

## Admissibility of Polygraph Test Results Upon Stipulation of the Parties

In *State v. Chambers*,<sup>1</sup> the Georgia Supreme Court held that “upon an express stipulation of the parties that they shall be admissible, the results of a lie detector test shall be admissible as evidence for the jury to attach to them whatever probative value they may find them to have.”<sup>2</sup> This decision marks the first time the supreme court has allowed the results of a polygraph test to be admitted into evidence.

The defendant was charged with statutory rape. It was stipulated between the defendant and the state that the results of polygraph tests administered to him and the prosecutrix would be admissible, regardless of what the tests showed. The results were admitted and the examiner testified that he interpreted the results to mean that the defendant was lying in denying the crime, and that the victim was truthful in accusing him. As a result, the defendant was convicted and sentenced to twenty years.

The Georgia Court of Appeals reversed the conviction on the ground that polygraph results are inadmissible and without probative value,<sup>3</sup> thus the victim’s charge failed for lack of corroboration.<sup>4</sup> The Georgia Supreme Court then granted certiorari to consider whether the results of the tests were properly admitted.

Courts have wrestled with the polygraph problem since *Frye v. United States*<sup>5</sup> was decided in 1923. This was the first reported opinion dealing with the admissibility into evidence of results of lie-detector tests.<sup>6</sup> In *Frye* the District of Columbia Court of Appeals upheld a decision to exclude the results from evidence and set forth the “general acceptance” standard for the admissibility of polygraph evidence, *i.e.*, the evidence would be admissible only if the scientific technique was sufficiently established to have gained general acceptance in the particular field.<sup>7</sup> The *Frye* decision, as the standard for both the admissibility of results of polygraph tests and the exclusion of such evidence, is still followed by a majority of jurisdictions today.<sup>8</sup>

The Georgia Supreme Court first confronted this problem in *Salisbury*

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1. 240 Ga. 76, 239 S.E.2d 324 (1977).

2. *Id.* at 76-77, 239 S.E.2d at 325.

3. *Chambers v. State*, 141 Ga. App. 438, 447, 233 S.E.2d 818, 824 (1977).

4. GA. CODE ANN. §26-2018 (1977).

5. 293 F. 1013 (D.C. Cir. 1923).

6. *Id.* The device used in *Frye* measured systolic blood pressure. This device was based on the assumption that blood pressure is influenced by change in the emotions of the witness, and that conscious deception would cause the systolic blood pressure to rise.

7. *Id.* at 1014.

8. Squires, *The Truth About the Lie Detector in Federal Court*, 51 TEMPLE L.Q. 69, 78-79 (1978); *State v. Chambers*, 240 Ga. 76, 81, 239 S.E.2d 324, 327 (1977) (dissenting opinion).

*v. State*.<sup>9</sup> It concluded that "results of lie detector tests are inadmissible"<sup>10</sup> because their "reliability and technique have not yet gained scientific acceptance as an accurate means of detecting deception. . . ."<sup>11</sup> In *Famber v. State*<sup>12</sup> the court of appeals found the results of a polygraph test insufficient to corroborate the testimony of a co-conspirator "even though the defendant consented to the test and agreed that its results be admitted in evidence."<sup>13</sup> The court concluded that polygraph results "are not only inadmissible but also have no probative value."<sup>14</sup>

The Georgia Supreme Court again considered the polygraph evidence issue in *Scott v. State*.<sup>15</sup> This case involved two defendants, only one of whom took the lie detector test and consented to its admissibility. Two justices concluded that there was "reversible error as to both defendants in the admission of the polygraph testimony even without objection."<sup>16</sup> Two other justices found reversible error as to the defendant who did not take the test because of the testimony concerning his co-defendant's failure of the test.<sup>17</sup>

In recent years several jurisdictions have made an exception to the rule of excluding polygraph results—by allowing the admission of the test results pursuant to a stipulation of all parties.<sup>18</sup> It would appear that *Famber* had established that Georgia would not follow this trend of admissibility by stipulation. The *Scott* decision, however, placed *Famber* in jeopardy and left in doubt the status of the admissibility of polygraph tests generally.<sup>19</sup>

In *Chambers v. State* the court of appeals acknowledged this confusion in the area of admissibility of polygraph test results.<sup>20</sup> It then considered the "state of the art" of lie detection and concluded that there are still many more questions than answers.<sup>21</sup> As a result it ruled, as stated above, that polygraph results are inadmissible and without probative value.<sup>22</sup>

In reversing the decision of the court of appeals—and overruling *Famber*—the Georgia Supreme Court in *State v. Chambers* cited cases in

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9. 221 Ga. 718, 146 S.E.2d 776 (1966).

10. *Id.* at 719, 146 S.E.2d at 777.

11. *Id.*

12. 134 Ga. App. 112, 213 S.E.2d 525 (1975).

13. *Id.* at 113, 213 S.E.2d at 525.

14. *Id.*

15. 238 Ga. 30, 230 S.E.2d 857 (1976).

16. *Id.* at 32, 230 S.E.2d at 859.

17. *Id.*

18. *See, e.g., State v. Chambers*, 104 Ariz. 247, 451 P.2d 27 (1969); *State v. Fields*, 434 S.W.2d 507 (Mo. 1968); *State v. McDavitt*, 62 N.J. 36, 297 A.2d 849 (1972); *State v. Ross*, 7 Wash. App. 62, 497 P.2d 1343 (1972); *Annot.*, 53 A.L.R.3d 1005 (1973).

19. 238 Ga. at 35, 230 S.E.2d at 860-861. There were three dissenting opinions in *Scott*. One dissenting justice considered the decision in *Famber* "erroneous," stating that the correct rule was that polygraph results are admissible in evidence.

20. 141 Ga. App. at 442, 233 S.E.2d at 822.

21. *Id.* at 444, 233 S.E.2d at 823.

22. *Id.* at 447, 233 S.E.2d at 824.

numerous other jurisdictions that allow polygraph results to be admitted by agreement.<sup>23</sup> The court pointed to *Cagle v. State*<sup>24</sup> as the correct statement of the law in Georgia: "Neither an agreement to take a polygraph, nor the taking of one, constitutes a waiver of a right to object to the admission of its results into evidence, absent an express stipulation of the parties as to its admissibility."<sup>25</sup>

The court then acknowledged that doubt still exists as to the complete reliability of lie detector tests and that it shares some of that doubt. However, it countered this by suggesting that cross-examination would be a sufficient means of discovering ambiguous results and faulty interpretations in any given case.<sup>26</sup> It seems odd that the court first offers polygraph evidence as a means of buttressing cross-examination and "other relics from the crossbow era of Henry II"<sup>27</sup> and yet then suggests that cross-examination may be used to detect deficiencies in the supposedly more scientific polygraph evidence.

The court also noted that there was some disagreement in characterizing polygraph evidence as testimonial, direct, physical, or expert.<sup>28</sup> Even so, it concluded that the results of the test were "at least some evidence . . . of Chamber's guilt"<sup>29</sup> and that this was sufficient, for it is the law in Georgia that "only slight circumstances can suffice to corroborate the accusation of a rape victim."<sup>30</sup> However, the court warned that when the *only* evidence of guilt is the defendant's performance on a lie detector test, a conviction can not stand.<sup>31</sup>

In his dissent, Justice Jordan rejected the idea that there was any such thing as a "lie detector." He equated the modern technique with a test used in ancient India in which a suspect was required to enter a darkened room and touch the tail of a donkey. If the donkey brayed when touched, the suspect was guilty; otherwise he was released.<sup>32</sup>

Although there may have been some improvements over this ancient

23. 240 Ga. at 77, 239 S.E.2d at 325.

24. 132 Ga. App. 227, 207 S.E.2d 703 (1974).

25. *Id.* at 229, 207 S.E.2d at 705. It is interesting to note, however, that the supreme court, in quoting *Cagle*, failed to include the next sentence of the opinion: "Under Georgia law the results of a lie detector, favorable or unfavorable to an accused, are not admissible in evidence."

26. 240 Ga. at 77, 239 S.E.2d at 325.

27. 240 Ga. at 78, 239 S.E. 2d at 325, quoting from Tarlow, *Admissibility of Polygraph Evidence in 1975*, 26 HASTINGS L.J. 917, 920-921 (1975).

28. Polygraph evidence consists of two parts—the graphs of the subject's physical responses to questions and the examiner's opinion of what those responses mean. There is no consensus among the courts as to what type of evidence this is. See *Schmerber v. California*, 384 U.S. 757 (1966); *Commonwealth v. A Juvenile*, 365 Mass. 421, 313 N.E.2d 120 (1974); Note, *Pinocchio's New Nose*, 48 N.Y.U.L. REV. 339 (1973); C. McCORMICK, EVIDENCE, §207, at 421 (2d ed. 1972).

29. 240 Ga. at 79, 239 S.E.2d at 326.

30. *Id.*

31. *Id.* at 80, 239 S.E.2d at 327.

32. *Id.* at 81, 239 S.E.2d at 327.

technique, serious problems remain with current methods of lie detection. Ten percent of such tests are uninterpretable by even the most skilled examiner.<sup>33</sup> The reliability of results that are interpretable has been placed at about seventy percent.<sup>34</sup> Thus, for every ten examinations given, three are probably faulty. Approximately eighty percent of polygraph operators are not qualified to interpret the results of the tests.<sup>35</sup> This fact is particularly disturbing, for the ability of the examiner is the crucial element in polygraph examinations; sixty-five percent of the cases require a highly skilled and well-trained examiner to be able to interpret them.<sup>36</sup> Another factor affecting the reliability of such tests is the type of examinee. If he is extremely nervous or has mental or physiological abnormalities the difficulty in diagnosing deception increases.<sup>37</sup> The age of the examinee may also affect the reliability of the results.<sup>38</sup>

In light of these and other problems still plaguing polygraph tests, it is difficult to understand the Georgia Supreme Court's decision in *Chambers*. The court's allowance of the admissibility of such tests is apparently without any new proof of the improved accuracy of the polygraph.

Although the court did limit admissibility to cases where there has been a stipulation among all parties that the results would be admissible, the value of such a limitation is, nonetheless, questionable. If the majority of courts in America have concluded that the results of polygraph tests are not sufficiently reliable to be considered "competent evidence"<sup>39</sup> how does stipulation by the parties elevate the quality of this evidence to a level acceptable for admissibility?<sup>40</sup> The only basis on which a change in the law to include polygraph evidence should be made is proof of a definite improvement in the reliability of the polygraph and legislation establishing the parameters for its use. Apparently, *Chambers* was decided without benefit of either of these elements.

Finally, concern has been expressed as to the undue influence polygraph evidence may have on the jury.<sup>41</sup> Because it is considered a scientific test

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33. Horvath and Reid, *The Reliability of Polygraph Examiner Diagnosis of Truth and Deception*, 62 J. OF CR. L. 276, 278 (1971).

34. Burkey, *The Case Against the Polygraph*, 51 A.B.A.J. 855, 856 (1965).

35. Inbau and Reid, *The Lie Detector Technique: A Reliable and Valuable Investigative Aid*, 50 A.B.A.J. 470, 473 (1964).

36. Horvath and Reid, *The Reliability of Polygraph Examiner Diagnosis of Truth and Deception*, 62 J. OF CR. L. 276, 278 (1971).

37. F. INBAU, *LIE DETECTION AND CRIMINAL INTERROGATION* at 65 (3d ed. 1953).

38. 141 Ga. App. at 441, 233 S.E.2d at 821. The court of appeals noted that polygraph operators had refused to give a ten-year-old child (the prosecutrix) a lie detector test. As a result, a court order was secured and the state crime lab's examiner administered the test to the defendant and to the alleged victim.

39. 240 Ga. at 82, 239 S.E.2d at 328.

40. Note, *Evidence—Lie Detector—Admissibility Under Pre-Trial Stipulation*, 15 ALA. L. REV. 248, 255 (1962-63); 53 A.L.R.3d 1005 (1973).

41. 240 Ga. at 82, 239 S.E.2d at 328 (Bowles, J. dissenting); *People v. Davis*, 343 Mich. 348, 72 N.W.2d 269 (1955); *United States v. Alexander*, 526 F.2d 161 (8th Cir. 1975); Squires, *The Truth About the Lie Detector in Federal Court*, 51 TEMPLE L.Q. 69 (1978).

it is likely to be "shrouded with an aura of near infallibility . . . ." <sup>42</sup> It is doubtful that a jury can objectively consider the results of something labeled "scientific". In spite of any limiting instructions given by the judge in his charge to the jury <sup>43</sup> there will be a very strong impulse to allow this evidence to become controlling on the issue of guilt. Consequently, the Georgia Supreme Court, by its decision in *Chambers*, may have unwittingly placed a premium on the polygraph test and in doing so, exchanged ancient India's donkey for a sacred cow.

EDWARD D. LUKEMIRE

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42. United States v. Alexander, 526 F.2d 161 at 168 (8th Cir. 1975).

43. 240 Ga. at 80.

