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POLYGRAPH ADMISSION THROUGH COMPULSORY PROCESS

"If it is not [constitutional], its virtues, if it have any, cannot save it; if it is, its faults cannot be invoked to accomplish its destruction."

Home Building and Loan Assn. v. Blaisdell, 290 U.S. 398, 483 (1934) (Sutherland, J., dissenting).

I. Introduction

POLYGRAPH EVIDENCE[1] IS included within the broad category of expert testimony, yet it is treated quite differently from other forms of expert testimony.[2] If admissible at all for the defense, polygraph evidence almost always requires the stipulation of the prosecution for it to be admitted into court.[3] Such a requirement vests soley, within the hands of a prosecutor, the ability to eliminate that proof which may be necessary for the defendant to effectively prove his innocence. Furthermore, in some jurisdictions a defendant cannot even place his faith in the sympathy of a prosecutor.[4] Instead, a rule bars him

[1]Polygraphy (sometimes called "lie detection") is a technique for detecting truth and deception. The underlying theory is that an individual's attempts to deceive the examiner leads to a conscious conflict. This conflict induces fear or anxiety which in turn will produce involuntary physiological changes which can be measured. *See* Solnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection,* 70 YALE L.J. 694, 699-700 (1961).

The polygraph machine is an electromechanical instrument which measures and records physiological activity. The polygraph examiner evaluates the recorded responses and interprets them as being indicative of truth or deception. Abrams, A Polygraph Handbook for Attorneys 4 (1977).

[2]*See infra* text accompanying notes 21-34.

[3]*See,* Pulakis v. State, 476 P.2d 474, 479 (Alaska 1970); State v. Antone, 615 P.2d 101, 109 (Hawaii 1980); People v. Monigan, 72 Ill. App.3d 87, 390 N.E.2d 562, 567 (1979); Conley v. Commonwealth, 372 S.W.2d 865 (Ky. 1974); State v. Corbin, 285 So. 2d 234, 239 (La. 1973); State v. Gagne, 343 A.2d 186, 192 (Me. 1975); Akronom v. State, 40 Md. App. 676, 394 A.2d 1213 (1978); People v. Barbara, 400 Mich. 352, 255 N.W.2d 171 (1977); Jordan v. State, 365 So. 2d 1198, 1204 (Miss. 1978); State v. Beachman, 616 P.2d 337, 339 (Mont. 1980); State v. Biddle, 599 S.W.2d 182, 187 (Mo. 1980) (en banc); State v. Steinmark, 195 Neb. 545, 239 N.W.2d 495, 497 (1976); State v. LaForest, 106 N.H. 159, 207 A.2d 429 (1964); Fulton v. State, 541 P.2d 871 (Okla. Crim. App. 1975); Commonwealth v. Gee, 467 Pa. 123, 354 A.2d 875, 833 (1976) State v. Watson, 248 N.W.2d 398 (S.D. 1976); Robinson v. State, 550 S.W.2d 54, 59 (Tex. Crim. App. 1977); Jones v. Commonwealth, 214 Va. 723, 204 S.E.2d 247, 248 (1974); State v. Frazier, 252 S.E.2d 39, 43 (W. Va. 1979). State v. Dean, 103 Wisc. 2d 228, 264 n.18, 307 N.W.2d 628, 646 n.18 (1981).

[4]*See,* Williams v. State, 378 A.2d 117, 120 (Del. 1977), *cert. den.* 436 U.S. 908 (1978); Moore v. State, 229 So. 2d 119 (Fla. App. 1974); State v. Chambers, 240 Ga. 76, 239 S.E.2d 324 (1977); Owens v. State, 373 N.E.2d 913 (Ind. App. 1978); State v. Conner, 241 N.W.2d 447, 457 (Iowa 1976); State v. Lassley, 218 Kan. 758, 545 P.2d 383, 385 (1976); Commonwealth v. Allen, 377 Mass. 674, 387 N.E.2d 553 (1979); State v. McDavitt, 62 N.J. 36, 297 A.2d 849 (1972); State v. Milano, 297 N.C. 485, 256 S.E.2d 154, 162

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from proving his innocence. Such rules and requirements may very well deny the defendant his constitutional right to compulsory process.[5]

II. Expert Testimony

The rule regarding expert testimony which had existed prior to *Frye v. United States*[6] was that "the opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it . . . ."[7] *Frye* changed this rule.

Stripped to its core, *Frye*'s two page opinion states:

> [W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.
>
> We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development and experiments thus far made.[8]

Through the years the *Frye* test has been implicitly modified. "Current case law establishes that only the opinions of polygraphers and those studying polygraphs (rather than psychologists and physiologists as suggested by *Frye*) should be considered in determining the general acceptance of polygraph evidence."[9] As directed in *People v. Williams,*[10] a court is to look to the procedure upon which the expert opinion is based and determine if "[i]t has generally been accepted by those who would be expected to be familiar with its use. In this age of specialization more should not be required."[11]

(1979); State v. Souel, 53 Ohio St.2d 123, 372 N.E.2d 1318 (1978); State v. Ross, 7 Wash. App. 62, 497 P.2d 1343 (1972); Cullin v. State, 565 P.2d 445, 453-459 (Wyo. 1977). State v. Dean, 103 Wis. 2d 228, 264 n.17, 307 N.W.2d 628, 646 n.17 (1981).

[5] "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. Const. amend. VI.

[6] 293 F. 1013 (D.C. Cir. 1923).

[7] *Id.* at 1014.

[8] *Id.*

[9] Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility In a Perjury-Plagued System,* 26 Hastings L.J. 917, 942 (1975). Even if such modification would not be allowed, "in excess of 70% of physiologists and psychologists generally . . . [accept] the proposition that [polygraph] recordings can be accurately interpreted." *Id.* at 943 n.129 *citing* People v. Adams, No. M69424 (Alhambra Mun. Ct. Los Angeles County, Cal., May 14, 1974).

[10] 164 Cal. App. 2d Supp. 858, 331 P.2d 251 (1958).

[11] *Id.* at 862, P. 2d at 154.

III. General Acceptance

The "general acceptance" test discovered in *Frye* has become the major stumbling block to the polygraph's admission into evidence today.[12] The *Frye* decision has locked within it the "magic incantation" which judges recite only after first preparing their chambers with the burning of incense. How unfortunate this case has been for those innocent defendants whose only hope for corroboration rests upon a polygraph examination.[13]

A. *Differing Standards of Trustworthiness*

1. The Judge's Standard

McCormick points out that: " 'General scientific acceptance' is a proper condition for taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion."[14]

Those judges who agree with McCormick's first statement — "general scientific acceptance" is proper for judicial notice — would, by acceptance of the *Frye* standard, require them to judicially notice the polygraph's reliability before it would be admissible as evidence. Yet, no one has claimed that the polygraph is perfect, only that it possesses a high degree of accuracy. "[E]ven the most ardent detractors from the validity of polygraph evidence concede a degree of reliability of 70% or higher for properly administered examination."[15] Furthermore, "the overwhelming majority believe its accuracy is in excess of 85% with most of those estimating over 90%."[16]

2. The Jury's Standard

Though it appears that trial judges may require perfection to judicially notice the polygraph's reliability, the opportunity to require perfection or to instead accept imperfection is generally denied the jury. In fact, "[t]he leading authority goes so far as to state that the courts have 'very properly' declined to lay down any more than generalized rules of competence, and suggests leaving

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[12] "It is interesting to note that although the defendant was convicted in the *Frye* case and sentenced to life imprisonment, the excluded blood pressure deception results indicating his innocence were subsequently corroborated when a third person confessed he was the real murderer. If the deception test results had not been excluded in the *Frye* case, it is probable that an innocent man would not have been convicted of murder." Wicker, *The Polygraphic Truth Test in the Law of Evidence,* 22 TENN. L. REV. 711, 715 (1953).

[13] O'Conner, *"That's the Man": A Sobering Study of Eye-Witness Identification and the Polygraph,* 49 ST. JOHN'S L. REV. 1 (1974).

[14] MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE 491 (E. Cleary 2d ed. 1972) [hereinafter cited as MCCORMICK].

[15] McMorris v. Isreal, 643 F.2d 458, 461-62 (7th Cir. 1981), *cert. denied,* 102 S. Ct. 1479 (1982).

[16] Tarlow, *supra* note 9, at 960 n.212.

the standard to the unreviewable discretion of the trial court."[17]

Yet this authority has been implicitly rejected by the Supreme Court in *Cool v. United States.*[18] In *Cool,* the Supreme Court held that whenever the judge delegates the competence decision of defense testimony to the jury and the rule of competence given to them creates an "artificial barrier" within their minds, then the defendant's right of compulsory process has been denied. Therefore, it only stands to reason that whenever the judge creates an actual barrier (judicial notice) to the minds of the jury, then the defendant's rights of compulsory process has been denied as well.

In *Cool* the defendant's only witness, an alleged accomplice, testified that the defendant was not involved with the crime. The trial court instructed the jury to disregard the accomplice testimony unless it found his testimony true beyond a reasonable doubt. The Supreme Court reversed the defendant's conviction. The Court, citing *Washington v. Texas*[19] noted that:

> [A] criminal defendant has a Sixth Amendment right to the jury exculpatory testimony of an accomplice. The instruction given below impermissibly obstructs the exercise of that right by totally excluding relevant evidence unless the jury makes a preliminary determination that it is extremely reliable.
>
> By creating an artificial barrier to the consideration of relevant defense testimony putatively credible by a preponderance of the evidence, the trial judge reduced the level of proof necessary for the Government to carry its burden. Indeed, where, as here, the defendant's case rests almost entirely on accomplice testimony, the effect of judge's instructions is to require the defendant to establish his innocence beyond a reasonable doubt.[20]

Significantly, in *Cool* the Supreme Court recognizes that to burden the defendant with proving the reliability of the evidence beyond a reasonable doubt, in essence, reverses the burden of proof in the criminal case when the defendant's case rests almost entirely on such evidence.

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[17]Westen, *The Compulsory Process Clause,* 73 MICH. L. REV. 71, 135 (1974) *citing* 2 J. WIGMORE EVIDENCE § 496 at 488 (3d ed. 1940).

"Such a conclusion, however, ignores the clear implication of *Washington* [Washington v. Texas 388 U.S. 14 (1967)]. If disqualification of whole groups of defense witnesses by means of arbitrary categories is unconstitutional, then disqualification of individual witnesses by means of arbitrary standards is equally impermissible. It would be unconstitutional, for example, to disqualify a child from testifying for the defendant on the ground that he lacked a perfect memory, or that he lacked the ability to express himself as well as an English professor . . . . It prevents the jury from hearing a material witness for the defense whose testimony may well be reliable. The present task, therefore, is to define a standard of competence for individual witnesses that is consistent with the purpose of the compulsory process clause." Western, *supra* note 17, at 135.

[18]408 U.S. 100 (1972).

[19]388 U.S. 14 (1967).

[20]409 U.S. at 104.

B. *Irregular Applications of the Rule*

> *The Frye* case is often cited by courts dealing with scientific evidence and usually followed when admissibility of lie detector evidence is in issue. In other areas, it has had remarkably little influence for a case that has received so much attention . . . It rears its head at irregular intervals and in some very important cases . . . (I)t is often the precedent that is used by courts that want to reject expert evidence but have difficulty in writing an opinion in relevance language.[21]

Because the influence of the *Frye* decision varies depending on the type of expert testimony used, the inference of a discriminatory standard arises — the standard being more rigorously applied toward the polygraph than toward other forms of expert testimony.

1. Jury Distrust Controls

> [T]he courts, when undertaking to pass on the question whether the evidence has sufficient probative value to assist the jury, mix that question with the one of effect on the jury and seemingly require that the probative value be as great as the courts decide the jury will think it to be. In the case of . . . [the] "lie-detector", . . . the courts seem to conclude that the jury will consider the test infallible, and so require that they be shown to be infallible before they are admitted. . . . Once a requirement of infallibility of the total test has been set up, there is scarcely any need to refer the matter to the scientific community to find out whether a test administered by humans is generally accepted by scientists as infallible.[22]

The courts, by deciding that the jury will give the polygraph too much weight, have in effect kept evidence from the jury for the same reason co-conspirator testimony had been before *Washington*[23] — the evidence might be believed. This underlying motivation for evidence exclusion exposes a manifest distrust of a constitutionally guaranteed institution and does little to fortify our American form of justice. Instead, justice is undermined.

2. Modified *Frye* Discriminates

A number of courts have had a great deal of difficulty in applying *Frye.*[24] This difficulty "has lead a number of courts to its implicit modification."[25] Yet, the modified *Frye* rule — general acceptance within an appropriate scientific community[26] — has been arbitrarily applied. One example of this arbitrary

[21]R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 934 (1977) [hereinafter cited as MODERN APPROACH TO EVIDENCE].

[22]McCormick, *supra* note 14, at 490 n.32.

[23]*See supra* note 19.

[24]*See* Strong, *Questions Affecting the Admissibility of Scientific Evidence,* 1970 U. ILL. L. F. 1,16; Boyce, *Judicial Recognition of Scientific Evidence in Criminal Cases,* 8 UTAH L. REV. 313, 314 (1963-64).

[25]United States v. Williams, 583 F.2d 1194, 1198 (2d cir. 1978).

[26]*See supra* text accompanying notes 9-11.

application is *Coppolino v. State*[27] in which a test for the detection of succinic acid in the body was specifically developed for use in this case and admitted into evidence by the state. The State of Florida had in a prior case excluded the polygraph from the courtroom using *Frye* as authority, yet in this case, a different rule was applied. The rule being "were the scientific test . . . so unreliable and scientifically unacceptable that their admission into evidence was error."[28]

Another example of discriminatory application is exemplified in *Washington v. United States*[29] where the court stated in its "Instruction to Expert Witness in Cases Involving the 'Insanity Defense' "[30] that:

> We recognize that an opinion may be merely a balance of probabilities and that we cannot demand absolute certainty. Thus you may testify to opinions that are within the zone of reasonable medical certainty. The crucial point is that the jury should know how your opinion may be affected by limitations of time or facilities in the examination of this defendant or by limitations in present psychiatric knowledge. The underlying facts you have obtained may be so scanty or the state of professional knowledge so unsure that you cannot fairly venture any opinion. If so, you should not hesitate to say so. And, again, if you do give an opinion, you should explain . . . the underlying facts, what these facts are, how they led to the opinion, and what, if any, are the uncertainties in the opinion.[31]

Psychiatric judgments and evaluations are commonly accepted into our courts of law. It is interesting to note, however, that Bruce J. Ennis, a lawyer, and Thomas R. Litwack, a lawyer and psychologist, have written an article,[32] in which they cite studies indicating that psychiatrists are less accurate at predicting dangerousness than is the flip of a coin.[33] If the reliability of commonly accepted psychiatric testimony is permitted to be less than fifty percent, there appears to be arbitrariness in a rule which excludes evidence commonly accepted by even its opponents to be at least seventy percent reliable[34]

C. *Common Arguments for Nonapplication*

Opponents to the polygraph contend that analysis of the polygraph data

[27] 223 So.2d 68 (Fla. Dist. Ct. App. 1969), *appeals dismissed,* 234 So. 2d 120 (Fla. 1969), *cert. denied,* 399 U.S. 927 (1970).

[28] *Id.* at 70.

[29] 390 F.2d 444 (D.C. Cir. 1967).

[30] *Id.* at 457.

[31] *Id.* at 458.

[32] Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 CALIF. L. REV. 693 (1974).

[33] *Id.* at 711-16.

[34] 643 F.2d at 461-62.

is too subjective for it to be admissible into court.[35] But [c]learly the analysis of polygraph charts is not 'subjective' when two competent polygraph examiners will almost always reach the same results when interpreting the charts.[36] Certainly examiner competence is a proper subject for concern, but "[e]xpert testimony in other fields is not conditioned on the absence of quacks and incompetents."[37]

The polygraph's opponents also conjure up visions of trial by machine.[38] However, proponents of the polygraph argue contra —

> The argument that the jury will be displaced by a machine or by a polygraph examiner lacks merit . . . . On the whole they read widely. Largely because of television they know generally what is going on in the world. Their educational background is extensive. They think. They reason. They are really very good at sorting out good evidence from bad, of separating the credible witness from the incredible, and of disregarding experts who attempt to inject their opinions into areas of which they have little knowledge. They would welcome all evidence having a bearing on the problem they are deciding and the give and take of deliberation would expose weaknesses in any witness or evidence. A modern jury that must deliberate, and must agree, is the ideal body to evaluate opinions of this kind.[39]

Opponents of the polygraph by reason of their position apparently believe that the polygraph is simply unnecessary for a fair trial and, therefore, should not be used. However, at least one commentator rebuts:

> [D]oesn't that assume the conclusion? No one would seriously urge that assessing the credibility of witnesses is not very important in judging a case. If the polygraph aids substantially in correctly assessing credibility, is it not necessary to a fair trial? Indeed, might the court's argument be better turned around? If the polygraph is accurate, it may be especially necessary to help assess witnesses' credibility because human beings are very fallible.[40]

IV. Compulsory Process

The contention that compulsory process requires the admission of the polygraph for the defendant finds its roots implanted within the words of Chief Justice John Marshall, who, sitting as a circuit judge wrote the opinion in *United*

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[35] *See, e.g.,* United States v. Wilson, 361 F. Supp. 510, 512-13 (D. Md. 1973).

[36] Tarlow, *supra* note 9, at 962. It has been noted that competent polygraph examiners will reach identical results on the same subject "85% to almost 99%" of the time. *Id.* at n.223.

[37] Modern Approach to Evidence, *supra* note 21, at 1018.

[38] *See, e.g.,* United States v. Bursten, 560 F.2d 779 (7th Cir. 1977); United States v. Alexander, 526 F.2d 161 (8th Cir. 1975).

[39] United States v. Ridling, 350 F. Supp. 90, 98 (E.D. Mich. 1972).

[40] Modern Approach to Evidence, *supra* note 21, at 1020.

States v. Burr.[41] This opinion deserves considerable attention "because [it] represent[s] a contemporary construction of the clause by the preeminent constitutional jurist of the time."[42] "Marshall had better opportunities than any student of history or law today to discover the intention of the framers of the federal constitution."[43] Justice Frankfurter himself stated that "[a] surer estimate"[44] of an amendment's meaning was possible for the judges of that time in which it was passed than for judges of a more remote time period.

A. *United States v. Burr*

The precipitating cause for this case was the accusation that Aron Burr, a former Senator and Vice-President of the United States, was attempting to start a war with Spain and create a separate government in the western states. At trial the defense attempted to subpoena a letter within the custody of President Jefferson. Justice Marshall ruled that compulsory process may be limited only if proven its use is improper, that it applies to papers as well as to persons and that it only requires a minimal showing of materiality to be exercised.

1. Limitation of Impropriety

Chief Justice Marshall stated that our system of government is not set up so as to allow "condemnation at all events."[45] The defendant is to have "a fair and impartial trial" guaranteed by giving the defendant "the right of preparing the means to secure such a trial."[46] The Chief Justice believed compulsory process "must be deemed sacred by the courts, and . . . should be construed as something more than a dead letter."[47]

Justice Marshall, when commenting on the absolute wording of the clause,[48] noted that compulsory process is "a motion to the discretion of the court."[49] Marshall was quick to point out, however, that "a motion to its discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles."[50] Marshall further stated that:

> [T]he opposite party can, regularly, take no more interest in the awarding a subpoena duces tecum [cumpulsory process] than in the awarding an ordinary subpoena . . . . [Therefore,] [i]f no inconvenience can be sustained by the opposite party, *he can only oppose the motion in the character of an amicus curaie, to prevent the court from making an improper order,*

[41]25 Fed. Cas. 30 (C.C.D. Vir. 1807) (No. 14, 692d.).

[42]Westen, *supra* note 17, at 102.

[43]*Id.* at 102 n.129 *citing* C. BEARD, THE SUPREME COURT AND THE CONSTITUTION 113 (1912).

[44]Adamson v. California, 332 U.S. 46, 64 (1947) (Frankfurter, J., concurring).

[45]25 Fed. Cas. at 33.

[46]*Id.*

[47]*Id.*

[48]*Id.*

[49]*Id.* at 35.

[50]*Id.*

or from burthening some officer by compelling an unnecessary attendance.[51] (emphasis added).

2. Application to Papers

The Chief Justice continued by ruling that it "is too much attenuated to be countenanced in the tribunals of a just and humane nation" and that there be a distinction between compelling the production of witnesses and papers when either may be material to the defense.[52]

3. Requirement of Materiality: Minimal

Chief Justice Marshall believed that the limited restrictions placed upon the "sacred" right of compulsory process must be carefully examined so as not to become broadened, denying the defendant his right.

> [I]t would seem to reduce his means of defense within narrower limits than is designed by the fundamental law of our country, if an overstrained rigor should . . . apply for papers deemed by himself to be material . . . [H]is judgment ought to be *controlled only so far as it is apparent that he means to exercise his privileges not really in his own defense, but for purposes which the court ought to discountenance.* The court would not lend its aid to motions obviously designed to manifest disrespect to the government; but *the Court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material in his defense* . . . [I]f they may be important in the defense, if they may be safely read at the trial, would it not be a blot in the page which records the judicial proceedings of this country, if . . . the accused should be denied the use of them?[53] (emphasis added).

Chief Justice Marshall foreshadowed the existence of what we call today "compelling state interest" and "strict scrutiny" when he states:

> That there may be matter, the production of which the court would not require, is certain; but, in a capital case, that the accused ought, in some form, to have the benefit of it, if it were really essential to his defense, is a position which the court would very reluctantly deny. It ought not to be believed that the department which superintends prosecutions in criminal cases, would be inclined to withhold it.[54]

One's thoughts tend to turn to the innocent defendant in the *Frye* decision as we read John Marshall stating:

> Should it [the prosecution] terminate . . . on the part of the United States, all those who are concerned in it should certainly regret that a paper which

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 37.

> the accused believed essential to his defense . . . had been withheld from him. I will not say, that his circumstance would, in any degree, tarnish the reputation of the government; but I will say, that it would justly tarnish the reputation of the court which had given its sanction to its being withheld. Might I be permitted to utter one sentiment, with respect to myself, it would be to deplore, most earnestly, the occasion which should compel me to look back on any part of my official conduct with so much self-reproach as I should feel, could I declare, on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him.[55]

Concluding his opinion, the Chief Justice declared "that such a subpoena, as is asked, ought to issue, if there exist *any reason* for supposing that the testimony *may be material* . . . ."[56] (emphasis added).

B. *Washington v. Texas*

In *Burr* Chief Justice John Marshall read the compulsory process clause as establishing the standards to be used when dealing with the applicability of the clause to papers as opposed to witnesses (i.e., identical), with the materiality of the desired evidence (i.e., minimal), and with the limitation upon the compulsory process right (i.e., impropriety). In *Washington v. Texas*[57] Chief Justice Warren read the clause to be more than a right of the defendant to compel a witness' appearance. He read it to be a tool by which the defendant could put his witness on the stand; however, "[t]he opinion is important, beyond its immediate holding, for its use of history, its standard of analysis, and its reliance on the specific words of the sixth amendment instead of the 'fundamental fairness' requirement of due process."[58]

In *Washington* the defendant had been convicted of murder in a trial during which he desired to offer supporting testimony for his denial of guilt. He testified a man named Fuller took the gun from him before the shooting. He further testified that he tried in vain to convince Fuller to leave peacefully, and then ran from the scene before the shooting started. Fuller, already convicted of the murder, was ready to testify to the truth of Washington's testimony and that he acted on his own during this killing, yet he was disqualified from testifying under a Texas accomplice statute. Texas contended that it was justified in disqualifying the witness because most certainly some "accomplices" were unreliable. Because it could not in advance determine the unrealiable from the reliable it had the right to disqualify all "accomplices". The defendant argued that categorical exclusion was unnecessary because the court could let the evidence go to the jury with instructions concerning weight and credibility.[59]

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[55] *Id.*

[56] *Id.* at 38.

[57] 388 U.S. 14 (1967).

[58] Westen, *supra* note 17, at 111.

[59] Westen, *Compulsory Process II,* 74 MICH. L. REV. 191, 202 (1975).

1. History of Compulsory Process

The Chief Justice began his analysis by referring to *In re Oliver*[60] and stating that "compulsory process . . . stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States."[61] The Chief Justice continued, holding: "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense . . . . This right is a fundamental element of due process of law."[62]

Being a fundamental element of due process, it is applicable to state proceedings.[63]

Chief Justice Warren utilizes history to point out the reactionary purpose which exists behind the compulsory process clause.

> [T]he right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all . . . . [T]he framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury.[64]

The Chief Justice points out that even though the compulsory process clause existed and was recognized as a reaction to the abuses of the past, the Supreme Court in *United States v. Reid*[65] held the rules of evidence in the federal courts to be those which existed within the states at the passage of the Judiciary Act of 1789.[66] The states in 1789 had various rules which disqualified defense witnesses on the ground of interest. These rules, through this holding, became the rules of the various federal courts The unspoken rationale for such disqualification rules was the "the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue."[67] In essence, "[t]he courts were afraid to trust the intelligence of jurors."[68]

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[60] 333 U.S. 257 (1948).

[61] 388 U.S. at 18.

[62] *Id.* at 19.

[63] *Id.*

[64] *Id.* at 19-20.

[65] 53 U.S. (12 How.) 361 (1852).

[66] 388 U.S. at 21.

[67] *Id.*

[68] *Id.* at 21 n.18 *quoting* Benson v. United States, 146 U.S. 325, 336 (1892).

The Supreme Court, however, in time saw the error of its way and reversed itself though on non-constitutional grounds, in *Rosen v. United States.*[69] Chief Justice Warren gave the reasoning of *Rosen* its constitutional character by declaring that its language was required by the sixth amendment. Hence, the sixth amendment requires the recognition of

> "the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding *who may seem to have knowledge* of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court."[70] (emphasis added).

By constitutionalizing these words Warren broke compulsory process free from the "dead hand of the common law rule of 1789"[71] and totally reversed the premise to be considered when contemplating the exclusion of defense evidence. The right to present defense witnesses would no longer be subordinate to the court's interest in preventing perjury.

2. Standard of Analysis: Arbitrariness

Having rejected the "dead hand" of the past the Chief Justice considered whether the rule was "arbitrary" by present constitutional standards. The Warren Court decided the disqualification was arbitrary because it placed witnesses into categories which presumed them to be untrustworthy without any showing that everyone within the category was necessarily so.

> In light of the . . . [fact] that the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court, it could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief.[72]

Chief Justice Warren points out that his disqualification rule cannot even pass the lowest level of judicial scrutiny — rationality — because of the exceptions made to it.

> The rule disqualifying an alleged accomplice from testifying on behalf of the defendant cannot even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury. The absurdity of the rule is amply demonstrated by the exceptions that have been made to it.[73]

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[69]245 U.S. 467 (1918).

[70]388 U.S. at 22. *citing Rosen,* 245 U.S. at 471.

[71]*Id.*

[72]*Id.*

[73]*Id.*

In concluding his opinion Chief Justice Warren relies on the specific words of the compulsory process clause — instead of the general standard of due process — stating:

> We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would be relevant and material to the defense.[74]

As if to emphasize the courts rejection of any literal construction of the compulsory process clause — that the clause only compels appearance, not testimony — in favor of a historical construction — that the clause compels testimony — Warren punctuates the court's holding with the words: "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.[75] The Warren Court could not believe that the Framers' ancestors had struggled so long for something that could be so easily circumvented.

V. Due Process: *Chambers v. Mississippi*

The two compulsory process cases just discussed — *Burr* and *Washington* — have gone a long way in giving shape and definition to the clause. *Burr* applied the clause to papers and to evidence having only slight materiality while allowing the prosecution to challenge its utilization only in the event that its exercise would be improper. *Washington* made the clause a tool to be used by the defendant to put his evidence on the stand. It did so by stating that the credit and weight of defense testimony is exclusively the province of the jury and that *a priori* categories for exclusion of defense testimony are generally invalid. *Washington* also held that compulsory process ia a fundamental right of due process.

Eventually, a compulsory process case was taken to the United States Supreme Court under the auspices of the due process clause in *Chambers v. Mississippi*.[76] The Court in *Chambers* disavowed the fact that it was making

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[74] *Id.* at 23.

[75] *Id.*

[76] 410 U.S. 284 (1973). The reasons why Chambers is a due process instead of a compulsory process case may lie in the facts that:

(1) It's author, "Powell, opposes incorporating the specifics of the Bill of Rights into the due process clause of the fourteenth amendment."

(2) Chambers "had not mentioned the compulsory process clause as the basis of his rights" in the lower courts.

(3) The Court "was invalidating the application of a well-established state rules of evidence." The Court invalidated them because it felt the facts made the decision appropriate in that Chambers was likely to be innocent; therefore, a due process analysis was utilized because it "allows the Court to tailor its decision rather strictly to the facts presented."

Modern Approach to Evidence, *supra* note 21, at 599.

any new constitutional principles.[77] Perhaps this is so because this case fell well within the reasoning already set forth in *Burr* and *Washington.*

The facts of *Chambers* are relatively simple. The defendant was arrested for murder. Subsequently, another person, McDonald, gave a written confession, which was later repudiated. McDonald also admitted to a different friend on three separate occasions — three friends in all — that he, himself, was the actual killer. Chambers called McDonald as a witness in his defense, but was prevented from cross-examining him because of Mississippi's common law voucher rule. Chambers was also prevented from calling those to whom McDonald had confessed, because of the state's hearsay rule. In effect, Chambers claimed that the state's use of these rules, thwarting his defense, had violated his right to due process.

The errors were essentially the converse of each other. The voucher rule prevented Chambers from confronting the witness against him and the hearsay rule prevented him from presenting witnesses in his favor. The Court held that in combination the two errors unconstitutionally deprived the defendant of due process.[78]

A. *The Voucher Rule*

As if to say the exclusionary voucher rule was based upon an *a priori* category that presumes trustworthiness, the Court points out that "[t]he rule rests upon the presumption — without regard to the circumstances of the particular case — that a party who calls a witness 'vouches for his credibility'"[79] The Court realistically determined that "defendants are rarely able to select their witnesses: they must take them where they find them."[80] Furthermore, the Court acknowledged that Chambers was "precluded from cross-examining"[81] the witness as well as "restricted in the scope of his direct examination . . . . "[82] Therefore, "[t]he 'voucher' rule, as applied in this case, plainly interfered with Chambers' right to defend against the State's charges."[83]

B. The *Hearsay Rule*

Perhaps the Court took note of the fact that *Washington v. Texas* no longer would allow the right to present defense witnesses to be subordinated to the court's interest in preventing perjury when it pointed out: "The hearsay rule . . . is based on experience and grounded in the notion that untrustworthy

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[77]*See* 410 U.S. at 302.

[78]*Id.*

[79]*Id.* at 295.

[80]*Id.* at 296.

[81]*Id.*

[82]*Id.* at 296-97.

[83]*Id.* at 298.

evidence should not be presented to the triers of fact."[84] "Exclusion . . . is usually premised on the view that admission would lead to the frequent presentation of perjured testimony to the jury."[85]

The Court realized that categorical exclusion of evidence which may only be *frequently perjurious* was not sufficient to pass constitutional muster; for if such evidence is not *necessarily perjurious*, the classification to which it belongs is an *a priori* category that presumes the evidence unworthy of belief. The Court's knowledge of this fact may be implied through its discussion on the reliability of this "declaration against interest". This type of hearsay is not necessarily perjurious, because it is "made under circumstances that tend to assure reliability and thereby compensate for the absence of oath and opportunity for cross-examination."[86] One is "unlikely to fabricate a statement against his own interest at the time it is made".[87]

Applying its analysis to the facts in question, the Court held that:

> The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.[88]

It was unnecessary for the *Chambers* Court to lay down the broad outlines of its analysis. Those outlines had been sufficiently presented in *Burr* and *Washington*. The *Chambers* Court followed these decisions and ruled: because the testimony "bore persuasive assurances of trustworthiness", the trial court could not "presume them unworthy of belief" *(Washington)*; because the "testimony also was critical to Chambers' defense", the trial court must have recognized that the testimony at a very minimum "may be material in his defense" *(Burr)*; and because the rules — even though they may have a logical persuasiveness — were "applied mechanistically to defeat the ends of justice", the trial court improperly made its decision "on the basis of *a priori* categories" *(Washington)*.

There are those who herald *Chambers* as the dawning of a new age.[89] There are those who decry *Chambers* as the wresting of authority which is rightfully to be placed in the states.[90] To answer the former: The dawn is done, they have merely overslept. To answer the latter: A state may not utilize rules of

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[84] *Id.*

[85] *Id.* at 299.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 302.

[89] Kaus, *Proceedings of the 1973 Sentencing Institute for Superior Judges,* 1973 JUD. COUNS. OF CAL. 97, *reprinted in* 112 Cal. Rptr. 97 (1973).

[90] *See* 410 U.S. at 308 (Renquist, J., dissenting).

evidence to violate a defendant's right — upon what the Constitution does not allow, logical legal scholarship may not tread.

Many will continue to fear and fight against the continuing development of the compulsory process clause. Yet, if individuals can so ingeniously present persuasive arguments for ignoring the dictates of the Constitution, then one can confidently place his faith in those same men to establish a means to regulate the rights the Constitution was meant to preserve.

VI. Polygraph Exclusion

> The compulsory process clause of the sixth amendment is a companion and counterpart to the confrontation clause. The confrontation clause governs the manner by which the state presents its case against the accused, requiring the prosecution to bring the defendant face to face with the witness against him and make them available for cross-examination. The compulsory process clause governs the presentation of the defendant's case, empowering him to produce and examine witnesses in his favor. Together they provide a constitutional basis for the law of evidence in criminal proceedings. Together "[they] constitutionalize the right to a defense as we know it."[91]

The right of compulsory process working in tandem with the right of confrontation creates a balance which favors the defendant[92] because of the potentially oppressive resources which may be wielded by the government while in the hands of the prosecutor.[93] The Framers were well aware of the existence and use of such resources. They were determined to disallow the inquisitional method by promoting the adversarial process.[94]

By doing so, they gave the defendant "the right to discover the existence of witnesses in his favor, to produce them in court, to introduce their statements into evidence, and, if necessary, to compel them to testify over claims of priviledge."[95] There is a "constitutional judgment embodied in the compulsory process clause that the government must not convict any person who can prove that he is innocent."[96]

A. *Unreliability: Reasonable Minds Do Not Differ*

In general, *"the defendant has a constitutional right to produce any witness whose ability to give reliable evidence is something about which reasonable people can differ."*[97] The polygraph's reliability has been a matter of great

[91]Westen, *supra* note 17, at 1982 *citing* California v. Green, 339 U.S. 149, 176 (1970) (Harlan, J., concurring).

[92]*See* Westen, *supra* note 17, at 156.

[93]*See* Williams v. Florida, 399 U.S. 78, 111-12 (1970).

[94]*See* Westen, *supra* note 17, at 78.

[95]*Id.* at 184.

[96]*Id.* at 177.

[97]Westen, *supra* note 59, at 203.

debate[98]; therefore, obviously reasonable minds do differ.

B. *Compelling State Interest: Less Drastic Means Unavailable*

When the state limits a fundamental right the Court will review it using "strict scrutiny".[99] "Under the strict scrutiny standard the Court requires that the law be necessary to promote a compelling or overriding interest of government if it is to limit the fundamental rights of individual citizens."[100] In other words, there must be no less drastic alternatives available to accomplish the state's objective.

> The less drastic alternative need not be equally efficient, so long as it is *adequate. Washington* did not suggest that a jury determination of the accomplice's credibility was as efficient in avoiding perjury as disqualifying the witness; the state would obviously prefer disqualification because it is fool-proof. By requiring the accomplice to be heard, however, the Court implicitly held that screening by the jury was an adequate alternative, and that added effectiveness, if any, of disqualification did not justify the additional burden it imposes on the defendant.[101] (emphasis in original).

A rule excluding the polygraph is not founded upon any compelling state interest. The rule is in fact "arbitrary."

> [B]y use of the term "arbitrary" the *[Washington]* Court was referring to the fact that the Texas rule imposed an *unnecessary* burden on the defendant's right to present witnesses because the rule wholly excluded evidence *that might have been reliable* instead of permitting it to be heard, weighed, and judged by the fact-finder.[102] (emphasis in original).

Washington implies that by allowing the witness to testify under oath subject to cross-examination, by giving cautionary instructions, and by allowing the prosecutor to comment, leaving the weight and credibility of his testimony to the jury, the state can adequately satisfy its interests by a less drastic means.[103]

It is improper for a state to create an unqualified assumption that the only way to avoid misleading the jury is to exclude all polygraph evidence. Undoubtably, there may be polygraphers so unprofessional, techniques so invalid and machines so unreliable that a state's interest may become compelling, but the state shall not assume such to be the case generally.

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[98] *See, e.g.,* Lhost v. State, 85 Wis. 2d 620, 271 N.W. 2d 121 (1978); State v. Dean, 103 Wis. 2d 228, 307 N.W.2d 628 (1981).

[99] J. NOWAK, R. ROTUNDA AND J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 383 (1978).

[100] *Id.*

[101] Westen, *supra* note 17, at 137.

[102] Westen, *supra* note 59, at 200.

[103] *See* Westen, *supra* note 17, at 136.

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It shall be remembered, of course, that non-arbitrary disqualification of evidence is valid. This is so "not simply because the trial court individualizes its determination, but because, in doing so, it presumably applies the strict standard of disqualifying only those witnesses whose competence is not reasonably disputable."[104] Also, where the evidence is so inherently unreliable that it cannot rationally be evaluated the jury shall not be allowed to consider the defendant's evidence. In such a case the jury is left with nothing except mere conjecture or speculation. Exclusion would be based on the "notion that a criminal trial — indeed, any trial — ceases to be a judicial proceeding when the outcome rests in evidence that cannot be rationally considered."[105]

C. *Burden of Proof: Prosecutors Bear*

It is incumbent upon the state to prove its compelling interest. The defendant has no constitutional obligation to prove the admissibility of his evidence.[106] Therefore, neither may the state require such an obligation. Should the prosecutor object to its admission, it is the prosecutor's burden to prove the state's compelling interest in its exclusion.[107]

The converse is not true should the prosecution attempt to admit polygraph evidence against the defendant. To allow the prosecution to admit polygraph evidence in the same manner as the defendant would ignore basic differences which exist between them. These differences were recognized in *Washington* by the Court's rejection of Harlan's narrow ground of reversal — the rule discriminated against the accused.[108]

> The Court, while agreeing with Harlan that the rule was discriminatory, refused to rest on that narrow ground. It distinguished between the discriminatory effect of the rule and its "arbitrary" effect. Even if the rule disqualified accomplices from testifying for both parties in the case, it was nonetheless "arbitrary" because it imposed an unnecessary burden on the defendant's right to present a defense.[109]

A key difference between the prosecution and the defense lies in the fact that the duty of the prosecuting attorney is to do justice,[110] while such is not the case for the defense attorney. Also, and perhaps most importantly, the confrontation doctrine is guaranteed only to the defendant. These differences require the prosecution to convict an accused using only reliable evidence; therefore, the burden of proof is upon the prosecution to prove that its polygraph evidence is reliable — no such burden is required of the defendant. To assure the reliability

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[104]Westen, *supra* note 59, at 203.

[105]Westen, *supra* note 17, at 157.

[106]*See supra* text accompanying notes 53-56.

[107]*See supra* text accompanying notes 45-51. *See also* Westen, *supra* note 17, at 156.

[108]*See* 388 U.S. at 24 (Harlan, J., concurring).

[109]MODERN APPROACH TO EVIDENCE, *supra* note 21 at 589.

[110]Berger v. United States, 295 U.S. 78, 88 (1935).

of the prosecution's evidence, the defendant was given the right of confrontation — no such right is guaranteed the prosecution. Accordingly, when the state offers incriminating evidence against the accused that cannot be cross-examined, "it must demonstrate that the evidence has such independent indicia of reliability that cross-examination would serve no real purpose."[111]

An argument having much support today is that our juries are too ignorant to realize that a polygraph examination is not infallible.[112] If this argument is as sound as its proponents contend, then the confrontation clause would in fact prevent the prosecution's use of polygraph evidence entirely. The defendant cannot confront this pre-conceived notion which would undoubtedly determine his fate. However, if juries are as enlightened as some commentators contend,[113] this problem of prejudice could be resolved in voir dire.

VII. Conclusion

The *Burr* and *Washington* cases establish and *Chambers* affirms that at a minimum compulsory process encompasses the right of the defendant to put on the stand favorable evidence. Evidence includes both papers and witnesses. The witnesses must be of competent understanding. It also requires evidence to be relevant to the case and potentially material to the verdict.

Implicitly, compulsory process is limited by a compelling state interest, but this is to be found only where less drastic means are not available. *Washington* assumes by implication that perjury penalties, vigorous cross-examination, and cautionary instructions are adequate by constitutional standards to safeguard the state's interests.

To place a higher burden upon the defendant than that which is allowed by the Constitution — especially a burden as heavy as judicial notice — is a clear violation of the defendant's rights. *Washington v. Texas* reversed the premise for judicial exclusionary determinations concerning defense evidence — the jury is to be trusted even if the threat of unreliability is great. Certainly, the defendant's use of polygraph evidence should be allowed when psychiatric judgements and evaluations, some of which are less than fifty percent accurate, are readily admitted.

Generally, exculpatory polygraph evidence which is to be used by the defense satisfies the admissibility requirements and exists beyond the reach of any compelling state interest. Some courts and judges are beginning to recognize the validity of this argument. *State v. Sims*[114] held compulsory process was

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[111]Westen, *supra* note 17, at 156.

[112]*See supra* text accompanying note 38.

[113]*See supra* text accompanying note 39.

[114]52 Ohio Misc.31, 369 N.E.2d 24 (1977).

denied the defendant when his pretrial and trial requests for a polygraph examination were not granted.[115] *State v. Dorsey*[116] held the requirements of a stipulation by the parties to a polygraph examination and the absence of an objection at trial were both "mechanistic in nature" and "inconsistent with the concept of due process".[117] Justice Dore, dissenting in *State v. Renfro,*[118] states that "[a]llowing the defendant to introduce polygraph evidence under these circumstances while denying the opportunity to the prosecution is consistent with our criminal justice system's presumption of the accused's innocence."[119] Most recently, *McMorris v. Israel,*[120] held that a prosecutor's discretion to withhold his consent to the defendant's introduction of exculpatory polygraphy evidence must be based on the unreliability of the defendant's proposed polygraph test, not on tactical considerations.

The sooner the courts recognize the compulsory process clause's applicability to the defendant's exculpatory polygraph evidence, the sooner the Constitution will no longer be honored more in its breach than in its observance.

TIMOTHY J. WALSH

[115]State v. Levert, 58 O.St.2d 213, 389 N.E.2d 848 (1979) has held directly to the contrary. However, the compulsory process analysis was not made. Instead, it was argued the polygraph had "come of age" (Brief of Defendant-Appellant p. 12).

[116]88 N.M. 184, 539 P.2d 204 (1975).

[117]*Id.* at 185, 539 P.2d at 205.

[118]96 Wash.2d 902, 639 P.2d 737 (1982).

[119]*Id.* at 913, 639 P.2d at 742-43 n.1. (Dore, J., dissenting).

[120]643 F.2d 458 (7th Cir. 1981), *cert. denied,* 102 S. Ct. 1479 (1982).