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Posado and the Polygraph: The Truth Behind Post-Daubert Deception Detection

Jeffrey Philip Ouellet

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I. Introduction

Society views the law as a means of seeking truth and dispensing justice.[1] The issue of witness credibility lies at the heart of this search.[2] The law constantly seeks accurate methods of measuring witness credibility by either verifying truthfulness or detecting deception.[3] The most important scientific technique for assessing a witness's credibility is the polygraph test.[4] Nevertheless, courts have been extremely reluctant to embrace the use of polygraph evidence.[5]

This Note analyzes the role of polygraph evidence in federal criminal cases. Part II provides a brief introduction to the Federal Rules of Evidence governing admissibility of polygraph evidence.[6] Part III describes the different tests used to determine the admissibility of scientific evidence with special emphasis on *Daubert v. Merrell Dow Pharmaceuticals*, the most recent Supreme Court decision in the area.[7] Part III.A focuses on the Fifth Circuit's interpretation of *Daubert* as the case relates to polygraph evidence in *United States v. Posado*.[8] *Posado* is a revolutionary decision which

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1. *See* Barry Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System*, 26 HASTINGS L.J. 917, 920 (1975) (describing judicial duty of searching for truth and maintaining integrity).

2. *See* PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, 1 SCIENTIFIC EVIDENCE § 8, at 215 (2d ed. 1993) (noting that witness credibility plays prominent role in trials).

3. *Id.*; *see* Tarlow, *supra* note 1, at 920 (describing polygraph as method of measuring witness credibility and controlling perjury in court system).

4. *See* GIANNELLI & IMWINKELRIED, *supra* note 2, at 215 (observing that polygraph technique is most important of all deception detection tests).

5. *See* CHARLES A. WRIGHT & KENNETH GRAHAM, 22 FEDERAL PRACTICE AND PROCEDURE § 5169, at 99 (1978) (articulating belief of some commentators that courts have latent anxiety regarding polygraphs because of "Man v. Machine psychology" and, specifically, because of jurisprudential idea that polygraph machines represent invasion into areas best left to human resolution).

6. *See infra* Part II (describing Federal Rules of Evidence relevant to admissibility determination when polygraph evidence is at issue).

7. Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993); United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989) (en banc); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); *infra* Part III (reviewing pre-*Daubert* polygraph cases).

8. 57 F.3d 428 (5th Cir. 1995); *see infra* Part III.A (discussing *Posado* as interpretation of *Daubert* in context of polygraph evidence admissibility).

concludes that a per se ban on polygraph evidence is untenable after *Daubert*. Further, *Posado* articulates a three-step inquiry applicable to all cases in which there is an issue of polygraph evidence admissibility. The tripartite inquiry is not a monumental departure in the area of polygraph admissibility, but the Fifth Circuit's analysis is remarkably broad. Part III.B discusses how other United States Circuit Courts of Appeals responded to *Daubert* and how their responses differed from the Fifth Circuit's approach.[9] Part III.C analyzes the impact of the decision and examines how district courts in the Fifth Circuit have applied *Posado*.[10] Part IV describes the three primary arguments against admitting polygraph evidence: (1) that the polygraph is unreliable, (2) that the evidence has an undue impact on the jury, and (3) that defendants can manipulate results by using a friendly polygrapher. Part IV concludes that empirical analysis does not support any of these contentions.[11] Part V articulates a constitutional argument based on Due Process Clause and Confrontation Clause principles for admitting exculpatory polygraph evidence.[12] Part VI then analyzes the admissibility of polygraph evidence generally in criminal cases under the applicable Federal Rules of Evidence.[13] Finally, Part VII of this Note offers a pragmatic solution to the problem of when to admit polygraph evidence.[14]

II. The Applicable Federal Rules of Evidence

The admissibility of polygraph evidence implicates numerous Federal Rules of Evidence, including Rules 104(a), 401, 402, 403, 608(a), 702, and 703. Rule 104(a) states that a court shall make all determinations regarding

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9. United States v. Kwong, 69 F.3d 663 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1343 (1996); United States v. Sherlin, 67 F.3d 1208 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 795 (1996); Conti v. Comm'r, 39 F.3d 658 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995); *infra* Part III.B (noting reaction of other United States Circuit Courts of Appeals to *Daubert*'s treatment of polygraph evidence).

10. United States v. Dominguez, 902 F. Supp. 737 (S.D. Tex. 1995); Ulmer v. State Farm Fire & Cas. Co., 897 F. Supp. 299 (W.D. La. 1995); *infra* Part III.C (describing district court decisions addressing polygraph evidence in Fifth Circuit after *Posado*).

11. *See infra* Part IV (articulating primary concerns about admitting polygraph evidence in court and demonstrating that existing empirical data lends no support to those assertions).

12. *See infra* Part V (describing constitutional argument for admitting exculpatory polygraph evidence).

13. *See infra* Part VI (analyzing admissibility of polygraph evidence in criminal cases under relevant Federal Rules of Evidence).

14. *See infra* Part VII (articulating pragmatic solution to problem of when to admit polygraph evidence).

the admissibility of evidence.[15] Rule 401 governs the relevance of evidence and defines relevant evidence as any evidence tending to make the existence of any consequential fact more or less probable.[16] Rule 402 complements Rule 401 by stating that relevant evidence generally is admissible.[17] Rule 403 also governs relevance and notes that if the danger of unfair prejudice substantially outweighs the probative value of the evidence, then the court may exclude the evidence.[18]

Rule 608(a) states that evidence of truthful character is admissible only after a party has attacked a witness's character for truthfulness.[19] Rule 608(a) is important because it provides an evidentiary theory as to how courts may admit polygraph evidence generally.[20]

Rules 702 and 703 provide an alternative basis for polygraph admissibility.[21] Rule 702 provides that if scientific knowledge will assist the trier of fact in determining a fact at issue, then a witness qualified as an expert may give an opinion based on his or her specialized knowledge.[22] Rule 703

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15. *See* FED. R. EVID. 104(a) (noting that "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court").

16. *See* FED. R. EVID. 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

17. *See* FED R. EVID. 402 (asserting that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority" and that "[e]vidence which is not relevant is not admissible").

18. *See* FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

19. *See* FED. R. EVID. 608(a) (stating that "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise").

20. *See infra* notes 226-31 and accompanying text (discussing Rule 608 as evidentiary basis for admitting polygraph evidence).

21. *See infra* notes 22-23 (describing terms of Rules 702 and 703). Assuming the proffered polygraph evidence will assist the trier of fact, it is conceivable that a polygraphist could testify as an expert under Rule 702. Further, Rule 703 allows an expert to base an opinion on evidence that itself is inadmissible, so arguably the admissibility of polygraph evidence is a moot point because an expert may testify as to polygraph results pursuant to Rule 703. However, as a practical matter, courts simply do not accept such a theory, as evidenced by the consistent refusal of most courts to admit polygraph evidence.

22. *See* FED. R. EVID. 702 (noting that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise").

provides that so long as the inferences that provide the basis for the expert's opinion are of a type upon which other experts reasonably rely, then the facts or data underlying the theory need not be admissible.[23]

III. The Changing Standards for Admissibility of Scientific Evidence

The general distrust of polygraph evidence has a long and storied history in the United States judicial system and begins with the landmark case of *Frye v. United States*.[24] In *Frye*, the United States Court of Appeals for the District of Columbia Circuit considered whether to admit expert testimony based on a crude predecessor of the modern polygraph.[25] The court concluded that the evidence was inadmissible because the polygraph had not gained "general acceptance" in the relevant scientific community.[26] The general acceptance principle espoused in *Frye* became the threshold of admissibility for novel scientific evidence.[27] With a few exceptions, post-*Frye* federal courts overwhelmingly rejected polygraph evidence for nearly half a century.[28] In the early 1970s, however, the

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23. *See* FED. R. EVID. 703 ("The facts . . . upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field . . . the facts or data need not be admissible in evidence.").

24. 293 F. 1013 (D.C. Cir. 1923).

25. *See* Frye v. United States, 293 F. 1013, 1013-14 (D.C. Cir. 1923) (concluding that systolic blood pressure deception test had not gained enough scientific recognition among physiological and psychological authorities to justify court's admission of expert testimony deduced from test). In *Frye*, the United States Court of Appeals for the District of Columbia Circuit considered whether to admit into evidence the expert testimony of a psychologist who conducted a "systolic blood pressure deception test" on the defendant. *Id.* at 1014. Before his trial for murder, the defendant arranged to take this deception test, a precursor to the modern polygraph, in the presence of a scientific expert in hopes of bolstering his case. *Id.* Defendant's counsel asked that the witnessing expert be allowed to testify to the results of the blood pressure test. *Id.* The Government objected to the proffered testimony, and the court sustained that objection. *Id.* The defendant's counsel then offered to have the test conducted in the presence of the jury. *Id.* The court also denied this request. *Id.* The district court found the defendant guilty of second-degree murder. *Id.* at 1013. On appeal, the defendant argued that the district court should have admitted the expert's opinion because of the general rule that opinions of skilled witnesses are admissible in cases in which experienced persons are unlikely to prove capable of formulating an informed opinion on the offered evidence. *Id.* at 1014. The court of appeals determined that the test was inadmissible because the principles that provided the basis for the test had not gained sufficient recognition in the relevant scientific community, composed of psychologists and psychiatrists. *Id.*

26. *Id.* at 1014.

27. *Id.*

28. *See* Charles M. Sevilla, *Polygraph 1984: Behind the Closed Doors of Admissibility*, 16 U. WEST L.A. L. REV. 5, 7 (1984) (describing federal courts' propensity to reject poly-

federal courts made a tentative movement toward admitting unstipulated polygraph evidence in limited circumstances.[29] For the first time, courts accepted polygraph results in the absence of both parties' approval.[30] However, the trend in favor of admissibility that these cases seemed to foreshadow never materialized, although commentators of the time maintained that these decisions altered the judicial approach to polygraph evidence.[31]

In 1989, the United States Court of Appeals for the Eleventh Circuit issued a monumental decision in the area of polygraph law in *United States v. Piccinonna*.[32] The *Piccinonna* court determined that polygraph evidence is admissible in two specific instances: (1) when a two-party stipulation articulates the scope and purpose of admitting the polygraph evidence or (2) when used to impeach or to corroborate the testimony of a witness at trial.[33] In fact, some authors believed that *Piccinonna* could become the

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graph evidence from time of *Frye* decision until early 1970s).

29. *See* GIANNELLI & IMWINKELRIED, *supra* note 2, at 231 (discussing instances when court admitted polygraph evidence (1) as relevant to perjury issue, (2) during suppression hearing because court deemed polygraph technique as "generally accepted," or (3) at trial because polygraph was capable of producing highly probative evidence); *see also* Sevilla, *supra* note 28, at 8-9 (discussing generally judicial movement toward admitting unstipulated polygraph evidence in early 1970s).

30. *See* Sevilla, *supra* note 28, at 9.

31. *See* GIANNELLI & IMWINKELRIED, *supra* note 2, at 232 n.87 (citing multiple commentators who maintained that short-lived trend in favor of admissibility had some impact on judicial approach to polygraph evidence).

32. 885 F.2d 1529 (11th Cir. 1989).

33. *See* United States v. Piccinonna, 885 F.2d 1529, 1535-36 (11th Cir. 1989) (en banc) (finding that polygraph evidence is not inadmissible when both parties stipulate in advance as to circumstances of test and as to scope of admissibility or, alternatively, when used to impeach or to corroborate witness testimony at trial). In *Piccinonna*, the United States Court of Appeals for the Eleventh Circuit reconsidered the issue of the admissibility of polygraph expert testimony and examination evidence at trial. *Id.* at 1530. In 1983, a grand jury conducted hearings to investigate alleged antitrust violations in the garbage disposal business. *Id.* The defendant operated a waste disposal business in southern Florida, and the grand jury compelled him to testify on his dealings within the industry. *Id.* The grand jury granted Piccinonna immunity for the substantive information revealed in his testimony, but he was not protected from prosecution based on any perjury he might commit. *Id.* The defendant denied knowledge of the alleged antitrust violations. *Id.* Subsequently, several other witnesses from the industry contradicted the defendant's testimony by implicating him in the wrongdoing. *Id.* After being indicted on four counts of perjury, the defendant arranged to take a polygraph examination prior to trial. *Id.* He asked that the Government stipulate to allowing an expert testify regarding the polygraph results. *Id.* The Government refused the offer. *Id.* Nonetheless, the defendant took a test administered by a licensed polygraph examiner, and he asserted that the expert's report conclusively supported his claim that he had not misrepresented the truth in front of the grand jury. *Id.* The trial judge refused to admit the evidence based on

seminal case legitimizing polygraph evidence in the federal courts.[34] However, the *Piccinonna* ruling lost some of its luster when the Supreme Court chose to revisit the *Frye* standards regarding the general admissibility of scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[35]

Determining that the promulgation of the Federal Rules of Evidence superseded the *Frye* approach, the *Daubert* Court explicitly rejected the general acceptance standard.[36] Instead of applying *Frye*'s "aus-

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the Eleventh Circuit's per se exclusion rule regarding polygraph evidence. *Id.* After reviewing both traditional approaches and modern judicial standards, the court of appeals explicitly rejected its prior per se rule of exclusion. *Id.* at 1536. The *Piccinonna* court gave three reasons for its conclusion. *Id.* at 1535. First, polygraph testing had gained increased acceptance in the scientific community as a useful and reliable scientific tool. *Id.* Second, the court referenced the recent technological advances in the field. *Id.* Third, the *Piccinonna* court noted that there was no evidence that juries were unduly swayed by polygraph evidence. *Id.* The court of appeals then determined that there were two specific instances in which polygraph evidence could be introduced at trial. *Id.* at 1536. The first instance is when both parties stipulate in advance as to the circumstances of the test and the scope of its admissibility, and the second occasion is when the evidence is needed to impeach or corroborate the testimony of a witness at trial. *Id.* Consequently, the *Piccinonna* court decided that a per se rule disallowing polygraph evidence was no longer viable. *Id.* at 1535-36.

34. *See* W. Thomas Halbleib, Note, United States v. Piccinonna*: The Eleventh Circuit Adds Another Approach to Polygraph Evidence in the Federal System*, 80 KY. L.J. 225, 227 (1991) (asserting that *Piccinonna* decision represented substantial step toward judicial legitimacy of polygraph evidence).

35. 509 U.S. 579 (1993).

36. *See* Daubert v. Merrell Dow Pharm., 509 U.S. 579, 583-88 (1993) (determining that "general acceptance" is not precondition to admissibility of scientific evidence under Federal Rules of Evidence and that trial judge is responsible for ensuring that expert testimony is both reliable and relevant within meaning of Rules). In *Daubert*, the Supreme Court considered the admissibility of qualified expert testimony regarding whether the drug Bendectin caused birth defects even though this testimony was contrary to the vast body of epidemiological data concerning the drug. *Id.* at 583-85. Both the district court and the United States Court of Appeals for the Ninth Circuit concluded that the expert opinion was inadmissible because the principles that provided the basis for the testimony did not have sufficient general acceptance in the relevant scientific community. *Id.* The Supreme Court concluded that the adoption of the Federal Rules of Evidence superseded the *Frye* test. *Id.* at 587. Instead of adhering to the general acceptance test, the Court described a more flexible inquiry based on whether the proffered evidence was relevant and reliable under the language of the Rules. *Id.* at 589-95. The Court noted that Rules 401 and 402 are very liberal regarding the basic standards for relevance. *Id.* at 587. As for the reliability aspect, the Supreme Court described a four factor test to resolve the inquiry. *Id.* at 593-95. First, the court should ask whether the theory or technique can be and has been tested. *Id.* Second, the court should examine whether the theory or technique has been subjected to peer review and publication. *Id.* Third, the court should consider the potential rate of error as it relates to determining whether the evidence is reliable. *Id.* Finally, general acceptance can have a bearing on the reliability assessment, although it is no longer dispositive of the issue as it was under the *Frye* test. *Id.* Thus, the *Daubert* Court rejected the general acceptance test as the only indicia of admissibility. *Id.* at

tere"[37] standard, the Court enunciated a more flexible approach based primarily on the Federal Rules of Evidence.[38] Because the *Frye* Court did not find the general acceptance test in either the language or the legislative history of the Federal Rules of Evidence,[39] the Court concluded that the test no longer applied.[40] Instead, the Court determined that Rule 702 required a determination whether the proffered evidence was sufficiently reliable to be admissible as "scientific knowledge" and whether the proffered evidence was relevant by helping the trier of fact to "understand the evidence or to determine a fact at issue."[41]

Daubert is in many ways a cryptic decision[42] because both proponents and opponents of scientific evidence have found support in its language.[43] Justice Blackmun's majority opinion emphasizes the liberal nature of the Federal Rules of Evidence, particularly Rule 401.[44] A plain reading of Rule 401 suggests that the threshold for relevance is low,[45] and the *Daubert* opinion asserts that vigorous cross-examination, opposing evidence, and careful jury instruction remain the appropriate methods of attacking shaky but admissible evidence.[46] Furthermore, the Court's inquiry focuses on the principles and methodology used and not the conclusions that those principles generate.[47]

597-98. The Supreme Court vacated the decision of the Ninth Circuit and remanded the case for further proceedings in light of the new reliability and relevancy inquiry required by the Federal Rules of Evidence. *Id.* at 598.

37. *See id.* at 589 (implying that *Frye* general acceptance test is too inflexible and that new, four-part inquiry enables courts to have more discretion when making admissibility determinations).

38. *Id.* at 592-95.

39. *See supra* note 22 (describing terms of Rule 702).

40. *Daubert*, 509 U.S. at 598.

41. *Id.* at 589-92; *see supra* note 22 (quoting from Rule 702).

42. *See* Thomas J. Mack, *Scientific Testimony After* Daubert*: Some Early Returns from Lower Courts*, TRIAL, Aug. 1994, at 24 (describing *Daubert*'s apparent ambiguity and how individuals on both sides of scientific evidence debate use opinion to bolster their positions).

43. *See id.* (noting that *Daubert* decision contained language useful for all participants in scientific evidence debate).

44. *See* Daubert v. Merrell Dow Pharm., 509 U.S. 579, 587 (1993) (describing liberal standard of relevance in Rule 401).

45. *See supra* note 16 (providing terms of Rule 401 and specifically articulating applicable standard of relevance).

46. *See Daubert*, 509 U.S. at 596 (articulating counterchecks available if trial judge admits relatively weak evidence).

47. *Id.*

However, the text of the *Daubert* opinion is sufficiently ambiguous that opponents of admissibility also draw support.[48] Although general acceptance is no longer dispositive of the admissibility of proffered scientific evidence, it is one of the Court's four indicia of reliability.[49] The Court does not provide a method of weighing these indicia. Consequently, lower federal courts still could consider the *Frye* general acceptance principle as sufficiently important to supersede the other three factors mentioned in *Daubert*. Thus, *Daubert* merely provides a mechanism for a different analysis of polygraph evidence: it does not mandate such analysis.

A. Posado *as a Response to* Daubert *in the Context of Polygraph Admissibility*

The post-*Daubert* decisions initially indicated that the federal courts saw little difference between the *Frye* and *Daubert* standards as applied to polygraph evidence.[50] One commentator noted that courts had little difficulty shifting from a general acceptance test to a scientific validity analysis without any change in result.[51] In other words, methods that were generally accepted under *Frye* are relevant and reliable in *Daubert* terms, and methods that were not generally accepted are neither relevant nor reliable.[52] In concluding that polygraph evidence was inadmissible, one court went so far as to say that the *Daubert* test changed nothing.[53] Author Thomas J. Mack suggested that, after *Daubert*, a single test taking the form of Rule 702's requirements could determine the admissibility of all scientific evidence.[54] Rule 702 provides that if scientific knowledge will assist the trier of fact in

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48. *See* Mack, *supra* note 42, at 24 (emphasizing aspects of *Daubert* opinion that opponents of scientific evidence admissibility cite in order to exclude proffered evidence).

49. *See Daubert*, 509 U.S. at 593-95 (describing four factors Court specifically suggested that trial judges weigh when determining whether proffered evidence is reliable: (1) whether theory or technique can be and has been tested, (2) whether theory or technique has been subjected to peer review and publication, (3) what potential rate of error is, and (4) whether evidence has gained general acceptance).

50. *See* United States v. Black, 831 F. Supp. 120, 123 (E.D.N.Y. 1993) (stating that pre-*Daubert* rationale that excluded polygraph evidence still applies).

51. *See* Mack, *supra* note 42, at 24 (asserting that change from *Frye* general acceptance to *Daubert* scientific validity analysis has not changed results).

52. *See id.* (observing that *Daubert*'s new test had little impact on results in federal court system).

53. *See Black*, 831 F. Supp. at 123 (observing that nothing in *Daubert* changed how court analyzed polygraph evidence).

54. *See* Mack, *supra* note 42, at 25 (suggesting that *Daubert* could lead to single Rule 702 test).

determining a fact at issue, then a witness qualified as an expert may testify as to an opinion based on his or her specialized knowledge.[55] The implication is that so long as evidence survived the Rule 702 inquiry and assisted the trier of fact, it is immune to challenge under either Rule 403 or Rule 703.[56] In the specific area of polygraphs, courts typically employ Rule 403 as a basis for excluding polygraph evidence.[57]

In *United States v. Posado*,[58] the United States Court of Appeals for the Fifth Circuit reconsidered its prior conclusion that polygraph evidence was per se inadmissible for any purpose in a federal court.[59] In *Posado*, a jury convicted each of three defendants on one count of conspiracy to possess cocaine and on one count of possession with intent to distribute cocaine.[60] The central issue in the case was whether the defendants gave valid consent to a search of their luggage.[61] The defendants feared that the suppression hearing would degenerate into a "swearing match" with the officers testifying that the defendants consented to the search and the defendants testifying that they did not consent.[62] Consequently, both defendants arranged to take multiple polygraph examinations in an attempt to bolster their credibility.[63] Counsel for the defendants contacted the prosecution and offered the opportunity to participate in the polygraph

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55. *See supra* note 22 (providing terms of Rule 702).

56. *See* Mack, *supra* note 42, at 25 (noting that if courts applied single Rule 702 test, then Rules such as 403 and 703 would be meaningless in context of polygraph evidence); *see also supra* note 18 (discussing content of Rule 403); *supra* note 22 (describing terms of Rule 702); *supra* note 23 (quoting language of Rule 703).

57. *See, e.g.*, United States v. Dillard, 43 F.3d 299, 305 (7th Cir. 1994) (affirming district court ruling that limited cross-examination regarding polygraph responses of government witness because district court's Rule 403 balancing is afforded special degree of deference); Conti v. Comm'r, 39 F.3d 658, 663 (6th Cir. 1994) (stating "that unilaterally obtained polygraph evidence is almost never admissible under Evidence Rule 403"), *cert. denied*, 115 S. Ct. 1793 (1995); United States v. Crumby, 895 F. Supp. 1354, 1363-65 (D. Ariz. 1995) (allowing introduction of polygraph evidence for very specific and narrowly tailored purpose, although evidence meets Rule 702 standards due to Rule 403 concerns); United States v. Lech, 895 F. Supp. 582, 585 (S.D.N.Y. 1995) (asserting that court should not admit proffered polygraph evidence pursuant to Rule 403 even assuming evidence passes standards of Rule 702 and of *Daubert*).

58. 57 F.3d 428 (5th Cir. 1995).

59. *See* Barrel of Fun, Inc. v. State Farm Fire & Cas. Co., 739 F.2d 1028, 1031 (5th Cir. 1984) (discussing past polygraph case law in Fifth Circuit and general per se rule of exclusion).

60. United States v. Posado, 57 F.3d 428, 429 (5th Cir. 1995).

61. *Id.* at 429-30.

62. *Id.* at 430.

63. *Id.*

tests.[64] Additionally, the defendants offered to stipulate before taking the tests that the prosecution could use the results against them if the results indicated deception.[65] The prosecution declined the offers.[66] After the three defendants took polygraph tests and two different experts agreed that the elicited responses did not indicate deception, the defendants asked that the experts be allowed to testify at the suppression hearing or, in the alternative, sought a hearing on the admissibility of polygraph evidence under the applicable *Daubert* standard and the Federal Rules of Evidence.[67] Included in the defendants' proffer was a curriculum vitae for the experts, as well as the affidavit of another polygraph expert who asserted that the polygraph technique possessed sufficient scientific validity to be admissible.[68] The district court refused to consider the polygraph testimony and denied the request for a *Daubert* hearing.[69] At the close of the suppression hearing, the district court denied the defendants' motion to allow the polygraphists to testify and concluded that the defendants voluntarily consented to the search.[70] The district court then convicted the defendants of both conspiracy to possess cocaine and cocaine possession, and the defendants appealed.[71]

1. The Initial Step in the Inquiry: The Rule 104(a) Determination of Relevance and Reliability

On appeal, the Fifth Circuit found that its per se exclusionary rule was untenable after *Daubert*.[72] More specifically, the court of appeals outlined a three-step inquiry to assist lower courts in determining whether the courts should admit polygraph results: First, the court must determine if the evidence is relevant and reliable. Second, the court must determine if the evidence assists the trier of fact in determining a fact at issue. Third, the court must decide if the evidence has an unfairly prejudicial effect that would substantially outweigh its probative value.[73] The court of appeals noted that the *Daubert* Court held that the trial court must make an initial

64. *Id.* at 431.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 432.
71. *Id.*
72. *Id.* at 429.
73. *Id.* at 432-36.

determination pursuant to Rule 104(a) of the Federal Rules of Evidence as to whether the proffered evidence possesses both sufficient reliability to be admissible as "scientific, technical, or other specialized knowledge" and sufficient relevance to enable the trier of fact to understand better the evidence or the issue in the case.[74] The crux of the reliability inquiry is whether the evidence is based on a solid foundation rather than on a speculative belief.[75] The Fifth Circuit noted the many technological advances in the field of polygraph instrumentation and technique since the D.C. Circuit's decision in *Frye*.[76] In fact, research indicated that polygraph examinations were accurate between seventy percent and ninety percent of the time when administered under controlled conditions.[77] According to the Fifth Circuit, the primary problem with polygraph evidence was the variation in the qualifications of the examiner and in the quality of the surrounding environment.[78] However, federal courts routinely find other similar scientific evidence admissible,[79] and requirements for professional polygraphists have become standardized.[80] Furthermore, the polygraph is

74. *See id.* at 432 (citing Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993)); *supra* note 15 (providing terms of Rule 104(a)).

75. *See* United States v. Posado, 57 F.3d 428, 432-33 (5th Cir. 1995) (describing reliability inquiry in terms of whether proffered evidence has solid scientific foundation instead of speculative belief as basis).

76. *Id.* at 434.

77. *See id.* at 434 n.7 (listing resources which assert that polygraph evidence accurately detects truth or deception between 70% and 90% of time).

78. *See id.* at 434 & n.8 (citing United States v. Piccinonna, 885 F.2d 1529, 1540-41 (11th Cir. 1989)) (Johnson, J., concurring in part and dissenting in part) (noting research indicating that examiner expertise and test procedure affect accuracy and citing Ronald J. Simon, *Adopting a Military Approach to Polygraph Evidence Admissibility: Why Federal Evidentiary Protections Will Suffice*, 25 TEX. TECH L. REV. 1055, 1063-66 (1994) (discussing effect of examiner competence, countermeasures, and test integrity to accuracy of polygraph results)).

79. *See* Catherine M. Polizzi, *A New View into the Truth: Impact of a Reliable Deception Detection Technology on the Legal System*, 21 RUTGERS COMPUTER & TECH. L.J. 395, 406 (1995) (noting that courts often admit voice identification evidence although reported error rates vary greatly, whereas polygraph evidence is 85% to 95% accurate for computer and original examiner interpretation, but is routinely excluded); *infra* notes 291-94 and accompanying text (describing other types of scientific evidence that have variable error rates, but which courts routinely admit).

80. *Compare Posado*, 57 F.3d at 434 n.9 (describing several sources that indicate more uniformity in field of polygraph evidence and role of American Polygraph Association (APA) in ensuring competency of members), *with* David C. Raskin, *The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence*, 1986 UTAH L. REV. 29, 66-67 (asserting that many who conduct polygraph tests lack training and competence).

subject to extensive scrutiny in the scientific community,[81] and many employers, as well as the government, consider it an extremely useful tool.[82]

The second half of the initial Rule 104(a) inquiry concerns the relevance of the evidence.[83] The Fifth Circuit noted that the relatively low standard of relevance, as defined by Rule 401, makes this inquiry a pro forma one.[84] The court concluded that valid polygraph evidence always is relevant so long as it either corroborates or undermines the credibility of a contested witness.[85] Rule 608,[86] which does not allow rehabilitation of a witness whose credibility has not yet been attacked, is key to this inquiry and requires an examination of the underlying theory as to why courts admit polygraph evidence in the first instance.[87]

2. *The Second Step: The Role of Rule 702 in Polygraph Admissibility*

The second aspect of the admissibility test must conform to Rule 702.[88] Rule 702 governs the admissibility of expert testimony at trial and requires that the offered evidence assist the trier of fact in understanding the evidence or in determining a fact at issue.[89] Thus, Rule 702 has a threshold for admissibility similar to the Rule 104(a) inquiry.[90] The key distinction

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81. *See* United States v. Posado, 57 F.3d 428, 434 (5th Cir. 1995) (claiming that polygraph is subject to intense scrutiny in scientific community); *see also* U.S. DEP'T OF DEFENSE, *The Accuracy and Utility of Polygraph Testing* (1984), *reprinted in* 13 POLYGRAPH 1, 58 (Mar. 1984) (noting that there was more scientific research conducted on lie detectors in past six years than in previous sixty years).

82. *See* United States v. Piccinonna, 885 F.2d 1529, 1532 (11th Cir. 1989) (describing extensive use of polygraphs by government agencies such as FBI, Secret Service, military intelligence, and law enforcement agencies); *cf.* Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009 (1994) (prohibiting use of polygraphs in pre-employment screening and sharply curtailing permissible uses of polygraph in specific-incident investigations primarily because of privacy concerns).

83. *See supra* note 15 (describing terms of Rule 104(a)).

84. *Posado*, 57 F.3d at 432.

85. *See id.* at 433 (noting that if polygraph technique is valid measure of verisimilitude, then relevance inquiry is resolved even if technique contains uncertainties).

86. *See supra* note 19 (quoting language of Rule 608(a)).

87. *See infra* notes 226-31 and accompanying text (articulating theory as to why courts admit polygraph evidence in context of Rule 608(a)).

88. *See* United States v. Posado, 57 F.3d 428, 435 (5th Cir. 1995) (citing Daubert v. Merrell Dow Pharm., 509 U.S. 579, 591-92 (1993) (describing second aspect of admissibility test)).

89. *See supra* note 22 (describing contents of Rule 702).

90. *Compare supra* note 22 (describing Rule 702 requirement that proffered testimony

is that Rule 702 applies only to expert scientific testimony, whereas Rule 104(a) applies universally.[91]

3. *The Third Step: Rule 403 Balancing of Probative Value and Prejudicial Effect*

In the final step of the three-part inquiry, the trial court must apply Federal Rule of Evidence 403[92] to determine whether the polygraph evidence would have an unfairly prejudicial effect that would substantially outweigh probative value.[93] The *Posado* court explicitly described several factors that the district court should examine when making its determination on remand.[94] First, the defense contacted the prosecution long before the examiners conducted the polygraph tests; therefore, the prosecution had an opportunity to participate in the examinations.[95] Furthermore, the defendants agreed to stipulate before the polygraph examinations that the prosecution could introduce any results indicating deception if the prosecution would reciprocate and allow the introduction of any results that corroborated the defendants' claims.[96] Thus, both parties bore some risk in the outcome of the proposed examinations because the results would corroborate either the defendants' or the officers' version of the facts.[97] Because both parties bore some risk in the examination the Fifth Circuit determined that the situation reduced the possibility of unfair prejudice and enhanced the reliability of the evidence.[98] The court looked with disfavor on unilaterally obtained results because the defendants had no risk in such a situation: the accused simply would not offer the polygraph results if they were unfavorable.[99] Next, the court considered that the defendants sought to

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assist trier of fact in understanding evidence or in determining fact at issue), *with supra* note 15 (describing Rule 104(a) requirement that court make preliminary determination that evidence offered is relevant and reliable before deciding whether to admit evidence).

91. *Compare supra* note 22 (describing limited applicability of Rule 702 because Rule only applies to expert scientific testimony), *with supra* note 15 (describing applicability of Rule 104(a) to all potential evidence).

92. *See supra* note 18 (quoting language of Rule 403).

93. *See Posado*, 57 F.3d at 435 (organizing facts that district court should consider before deciding whether to admit polygraph evidence).

94. *Id.*

95. *Id.*

96. *Id.*

97. *See id.* at 431 (describing terms of offer made by defendants in attempt to persuade Government to participate in polygraph examinations).

98. *Id.* at 435.

99. *See id.* at 431 (implying that because defendant extended to prosecution offer to

introduce the evidence in a pretrial hearing before a judge, rather than at trial in front of a jury.[100] The presence of the judge as arbiter mitigated any possible prejudice that could have ensued in the pretrial proceedings.[101] The final factor the Fifth Circuit mentioned in determining whether the polygraph evidence would have an unfairly prejudicial effect was the need for the evidence, as measured by whether the evidence assists in clarifying conflicting factual accounts of the conduct at issue.[102]

Interestingly, the *Posado* court suggested that the trier of fact should decide between two plausible stories without the help of the proffered polygraph evidence.[103] Thus, the *Posado* court asserted that courts should not use polygraph results as "tie-breaker" evidence.[104] If some doubt existed as to the veracity of one version of the events, then the court of appeals would be more likely to admit the polygraph evidence to help resolve the dispute.[105]

In *Posado*, a substantial amount of evidence called the officers' version of the facts into doubt.[106] For example, the defendants in *Posado* spoke only Spanish, and only one Spanish-speaking officer was on the scene.[107] Therefore, that officer was the only law enforcement official who could testify as to what he had told the defendants, specifically with regard to the key issues of whether the defendants thought they were under arrest and whether they consented to a search of their luggage.[108] The Spanish-speaking officer testified at trial that he explained the search consent form to the defendants, yet the same officer was unable to read the consent form, which was written in Spanish, to the court at either the probable cause hearing or the suppression hearing.[109] In addition, the officers' recollections of events were questionable.[110] One officer testified incorrectly at the probable cause hearing that the defendants were traveling with one-way tickets and that this

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participate, probative value of results presumably was higher because prosecution could have used unfavorable results against defendant; thus both parties bore some risk in outcome of examination).

100. *Id.* at 435.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 436.
107. *Id.* at 435.
108. *Id.*
109. *Id.*
110. *Id.*

contributed to his reasonable suspicion that the defendants were transporting narcotics.[111] In fact, the defendants had round-trip tickets.[112] Furthermore, a disinterested witness, an airline employee, contradicted the officers' descriptions of the events surrounding the retrieval of the defendants' bags prior to the search.[113] Finally, at the suppression hearing, the defendants introduced an order from another district court that involved the Spanish-speaking officer and which called his credibility into question.[114] In a case factually similar to *Posado*, a judge had found that the Spanish-speaking officer's version of the events leading up to the search was "untruthful," and the court subsequently suppressed the evidence that the officer had obtained after the defendants allegedly consented to the search.[115] These inconsistencies convinced the court that there was a need for the polygraph evidence to clarify the competing factual accounts of the events.[116]

The third factor, the need for the evidence, has an interesting and perhaps anomalous repercussion.[117] The Fifth Circuit implied that had the polygraph results merely served the purpose of tiebreaker evidence between the conflicting factual accounts of the events in question, then the court would not have admitted the results of the examinations.[118] However, because independent evidence supported the defendants' version of the facts, the court looked more favorably on the results.[119] Therefore, the

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111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 435-36.

117. *See* Ulmer v. State Farm Fire & Cas. Co., 897 F. Supp. 299, 302 (W.D. La. 1995) (describing counterintuitive nature of Fifth Circuit's approach in *Posado*). The United States District Court for the Western District of Louisiana observed that, under the *Posado* rule, if the case is truly close, the evidence has less probative value and the court is less likely to admit the polygraph results. *Id.* However, if the court already doubts one party's version of events, then there is an increased probative value in the polygraph results because they help resolve latent ambiguity. *Id.*

118. *See* United States v. Posado, 57 F.3d 428, 435 (5th Cir. 1995) (noting that if polygraph evidence is mere tiebreaker evidence and trier of fact must decide between stories of relatively equal plausibility, then evidence may have less probative value as compared to prejudicial effect); *see also Ulmer*, 897 F. Supp. at 302 (interpreting *Posado* as stating that polygraph results used as tiebreaker evidence have less probative value).

119. *See Posado*, 57 F.3d at 435 (noting that there was increased need in this case because of numerous events that cast doubt upon officers' version of facts); *see also Ulmer*, 897 F. Supp. at 302 (suggesting that if one party in dispute raised serious questions about veracity of other party's version of events in question, then mechanical help in form of polygraph may have more probative value because it can resolve existing doubts).

court's last factor leads to a counterintuitive result, namely, that the court would allow polygraph examination results into evidence only in those cases in which the court already had a predisposition toward one party in the dispute.[120] If one party's version of events is subject to suspicion, then allowing the jury to hear polygraph evidence simply may help clarify the factual picture.[121] If, however, the case is very close, the court may prefer to have a panel of the party's peers — the jury — determine credibility.[122] This view may be a remnant of the antiquated jurisprudential notion that polygraphs invade human autonomy and therefore, are inappropriate in courts.[123] The *Posado* court implied that polygraph evidence should not be the deciding factor in close cases.[124]

In *Posado*, the Fifth Circuit described Rule 403 as a "gatekeeper" in the threshold admissibility determination.[125] The court suggested that Rule 403 should play an enhanced role, particularly when the proffered scientific evidence is novel or controversial.[126] In essence, the court of appeals

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120. *See Posado*, 57 F.3d at 435 (describing other independent evidentiary factors that led court to imply that it would admit polygraph evidence); *see also Ulmer*, 897 F. Supp. at 302 (elaborating on possibility of admitting polygraph results only when evidence is nonessential because of existing independent facts).

121. *Ulmer*, 897 F. Supp. at 302.

122. *Id.*

123. *See, e.g.*, United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975) (expressing concern that polygraph results offered into evidence are likely to distract jury from other equally persuasive evidence); United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974) (asserting that jury may ascribe aura of infallibility to scientific evidence); GIANNELLI & IMWINKELRIED, *supra* note 2, at 232 (positing that major objection to polygraph evidence is that jury may give "white coat" evidence unjustified weight in deliberations and thereby sacrifice its independence); WRIGHT & GRAHAM, *supra* note 5, at 99 (discussing "Man v. Machine psychology" and jurisprudential intuition that polygraphs invade human autonomy and deny due process by effectively dehumanizing justice system and taking ultimate decision away from jury of parties' peers); Benjamin Kleinmuntz & Julian J. Szucko, *On the Fallibility of Lie Detection*, 17 L. & SOC'Y REV. 85, 87 (1982) (alleging that theoretical underpinning of polygraph evidence — that deceit triggers detectable physical changes — is incorrect because lying does not produce measurable physical response). *But see* U.S. DEP'T OF DEFENSE, *supra* note 81, at 63 (claiming accuracy rates of 80% to 95% in criminal investigations that employ controlled testing); *infra* Part IV (citing studies that indicate the polygraph evidence is at least as reliable as other types of evidence regularly admitted by courts).

124. *See* United States v. Posado, 57 F.3d 428, 435 (5th Cir. 1995) (suggesting that court would not admit polygraph evidence solely as "tiebreaker" evidence when police officer and defendant have conflicting factual accounts, but rather in cases when there are other independent reasons to doubt one party's veracity).

125. *Id.*

126. *Id.*

implied that courts should use Rule 403 as a foil to ensure that the liberality of Rules 401 and 402 and the flexibility of the *Daubert* inquiry do not open the floodgates for scientific evidence.[127] In practice, however, federal courts do not use Rule 403 as a gatekeeper, but rather as a watchdog that consistently turns away polygraph evidence which otherwise is admissible under the Federal Rules of Evidence.[128]

B. Other Reactions to Daubert *in the United States Circuit Courts of Appeals*

In *Conti v. Commissioner*,[129] the United States Court of Appeals for the Sixth Circuit considered whether to admit polygraph evidence in a tax fraud case.[130] The Commissioner of Internal Revenue (Commissioner) concluded that the taxpayers, a husband and wife, filed incorrect tax returns.[131] The dispute centered on how much money the taxpayers had in their home because this figure was necessary to calculate the taxpayers' net worth.[132] After settling on a figure for net worth, the Commissioner penalized the taxpayers for fraud and understatement of income tax.[133] The taxpayers sued in the Tax Court and challenged the Commissioner's deficiency determination and the additional penalties imposed for fraud and understatement of income tax.[134] To support their version of the facts, the taxpayers

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127. *See id.* (asserting that Rule 403 may operate to exclude evidence otherwise admissible under Rule 702).

128. *See* United States v. Kwong, 69 F.3d 663, 668 (2d Cir. 1995) (finding that polygraph results were inadmissible under Rule 403 even assuming that results could be admitted under Rule 702), *cert. denied*, 116 S. Ct. 1343 (1996); United States v. Sherlin, 67 F.3d 1208, 1217 (6th Cir. 1995) (concluding that unilaterally obtained polygraph evidence was not, and usually will not be, admissible pursuant to Rule 403 despite defendant's reliance on *Daubert* and Rule 702), *cert. denied*, 116 S. Ct. 795 (1996); United States v. Dillard, 43 F.3d 299, 305 (7th Cir. 1994) (affirming district court's Rule 403 analysis that excluded polygraph evidence and noting that district court's balancing is afforded special degree of deference in relation to polygraph evidence); Conti v. Comm'r, 39 F.3d 658, 663 (6th Cir. 1994) (stating that unilaterally obtained polygraph evidence is almost never admissible under Rule 403), *cert. denied*, 115 S. Ct. 1793 (1995); United States v. Lech, 895 F. Supp. 582, 585 (S.D.N.Y. 1995) (finding that polygraph results were inadmissible under Rule 403, even assuming that results were admissible under Rule 702, because defendant's responses would not assist jury in its inquiry into facts).

129. 39 F.3d 658 (6th Cir. 1994).

130. *See* Conti v. Comm'r, 39 F.3d 658, 662 (6th Cir. 1994) (describing factual background of case), *cert. denied*, 115 S. Ct. 1793 (1995).

131. *Id.* at 660.

132. *Id.*

133. *Id.* at 661.

134. *Id.*

told an individual representing the Commissioner that they were each willing to undergo a polygraph examination to prove their innocence.[135] However, the Commissioner refused the offer.[136] Nevertheless, the taxpayers took polygraph tests without informing the court or the Commissioner.[137] At trial, the taxpayers attempted to introduce the results of these allegedly favorable examinations into evidence, but after an evidentiary hearing, the Tax Court concluded that the results were unreliable and therefore inadmissible.[138] The Tax Court relied on two pre-*Daubert* Sixth Circuit cases for its conclusion that unilaterally obtained polygraph evidence is almost never admissible under Rule 403.[139]

On appeal, the Sixth Circuit restated its strict rule of exclusion regarding unilaterally obtained polygraph evidence, rejected the taxpayers' appeal, and affirmed the Tax Court's ruling.[140] Additionally, the court rejected the idea that *Daubert* controlled under these circumstances and instead asserted that Rule 403 offers a separate and distinct basis for excluding polygraph results.[141] Apparently, the *Daubert* decision did not change the Sixth Circuit's perception of unilaterally obtained polygraph evidence.[142] Presumably, the Sixth Circuit's rationale for excluding unilaterally obtained polygraph evidence is that a defendant does not have an adverse interest in a unilateral examination because the defendant can choose not to offer unfavorable examination results.[143]

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135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 662 (citing Wolfel v. Holbrook, 823 F.2d 970, 972 (6th Cir. 1987) (finding that unilaterally obtained polygraph evidence is almost never admissible under Rule 403); Barnier v. Szentmiknosi, 810 F.2d 594, 597 (6th Cir. 1987) (same)).

140. *See id.* at 663 (articulating rule of exclusion regarding unilaterally obtained polygraph evidence).

141. *Id.* at 662-63.

142. *Compare Wolfel*, 823 F.2d 970, 973-75 (finding, in pre-*Daubert* case, that unilaterally obtained polygraph evidence is almost never admissible under Rule 403), *and Barnier*, 810 F.2d 594, 597 (same), *with* United States v. Sherlin, 67 F.3d 1208, 1216 (6th Cir. 1995) (applying strict rule of exclusion in post-*Daubert* case), *cert. denied*, 116 S. Ct. 795 (1996), *and* Conti v. Comm'r, 39 F.3d 658, 663 (6th Cir. 1994) (applying strict rule of exclusion regarding unilaterally obtained polygraph evidence), *cert. denied*, 115 S. Ct. 1793 (1995). Interestingly, *Daubert* had no impact on admissibility of unilaterally obtained polygraph exams in the Sixth Circuit whereas, in the Fifth Circuit, *Daubert* changed the court's view of some unilaterally obtained polygraph evidence, as exemplified by the *Posado* decision.

143. *See Wolfel*, 823 F.2d at 975 (asserting that defendant has no adverse interest in proceeding when defendant obtains results unilaterally).

In *United States v. Sherlin*,[144] the Sixth Circuit again considered the admissibility of unilaterally obtained polygraph evidence.[145] A jury convicted the defendant of arson, conspiracy to commit arson, and perjury for false grand jury testimony.[146] The defendant attempted to introduce unilaterally obtained polygraph results into evidence in an effort to boost his credibility, but the trial court denied his motion.[147] The trial court rejected the *Daubert* standards and based its denial of the evidence on Rule 403.[148] The Sixth Circuit applied a strict rule of per se exclusion for unilaterally obtained polygraph evidence and upheld the trial court's decision.[149] The court of appeals elaborated on its position by stating that, in the absence of a prior agreement between the parties that polygraph examination results are admissible, the probative value of the polygraph is substantially less because the defendant has no adverse interest in the proceeding and can only benefit from its results.[150] Further, the court stated that the results of any polygraph examination used solely to bolster a witness's credibility are "highly prejudicial," especially when credibility is central to the verdict.[151] Thus, *Sherlin* differs from *Posado* in one important respect.[152] In *Posado*, the defendants sought to have the polygraph results admitted to bolster credibility on a peripheral issue — whether the defendants consented before the officers searched the defendants' bags — whereas in *Sherlin*, the defendant wanted the results admitted to bolster his credibility regarding the ultimate issue of guilt or innocence.[153] Consequently, the Sixth Circuit reaffirmed

144. 67 F.3d 1208 (6th Cir. 1995).

145. United States v. Sherlin, 67 F.3d 1208, 1216-17 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 795 (1996).

146. *Id.* at 1211.

147. *Id.* at 1216.

148. *Id.*

149. *Id.* at 1217.

150. *See id.* (implying that probative value of polygraph evidence is partly contingent upon both parties having interest in outcome).

151. *Id.*

152. *Compare id.* (noting that defendant attempted to introduce polygraph results to bolster his credibility regarding issue to be decided by trier of fact), *with* United States v. Posado, 57 F.3d 428, 435 (5th Cir. 1995) (noting that defendant sought to have results admitted to boost credibility on peripheral issue — search — before judge in pretrial suppression hearing).

153. *See* United States v. Sherlin, 67 F.3d 1208, 1216 (6th Cir. 1995) (noting that defendant sought to introduce polygraph test results to prove that he did not lie to grand jury when he testified that he did not burn down dormitory), *cert. denied*, 116 S. Ct. 795 (1996); *Posado*, 57 F.3d at 429 (noting that defendant intended to have polygraph results introduced to boost credibility regarding search for narcotics, not for purpose of determining whether

both the approach in *Conti* and the idea that *Daubert* analysis is unnecessary when polygraph evidence fails to meet an independent Rule 403 threshold.[154]

The Sixth Circuit's opinions on polygraph evidence in the wake of *Daubert* clearly conflict with the Fifth Circuit's *Posado* opinion. Given the language in the Sixth Circuit's opinions, the Sixth Circuit likely would conclude that polygraph evidence is inadmissible in a *Posado*-type case for several reasons.[155] First, despite the *Posado* defendants' offer to stipulate to the admissibility of the results of the polygraph examinations, even if the results indicated that the search was proper, the Government refused to participate in the polygraph examinations.[156] Thus, under a strict application of the *Sherlin* per se rule, the Sixth Circuit likely would not admit any unilaterally obtained polygraph evidence under the initial Rule 403 test.[157] As a practical matter, the Sixth Circuit's decisions eliminate polygraph evidence from consideration in criminal cases so long as the prosecution refuses to participate in the tests.[158] Such a rule does not help promote the efficient administration of justice in a *Posado*-type case when evidence shows that the state violated a fundamental right[159] and when the government's refusal to participate in the examinations seems predicated on the possibility that the results will harm its case.[160] The premise of the Ameri-

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defendant actually possessed contraband).

154. *Sherlin*, 67 F.3d at 1217.

155. *See id.* at 1216 (excluding unilaterally obtained polygraph evidence and stating in dicta that unilaterally obtained polygraph evidence is almost never admissible under Rule 403).

156. *See Posado*, 57 F.3d at 435 (describing defendants' offer that polygraph evidence would be admissible no matter what results obtained, thereby ensuring risk for both parties).

157. *See Sherlin*, 67 F.3d at 1217 (excluding unilaterally obtained polygraph evidence pursuant to Rule 403); Conti v. Comm'r, 39 F.3d 658, 663 (6th Cir. 1994) (same), *cert. denied*, 115 S. Ct. 1793 (1995); Wolfel v. Holbrook, 823 F.2d 970, 975 (6th Cir. 1987) (same); Barnier v. Szentmiknosi, 810 F.2d 594, 597 (6th Cir. 1987) (same).

158. *See Sherlin*, 67 F.3d at 1216 (articulating Sixth Circuit rule that unilaterally obtained polygraph evidence is almost never admissible under Rule 403); *Conti*, 39 F.3d at 663 (same). From a tactical perspective, such a strict rule encourages the prosecution to refuse to participate if the evidence against the defendant in a criminal case is reasonably strong. Any negative results (results that indicate deception) from an examination do little to benefit the prosecution's case, yet a positive examination has the possibility of raising reasonable doubt in the mind of the trier of fact.

159. *See Posado*, 57 F.3d at 435-36 (describing circumstances which suggested that officers conducted illegal search).

160. *See id.* at 435 (describing numerous facts that cast doubt upon officers' version of events in question). For example, the court noted that the police officer was unable to read the search consent form in Spanish, despite the fact he allegedly read it to the defendants

can criminal justice system is that all defendants are innocent until proven guilty.[161] Yet the Sixth Circuit's view effectively deprives the defendant of a key method of bolstering his or her credibility in response to a government accusation.[162] Realistically, a defendant has a slim chance of prevailing when a trial comes down to the testimony of the accused versus the testimony of a police officer.[163] Although *Daubert* is susceptible to many interpretations, the intent behind the decision certainly was not to limit the possibilities for the accused to raise a successful defense.[164] The Sixth Circuit also opined that it usually would not admit polygraph evidence in cases in which witness credibility was at issue.[165] This rule places an inherent limitation on criminal defendants.[166]

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before searching their luggage. *Id.* In addition, there was a court order from a similar case in which a district court judge characterized the Spanish-speaking officer's conduct as untruthful so the court suppressed evidence confiscated from his search. *Id.* Finally, there was the testimony of a disinterested witness who contradicted the officers' claim as to how they retrieved the defendants' luggage. *Id.* All of these facts, taken as a whole, called into question the credibility of the officers, but arguably were not fatal to the prosecutor's case. However, the surrounding facts, coupled with a positive polygraph test result for the defendant, likely would provide reasonable doubt in the mind of the trier of fact.

161. *See* Tarlow, *supra* note 1, at 917 (describing presumption of innocence of all criminal defendants).

162. *See* United States v. Sherlin, 67 F.3d 1208, 1211 (6th Cir. 1995) (charging defendant with conspiracy, arson, and perjury), *cert. denied*, 116 S. Ct. 795 (1996); *Conti*, 39 F.3d at 661 (accusing husband and wife of fraud and understatement of income tax liability).

163. *See* Tarlow, *supra* note 1, at 917 (describing case in which Supreme Court of California deferred to implied finding that officer was truthful and that defendant was not). In *People v. West*, an officer testified under oath that the defendant obligingly opened a trunk to his car, handed the officer a shoebox with contraband in it, and told the officer that he could take whatever he wanted. People v. West, 477 P.2d 409, 412 (Ca. 1970). The defendant contradicted this testimony. *Id.* The trial court made an "implied" finding that the officer told the truth despite the fact that no rational person would have voluntarily given a box containing contraband to an officer with instructions to search it. *Id.*

164. *See* Mack, *supra* note 42, at 24 (observing that intent of *Daubert*'s more flexible inquiry was to relax requirements for admission of scientific evidence).

165. *See Sherlin*, 67 F.3d at 1217 (asserting that if credibility of witness is central issue, Sixth Circuit likely would not consider polygraph evidence).

166. *Cf.* McMorris v. Israel, 643 F.2d 458, 466 (7th Cir. 1981) (determining that refusal of prosecutor to enter into stipulation admitting polygraph evidence violated due process because prosecutor failed to articulate valid reason for refusing request). In *McMorris*, the prosecution presented a single witness, the victim, in a trial for strong-armed robbery. *Id.* at 459. The witness identified the defendant as the assailant. *Id.* However, the victim also testified that it was dark that night, that the whole incident was over quickly, that he never saw the defendant prior to the alleged incident, and that he could not describe the assailant to the police immediately after the incident. *Id.* The court acknowledged the

The United States Court of Appeals for the Second Circuit, on the other hand, takes a more moderate view with respect to polygraph evidence in the post-*Daubert* era.[167] In *United States v. Kwong*,[168] a jury convicted the defendant of attempting to murder an Assistant U.S. Attorney by sending her a briefcase with a bomb in it.[169] The defendant appealed the conviction on several grounds, most notably on the district court's refusal to allow a certified polygraph examiner to testify as to the results of an examination administered to the defendant.[170] The district court based its decision in part on the nature of the questions that the polygraph examiner asked.[171] The first relevant question that the examiner asked the defendant was whether the defendant had conspired with anyone to send the package to the Assistant U.S. Attorney.[172] The court concluded that this question clearly had little probative value because the defendant was not charged with conspiracy.[173] The second relevant question was whether the defendant sent the package to the Assistant U.S. Attorney.[174] Again, the court concluded that this question had little significance given the charge against the defendant; the defendant could have answered the question honestly and still could have constructed the bomb.[175] The court found that the defendant could have had an innocent third party send the package, and therefore, the defendant would not have conspired to send the bomb because the third

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inherent importance of credibility in such a case. *Id.* Subsequently, the court issued a ruling that admitted the polygraph evidence in the absence of a valid prosecutorial reason for failing to stipulate. *Id.* at 466; *see also* Tarlow, *supra* note 1, at 917 (describing case in which trial court made implied finding that police officer's version of events was accurate and defendant's version was not accurate despite seemingly implausible description of events by officer). Consider a scenario in which a defendant and a police officer are the only witnesses to an alleged crime. For nearly any crime that can be hypothesized, save perhaps some strict liability offenses (like failing to register for the draft), the credibility of the defendant and the officer clearly will be the key to the case. Accordingly, under the Sixth Circuit's precedents regarding the polygraph, the test results may not come into evidence even if there is other independent evidence either corroborating the defendant's version of the facts or refuting the police officer's assertions because credibility is still a key issue at the trial.

167. *See* United States v. Kwong, 69 F.3d 663, 668 (2d Cir. 1995) (excluding polygraph evidence in large part because phrasing of examiner's questions would mislead and confuse jury), *cert. denied*, 116 S. Ct. 1343 (1996).

168. 69 F.3d 663 (2d Cir. 1995).

169. *Kwong*, 69 F.3d at 664.

170. *Id.* at 665.

171. *Id.* at 668.

172. *Id.* at 667.

173. *See id.* at 668 (observing that prosecution did not charge defendant with conspiracy).

174. *Id.*

175. *Id.*

party would have participated unwittingly.[176] Thus, the defendant could have answered both of the questions truthfully yet still have committed the crime of the attempted murder of an Assistant U.S. Attorney.[177]

The Federal Rules of Evidence provided the Second Circuit with the threshold test.[178] The court of appeals noted that despite the relative liberality of the Rules when compared with the old *Frye* standard,[179] the Rules still require a showing that the proffered scientific evidence is both relevant and reliable.[180] Rule 702 mandates that the proffered evidence "assist the trier of fact."[181] The court questioned whether the defendant's responses would help the trier of fact resolve whether the defendant was guilty of the crime of attempted murder.[182] Even assuming that the proffered polygraph evidence would assist the trier of fact, the court concluded that Rule 403 excludes the results of the examinations.[183] The district court determined that the ambiguity inherent in the examiner's questions would mislead and confuse the jury, thus outweighing any probative value that the defendant's responses might have had.[184]

On appeal, the Second Circuit agreed with the district court's assessment and frankly discussed its general perceptions of polygraph evidence.[185] The court of appeals referred to *Posado* and noted that the "legal Pandora's box" opened by the Fifth Circuit in that case was not yet agape in the

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176. *See id.* (stating that defendant could have provided truthful response to second question of examiner and still have committed crime in question).

177. *See id.* (noting that defendant could have truthfully answered both questions and still have committed crime in question). The examiner's first question was whether the defendant conspired to send the bomb to the Assistant U.S. Attorney, but that question had no bearing on the charged offense because there is no element of conspiracy necessary in the crime of attempted murder of an Assistant U.S. Attorney. *Id.* The defendant also could have answered the second question truthfully, whether he sent the briefcase that contained the bomb to the U.S. Attorney, because he could have arranged for someone without knowledge of his plan to mail the briefcase. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *See supra* note 22 (quoting language of Rule 702).

182. *See* United States v. Kwong, 69 F.3d 663, 668 (2d Cir. 1995) (finding that district court did not abuse its discretion in excluding polygraph results because admission of those results would have misled and confused jury), *cert. denied*, 116 S. Ct. 1343 (1996); *see also supra* note 18 (articulating terms of Rule 403).

183. *Kwong*, 69 F.3d at 668.

184. *Id.*

185. *See id.* at 668-69 (describing *Posado* and how case at issue was not proper forum to reexamine validity of polygraph examinations under Rule 702).

Second Circuit.[186] However, the appellate court exhibited a more sympathetic view toward polygraph evidence and explicitly asserted that the factual record in *Kwong* simply did not provide a proper opportunity to revisit the issue of the validity of polygraph evidence.[187]

C. How District Courts in the Fifth Circuit Interpret Posado

The most interesting aspect of *Posado* is how district courts in the Fifth Circuit have applied its rationale.[188] In *United States v. Dominguez*,[189] the United States District Court for the Southern District of Texas considered a defendant's motion to introduce polygraph results into evidence.[190] The district court denied the motion at the *Daubert* hearing because it determined that the defendant was not able to clear the Rule 403 threshold of admissibility.[191] After the court's denial of the defendant's motion, the prosecution moved to dismiss the indictment against the defendant.[192] Nevertheless, because the court believed that the admission of polygraph test results could pose difficulties in the future, the court decided to issue a written order providing some guidance through the legal quagmire of polygraph admissibility.[193]

The district court denied the defendant's motion to admit polygraph results for several reasons.[194] First, the defendant did not invite the prosecution to participate during the pre-test and post-test interview process.[195] Second, the defendant refused to take a Government-sponsored polygraph unless the prosecution agreed to three demands.[196] The first condition was that the defendant's polygraphist or a representative from his defense team have the opportunity to observe the proceedings in their entirety.[197] The

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186. *See id.* at 668.

187. *See id.* at 669 (suggesting that court would not reconsider validity of polygraph evidence on factual record before it in *Kwong*, but implying more lenient view toward polygraph evidence in general).

188. *See* United States v. Dominguez, 902 F. Supp. 737, 738 (S.D. Tex. 1995) (refusing to allow defendant to introduce polygraph results).

189. 902 F. Supp. 737 (S.D. Tex. 1995).

190. *Dominguez*, 902 F. Supp. at 738.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 739-40.

195. *Id.* at 739.

196. *Id.*

197. *Id.*

second condition was that the Government could not conduct a post-test interview.[198] The final condition was that the Government would drop all charges if the defendant passed the Government's polygraph examination.[199]

The court found these prerequisites prejudicial and unreasonable, especially considering the defense examiner's testimony at the *Daubert* hearing.[200] The examiner testified that subsequent tests are not as reliable as the initial polygraph examination because the subject usually becomes more acclimated to the process.[201] In addition, expert testimony noted that to ensure reliability the examiner should administer the test to the subject with no other individuals present because other individuals could influence how, or if, the subject answered a question.[202] Essentially, the court found that the Government could not conduct a reliable test because of the unreasonable defense restrictions.[203] In particular, the court indicated that the defense's request that the Government dismiss all charges if the defendant passed the polygraph was unduly prejudicial.[204] These conditions effectively made the defendant unavailable for a Government polygraph because a result that corroborated the defendant's version of the facts would require dismissal of the charges no matter how compelling other evidence might be against the defendant.[205] The court concluded that these restrictions had the effect of denying the Government the opportunity to refute the results of the defense's prior polygraph examination.[206] In dicta, the district court took a step toward interpreting *Posado* by articulating ten factors relevant to the determination of when a polygraph test's probative value substantially outweighs its prejudicial effect.[207] Thus, the *Dominguez* decision is noteworthy because the Southern District of Texas provided a more specific analysis of the highly subjective Rule 403 test in the context of polygraph evidence.[208]

The ten relevant factors that the *Dominguez* court would have considered when deciding whether proffered polygraph evidence had sufficient probative value to ensure that it passed the Rule 403 threshold were:

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198. *Id.* at 740.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *See id.* (describing ten relevant factors in Rule 403 balancing test).

(1) that the parties have the opportunity to observe the proceedings;[209]

(2) that the parties make a binding commitment to allow either side to admit the results of the examination;[210]

(3) that the subject agree to be examined by a polygraph expert that the opposing party designates;[211]

(4) when the parties contemplate more than one examination, that the choice of who conducts the first examination take place by chance;[212]

(5) that all parties have the opportunity to attend the pre-test interview;[213]

(6) that all parties have the opportunity to attend the post-test interview;[214]

(7) that the subject agree to be examined to ensure that he or she did not have any drugs or sedatives in his or her body at the time of the exam;[215]

(8) that any rule that prohibits character evidence for truthfulness be waived;[216]

(9) that the examiner not ask questions regarding the mental state of the defendant at the time of the alleged commission of the crime;[217] and

(10) that the failure of the defendant to make himself or herself available to testify in the case be considered.[218]

The court concluded that a party need not meet all of these factors before it would admit polygraph results, but the court would weigh these considerations and note whether the parties made an effort to conform to the guidelines.[219]

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209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*; *see also* GIANNELLI & IMWINKELRIED, *supra* note 2, at 219 (noting importance of pre-test interview generally and describing functions of pre-test interview, which include acquainting subject with effectiveness of technique, assessing suitability of subject to testing, and formulating test questions with subject's assistance during interview).

214. United States v. Dominguez, 902 F. Supp. 737, 740 (S.D. Tex. 1995).

215. *Id.* *But see* Raskin, *supra* note 80, at 49-50 (asserting that drug use during commission of crime may adversely affect polygraph test accuracy, but noting that no support exists for idea that drugs injected before taking polygraph help defeat examination).

216. *Dominguez*, 902 F. Supp. at 740.

217. *Id.*; *see also* Raskin, *supra* note 80, at 46-47 (claiming that polygraph examinations that address specific factual issues produce more valid results than those that involve mental state issues).

218. *Dominguez*, 902 F. Supp. at 740.

219. *Id.*

The factors have many interesting dynamics.[220] For example, the court specifically explained that its first factor — that all parties have the opportunity to observe the proceedings — was not meant to imply that all parties must be in the room at the time of the examination.[221] Rather, the court suggested that both parties need to make arrangements so that they have representatives observing the proceedings through the use of hidden video cameras or similar devices.[222]

The court responded to the testimony of a polygraph expert in formulating factors number four and number seven.[223] Factor four, regarding choice of the first examiner, probably was a result of the defendant's expert testifying that no examination is as accurate as the first polygraph examination.[224] The seventh factor, whether to allow sedative or drug testing of the subject immediately prior to the polygraph, resulted from testimony by the defendant's expert that drugs or sedatives of any type could cause misleading or incorrect results.[225]

The eighth factor, which suggested waiver of any rule prohibiting the introduction of character evidence for truthfulness, implicitly addresses a potential problem with admitting polygraph evidence under the Federal Rules of Evidence.[226] Some courts accept polygraph-related testimony under the theory that polygraph results should be admitted because they can bolster a defendant's credibility in the face of an accusation by the government.[227] This theory is fine in the abstract, but Rule 608 of the Federal Rules of Evidence applies to the situation.[228] Rule 608(a)(2) states

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220. *See infra* notes 221-37 (describing interesting repercussions of *Dominguez* court's ten factors).

221. *See* United States v. Dominguez, 902 F. Supp. 737, 740 n.7 (S.D. Tex. 1995) (stating that representatives need not be in room, but rather ought to watch proceedings through other available means).

222. *Id.*

223. *Compare id.* at 740 (describing how defendant's expert testified that first polygraph examination is always most reliable and that drugs could cause misleading or incorrect results), *with id.* (listing as two of ten factors requirement that choice of first examiner be random and that subject be tested for drugs prior to examination).

224. *See id.* (describing how defendant's expert testified that first polygraph examination given is always most reliable examination and later noting that court considered this idea when listing its ten factors to consider under Rule 403 balancing).

225. *Id.* at 739.

226. *See id.* at 740 n.8 (discussing Rule 608 and how specific instances of witness's conduct, other than conviction of crime as Rule 609 provides, are not admissible for purpose of attacking or supporting witness's credibility).

227. *See* United States v. Posado, 57 F.3d 428, 429 (5th Cir. 1995) (asserting that defendants wanted to introduce polygraph results to corroborate their version of events in question).

228. *See supra* note 19 (quoting terms of 608(a)).

that a court may admit evidence of a witness's truthful character only after the opposing party has attacked the witness's character for truthfulness.[229] Further, as noted by the *Dominguez* court in a footnote, Rule 608(b) does not allow specific instances of a witness's conduct into evidence for the purpose of bolstering or attacking that witness's credibility.[230] The *Dominguez* court's answer to this conceptual problem was to suggest that the parties involved agree prior to the polygraph test to waive the applicable Federal Rules of Evidence that prohibit character evidence of truthfulness.[231]

The ninth factor articulated by the *Dominguez* court was that the expert could not ask questions that related to the mental state of the defendant at the time of the alleged crime.[232] Arguably, this factor is merely the court's method of ensuring that both parties observe Rule 704.[233] Rule 704(b) states that an expert witness may not state an opinion or an inference as to whether the accused possessed the mental state necessary to fulfill an element of a crime or a defense to a crime.[234] Without this disclaimer, a party might lose sight of Rule 704(b) and attempt to have a polygraphist testify to the defendant's state of mind.[235] Further, some polygraph experts assert that polygraph examinations which address specific factual issues produce more valid results than those that involve the mental state issue.[236] Thus, the district court likely articulated its ninth factor to ensure accuracy and to provide notice to future defendants that they cannot use the poly-

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229. *See* FED. R. EVID. 608(a)(2) (describing how "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise").

230. *See* United States v. Dominguez, 902 F. Supp. 737, 740 n.8 (S.D. Tex. 1995) (addressing impact of Rule 608(b) in context of factors court previously enunciated); *supra* notes 188-219 and accompanying text (providing discussion of *Dominguez*); *see also* FED. R. EVID. 608(b) (stating that "[s]pecific instances of conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence").

231. *Dominguez*, 902 F. Supp. at 740.

232. *Id.*

233. *See* FED. R. EVID. 704(b) (noting that "no expert witness testifying with respect to the mental state or condition of the defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged").

234. *Id.*

235. *See* United States v. Dominguez, 902 F. Supp. 737, 740 n.8 (S.D. Tex. 1995) (suggesting distinction between polygraph evidence generally and polygraph evidence that goes to issue of defendant's state of mind).

236. *See* Raskin, *supra* note 80, at 47-48 (noting that polygraph test should not require subject to draw inference or legal conclusion concerning alleged event, such as whether there was consent in sexual assault case).

graph as a method to circumvent Rule 704(b) by interjecting otherwise inadmissible evidence into a trial or a hearing.[237]

The United States District Court for the Western District of Louisiana took a slightly different view of *Posado* in *Ulmer v. State Farm Fire & Casualty Co.*[238] In *Ulmer*, the court considered whether to admit polygraph evidence that supported homeowners' claims that they did not commit arson.[239] After a fire destroyed their home and personal property, the homeowners filed a formal claim of damages with their insurance company.[240] The insurer, State Farm, refused to pay the damages and alleged that the homeowners caused the fire.[241]

The Louisiana State Fire Marshal investigated the plaintiffs as a result of State Farm's arson accusations.[242] An investigator with the Fire Marshal's office requested that the plaintiffs undergo polygraph examinations, to which the plaintiffs agreed.[243] A certified polygraphist administered the test with the Fire Marshal investigator present, and the polygraphist determined that the examination results supported the plaintiffs' contentions that they were not responsible for the fire.[244] Consequently, the Fire Marshal concluded that insufficient evidence existed to warrant further investigation of the plaintiffs' possible role in the fire.[245] Although the Fire Marshal released the investigation and the polygraph examination results to State Farm, the company still refused to pay any benefits owed under the policy.[246] The policyholders sued State Farm for breach of contract and for breach of an insurer's statutory duty to deal in good faith with insured parties.[247]

The district court began its analysis by noting that the Fifth Circuit abandoned its per se exclusionary rule regarding polygraph evidence in *Posado*.[248] The *Ulmer* court enunciated *Posado*'s three-step approach toward polygraph evidence.[249] The district court articulated the initial Rule 104(a)

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237. *See Dominguez*, 902 F. Supp. at 740 n.8 (suggesting that polygraph evidence that goes to state of mind has less value generally).

238. 897 F. Supp. 299 (W.D. La. 1995).

239. Ulmer v. State Farm & Cas. Co., 897 F. Supp. 299, 300 (W.D. La. 1995).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 301.

249. *Id.*

reliability inquiry, which included the four Rule 702 factors that the *Daubert* Court mentioned in its analysis.[250] Applying the *Posado* framework to the facts, the *Ulmer* court concluded that the polygraph examinations were sufficiently reliable to meet the threshold of admissibility.[251] The defendants argued that the polygraph results were not reliable because (1) the plaintiffs failed to provide the examiner's report as the district court ordered, and (2) the plaintiffs failed to list an expert — other than the administering polygraphist — who could testify regarding the reliability of polygraphs generally and of this examination in particular.[252] The court noted that polygraph experts review polygraph theory and technique extensively and that such experts have concluded that the examinations have a reasonable potential rate of error.[253] Further, the court noted that the Fire Marshal requested the examinations and required a government employee to administer and interpret the examinations.[254] These facts bolstered the examinations' reliability in the court's eyes,[255] and therefore, the district court found the proffered evidence reliable within the terms of Rule 702 as interpreted by *Daubert* and *Posado*.[256]

The second step in the process required the *Ulmer* court to determine the relevance of the proffered evidence.[257] The court noted that the Rule 401 relevance inquiry may be a pro forma inquiry in the case of polygraph evidence; if the polygraph technique at issue in the case accurately measures truthfulness, then relevance is not at issue.[258] After resolving the reliability inquiry, the district court quickly dismissed any concerns about relevance by referencing Rule 401's low standard for admissibility.[259]

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250. *See id.*; *see also* Daubert v. Merrell Dow Pharm., 509 U.S. 579, 593-95 (1993) (articulating four factors in Rule 702 inquiry); *supra* note 15 (quoting terms of Rule 104(a)).

251. Ulmer v. State Farm Fire & Cas. Co., 897 F. Supp. 299, 301 (W.D. La. 1995).

252. *Id.* at 302.

253. *See id.* (indicating that under controlled conditions polygraph technique accurately predicts truth or deception between 70% and 90% of the time). *But see* Rex Beaber, *Not Guilty by Reason of Polygraph*, 16 U. WEST L.A. L. REV. 27, 34 (1984) (asserting that polygraph accuracy rate is no greater than 50%).

254. *See Ulmer*, 897 F. Supp. at 302 (noting that government employee, rather than polygraphist employed by one party, administered examinations).

255. *Id.* (asserting that proffered testimony is supported by sufficient indicia of reliability to satisfy Rule 702 as interpreted in *Daubert* and *Posado*).

256. *See id.* at 303.

257. *See id.* (interpreting *Posado* to make relevance inquiry under Rule 401 mere formality once court determined that evidence met more exacting Rule 104(a) reliability inquiry).

258. *Id.* at 301-02.

259. *See id.* at 302-03 (making conclusory statement that because polygraph examina-

The third aspect of the *Posado* test — Rule 403 balancing — provided the bulk of the analysis in the *Ulmer* decision.[260] The court first addressed State Farm's claim that it faced a higher risk of prejudice because it did not have the opportunity to participate in the examinations or to select the examiner.[261] The court responded by noting that the plaintiffs — the homeowners — did not "select" the polygraphist and that the administering polygraphist had no interest in the outcome.[262] The court concluded that the circumstances surrounding the administration of the polygraph tests weighed in favor of admissibility.[263]

However, the district court also identified a factor that weighed against the introduction of the polygraph evidence.[264] The court noted that a jury would hear the proffered polygraph evidence, as opposed to the situation in *Posado*, in which the defendant attempted to offer the evidence before a judge at a suppression hearing.[265] The court determined that this distinction weighed in favor of exclusion.[266] The court further noted that if such a factor was dispositive by itself, then Rule 403 would prohibit introduction of polygraph evidence in jury trials; thus, the Fifth Circuit's explicit shift in *Posado* was meaningless in such cases.[267]

Finally, the court found a special need for the evidence because of the facts in this case.[268] Because the state Fire Marshal's office chose to close the investigation, independent evidence supported the plaintiffs' version of the events.[269] The court concluded that the polygraph results were not merely tiebreaker evidence and that this factor therefore weighed in favor of admissibility.[270] After considering all of the facts and circumstances surrounding the proffered polygraph evidence, the court concluded that the plaintiffs could question the polygraphist and Fire Marshal investigator

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tions presumptively were reliable under Rule 702 and standards set forth in *Posado*, examinations, therefore, must be relevant under Rule 401).

260. *See id.* at 301-04 (analyzing at length competing factors under Rule 403 that counsel for and against admitting polygraph evidence).

261. *Id.* at 303.

262. *Id.*

263. *Id.*

264. *Id.* at 303-04.

265. *Id.* at 304.

266. *Id.*; *see also supra* notes 58-128 and accompanying text (discussing *Posado* generally and specific procedural aspects of case).

267. Ulmer v. State Farm Fire & Cas. Co., 897 F. Supp. 299, 303-04 (W.D. La. 1995).

268. *See id.* at 304 (describing Rule 403 factor of special need and how findings of state Fire Marshal's office provided independent support for plaintiff's explanations of fire).

269. *Id.*

270. *Id.*

regarding both the administered examinations and the results obtained from the plaintiffs.[271]

IV. The Fallacies That Underlie the Exclusion of Polygraph Evidence

As evidenced by existing case law, most courts refuse to admit polygraph evidence.[272] The rationale behind the exclusion is twofold.[273] Opponents of admissibility argue that polygraph evidence has an unacceptably high error rate and, additionally, that the evidence has an undue influence on the jury.[274] A third criticism of polygraph evidence appears in the criminal context.[275] The "friendly polygrapher theory," posited by psychiatrist Martin Orne, suggests that when a defense-sponsored examiner administers a unilateral polygraph test, a guilty subject is more likely to pass the test because the polygraphist will report only favorable results.[276] Although all three of these theories seem plausible, the existing data simply provide no support.[277]

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271. *Id.*

272. *See* GIANNELLI & IMWINKELRIED, *supra* note 2, at 232 (noting that majority of jurisdictions still exclude polygraph evidence regularly).

273. *See* United States v. Alexander, 526 F.2d 161, 166-69 (8th Cir. 1975) (asserting that there is not sufficient scientific reliability to warrant admission of results of polygraph examination and that when polygraph evidence is offered, it is "likely to be shrouded with an aura of near infallibility"); United States v. Wilson, 361 F. Supp. 510, 512-14 (D. Md. 1973) (challenging reliability of polygraph evidence and asserting that technology is in "incipient stage of experimental research"); *see also* Edward J. Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 28 VILL. L. REV. 554, 564 (1982-1983) (asserting that two primary criticisms motivate exclusion of scientific evidence). It is worth noting that few federal courts explicitly have articulated these concerns since the mid-1970s, when many empirical studies indicated that these concerns were misplaced.

274. *See* Imwinkelried, *supra* note 273, at 564 (describing high level of error and jury's inability to evaluate complex testimony as two primary reasons for excluding scientific evidence).

275. *See* Raskin, *supra* note 80, at 60 (articulating "friendly polygrapher" theory that guilty subject is more likely to "beat" polygraph test when subject takes defense-sponsored examination because defendant does not fear adverse outcome, as polygraph results can only bolster case).

276. *See id.* (citing Martin Orne, *Implications of Laboratory Research for the Detection of Deception*, *in* LEGAL ADMISSIBILITY OF THE POLYGRAPH 94 (N. Ansley ed., 1975) (describing "friendly polygraphist" theory)).

277. *See* Imwinkelried, *supra* note 273, at 564-68 (listing studies asserting that eyewitness testimonial error is as frequent as, and less controllable than, scientific testimony, as well as studies which assert that jurors frequently reject polygraph testimony and return verdicts inconsistent with polygraphist's testimony); Polizzi, *supra* note 79, at 399 (noting that polygraph evidence is at least as reliable as eyewitness testimony and that it has acceptable error rate); Raskin, *supra* note 80, at 61-66 (concluding first that scientific literature contradicts rather than supports "friendly polygrapher" theory generally, and second, that available evidence indicates that polygraph evidence does not have undue influence on trier of fact).

Focusing on the strengths and weaknesses of polygraph evidence in the abstract is misleading.[278] Whenever a court excludes polygraph testimony, the court relies on other evidence to resolve the issue addressed by the polygraph evidence.[279] Therefore, the appropriate inquiry is not whether polygraph evidence is reliable given its error rate, but rather whether the evidence is reliable when compared with other types of evidence that courts routinely admit.[280]

A. The Reliability Argument

Although reported error rates for polygraph examinations vary, most observers concede an accuracy rate of at least eighty percent for polygraph examinations.[281] In contrast, researchers consistently find a high level of error in lay eyewitness identification testimony.[282] For example, a psychologist staged a simulated crime on a televised newscast and asked the viewing audience to identify the perpetrator from a lineup shortly after the event.[283] Of the 2145 viewers who responded, only fifteen percent correctly identified the perpetrator.[284] This figure is roughly equivalent to the percentage of viewers who could identify the perpetrator by guessing.[285] Additionally,

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278. *See* Imwinkelried, *supra* note 273, at 564 (asserting that critics of scientific evidence generally are misguided when they analyze scientific evidence without comparing it to other types of evidence).

279. *See id.* (describing how exclusion of some evidence necessarily encourages reliance on other forms of evidence).

280. *Id.*

281. *See* Bennett v. City of Grand Prairie, 883 F.2d 400, 404 (5th Cir. 1989) (asserting that, by most accounts, polygraph examinations correctly detect truth or deception 80% to 90% of time); Brown v. Darcy, 783 F.2d 1389, 1395 n.12 (9th Cir. 1986) (collecting studies of accuracy of polygraph results and noting that even most ardent polygraph detractors cite accuracy rates of 70%); Raskin, *supra* note 80, at 72 (claiming that existing literature suggests accuracy rate of 90% or higher when law enforcement officials conduct examinations to assess the credibility of suspects in criminal investigations).

282. *See, e.g.*, ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 8-19 (1979) (compiling empirical data on eyewitness testimony and generally describing inaccuracies associated with such testimony); A. DANIEL YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 228 (1979) (asserting that societal trust in accuracy of eyewitness accounts is misplaced); Robert Buckhout & Mark Greenwald, *Witness Psychology*, *in* SCIENTIFIC AND EXPERT EVIDENCE 1291, 1298 (Edward J. Imwinkelried ed., 2d ed. 1981) (describing author Buckhout's staging of simulated crime on televised newscast). After the simulated crime, 2145 viewers called in to try to identify the perpetrator from a lineup, yet only 14.7%, a figure roughly at the chance or guessing level, made the correct identification. *Id.*

283. *See* Buckhout & Greenwald, *supra* note 282, at 1298 (describing nature of simulated crime and results obtained from viewing public).

284. *Id.*

285. *Id.*

other types of routinely admitted lay testimony, such as excited utterances, which are admissible pursuant to the hearsay exception of Federal Rule of Evidence 803(2),[286] have a high probability of inaccuracy.[287] Further, the level of error in lay testimony is intractable, and very little can be done to aid the human processes of perception and memory.[288] In contrast, most of the error in polygraph results is attributable to the training and competence of the examiners, a readily curable problem.[289]

Not only do courts accept eyewitness testimony despite its inherent unreliability,[290] but courts frequently accept scientific evidence other than polygraph evidence so long as the scientific principles that support the expert testimony are reliable enough to ensure acceptably probative results.[291] For example, courts admit the results of Breathalyzer tests, radar speed-checking devices, various forensic tests, and neutron activation tests despite disagreement in the scientific community over how reliable the test results are.[292] Generally, courts admit scientific test results if they are "reliable enough to be probative" or if they provide "an aid to the jury."[293] In the case of poly-

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286. *See* FED. R. EVID. 803(2) (describing admissibility of excited utterances pursuant to hearsay exceptions).

287. *Compare* I. Daniel Stewart, Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 28 (noting that theory of admissibility of excited utterances under hearsay exceptions is faulty and that likelihood of inaccurate perception is high), *with, e.g.*, Bennett v. City of Grand Prairie, 883 F.2d 400, 404 (5th Cir. 1989) (asserting that polygraph results are accurate between 80% and 90% of time).

288. *See* Imwinkelried, *supra* note 273, at 566 (noting inherent limitations of human perception and memory).

289. *See* United States v. Posado, 57 F.3d 428, 434 (5th Cir. 1995) (asserting that remaining controversy about accuracy of polygraph tests is attributed almost unanimously to variations in surrounding environment and qualifications of examiner).

290. *See supra* notes 282-89 and accompanying text (discussing high probability of error in eyewitness testimony).

291. *See* Tarlow, *supra* note 1, at 938 (noting that courts which consider admissibility of most types of scientific evidence require only that expert testimony is reliable enough to insure reasonably probative results).

292. *See id.* at 938-39 n.107 (describing other types of scientific evidence and how apparent judicial hostility is manifested in higher threshold for admissibility of polygraph). For example, Tarlow discusses cases in which a court rejected proffered polygraph testimony based on the general acceptance theory while accepting Breathalyzer testimony despite the fact that the expert witness in the Breathalyzer case admitted that some scientists disagree with its accuracy. *Id.* The court concluded that in the case of the Breathalyzer, the differing opinions regarding accuracy went to the weight of the evidence and not to its admissibility generally. *Id.* Tarlow describes a similar pattern in the case of voiceprint analysis, *id.*, radar speedometers, *id.* at 939, various forensic tests, *id.*, and neutron activation tests. *Id.*

293. *Id.* at 939.

graph evidence, results often meet this low threshold, yet courts still tend to exclude the evidence.[294]

B. The Undue Influence Argument

The second major criticism of polygraph evidence is that jurors will attach too much weight to the proffered evidence and will not consider the evidence in its totality when reaching a verdict.[295] In fact, most of the empirical data support the contrary position.[296] A survey of the use of polygraph evidence in 220 cases in Wisconsin led one commentator to conclude that polygraph evidence does not assume undue influence in the evidentiary scheme.[297] Of the 220 cases, only eleven actually went to trial, and the court admitted the relevant polygraph evidence pursuant to a stipulation between the parties.[298] In the one case in which the polygraph examination results indicated that the defendant was truthful when he or she denied commission of the crime, the jury chose to convict in spite of the proffered polygraph results.[299] In the other ten cases — in which the test indicated deception on

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294. *See id.* (asserting that courts should admit polygraph evidence under probative value standard, but usually do not admit such evidence).

295. *See* United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975) (expressing concern that polygraph results offered into evidence are likely to be "shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi"); Michael Abbell, *Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials*, 15 AM. CRIM. L. REV. 29, 53 (1977) (asserting that use of polygraph machine lends degree of scientific objectivity that will mislead jurors into giving undue weight to polygraph examinations).

296. *See, e.g.*, Frederic J. Barnett, *How Does a Jury View Polygraph Examination Results?*, 2 POLYGRAPH 275, 276 (1973) (describing interviews with jurors in criminal case who heard testimony from qualified experts concerning likelihood of accuracy of polygraph examination and how jurors gave no formal consideration to polygraph evidence in reaching verdict of not guilty); Ann Cavoukian & Ronald J. Heslegrave, *The Admissibility of Polygraph Evidence in Court: Some Empirical Findings*, 4 LAW & HUM. BEHAV. 117, 123-24 (1980) (indicating that polygraph evidence only slightly influenced jurors, especially when court gave jurors cautionary instruction stating that polygraphs only had 80% accuracy rate); Robert B. Peters, *A Survey of Polygraph Evidence in Criminal Trials*, 68 A.B.A. J. 162, 165 (1982) (noting that results from 220-case sample in Wisconsin indicated that polygraph evidence can be presented in such manner that evidence does not assume undue influence in evidentiary scheme, and that in survey of nineteen lawyers involved in these cases, seventeen felt that polygraph evidence was "reasonable and intelligible," whereas only four felt that jury "disregarded significant evidence because of the polygraph testimony"); Tarlow, *supra* note 1, at 968 n.258 (1975) (noting that jurors frequently reject polygraph evidence and return verdicts inconsistent with polygraphist's testimony).

297. *See* Peters, *supra* note 296, at 164 (concluding that polygraph evidence did not assume undue influence in Wisconsin case sample).

298. *Id.*

299. *Id.*

the defendant's part — the jury voted to convict nine times and voted to acquit once.[300] Nineteen of the twenty-two attorneys involved in those trials also participated in an independent survey following resolution of all the cases.[301] Seventeen of the attorneys believed that the polygraph testimony was reasonable and intelligible; only four concluded that the trier of fact disregarded significant evidence because of the polygraph testimony.[302]

Another empirical study indicated that polygraph evidence only slightly influenced a group of simulated jurors and that the group of subjects weighed the polygraph evidence rather than blindly accepting it.[303] Further, when the court gave a cautionary statement and noted that polygraph evidence was accurate only about eighty percent of the time, the authors found that the simulated jurors weighed the polygraph evidence with greater reservations.[304] The authors concluded that jurisdictions that presently exclude polygraph evidence should reconsider the appropriateness of their approaches.[305]

In another study, an attorney interviewed eight members of a postverdict jury to determine the role that the polygraph test results played in deliberations.[306] The polygraph results supported the defendant's contention that he had not committed the alleged crime.[307] The interviewed jurors indicated that, despite the fact that several highly qualified experts testified as to the validity of the polygraph technique, the jurors did not consider the test results in rendering a verdict.[308] In fact, the jurors stated that they resolved the case based on other evidence that the defendant presented at trial.[309] A separate simulated experiment found that jurors spent only four percent of their deliberation time discussing polygraph evidence and that some jurors dismissed it without mention.[310] Because existing data indicate that jurors

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300. *Id.*

301. *Id.*

302. *Id.*

303. *See* Cavoukian & Heslegrave, *supra* note 296, at 123-24, 127 (asserting that subjects of survey considered polygraph evidence in light of other existing evidence instead of blindly accepting it).

304. *See id.* at 124 (noting that judge's cautionary ruling that polygraph evidence is accurate only roughly 80% of time mitigated effect associated with inclusion of polygraph results).

305. *See id.* at 131 (concluding with statement that polygraph evidence may raise *reasonable* doubt as to whether party committed act in question, but that it would not, in authors' opinion, raise *unreasonable* doubt).

306. *See* Barnett, *supra* note 296, at 276 (describing interviews with jurors).

307. *Id.* at 275.

308. *Id.*

309. *Id.*

310. *See* Alan Markwart & Brian E. Lynch, *The Effect of Polygraph Evidence on Mock*

spend little or no deliberation time discussing polygraph results, it is difficult to argue that the evidence has undue influence.

In 1983, the Supreme Court of New Mexico adopted a provision for the use of polygraph evidence in its courts after concluding that the polygraph was a useful tool.[311] New Mexico Rule of Evidence 707 requires that polygraph examiners have minimum qualifications,[312] regulates the admissibility of results,[313] and regulates the notice required for polygraph examinations.[314] Since the adoption of Rule 707, the quality of the polygraph evidence offered and admitted in New Mexico courts has improved, and the frequency of polygraph testimony has decreased.[315]

Jury Decision-Making, 7 J. POLICE SCI. & ADMIN. 324, 329 (1979) (describing how tape recordings of jury deliberations in simulated felony-murder trial documented how little time jurors devoted to polygraph evidence).

311. *See* N.M. R. EVID. 11-707(B)-(E) (describing minimum qualifications of polygraph examiner, admissibility of polygraph results, required notice of examination, and required recording of pre-test interview and actual testing).

312. *See* N.M. R. EVID. 11-707(B) (articulating minimum qualifications of examiner). The minimum qualifications for an examiner in New Mexico include at least five years experience in administration or interpretation of polygraphs (or equivalent academic training) conducted in accordance with other provisions of Rule 707 and completion of at least twenty hours of continuing education in the field of polygraph examinations during the twelve month period prior to the administration of the examination. *Id.*

313. *See* N.M. R. EVID. 11-707(C) (noting that opinion of polygraph examiner may, at trial judge's discretion, be admitted as evidence of truthfulness of any person called as witness if examiner who performed test is qualified as expert within terms of rule and other conditions are met). Assuming the examiner is qualified, polygraph results are admissible pursuant to Rule 11-707 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 relevant questions were asked during the examination; and (5) at least three charts were taken of the examinee. *Id.*

314. *See* N.M. R. EVID. 11-707(D) (requiring any party who intends to introduce polygraph evidence at trial to serve opposing party written notice of such intent not less than thirty days before trial). In addition to providing notice, a party that wishes to introduce polygraph results is responsible for delivering to its adversarial party: (1) a copy of the polygraph examiner's report, if any; (2) a copy of each chart; (3) a copy of the audio or video recording of the pretest interview; and (4) a list of any prior polygraph examinations taken by the examinee in the matter under question, including the names of all persons administering such examinations, and the dates and the results of the examinations. *Id.*

315. *See* Raskin, *supra* note 80, at 72 (describing trend of higher quality of polygraph evidence in court and decreased use of polygraph testimony generally since New Mexico Supreme Court adopted Rule 707).

C. The Friendly Polygrapher Theory

Finally, a major challenge to defense-sponsored, unilaterally obtained polygraph evidence in criminal cases is psychiatrist Martin Orne's friendly polygrapher hypothesis.[316] Under this theory, when a defense-sponsored examiner administers a polygraph test on a confidential basis, a guilty subject is more likely to beat the test than if the individual who administers the examination is independent and reports the results regardless of whether the results are favorable or adverse.[317] The premise of Orne's theory is that if the subject anticipates the disclosure of favorable results, then the subject will have more confidence because an adverse outcome will not harm the subject's case.[318]

Dr. David Raskin asserts that Orne's hypothesis is illogical in the context of criminal cases for two reasons.[319] First, subjects have no assurance that the polygraphist will not disclose adverse results.[320] Second, subjects do have a stake in the outcome of the examination because they might obtain a dismissal of the charges if they pass the polygraph test.[321] Failing the test, however, could lead to increased legal costs and personal stress.[322] Thus, although the friendly polygrapher theory may sound reasonable, scientific literature generally contradicts it.[323]

V. A Constitutional Perspective as to Why Polygraph Evidence Should Be Admissible

Supporters of polygraph admissibility claim that a defendant's constitutional right to present a defense mandates the introduction of favorable

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316. *See id.* at 60 (articulating and explaining friendly polygrapher theory and its origins).

317. *See id.* (describing assumptions of friendly polygrapher theory) (citing Martin Orne, *Implications of Laboratory Research for the Detection of Deception*, *in* LEGAL ADMISSIBILITY OF THE POLYGRAPH 94 (N. Ansley ed., 1975)).

318. *Id.* at 61.

319. *See id.* at 62 (describing how basic premise of friendly polygrapher hypothesis is flawed because subjects have no assurance that adverse results will not be disclosed and because failure to pass polygraph can cause increased legal costs and additional personal stress to accused).

320. *Id.*

321. *Id.*

322. *Id.*

323. *See id.* (asserting that existing scientific literature does not support friendly polygraphist hypothesis); Howard W. Timm, *Effect of Altered Outcome Expectancies Stemming from Placebo and Feedback Treatments on the Validity of the Guilty Knowledge Technique*, 67 J. APPLIED PSYCHOL. 391, 397 (1982) (describing how results of study did not support Orne's friendly polygraphist theory).

polygraph results into court.[324] Although a New Mexico appellate court has found that a defendant has a due process right to present critical and reliable defense evidence in the form of polygraph evidence,[325] few federal courts have accepted this argument.[326]

The procedural due process argument originated in 1973, when the Supreme Court concluded that exclusionary rules are subject to stricter review when they conflict with a criminal defendant's due process rights and when a state's policy justification is not substantial.[327] Applying this rationale to polygraph evidence leads to the conclusion that when the examination results are reliable and relevant within the terms of Rule 104(a) and are critical to the accused's defense, then the accused has a due process right to present the results absent a compelling state justification for exclusion.[328]

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324. *See* GIANNELLI & IMWINKELRIED, *supra* note 2, at 242 (noting that some polygraph supporters believe that constitutional right to present defense mandates introduction of exculpatory polygraph evidence).

325. *See* New Mexico v. Dorsey, 532 P.2d 912, 914-15 (N.M. Ct. App. 1974), (finding that district court exclusion of polygraph evidence was error when reliability of polygraph examination was not in question, defendant's credibility was central to case, and polygraph results indicated that defendant was telling truth with respect to his claim of self-defense even though state refused to stipulate to tests before trial), *aff'd on other grounds*, 539 P.2d 204 (N.M. 1975).

326. *See* GIANNELLI & IMWINKELRIED, *supra* note 2, at 243 (noting that limited number of courts accept constitutional argument and that there is little precedential value in cases in which courts did accept constitutional argument). *But see* McMorris v. Israel, 643 F.2d 458, 466 (7th Cir. 1981) (finding that prosecution's refusal to stipulate to polygraph results without offering valid ground for refusal violated due process because state law admitted stipulated polygraph results); Jackson v. Garrison, 495 F. Supp. 9, 11-12 (W.D.N.C. 1979) (finding that exclusion of polygraph evidence denied defendant fair trial), *rev'd*, 677 F.2d 371 (4th Cir. 1981).

327. *See* Chambers v. Mississippi, 410 U.S. 284, 300-03 (1973) (determining that Mississippi trial court's application of traditional hearsay rules deprived criminal defendant of opportunity to confront adverse witness effectively and to introduce exculpatory probative evidence and therefore violated his due process rights).

328. *See* Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 814 (1976) (noting that admission of polygraph evidence to substantiate defendant's veracity or to discredit government witness would be compelled in most cases because such evidence usually is critical and outweighs government concern of unreliability of polygraph results, especially given (1) volume of literature which indicates that polygraphs are accurate at least 70% of time and (2) less restrictive alternative of allowing prosecution to cross-examine and offer rebuttal evidence to discredit accused's polygraph results); Thomas K. Downs, Note, *Admission of Polygraph Results: A Due Process Perspective*, 55 IND. L.J. 157, 166 (1979) (noting how extrapolation from *Chambers* suggests that defendant has due process right to present exculpatory polygraph results absent sufficiently compelling countervailing state interest); Debra S. Katz, Note, State v. Dean*: A Compulsory Process Analysis of the Inadmissibility of Polygraph Evidence*, 1984 WIS. L. REV. 237, 274 (concluding that once polygraph evidence is shown to be reliable and

Most federal courts have refused to accept such a theory,[329] and they continue to hold polygraph evidence inadmissible absent a stipulation between the parties.[330] However, a few notable opinions seem to adopt a compulsory process rationale toward the admissibility of polygraph evidence.[331]

In *Jackson v. Garrison*,[332] a defendant sought to introduce favorable polygraph results in an effort to bolster his credibility.[333] Two extremely

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critical within factual context of case, state rule mandating exclusion absent stipulation between parties may be unconstitutional under due process analysis); Paul Thomas, Comment, *Compulsory Process and Polygraph Evidence: Does Exclusion Violate a Criminal Defendant's Due Process Rights?*, 12 CONN. L. REV. 324, 351 (1980) (asserting that absent compelling state interest which can be furthered only by exclusion, courts should admit polygraph on behalf of most criminal defendants under Sixth Amendment right to compulsory process); Timothy J. Walsh, Comment, *Polygraph Admission Through Compulsory Process*, 16 AKRON L. REV. 761, 780 (1983) (concluding that compulsory process clause applies to defendant's exculpatory polygraph evidence absent compelling state interest for exclusion).

329. *See, e.g.*, Bashor v. Risley, 730 F.2d 1228, 1238 (9th Cir. 1984) (rejecting broad proposition that there is constitutional right to present polygraph evidence); United States v. Gordon, 688 F.2d 42, 44-45 (8th Cir. 1982) (same); Milano v. Garrison, 677 F.2d 374, 375 (4th Cir. 1981) (same); Jackson v. Garrison, 677 F.2d 371, 373 (4th Cir. 1981) (same); United States v. Glover, 596 F.2d 857, 867 (9th Cir. 1979) (same); Conner v. Auger, 595 F.2d 407, 411 (8th Cir. 1979) (same); United States v. Bohr, 581 F.2d 1294, 1303 (8th Cir. 1978) (same).

330. *See* United States v. Black, 684 F.2d 481, 483 (7th Cir. 1982) (concluding that federal prosecutor's unexplained refusal to stipulate to polygraph test, in light of overwhelming evidence of defendant's guilt, did not violate due process); Conner v. Auger, 595 F.2d 407, 411 (8th Cir. 1979) (finding that trial court's exclusion of unstipulated polygraph evidence did not deprive defendant of fair trial).

331. *See* McMorris v. Israel, 643 F.2d 458, 466 (7th Cir. 1981) (determining that prosecutor violated due process when, acting in adversarial capacity, he exercised unfettered discretion in refusing to stipulate to polygraph examination that could have produced significant exculpatory evidence without providing appropriate reason for refusal on record); Jackson v. Garrison, 495 F. Supp. 9, 11 (W.D.N.C. 1979) (deciding that exclusion of polygraph evidence denied defendant constitutional right to fair trial), *rev'd*, 677 F.2d 371 (4th Cir. 1981).

332. 495 F. Supp. 9 (W.D.N.C. 1979).

333. *See Jackson*, 495 F. Supp. at 11 (concluding that exclusion of polygraph evidence denied defendant fair trial). In *Jackson*, a North Carolina trial court refused to allow the defendant to introduce testimony at his trial for robbery which indicated that he successfully had passed numerous polygraph examinations. *Id.* at 10. Subsequently, the jury convicted the defendant of robbery, and the defendant filed a petition for habeas corpus. *Id.* The district court first noted that Claude Gilliken, the North Carolina State Bureau of Investigation's chief polygraph examiner from 1963 to 1975, administered three examinations to the defendant at the request of J. Mac Boxley of the North Carolina Board of Parole. *Id.* All three tests indicated that there was no deception in the defendant's negative responses to questions directed at his possible involvement in a robbery. *Id.* Frank Faulk, a retired chief polygraph examiner for the South Carolina Law Enforcement Division and a former president of the APA, also examined the defendant at the request of the Attorney General of South Carolina in connection with an extradition request. *Id.* Faulk concluded that the defendant truthfully

well-qualified polygraphists administered the examinations.[334] However, a North Carolina court refused to allow the polygraphists to testify, and the jury convicted the defendant.[335] On appeal, the United States District Court for the Western District of North Carolina considered whether the state court's exclusion of the exculpatory polygraph evidence deprived the defendant of a fair trial.[336] The district court noted that the two individuals who administered the polygraph examinations tested the defendant because of third-party requests, not at the request of defense counsel.[337] The court further noted that the polygraphists had impressive credentials: one of the polygraphists was a former president of the American Polygraph Association.[338] Both polygraphists indicated that the responses to polygraph examinations are ninety-five percent to ninety-six percent accurate for individuals of normal intelligence.[339] The court analogized the polygraph to many other mechanical devices, such as speedometers and thermometers, and noted that society relies on these and many other mechanical instruments to make routine decisions regarding speed, distance, and other measures,[340] despite the fact that nearly all of these machines have failures or shortcomings.[341] The court asserted that a machine's shortcomings go only to the weight of the mechani-

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responded to all questions. *Id.* Both examiners indicated that for individuals of average intelligence, polygraph responses are 95% to 96% accurate. *Id.* The court mentioned that under the most recent case on polygraph evidence in North Carolina, the court excluded evidence because it was not reliable enough. *Id.* The district court responded to this criticism by noting that a polygraph, like the speedometer, the thermometer, and even the eyeball, is a device that reads or observes data and enables the operator to come to a conclusion. *Id.* at 11. Further, the court asserted that everyone relies on these types of instruments every day, and that none of them, especially the human eye, is infallible. *Id.* In fact, the human eye is far less than 95% accurate. *Id.* The court concluded that the failures and shortcomings of these devices are weighed accordingly by the court, but such weighing does not decide the question whether they should come into evidence generally. *Id.* In the case of polygraph evidence, the court noted that the polygraph reading is at least as reliable as many other methods of proving that someone is lying, such as reputation, shiftiness of eyes, or clarity of gaze; thus, it is unfair not to allow a jury to consider polygraph evidence assuming the court gives a proper limiting instruction. *Id.* Therefore, because polygraph evidence was at least as reliable as many other methods for determining honesty, the court concluded that excluding the polygraph evidence deprived the defendant of the constitutional right to a fair trial. *Id.* at 12.

334. *Id.* at 11.
335. *Id.* at 10.
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.*

cal evidence rather than to its general admissibility.[342] The court concluded that the polygraph is more reliable than many of the accepted ways of trying to prove that an individual is lying, such as reputation evidence, shiftiness of eyes, or clarity of gaze.[343] Therefore, the court ruled that there was no reason to withhold the evidence from the jury so long as the court gave a limiting instruction to the jury.[344] The court noted that in a factual context in which the defendant's whole defense is an alibi, excluding the polygraph evidence deprives the defendant of the constitutional right to a fair trial.[345]

The United States Court of Appeals for the Fourth Circuit reversed the *Jackson* decision on appeal.[346] The court of appeals determined that the results were inadmissible under existing North Carolina law.[347] The Fourth Circuit ruled that the state court's decision to exclude the evidence did not violate the defendant's constitutional right to a fair trial.[348]

In *McMorris v. Israel*,[349] the United States Court of Appeals for the Seventh Circuit considered a case in which the prosecution accused the defendant of committing strong-arm robbery.[350] The prosecution had a single witness to the crime, the victim, who testified that the attacker pushed him from behind, took his wallet, and shoved him to the ground.[351] In court, the victim identified the defendant as his assailant, yet admitted on cross-exami-

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342. *Id.*

343. *Id.* at 11.

344. *Id.*

345. *Id.*

346. Jackson v. Garrison, 677 F.2d 371, 374 (4th Cir. 1981), *rev'g* 495 F. Supp. 9 (W.D.N.C. 1979).

347. *See id.* at 372 (deciding that failure to admit polygraph results did not deprive defendant of fair trial and reversing district court decision); *supra* note 333 (providing factual background of case). On appeal, the Fourth Circuit determined that the polygraph results were inadmissible under North Carolina law. *Jackson*, 677 F.2d at 373. In addition, the court found that restricting the admission of polygraph evidence was a matter of state procedure rather than an issue of federal constitutional law. *Id.* Thus, the court ruled that the exclusion of the polygraph evidence did not negate the fundamental fairness of the petitioner's trial or violate any constitutional right. *Id.*

348. *Id.* at 373-74.

349. 643 F.2d 458 (7th Cir. 1981).

350. *See* McMorris v. Israel, 643 F.2d 458, 466 (7th Cir. 1981) (finding that prosecutor violated due process when, acting in adversarial capacity, he exercised unfettered discretion in deciding not to participate in polygraph examination without providing appropriate reason on record for refusal); *cf.* United States v. Black, 684 F.2d 481, 483 (7th Cir. 1982) (distinguishing *McMorris* and determining that federal prosecutor's refusal to stipulate to admission of exculpatory polygraph evidence did not violate defendant's constitutional guarantees of due process and compulsory process).

351. *McMorris*, 643 F.2d at 459.

nation that it was dark that night, that the incident happened very quickly, that he never had seen the defendant previously, and that he could not give a description of his attacker to the police.[352] The defendant denied committing the crime.[353]

Anticipating a trial that would turn on the credibility of the opposing witnesses, the defendant attempted to take a polygraph examination prior to trial.[354] Under Wisconsin law, the prosecutor must agree to stipulate to the admissibility of the polygraph results before a court will admit polygraph results into evidence.[355] Without providing a reason, the prosecutor twice refused to stipulate to the admissibility of the results.[356] The court of appeals determined that the proffered polygraph evidence was very important because the case hinged on the credibility of the two key witnesses.[357] The Seventh Circuit further noted that a prosecutor may refuse to enter into a stipulation for numerous reasons, including a defendant's proposal to use an unqualified examiner or offer to take the test under conditions not conducive to reliable results.[358] However, the court ruled that tactical considerations are not a legitimate reason for the prosecution to refuse to enter into a stipulation.[359] The court concluded that the prosecutor must articulate reasons for refusing to stipulate.[360] Consequently, the Seventh Circuit found the prosecutor's veto of the proposed test constitutionally impermissible under the Due Process Clause.[361]

VI. The Response of the Federal Rules of Evidence to the Polygraph Problem in Criminal Cases

Despite the logic of the compulsory process argument,[362] courts simply do not find the argument compelling.[363] In a *Posado*-type criminal case,

352. *Id.*

353. *Id.*

354. *Id.*

355. *See id.* (listing preconditions before court will admit polygraph evidence) (citing State v. Stanislawski, 216 N.W.2d 8 (Wis. 1974)).

356. *Id.* at 460.

357. *Id.* at 461.

358. *Id.* at 464.

359. *Id.*

360. *Id.*

361. *Id.* at 466.

362. *See supra* notes 324-61 and accompanying text (explaining compulsory process argument).

363. *See* GIANNELLI & IMWINKELRIED, *supra* note 2, at 243 (noting that few federal courts have found compulsory process argument compelling and that there is little precedential

however, the constitutional argument is unnecessary because the Federal Rules of Evidence provide a sufficient basis for admissibility.[364] The *Posado* court implied that polygraph examinations were sufficiently reliable to be admissible under Rule 104(a), assuming that the examiner was qualified and that the surrounding conditions were reasonably conducive to producing an accurate examination.[365] This conclusion is logical considering the other scientifically-oriented and perception-based evidence that courts routinely deem reliable.[366]

The second aspect of the admissibility inquiry is whether the proffered polygraph evidence falls within the terms of Rule 702 and assists the trier of fact in resolving a fact at issue.[367] Once a court has agreed to admit polygraph evidence, there is no basis for excluding it under Rule 702.[368] Polygraph evidence is either uniformly scientifically invalid or it is uniformly scientifically valid, and it is an inconsistency to admit some results and exclude other results under the guise of Rule 702 analysis.[369] Thus, because

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value in those cases in which courts accepted compulsory process argument). The authors note that *Jackson* has little precedential value because it was overruled on appeal. *Id.* As for *McMorris*, its impact was limited because some courts dismiss the idea that a prosecutor must provide a reason for refusing to stipulate, whereas other courts refute the general proposition that there is a constitutional right to present exculpatory evidence. *Id.*; *see also id.* at 245 n.160 (listing numerous cases in which courts rejected notion that there is constitutional right to present polygraph evidence).

364. *See* United States v. Posado, 57 F.3d 428, 436 (5th Cir. 1995) (remanding case to district court for resolution, but concluding that per se rule against exclusion was no longer viable and implying that, under circumstances of this case and applicable Federal Rules of Evidence, court should admit polygraph evidence).

365. *See id.* at 434 (suggesting that polygraph evidence is sufficiently reliable to be admissible, assuming that offering party takes reasonable precautions); *see also supra* note 15 (quoting language of Rule 104(a)).

366. *See supra* Part IV (comparing accuracy of polygraph with other scientific evidence and eyewitness testimony and concluding that polygraph evidence is much more reliable than many forms of evidence courts routinely admit).

367. *See Posado*, 57 F.3d at 433 (considering whether polygraph evidence is sufficiently technologically advanced to constitute scientific knowledge within terms of Rule 702 and *Daubert*); *supra* note 22 (discussing Rule 702 and how qualified witness may testify as to scientific knowledge if such knowledge will aid trier of fact in determining fact at issue).

368. *See Posado*, 57 F.3d at 434 (listing elements that court considered in Rule 702 inquiry).

369. *See supra* note 22 (discussing terms of Rule 702). Once the first court agreed to admit polygraph evidence, it conceded that polygraph results were scientifically valid. If one polygraph result is scientifically valid, all polygraph results must be scientifically valid. Certainly, other Federal Rules of Evidence may operate to exclude the proffered polygraph testimony if the examiner was not qualified (Rule 104) or if the prejudicial effect of the evidence substantially outweighs its probative value (Rule 403), but Rule 702 logically cannot be used to exclude the results.

nearly all courts accept polygraph evidence at least some of the time,[370] Rule 702 cannot provide the basis for excluding polygraph evidence.

The final aspect of the admissibility test applies Rule 403 to determine whether the polygraph evidence has an unusually high and unfairly prejudicial effect that would substantially outweigh its probative value.[371] Numerous studies have indicated that juries do not give undue weight to polygraph testimony;[372] thus, it is difficult to imagine why courts would conclude that the prejudicial effect of polygraph testimony substantially outweighs its probative value.[373] If the polygraph evidence is reliable[374] and it does not have an undue influence on the jury,[375] courts should admit such evidence.

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370. *See* United States v. Piccinonna, 885 F.2d 1529, 1534 (11th Cir. 1989) (noting that only Fourth, Fifth, and District of Columbia Circuits adhered to rule of per se inadmissibility in 1989). *But see* Posado v. United States, 57 F.3d 428, 432 (5th Cir. 1995) (disclaiming prior per se rule of exclusion in Fifth Circuit and concluding that such rule is no longer tenable after *Daubert*).

371. *See Posado*, 57 F.3d at 435 (describing Rule 403 as gatekeeper in whole process); *supra* note 18 and accompanying text (discussing how Rule 403 operates to exclude evidence if prejudicial effect of evidence substantially outweighs its probative value).

372. *See supra* Part IV (recounting numerous studies which indicate that juries do not give undue weight to polygraph evidence).

373. *See supra* note 22 (quoting terms of Rule 702). It is important to note that the prejudicial effect of the evidence must *substantially* outweigh its probative value. If polygraph evidence is scientifically reliable and if juries do not give the evidence undue weight, then courts should admit the evidence. In the case of a criminal defendant attempting to present exculpatory evidence, it is difficult to hypothesize a situation in which evidence could meet the standards of Rules 104(a) and 702 yet have its prejudicial effect substantially outweigh its probative value. *But cf.* United States v. Kwong, 69 F.3d 663, 668 (2d Cir. 1995) (finding that polygraph results were inadmissible under Rule 403 even assuming that court could admit results under Rule 702), *cert. denied*, 116 S. Ct. 1343 (1996); United States v. Sherlin, 67 F.3d 1208, 1217 (6th Cir. 1995) (concluding that unilaterally obtained polygraph evidence was not, and usually will not be, admissible pursuant to Rule 403 despite defendant's reliance on *Daubert* and Rule 702), *cert. denied*, 116 S. Ct. 795 (1996); United States v. Dillard, 43 F.3d 299, 305 (7th Cir. 1994) (affirming district court's Rule 403 analysis that excluded polygraph evidence and noting that district court's Rule 403 balancing is afforded special degree of deference in relation to polygraph evidence); Conti v. Comm'r, 39 F.3d 658, 663 (6th Cir. 1994) (stating that unilaterally obtained polygraph evidence is almost never admissible under Rule 403), *cert. denied*, 115 S. Ct. 1793 (1995); United States v. Lech, 895 F. Supp. 582, 584-85 (S.D.N.Y. 1995) (deciding that polygraph results were inadmissible under Rule 403 even assuming that results were admissible under Rule 702 because defendant's responses would not assist jury in its inquiry into facts).

374. *See supra* Part IV.A (describing empirical studies which indicate that polygraph evidence is reliable).

375. *See supra* Part IV.B (describing empirical studies which indicate that polygraph evidence does not have undue influence on trier of fact).

It is difficult to conceive of a situation in which a criminal defendant offers exculpatory polygraph evidence that meets the standards of Rule 104(a) and Rule 702, yet the court reasonably excludes the evidence because its prejudicial effect substantially outweighs its probative value.[376] Exculpatory evidence has probative value because the trier of fact must determine whether the defendant committed the crime in question. However, courts have yet to articulate a viable prejudice concern regarding polygraph evidence that could substantially outweigh the inherent probative value in exculpatory polygraph evidence.[377] Thus, in the criminal context, the terms of Rule 403 are more appropriately described as a protective device, a shepherd that keeps inherently bad evidence away from the jury, rather than as a gatekeeper that allows judges unfettered discretion to decide what evidence may enter the courtroom.[378]

VII. Conclusion

Under the Federal Rules of Evidence, courts should admit unilaterally obtained polygraph evidence on a collateral issue or at a proceeding other than a jury trial if two preconditions are met. First, the courts should admit polygraph results if the polygraphist is accredited and the conditions under which the polygraphist administers the examination are reasonably well suited to producing an accurate examination.[379] Second, the defense should record the pre-test interview, the examination, and the post-test interview so that the prosecution has the opportunity to argue for exclusion of the results for any number of valid reasons, including exclusion because the polygraphist asked misleading questions.[380] The collateral issue limitation advocated by this

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376. *See supra* note 18 (articulating terms of Rule 403).

377. *See supra* Part IV.A (noting that factual data does not support contention that polygraphs are unreliable and, therefore, that courts should not admit results); *supra* Part IV.B (discussing how fear that polygraph evidence has undue influence with jury is not supported by empirical data); *supra* Part IV.C (dismissing Orne's friendly polygrapher theory because no independently conducted studies support and most studies refute his hypothesis).

378. *See* United States v. Posado, 57 F.3d 428, 435 (5th Cir. 1995) (describing role of Rule 403 as that of gatekeeper). Under the Federal Rules of Evidence, there should be a presumption that polygraph evidence is admissible in criminal cases. No justifiable evidentiary basis exists for excluding the polygraph evidence assuming that the offering party used reasonable precautionary measures to preserve the accuracy of the test. Therefore, courts should consider Rule 403 a protective measure that only excludes polygraph evidence obtained under unreasonably inaccurate conditions, rather than a "gatekeeper" that allows judges to choose to admit evidence based on whimsical intuition.

379. *See id.* at 434 (noting importance of uniform conditions and accredited polygraphists and noting that requirements are becoming more standardized).

380. *See* United States v. Kwong, 69 F.3d 663, 668 (2d Cir. 1995) (excluding poly-

author effectively addresses the long-held fear of invading the province of the jury; such testimony addresses an issue separate from the innocence or guilt of the accused.[381] Admitting polygraph results in a bench proceeding eliminates the potential Rule 403 problem because the presence of a judge mitigates against the danger of unfair prejudice.[382] Such a solution would provide greater polygraph admissibility generally and would conform with the language of the Federal Rules of Evidence.[383]

Further, this compromise position provides a pragmatic solution to a problematic area of the law. Judges are reluctant to hear polygraph evidence despite its apparent admissibility under the Federal Rules of Evidence. The best solution is to admit the evidence initially in limited circumstances. If the proffered evidence assists the trier of fact, then perhaps courts will comply with the Federal Rules of Evidence and choose to admit polygraph evidence generally. If, however, polygraph evidence hinders the judicial system, then at least courts could articulate a logical reason for the decision to exclude the evidence. *Posado* is, therefore, a key case not only because of its practical repercussions, but also because the Fifth Circuit's rationale advocates a thoughtful Federal Rules of Evidence approach whenever a defendant seeks to introduce polygraph evidence.

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graph evidence because examiner's questions were such that defendant could have responded truthfully yet still have committed crime in question), *cert. denied*, 116 S. Ct. 1343 (1996).

381. *See* Tarlow, *supra* note 1, at 99 (discussing jurisprudential idea that polygraph machines intrude into innately human decisionmaking process of jury); *cf.* Thomas, *supra* note 328, at 347 (dismissing argument that polygraph evidence will usurp traditional jury function).

382. *See supra* note 18 (describing terms of Rule 403). Interestingly, Rule 403 specifically articulates the concern that the proffered evidence may mislead the *jury*, but says nothing about cases or hearings in which a judge presides. Presumably, the authors of Rule 403 assumed that judges would be able to weigh all of the relevant evidence without being unduly influenced by any singular piece of proffered evidence, so the danger of unfair prejudice is mitigated in the case of a bench proceeding. There is no reason to think that polygraph testimony should be treated any differently under Rule 403 than any other evidence.

383. *See supra* Part II (articulating language of Federal Rules of Evidence); *supra* Part VI (describing application of Federal Rules of Evidence to determination of polygraph evidence admissibility in criminal cases).