 (Ohio 1978).

156. *Id.* at 1323.

157. See GIANNELLI & IMWINKELRIED, *supra* note 40, at 419-20. Giannelli and Imwinkelried note that:

The examiner's expertise is critical in (1) determining the suitability of the subject for testing, (2) formulating proper test questions, (3) establishing the necessary rapport with the subject, (4) detecting attempts to mask or create chart reactions or other countermeasures, (5) stimulating the subject to react, and (6) interpreting the charts.

Id.

158. See Brief of Petitioner-Appellant, *United States v. Scheffer*, No. 96-1133 (U.S. July 3, 1997), 1997 WL 367053, at *23; see also *State v. Davis*, 581 N.E.2d 1362, 1376 (Ohio 1991).

159. See GIANNELLI & IMWINKELRIED, *supra* note 40, at 421. The American Polygraph Association (APA) was founded in 1966. See American Polygraph Association, <http://www.polygraph.org> (last visited Oct. 10, 2008). The APA has accredited fourteen polygraph schools. GIANNELLI & IMWINKELRIED, *supra* note 40, at 420 n.22. One school is in Canada (Canadian Police College Polygraph School). *Id.* The rest are located in the United States, including two government-sponsored schools: DoD Polygraph Institute and the Texas Department of Public Safety Law Enforcement Polygraph School. *Id.*

160. GIANNELLI & IMWINKELRIED, *supra* note 40, at 420-21 (stating that “[o]ver half the states have licensing statutes, a number of which require continuing education (typically 20 hours

examiner's expertise is vital to any polygraph test, and critics claim that a substantial number of examiners lack adequate training and competence.¹⁶¹

Another concern along these lines is that the polygraph test is not replicable because it only tests a person's physiological reactions to questions posed at a particular time and place.¹⁶² The fear is that a person may produce a completely different polygraph chart in response to the same questions asked on a different day or in a different setting.¹⁶³ Courts have pointed to multiple variables that may influence the results of a particular polygraph test, including the physical and mental condition of the subject, the subject's attitude toward the examiner, the subject's use of alcohol or drugs, distractions in the examination setting, the extent of a guilty subject's subjective belief in his own innocence, and the phrasing of the examiner's questions.¹⁶⁴

per year) In some jurisdictions, the statute merely establishes an administrative agency, which is responsible for promulgating rules governing examiners.”). *See also* Brief for the State of Connecticut et al. as Amici Curiae in Support of Petitioner, *United States v. Scheffer*, 523 U.S. 303 (1998) (No. 96-1133), 1997 WL 370039, at *12 (arguing that, while polygraph examiners are required in many states to obtain a license, there are no uniform standards for training examiners and no uniform test procedures).

161. *See, e.g.*, *United States v. Alexander*, 526 F.2d 161, 164 n.6 (8th Cir. 1975) (stating that “[e]xperts in neurology, psychiatry and physiology may offer needed enlightenment upon the basic premises of polygraphy. Polygraphists often lack extensive training in these specialized sciences.”); *see also* David C. Raskin, *The Polygraph in 1986: Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence*, 1986 UTAH L. REV. 29, 66-67 (1986) (noting that “[p]erhaps the major problem with polygraph evidence and testimony is the present state of training and competence of polygraph examiners [A] substantial proportion of those who conduct tests in the public and private sectors lack adequate training and competence.”).

162. Brief for Petitioner, *supra* note 158, at *23 (stating that “[c]ourts have noted the highly subjective nature of polygraph testing. Because a polygraph examination tests a person's physiological reactions to questions posed at a particular time and place, the test is not replicable. Influences as varied as the emotional state of the subject on the day of the test, the room in which the polygraph is administered, the amount of sleep the subject has had the night before, and the number of cups of coffee the subject has consumed before the test may alter the physiological responses to questions.”).

163. *Id.*

164. *Id.* at *23 n.8. *See also Alexander*, 526 F.2d at 165 (stating that “[a]mong the numerous constituents which may individually or collectively operate to result in an inaccurate [polygraph] reading are: (1) the physiological abnormalities of the examinee, which may include high or low blood pressure, respiratory disorders and heart diseases, as well as a state of discomfort or extreme fatigue during the examination; (2) extreme nervousness or emotional tension by an innocent person who may believe that the polygraph will produce an inaccurate and inculpatory result; (3) anger or resentment toward the examiner or the questions asked; (4) inadequate or misleading phrasing of the questions by the examiner; and (5) a mental abnormality of the examinee, which may include psychosis, psychoneurosis or a psychopathic personality If the existence of these many variables is not detected and controlled, inaccurate or inconclusive results may be reached.”).

2. The Danger of Polygraph Evidence Usurping the Jury Function

The Supreme Court has long held that determining the weight and credibility of witness testimony is the “part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.”¹⁶⁵ The plurality in *Scheffer* forcefully argued that the Rule 707 ban on polygraph evidence also served to preserve the jury’s core function of making credibility determinations.¹⁶⁶ Writing for the plurality, Justice Thomas noted that “[a] fundamental premise of our criminal trial system is that ‘the jury is the lie detector.’”¹⁶⁷ Justice Thomas distinguished polygraph experts from other expert witnesses and explained why juries are naturally inclined to give polygraph evidence too much weight:

Unlike other expert witnesses who testify about factual matters outside the jurors’ knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth. Jurisdictions, in promulgating rules of evidence, may legitimately be concerned about the risk that juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering . . . a conclusion about the ultimate issue in the trial. Such jurisdictions may legitimately determine that the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt.¹⁶⁸

Particularly in light of the questions surrounding polygraph validity, it is reasonable to believe that juries will tend to regard polygraph results as more scientific than they are, and, as a consequence, afford them too much weight.¹⁶⁹ It also seems unlikely that a judge reading the jury a limiting instruction like the one adopted in *Souel* will realistically do much to curb this problem; in fact, certain limiting instructions may do more harm than good.¹⁷⁰

165. *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891).

166. *United States v. Scheffer*, 523 U.S. 303, 312-14 (1998).

167. *Id.* at 313 (quoting *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973)).

168. *Id.* at 313-14.

169. See MCCORMICK ON EVIDENCE, *supra* note 147, at 320.

170. The limiting instruction suggested by *Souel* and *Valdez* regarding stipulated polygraph evidence read as follows:

(4) [I]f such evidence is admitted the trial judge should instruct the jury that the examiner’s testimony does not tend to prove or disprove any element of the crime with which a defendant is charged but at most tends only to indicate that at the time of the examination defendant was not telling the truth. Further, the jury members should be

3. The Interest in Avoiding Collateral Litigation and Undue Delay

Because polygraphs remain so controversial, critics argue that attempts to admit polygraph results inevitably produce lengthy collateral litigation regarding the general validity of the polygraph and the reliability of specific results.¹⁷¹ In *Scheffer*, the Supreme Court plurality cited concerns about collateral litigation as another reason for upholding the military's polygraph ban: "A third legitimate interest served by Rule 707 is avoiding litigation over issues other than the guilt or innocence of the accused. Such collateral litigation prolongs criminal trials and threatens to distract the jury from its central function of determining guilt or innocence."¹⁷²

In fact, protracted battles between experts over polygraph tests have occurred even in jurisdictions with extensive experience litigating polygraph admissibility.¹⁷³ A frustrated Supreme Court of North

instructed that it is for them to determine what corroborative weight and effect such testimony should be given.

State v. Souel, 372 N.E.2d 1318, 1323 (Ohio 1978).

The author suggests that a limiting instruction with this "not telling the truth" language would in reality cause the jury to give the polygraph testimony *more* weight than it would otherwise. This is because it involves the *judge* telling the jury that the polygraph evidence tends to indicate the defendant was lying, likely giving the results an additional air of legitimacy in jurors' minds. A better version of this limiting instruction, without the "not telling the truth" language, is found at *Souel's* syllabus:

(4) If such evidence is admitted the trial judge should instruct the jury to the effect that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, and that it is for the jurors to determine what weight and effect such testimony should be given.

Id. at 1319.

171. Brief for Petitioner, *supra* note 158, at *29 (stating that "[b]ecause of the many elements of subjectivity associated with polygraphy and the lack of widespread acceptance of it in the scientific community, attempts to admit results of a polygraph examination will produce lengthy collateral litigation regarding the validity of the technique in general and the reliability of the test results in particular cases.").

172. *Scheffer*, 523 U.S. at 314. The plurality continued:

Allowing proffers of polygraph evidence would inevitably entail assessments of such issues as whether the test and control questions were appropriate, whether a particular polygraph examiner was qualified and had properly interpreted the physiological responses, and whether other factors such as countermeasures employed by the examinee had distorted the exam results. Such assessments would be required in each and every case.

Id.

173. *See, e.g.*, *Commonwealth v. Mendes*, 547 N.E.2d 35, 36-37 (Mass. 1989) (noting the evidentiary hearing on admissibility of polygraph results and motion for new examinations took four days of court time even though polygraph evidence had been permitted in Massachusetts courts for fifteen years). Citing reliability concerns, in *Mendes* the Supreme Judicial Court of Massachusetts struck down its previous rule allowing polygraph evidence and reinstated the *per se* inadmissibility of polygraph evidence in Massachusetts. *Id.* at 38-41. The previous rule was set out fifteen years earlier by the Court as follows:

[I]f a defendant agrees in advance to the admission of the results of a polygraph test

Carolina concluded that “the administration of justice simply cannot, and should not, tolerate the incredible burdens involved in the process of ensuring that a polygraph examination has been properly administered.”¹⁷⁴

4. Routine Polygraph Admission May Pressure Criminal Defendants to Forfeit Their Right against Self-Incrimination

There is also an interesting argument against wider polygraph admissibility from the *criminal defense* perspective. The concern here is that if a jurisdiction liberally admits polygraph evidence, the factfinder might presume that a criminal defendant who did not introduce polygraph evidence either failed or refused to take a test.¹⁷⁵ Particularly given the fact that the polygraph’s accuracy is disputed, this type of reasoning by juries might amount to an unfair burden on the criminal defendant’s Fifth Amendment right to remain silent.¹⁷⁶

regardless of their outcome, the trial judge, after a close and searching inquiry into the qualifications of the examiner, the fitness of the defendant for such examination, and the methods utilized in conducting the tests, may, in the proper exercise of his discretion, admit the results, not as binding or conclusive evidence, but to be considered with all other evidence as to innocence or guilt. As a prerequisite the judge would first make sure that the defendant’s constitutional rights are fully protected.

Commonwealth v. A Juvenile, 313 N.E.2d 120, 124 (Mass. 1974).

174. State v. Grier, 300 S.E.2d 351, 359 (N.C. 1983). The court continued:

If a trial court were to adequately police the reliability of [polygraph] results, the time required to explore the innumerable factors which could affect the accuracy of a particular test would be incalculable.

. . . [T]he criminal proceeding may degenerate into a trial of the polygraph machine

The introduction and rebuttal of polygraph evidence . . . could divert the jury’s attention from the question of the defendant’s guilt or innocence to a judgment of the validity and limitations of the polygraph.

Id. at 359-60.

175. RICHARD O. LEMPert & STEPHEN A. SALTzBURG, A MODERN APPROACH TO EVIDENCE 328 (2d ed. 1983). The rule that existed in Massachusetts from 1974 to 1989 is a good example of a liberal polygraph admissibility rule that may raise this type of concern. See *supra* note 173. It is certainly conceivable that a rule like this might compel criminal defendants to forfeit their right against self-incrimination and submit to polygraphs on a regular basis in order to avoid the appearance of guilt.

176. *Id.* (stating that “if juries knew that polygraph evidence [was] always admissible, they might draw a negative inference when such testimony was not offered, thus putting an additional price on the accused’s invocation of the Fifth Amendment right to remain silent.”). See also MCCORMICK ON EVIDENCE, *supra* note 147, at 320. The Fifth Amendment to the U.S. Constitution provides, in relevant part: “No person . . . shall be compelled in any criminal case to be a witness against himself” U.S. CONST. amend. V.

B. The Case for Further Polygraph Admissibility

1. Stipulation Rules that Allow the Prosecutor to Decide When Polygraph Evidence Will Be Used May Violate an Accused's Sixth Amendment Right to Present a Defense

The Compulsory Process Clause of the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor”¹⁷⁷ This means that criminal defendants have a constitutional right to obtain and present evidence helpful to their defense.¹⁷⁸ In criminal cases, the fact-finder’s decision almost always hinges on the credibility of the defendant and his witnesses.¹⁷⁹ Thus, it is not surprising that many criminal defendants have argued that the Compulsory Process Clause entitles them to present to the fact-finder evidence that they passed a polygraph test.¹⁸⁰

On several occasions the Supreme Court has struck down laws preventing the admission of exculpatory evidence.¹⁸¹ In *Washington v. Texas*,¹⁸² the Supreme Court struck down two Texas statutes governing the competency of co-defendants to testify because the statutes prevented an accused from introducing potentially exculpatory evidence.¹⁸³ The statutes invalidated in *Washington* provided that

177. U.S. CONST. amend. VI.

178. See, e.g., *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (stating that “[o]ur cases establish, at a minimum, that criminal defendants have the right to the government’s assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.”).

179. See Thomas K. Downs, *Admission of Polygraph Results: A Due Process Perspective*, 55 IND. L.J. 157, 180 (1979) (noting that “credibility is always at issue where witnesses testify before the court. The defendant’s credibility is often critical to the defense and may be directly supported by relevant, reliable polygraph results.”).

180. See, e.g., *supra* Part III(A) and notes 35-39 and accompanying text. The defendants in *Sharma* and *Scheffer* both argued that the Sixth Amendment supported admission of their potentially exculpatory polygraph evidence. *Sharma*’s argument was successful; *Scheffer*’s was not.

181. *Peeples, Bell & Guiffre, supra* note 27, at 88.

182. 388 U.S. 14 (1967).

183. *Id.* at 23 (holding that “the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor 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 that he had personally observed, and whose testimony would have been relevant and material to the defense.”). Jackie Washington, on trial for murder, wanted to present the testimony of Charles Fuller, a man who had already been convicted and sentenced for the same murder Washington was charged with. *Id.* at 16. The trial record indicated that, if permitted, Fuller would have testified that Washington pulled at him and tried to persuade him to leave, and that Washington ran before Fuller fired the fatal shot. *Id.*

“persons charged or convicted as co-participants in the same crime could not testify for one another, although [they could testify] for the State.”¹⁸⁴ In *Chambers v. Mississippi*,¹⁸⁵ the Supreme Court held that a Mississippi rule of evidence known as the “voucher” rule compromised the right of a defendant to call witnesses on his behalf.¹⁸⁶ In *Rock v. Arkansas*,¹⁸⁷ the Supreme Court applied *Washington* and *Chambers* to strike down a *per se* exclusion of hypnotically refreshed recollection.¹⁸⁸ The Court held that “[a] State’s legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case.”¹⁸⁹

Washington, *Chambers*, and *Rock* establish that, under certain circumstances, denying a criminal defendant the right to present exculpatory evidence may violate his constitutional right to present a defense.¹⁹⁰ There is no bright-line test, and the question must necessarily be resolved based on the facts of each case. A case-by-case analysis of Compulsory Process claims involving polygraph evidence is consistent with the view of scientific evidence developed in *Daubert*.¹⁹¹ In *Scheffer*, the Supreme Court plurality concluded that reliability and public policy concerns about the polygraph outweighed the defendant’s

184. *Id.* at 16-17. *Washington* is most famous for its holding that the Compulsory Process Clause applies to the *states* through the Fourteenth Amendment’s Due Process Clause because it is “a fundamental element of due process.” *Id.* at 19. The Fourteenth Amendment provides, in relevant part, “[n]or shall any State deprive any person of life, liberty, or property, without due process of law” U.S. CONST. amend. XIV, § 1.

185. 410 U.S. 284 (1973).

186. *Id.* at 284, 302-03. A Mississippi jury convicted Leon Chambers of murdering a policeman. *Id.* at 285. After Chambers’ arrest, a man named Gable McDonald made repeated confessions to the policeman’s murder, which he later recanted. *Id.* at 284, 287-88. Chambers’ main defense at trial was that McDonald actually committed the murder. *Id.* at 289. Because the prosecution did not call McDonald as a witness, Chambers had no choice but to call McDonald to the stand as a defense witness. *Id.* at 291. The Mississippi “voucher” rule did not permit a party to cross-examine his own witness unless the witness was shown to be “adverse.” *Id.* As a result, Chambers was unable to either cross-examine McDonald or to present witnesses who would have discredited McDonald. *Id.* at 294.

187. 483 U.S. 44 (1987).

188. *Id.* at 53-56, 62 (noting that “Arkansas’ *per se* rule excluding all post-hypnosis testimony infringes impermissibly on the right of a defendant to testify on his own behalf.”).

189. *Id.* at 61.

190. See Peeples, Bell & Guiffre, *supra* note 27, at 93.

191. See *supra* Part II(A)(2). New and novel scientific techniques clearly have a better chance of being admitted into evidence under *Daubert* than they did under *Frye*. If a new technique is found to be reliably scientific, the fact that it has not yet been “generally accepted” is no longer fatal. Under *Daubert*, the trial judge’s job in dealing with scientific evidence is quite different than it was under *Frye*. It is no longer enough for the judge to conduct a “head count” and allow scientific evidence only if enough experts in the field have accepted it. Instead, the judge must make her own case-by-case assessment of the reliability of the science, with general acceptance only one factor to consider.

Compulsory Process concerns.¹⁹² In *Sharma*, on the other hand, Judge Hunter concluded that Compulsory Process concerns outweighed reliability and other concerns about the polygraph.¹⁹³

V. CONCLUSION

Ohio could improve its approach to polygraph admissibility by removing stipulation as an absolute requirement, as this requirement is inconsistent with *Daubert's* spirit of trial judge discretion in dealing with novel scientific evidence.¹⁹⁴ However, given the strong arguments for restricting polygraph admissibility,¹⁹⁵ Ohio law should stop well short of encouraging the routine admission of polygraph evidence.

Rather than being an absolute requirement for polygraph admission, stipulation should be the standard guideline that Ohio judges follow in all but the most exceptional cases. If the State and defendant have entered into a stipulation agreement, courts should not simply presume that the polygraph evidence is reliable enough to qualify as relevant scientific evidence. If a test is found to be unreliable, a stipulation should not be honored and the polygraph evidence should not be admitted. On the other hand, in exceptional cases, judges should not be forced to bar defendants' polygraph evidence that they find to be otherwise relevant and reliable solely because the parties did not stipulate beforehand. In this scenario, however, the prosecution should have the right to retest the defendant with its own examiner and test questions, with the results to be admitted alongside the defendant's private polygraph results (provided they are also determined to be reliable). *Souel's* three other safeguards outside of stipulation should be retained in full.¹⁹⁶

192. *United States v. Scheffer*, 523 U.S. 303, 316-17 (1998).

193. *State v. Sharma*, 875 N.E.2d 1002, 1010-11 (Ohio Ct. Com. Pl. 2007).

194. *See supra* Part II(A)(2) and note 191.

195. *See supra* Parts IV(A)(1), (2), (3), and (4).

196. To review, those other safeguards are:

(2) Notwithstanding the stipulation, the admissibility of the test results is subject to the discretion of the trial judge, and if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.

(3) If the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:

- (a) the examiner's qualifications and training;
- (b) the conditions under which the test was administered;
- (c) the limitations of and possibilities for error in the technique of polygraphic interrogation; and,

As a general principle, polygraph experts should *not* be treated the same as any other expert, as the Ohio Supreme Court suggested in *Souel*.¹⁹⁷ The *Souel* court could not truly have believed the statement it quoted about treating polygraph experts the same as other experts, or it would not have created a stipulation requirement that in fact treats polygraph experts differently than other experts. The nature of a polygraph expert's testimony is fundamentally different from other scientific testimony.¹⁹⁸ The polygraph expert is presented as possessing scientific proof of a witness's veracity, making him a sort of expert character and credibility witness.¹⁹⁹ Polygraph evidence is consumptive of time, it may be given undue weight by jurors, and its reliability/validity remains a serious and controversial issue.²⁰⁰ Judges should take into account whether the trier of fact will be the judge herself or a jury, and polygraph evidence should be admitted less often where cases are being tried to a jury.

Because polygraph evidence differs significantly from other forms of scientific evidence,²⁰¹ Ohio and other states might benefit from a new and separate Rule of Evidence pertaining exclusively to polygraphs and constructing uniform standards for their admissibility. This rule might be similar to New Mexico Rule of Evidence 11-707, setting out particular and standardized requirements for how a "reliable" polygraph test is to be conducted.²⁰² A study of New Mexico Rule 707 and its successes and failures is beyond the scope of this Note, but this sort of information could aid in crafting a more effective rule. Highly regarded polygraphers should be consulted for suggestions. The new rule would work in concert with Ohio Rule of Evidence 702²⁰³ and *Daubert's* more general reliability requirements.²⁰⁴ Like the New Mexico Rule, the rule

(d) at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.

(4) If such evidence is admitted the trial judge should instruct the jury to the effect that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, and that it is for the jurors to determine what weight and effect such testimony should be given.

State v. Souel, 372 N.E.2d 1318, 1318-19 (Ohio 1978).

197. *Id.* at 1324 (stating, "[w]e see no reason why the polygraph expert should be treated in any more restrictive manner than other experts.>").

198. *See supra* note 168 and accompanying text.

199. *Id.*

200. *See supra* Parts IV(A)(1), (2), and (3).

201. *See supra* note 168 and accompanying text.

202. *See supra* note 48.

203. *See supra* note 29.

204. *See supra* Part II(A)(2).

should apply to the admission of polygraph evidence tending to show the truthfulness of *witnesses*. Thus, for a criminal defendant to introduce his own exculpatory polygraph results, he would have to take the stand in his own defense and subject himself to cross-examination.

As for polygraph technology, there have been enormous advances since Dr. Marsten introduced his primitive “lie-detector” device in the early twentieth century.²⁰⁵ Originally, polygraph machines crudely recorded only systolic blood pressure.²⁰⁶ As the technology evolved over the decades, measurement of breathing was added, computerized scoring was adopted, and most recently voice-stress analysis has been added to the list of measured variables.²⁰⁷ The constant advancement of polygraph technology should be taken into account in the admissibility analysis. Regardless, however, of the technology and its ability to provide reliable results, questions will always remain about the polygraph’s *validity* and true ability to detect lying.²⁰⁸ These concerns must be taken seriously.

In conclusion, Ohio could improve its approach to polygraph admissibility by removing stipulation as an absolute requirement but retaining it as the basic standard for trial judges to follow. Polygraph experts should not be treated the same as any other expert, and Ohio should adopt a new, separate rule of evidence dealing exclusively with polygraphs and the unique challenges that they present.

205. Morgan, *supra* note 66, at 116.

206. Barland, *supra* note 13, at 75.

207. Morgan, *supra* note 66, at 116.

208. *See supra* Part IV(A)(1)