COMMENT

Mitigating Evidence?
The Admissibility of Polygraph
Results in the Penalty Phase of a
Capital Trial

Christopher Domin*

TABLE OF CONTENTS

INTRODUCTION ................................................................................. 1463
I. BACKGROUND ......................................................................... 1465
   A. The Polygraph ........................................................................ 1466
   B. Mitigating Evidence ................................................................. 1468
   C. The Role of Mitigating Evidence in the Penalty Phase ...... 1469
   D. United States v. Scheffer and the Military’s Per Se
      Polygraph Ban ......................................................................... 1473
II. THE CIRCUIT SPLIT ................................................................. 1475
   A. Rupe v. Wood .......................................................................... 1475
   B. United States v. Fulks ................................................................. 1477
III. ANALYSIS ................................................................................ 1478
   A. Expansive Rules of Evidence Govern the Penalty Phase.... 1478
   B. Lower Courts Incorrectly Apply the Scheffer Analysis..... 1482

* Associate Articles Editor, UC Davis Law Review; J.D. Candidate, UC Davis
School of Law, 2010; B.A., Political Science and History, UCLA, 2006. Many thanks to
my terrific editorial team, John Tan, Ferry Eden Lopez, and Lowell Chow. Special
thanks to Kim Lucia for guiding me through the writing process. Thanks to Melissa
Hooper and Bruce Cohen for sparking my interest in death penalty issues. I also want
to thank my fiancée, Kaydi, for her love and support; I couldn’t have made it through
without you. Thanks to my black lab, Smokey, who laid at my feet while I researched
and wrote the majority of this Article. Above all, thanks to my mom, dad, and brother,
for their unconditional love and support throughout my life.

1461
C. Barring Polygraph Evidence During the Penalty Phase
   Is Prejudicial to the Defendant ........................................ 1485
CONCLUSION .............................................................................. 1489
INTRODUCTION

Snitch testimony is a leading cause of wrongful convictions in capital cases. Typically, snitch testimony involves a codefendant or an accomplice to the murder in question giving testimony in exchange for a lighter sentence or immunity. Courts nationwide have exonerated fifty-one death row inmates who received death sentences based on the testimony of witnesses with incentives to lie. Currently there is no judicially recognized method for determining whether a person is being truthful when answering questions. Studies of polygraph testing indicate that test results are eighty to ninety-eight percent accurate in deciphering when a person is being truthful. Despite such evidence, courts continue to consider polygraph test results too unreliable to serve as evidence under most circumstances.


2 See Thornburg v. Mullin, 422 F.3d 1113, 1120 (10th Cir. 2005); Rupe v. Wood, 93 F.3d 1434, 1439 (9th Cir. 1996); State v. Bartholomew, 683 P.2d 1079, 1088 (Wash. 1984).

3 CTR. ON WRONGFUL CONVICTIONS, supra note 1, at 3; see also Innocence Project, supra note 1 (discussing exoneration of death row inmates sentenced to death based on testimony of informant); Midwestern Innocence Project, supra note 1 (same).


5 See NAT’L RESEARCH COUNCIL, supra note 4, at xiii (noting that since 1980, studies published by American Polygraph Association show average accuracy rates ranging from 80 to 98 percent); see also STANLEY ABRAMS, A POLYGRAPH HANDBOOK FOR ATTORNEYS 105 tbl.6-1 (1977) (showing accuracy rates between 63 to 100 percent); Yvette J. Bessent, Admissibility of Polygraph Evidence and Repressed Memory Evidence When Offered by the Accused, 55 U. MIAMI L. REV. 975, 980 (2001) (noting that “the APA reports that the accuracy of polygraph testing . . . ranges from eighty to ninety-eight percent”).

6 See United States v. Scheffer, 523 U.S. 303, 310 (1998) (noting that question of
However, some courts allow the admission of polygraph results of defendants and witnesses as mitigating evidence in the penalty phase of a capital trial.\footnote{Paxton v. Ward, 199 F.3d 1197, 1216 (10th Cir. 1999); Rupe v. Wood, 93 F.3d 1434, 1440-41 (9th Cir. 1996); Height v. State, 604 S.E.2d 796, 798-99 (Ga. 2004).}

Generally, defendants are only eligible for a death sentence for crimes of first-degree murder with aggravating circumstances and certain military crimes.\footnote{Raphael Goldman, Capital Punishment 57-58 (2002); Death Penalty Info Center, Crimes Punishable by the Death Penalty, http://www.deathpenaltyinfo.org/crimes-punishable-death-penalty (last visited Oct. 29, 2009); Death Penalty Info Center, Death Penalty for Offenses Other than Murder, http://www.deathpenaltyinfo.org/death-penalty-offenses-other-murder (last visited Oct. 29, 2009).} The U.S. Supreme Court has recognized a fundamental difference between crimes that carry potential death sentences and noncapital crimes.\footnote{See Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (recognizing that death sentence is "profoundly different" penalty); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (recognizing that death sentence is different from other sentences); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (noting that death penalty is "qualitatively different from a sentence of imprisonment, however long").} The difference between the two is that there are no corrective or modifying mechanisms for a completed capital sentence.\footnote{Eddings, 455 U.S. at 113-15; Lockett, 438 U.S. at 605 (noting difference between death sentences and noncapital cases, in which sentences can be modified by systems and programs such as parole or work furloughs); Woodson, 428 U.S. at 304.} Thus, the Eighth and Fourteenth Amendments to the Constitution require individualized sentencing, taking into account a defendant's personal history and circumstances of his crime.\footnote{See United States v. Fulks, 454 F.3d 410, 434 (4th Cir. 2006) (finding no error in trial court's refusal to admit polygraph evidence during penalty phase of capital trial); United States v. Catalan-Roman, 368 F. Supp. 2d 119, 121 (D.P.R. 2001) (noting that "[p]olygraphs remain nearly universally frowned upon as courtroom lie...".)} Yet most federal and state courts refuse to allow polygraph evidence in capital cases despite such evidence’s relation to the circumstances of an individual’s crime.\footnote{See United States v. Fulks, 454 F.3d 410, 434 (4th Cir. 2006) (finding no error in trial court's refusal to admit polygraph evidence during penalty phase of capital trial); United States v. Catalan-Roman, 368 F. Supp. 2d 119, 121 (D.P.R. 2001) (noting that "[p]olygraphs remain nearly universally frowned upon as courtroom lie...".)}
This Comment argues that polygraph evidence should be admissible in the penalty phase of a capital trial. Part I discusses the legal background and evolution of case law involving the admissibility of polygraph evidence during the penalty phase of a capital trial. Part II outlines the circuit split between the Fourth and Ninth Circuit Courts of Appeals on the admissibility of polygraph evidence in capital sentencing. Part III argues that courts should admit polygraph evidence during the penalty phase of a capital trial. First, U.S. Supreme Court precedent establishes that expansive standards of evidence govern the penalty phase of a capital trial. Thus, lower courts should permit the admission of polygraph evidence. Second, lower courts incorrectly apply the Supreme Court’s analysis in United States v. Scheffer when ruling on polygraph evidence in the penalty phase of a capital trial. (In Scheffer, the Supreme Court held that due to reliability concerns, polygraph evidence was inadmissible in a noncapital case.) Finally, a per se ban on the admission of polygraph test results in all criminal proceedings is prejudicial to the defendant. For the reasons mentioned above, the Supreme Court should hold that polygraph test results are admissible as evidence in the penalty phase of a capital trial.

I. BACKGROUND

Polygraph tests, better known as lie detector tests, are a controversial topic for courts. Historically, courts have been
reluctant to admit polygraph test results as evidence because of reliability concerns. In 1998, the U.S. Supreme Court upheld a military rule of evidence making polygraph evidence categorically inadmissible in all military court proceedings. This ruling instilled renewed vigor into the discussion over the use of polygraph test results as evidence. In particular, courts have split over whether polygraph test results can serve as mitigating evidence during the penalty phase of a capital trial.

A. The Polygraph

Invented in the twentieth century, a polygraph machine measures multiple physiological processes and changes in those processes. Examiners infer that a person is telling the truth or is lying from charts of those physiological processes in response to questions on a polygraph test. The National Academy of Sciences has never certified

June 2003, at 36 (noting continued debate over admissibility of polygraph evidence).

24 See Scheffer, 523 U.S. at 310 (noting that question of reliability of polygraph evidence polarizes scientific community); United States v. Fulks, 434 F.3d 410, 434 (4th Cir. 2006) (noting unreliable nature of polygraph results); Barnes, supra note 6, at 669-70 (discussing reasons why courts do not allow polygraph evidence); Jeffrey Philip Ouellet, Note, Posado and the Polygraph: The Truth Behind Post-Daubert Deception Detection, 54 WASH. & LEE L. REV. 769, 770, 802-05 (1997) (noting that “courts have been extremely reluctant to embrace the use of polygraph evidence” due to reliability concerns).

25 See Scheffer, 523 U.S. at 310, 317 (noting lack of scientific consensus regarding reliability of polygraphs as instruments for establishing truth).

26 See SEGRAVE, supra note 4, at 169; Bessent, supra note 5, at 980; Daniels, supra note 23, at 36.

27 Compare Fulks, 454 F.3d at 434 (noting that polygraph evidence is inadmissible during penalty phase of capital trial), with Paxton v. Ward, 199 F.3d 1197, 1216 (10th Cir. 1999) (holding that exclusion of defendant’s polygraph evidence denied him “his right to present mitigating evidence as a basis for a sentence of less than death”), and Rupe v. Wood, 93 F.3d 1434, 1441 (9th Cir. 1996) (holding exclusion of polygraph evidence under state evidence rules violated defendant’s right to present relevant mitigating evidence in capital case).

28 See NAT’L RESEARCH COUNCIL, supra note 4, at 12-13 (describing how polygraph instrument “records physiological phenomena — typically, respiration, heart rate, blood pressure, and electrodermal response (electrical conductance at the skin surface)”). See generally ABRAMS, supra note 5, at 4-8 (describing lie detector test as measuring individual’s emotional reactions, which create variations in physiologic functions); LYKKEN, supra note 4, at 93-106 (describing various polygraph test methods which have developed over last century).

29 NAT’L RESEARCH COUNCIL, supra note 4, at 12-13. See generally ABRAMS, supra note 5, at 4-8; LYKKEN, supra note 4, at 93-106.
polygraph technology as a scientific field of study. The government, however, routinely uses polygraph technology for many practical purposes. For example, police departments and national security organizations perform numerous polygraph tests each year on job applicants and current employees. Despite these practical purposes, Congress limited polygraph testing to governmental use. In 1988, Congress passed the Employment Polygraph Protection Act (“EPPA”), which restricted the use of polygraph testing in the private sector. The EPPA prohibits employers in the private sector from even suggesting that employees submit to polygraph testing.

Courts have followed congressional example and have refused to embrace polygraph technology. Many courts view the study of

---

30 See generally Jim Fisher, Forensics Under Fire: Are Bad Science and Dueling Experts Corrupting Criminal Justice? 109-10 (2008) (noting that lie-detection technology does not have accepted scientific base); Lykken, supra note 4, at 235-54 (noting that all scientific evidence admitted at trial must be reliable); Nat’l Research Council, supra note 4, at 212-13 (noting that “[a]lmost a century of research in scientific psychology and physiology provides little basis for the expectation that a polygraph test could have extremely high accuracy”).


34 29 U.S.C. §§ 2001-08; see Lykken, supra note 4, at 151-52 (noting that EPPA forbids use of polygraph testing in private sector); Nat’l Research Council, supra note 4, at 12 (noting that EPPA “sharply limited the use of polygraphs in employment settings”); Segrave, supra note 4, at 165 (noting that EPPA “prohibited pre-employment polygraph screening and random testing of existing employees”).

35 See generally sources cited supra note 34.

36 See United States v. Scheffer, 523 U.S. 303, 317 (1998) (upholding military evidence rule that acted as per se ban on polygraph evidence); United States v. Fulks, 454 F.3d 410, 434-35 (4th Cir. 2006) (holding that defendant does not have constitutional right to present polygraph evidence during penalty phase of capital trial); People v. Richardson, 183 P.3d 1146, 1195 (Cal. 2008) (noting that same rules of evidence apply in both the penalty phase and guilt phase of capital trial); State v. Cosey, 779 So. 2d 675, 688 (La. 2001) (holding that polygraph evidence was not admissible in penalty phase of capital trial); Emil v. State, 784 P.2d 956, 960 (Nev.
polygraph technology as a “junk science.” Despite courts' skepticism regarding polygraph evidence, scientists continue to study and improve polygraph technology. Currently, a large number of experts believe that polygraph test results are extremely accurate. The avid support of some experts intensifies the debate over the admissibility of polygraph test results as mitigating evidence in capital trials.

B. Mitigating Evidence

Mitigating evidence comprises facts or situations that may reduce a defendant's degree of culpability, thereby reducing his sentence. In the context of a capital trial, mitigating evidence serves to reduce a defendant's sentence from death to life in prison or less. When dealing with a defendant's potential death sentence, the Supreme Court has liberally defined mitigating evidence in the penalty phase of a capital trial.

1990) (holding that trial court was correct in excluding polygraph test results in penalty phase of capital trial).

37 See Scheffer, 523 U.S. at 310 (noting that some experts believe accuracy of polygraph test results are less than 50 percent); Donald A. Dripps, Police, Plus Perjury, Equals Polygraphy, 86 J. CRIM. L. & CRIMINOLOGY 693, 707 (1996) (noting courts are usually hostile to polygraph evidence); Jason C. Parkin, Lie Detectors: An Expanded Definition, 30 McGeorge L. Rev. 729, 729 (1999) (noting that because polygraph tests are unreliable, courts view them as less credible).

38 See Nat'l Research Council, supra note 4, at 91-99 (describing current state of polygraph research); Barnes, supra note 6, at 675 (noting that “although polygraph technology has advanced significantly since its inception,” courts remain skeptical); Reyhan Harmanet, New Window into the Mind Worries Some Legal Experts, S.F. Chron., Oct. 17, 2008, at A1 (discussing fMRI technology, and its potential effects in determining if individual is deceptive when answering questions).

39 See Scheffer, 523 U.S. at 310 (noting that “some studies have concluded that polygraph tests overall are accurate and reliable”); Bessent, supra note 5, at 980 (noting that researchers at APA report accuracy of polygraph testing to be from 80 to 98 percent); Bennett L. Gershman, Lie Detection: The Supreme Court’s Polygraph Decision, N.Y. St. B.J., Sept.-Oct. 1998, at 34 (noting proponents claim polygraph testing to range from 70 to well over 90 percent).

40 See sources cited supra note 38.


The Supreme Court’s definition of mitigation in the penalty phase includes any part of the character or record of the individual offender and the circumstances of the particular offense.\textsuperscript{44} Examples of common mitigating evidence include a defendant’s history of childhood abuse, mental retardation, and the relative culpability of the defendant with regard to the offense committed.\textsuperscript{45} Such factors ultimately play into the sentencer’s decision to impose the death sentence or not.\textsuperscript{46} The Supreme Court has continually emphasized that criminal defendants have a right to admit all mitigating evidence during the penalty phase of a capital trial.\textsuperscript{47} This emphasis led the Supreme Court to hold that expansive rules of evidence govern the penalty phase of a capital trial.\textsuperscript{48}

\textbf{C. The Role of Mitigating Evidence in the Penalty Phase}

The Supreme Court has indicated that a jury must consider all mitigating evidence during the penalty phase of a capital trial.\textsuperscript{49} Historically, this was not the case, as many states enacted death penalty statutes that imposed mandatory death sentences for crimes such as first-degree murder.\textsuperscript{50} A series of Supreme Court cases, however, established that such mandatory impositions of the death

\begin{footnotesize}
\item[44] See McKoy, 494 U.S. at 438; Mills, 486 U.S. at 374 (quoting Lockett, 438 U.S. at 604); Lockett, 438 U.S. at 604.
\item[46] Eddings, 455 U.S. at 113; Lockett, 438 U.S. at 601-02; Woodson, 428 U.S. at 297-300.
\item[47] See Mills, 486 U.S. at 374-75; Eddings, 455 U.S. at 110; Lockett, 438 U.S. at 604.
\item[48] See McKoy, 494 U.S. at 441; Mills, 486 U.S. at 374-75; Lockett, 438 U.S. at 604.
\item[49] See Mills, 486 U.S. at 374-75 (noting that “it is beyond dispute” that sentencer in capital trial must consider all mitigating evidence proffered by defendant); Eddings, 455 U.S. at 110 (discussing requirement that court and sentencer consider all mitigating evidence defendant proffers at penalty phase); Lockett, 438 U.S. at 604 (noting that jury must hear all relevant mitigating evidence proffered at penalty phase by defendant).
\item[50] See Woodson, 428 U.S. at 297-300 (providing historical overview of mandatory death penalty statutes in American legal system); Goldman, supra note 8, at 15 (noting that in early America, death sentences by public hanging were mandatory for certain crimes); Donald D. Hook & Lothar Kahn, Death in the Balance: The Debate over Capital Punishment 21 (1989) (noting that American colonies followed British model of capital punishment, where around 55 crimes including heresy, vagrancy, and rape were punishable by death).
\end{footnotesize}
penalty, without consideration of all mitigating evidence, are contrary
to the Constitution.\textsuperscript{51}

In \textit{Woodson v. North Carolina}, the Supreme Court first deemed
mandatory death sentences unconstitutional.\textsuperscript{52} At the trial level, the
jury convicted two men of murder.\textsuperscript{53} At the time, North Carolina’s
death penalty statute required a death sentence for any person
convicted of first-degree murder.\textsuperscript{54} On appeal, the Supreme Court held
that the North Carolina statute violated the Eighth and Fourteenth
Amendments.\textsuperscript{55} The Court noted that a mandatory death sentence
without consideration of a defendant’s character, record, or
circumstances of the offense was inconsistent with the Constitution.\textsuperscript{56}
Specifically, the Court noted that such statutes were inconsistent with
“the fundamental respect for humanity underlying the Eighth
Amendment.”\textsuperscript{57} The North Carolina statute violated the Eighth and
Fourteenth Amendments because it did not permit consideration of
relevant facets of the defendant’s character or record.\textsuperscript{58} The statute also
failed to permit consideration of the circumstances of the defendant’s
particular offense.\textsuperscript{59} The Supreme Court, however, failed to define
which “relevant facets” it would require courts to consider.\textsuperscript{60} After
\textit{Woodson}, many states became confused over how to construct death
penalty statutes that allowed consideration of all relevant facets and
guaranteed Eighth Amendment protections.\textsuperscript{61}

Two years after \textit{Woodson}, the Supreme Court provided states with
the guidance they so desperately needed in the case of \textit{Lockett v. Ohio}.\textsuperscript{62} A trial court convicted Lockett of murder with aggravating
circumstances and sentenced her to death.\textsuperscript{63} The Ohio Court of

\textsuperscript{51} See cases cited supra note 46.
\textsuperscript{52} \textit{Woodson}, 428 U.S. at 305.
\textsuperscript{53} Id. at 282.
\textsuperscript{54} Id. at 285-86.
\textsuperscript{55} Id. at 305.
\textsuperscript{56} Id. at 304.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 305.
\textsuperscript{59} Id. at 304.
\textsuperscript{60} See \textit{Lockett v. Ohio}, 438 U.S. 586, 604 (1978) (noting that after \textit{Woodson},
Supreme Court “did not attempt to indicate . . . which facets of an offender or his
offense it deemed ‘relevant’ ”).
\textsuperscript{61} See id. at 602 (noting that over previous decade, signals on how to revise state
dead penalty statutes were not “easy to decipher”).
\textsuperscript{62} Id. at 602-05.
\textsuperscript{63} See id. at 589, 593-94 (noting that trial court charged Lockett “with aggravated
murder with aggravating specifications of committing crime for purpose of escaping
Appeals and the Ohio Supreme Court affirmed the defendant’s conviction.64 The U.S. Supreme Court reversed and remanded on Lockett’s death sentence.65 In reversing Lockett’s sentence, the Supreme Court established a principle relating to the admission of mitigating evidence in the penalty phase of a capital trial.66 The Court mandated that state statutes cannot preclude a sentencer “from considering, as a mitigating factor, any aspect of the defendant’s character or record.”67 The Supreme Court also mandated that state statutes cannot preclude a sentencer from considering as mitigating evidence “any of the circumstances of the offense.”68 The Court determined that the Constitution requires the sentencer to hear all mitigating evidence that the defendant proffers as a basis for a lesser sentence.69 The Court founded its decision on the idea that a death sentence is qualitatively different from other kinds of sentences.70 Thus, a more relaxed standard of evidence governs in the penalty phase because courts want to ensure that defendants have every opportunity to advocate for a penalty less than death.71 The Court recognized that restricting a defendant’s opportunity to advocate for a sentence less severe than the death penalty was contrary to the Eighth and Fourteenth Amendments.72 The Court in Lockett determined that the Ohio death penalty statute impermissibly failed to allow such individualized consideration of mitigating factors.73 The statute did not enable the sentencing judge to consider mitigating factors such as age, character, lack of intent and prior record.74 The Court determined that such factors related to the defendant’s character, record, and detection . . . or punishment . . . and committing murder immediately after robbery”).  

64 See id. at 589.  
65 Id. at 608-09.  
66 See id. at 604.  
67 Id.  
68 Id.  
69 Id.  
70 Id.  
71 See id. at 605.  
72 Id.  
73 See id. at 601 (noting that “sentencing procedures should not create ‘a substantial risk that the [death penalty will] be inflicted in an arbitrary or capricious manner’ “ (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976))).  
74 See id. at 597 (recognizing that trial court’s failure to consider important mitigating facts such as age, character, lack of intent, and prior record violated constitutional principles of fairness).
circumstances of the crime.\textsuperscript{75} Thus, the Supreme Court declared Ohio’s statute unconstitutional.\textsuperscript{76}

Four years later, the Court reaffirmed the rule of \textit{Lockett} in \textit{Eddings v. Oklahoma}.\textsuperscript{77} In \textit{Eddings}, the state charged the defendant with murder and sentenced him to death.\textsuperscript{78} The Oklahoma Court of Criminal Appeals affirmed Eddings’s conviction and the U.S. Supreme Court granted certiorari.\textsuperscript{79} The Supreme Court reversed in part and remanded for further proceedings.\textsuperscript{80} The Oklahoma courts, according to the Supreme Court, had refused to consider Eddings’s turbulent family history and emotional disturbances as mitigating evidence.\textsuperscript{81} The majority cited as its main authority the rule established in \textit{Lockett}.\textsuperscript{82} The rule prohibited states from enacting statutes that precluded the consideration of any relevant mitigating factors as evidence.\textsuperscript{83} In addition, the rule required the sentencer as a matter of law to consider all relevant mitigating factors as evidence.\textsuperscript{84}

\textit{Lockett} and \textit{Eddings} established that, given the unique circumstances of the death penalty, lax rules of evidence govern the admission of mitigating evidence in the penalty phase of a capital trial.\textsuperscript{85} Over the next eight years, two other Supreme Court cases echoed the principle established in \textit{Lockett} and \textit{Eddings}.\textsuperscript{86} \textit{Mills v. Maryland} and \textit{McKoy v. North Carolina} both involved defendants charged and convicted of capital murder.\textsuperscript{87} The Supreme Court overturned the defendants’ convictions in both cases.\textsuperscript{88} The Court again held that the state statutes at issue violated the Constitution by preventing the sentencer from

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{75} \textit{Id.} at 608.
\item \textsuperscript{76} \textit{Id.} at 604, 606 (recognizing that in capital cases, fundamental respect for humanity underlying Eighth Amendment requires consideration of character, record of individual offense, and circumstances of crime).
\item \textsuperscript{77} \textit{Eddings v. Oklahoma}, 455 U.S. 104, 105 (1982).
\item \textsuperscript{78} \textit{Id.}
\item \textsuperscript{79} \textit{Id.} at 105, 109.
\item \textsuperscript{80} \textit{Id.} at 117.
\item \textsuperscript{81} \textit{Id.} at 115.
\item \textsuperscript{82} See \textit{id.} at 110 (noting that rule in \textit{Lockett} established that sentencer must consider all relevant mitigating factors during penalty phase of capital trial).
\item \textsuperscript{83} \textit{Id.} at 113-14.
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} See \textit{id.} at 110; \textit{Lockett v. Ohio}, 438 U.S. 586, 604-05 (1978).
\item \textsuperscript{86} See \textit{McKoy v. North Carolina}, 494 U.S. 433, 438 (1990) (noting that Supreme Court’s decision in \textit{Lockett} established that juror must weigh all mitigating evidence); \textit{Mills v. Maryland}, 486 U.S. 367, 374 (1988) (noting that “it is beyond dispute” that in capital case principle established in \textit{Lockett} applies).
\item \textsuperscript{87} \textit{McKoy}, 494 U.S. at 435; \textit{Mills}, 486 U.S. at 371.
\item \textsuperscript{88} \textit{McKoy}, 494 U.S. at 444; \textit{Mills}, 486 U.S. at 384.
\end{itemize}
\end{footnotesize}
considering all mitigating evidence. Both statutes precluded jurors from considering evidence as mitigating unless the jury unanimously agreed that such evidence was mitigating. In finding the statutes unconstitutional, the Court cited the principle established in Lockett and Eddings that all relevant mitigating evidence is admissible in the penalty phase. Ultimately, however, the Court would lead the way to challenges to this principle in the lower courts after its ruling in United States v. Scheffer, discussed next.

D. United States v. Scheffer and the Military’s Per Se Polygraph Ban

In 1998, the Supreme Court held that a per se rule against admission of polygraph evidence in court martial proceedings did not violate the Constitution. In Scheffer, the military court convicted the defendant of using methamphetamines, failing to go to his place of duty, and leaving his unit without authority. The defendant agreed to take a polygraph test to answer questions regarding his possible use of methamphetamines. The results of Scheffer’s polygraph test showed no deception when he stated that he had not used illegal drugs while in the Air Force. Scheffer sought to introduce the results of the polygraph test to support his testimony that he did not knowingly use drugs. However, the military court denied the motion, relying on a military rule of evidence that acted as a per se bar to all polygraph evidence. The U.S. Court of Appeals for the Armed Forces reversed the military court’s decision. The Court of Appeals held that the per se rule violated the defendant’s Sixth Amendment right to present a

89 McKoy, 494 U.S. at 443; Mills, 486 U.S. at 384.
90 McKoy, 494 U.S. at 444; Mills, 486 U.S. at 384.
91 McKoy, 494 U.S. at 438-42; Mills, 486 U.S. at 374-75.
92 See United States v. Fulks, 454 F.3d 410, 434 (4th Cir. 2006) (holding that no constitutional violation occurred where trial court denied Fulk’s motion to admit polygraph results in sentencing phase); Goins v. Angelone, 52 F. Supp. 2d 638, 675 (E.D. Va. 1999) (noting that under Scheffer, “Constitution does not mandate admission of polygraph results in capital sentencing proceedings”); People v. Richardson, 183 P.3d 1146, 1195 (Cal. 2008) (holding that exclusion of polygraph results in penalty phase did not violate defendant’s constitutional rights).
94 Id. at 306-07.
95 Id. at 306.
96 Id.
97 Id.
98 Id. at 306-07.
99 Id. at 307.
In reversing, the majority emphasized that a defendant does not have an unlimited right to present all relevant evidence. Instead, relevant evidence is “subject to reasonable restrictions” and must accommodate “other legitimate interests in the criminal trial process.” The majority found that the per se ban in question served several legitimate interests in the criminal trial process. First, the Court noted that the rule ensured that defendants would only introduce reliable evidence at trial. Second, the rule preserved the role of members of the court-martial panel in determining credibility. Finally, the Court noted that the rule “avoid[ed] litigation that is collateral to the primary purpose of the trial.” The statute passed constitutional muster because it served legitimate interests and was neither arbitrary nor disproportionate. The decision in Scheffer impacted the admissibility of polygraph evidence in both noncapital cases and capital cases. Ultimately, the federal circuit courts split over the admissibility of polygraph evidence in the penalty phase of a capital trial.

100 Id.
101 Id. at 308.
102 See id. (noting that defendant’s interest in presenting relevant evidence must “bow to accommodate other legitimate interests in the criminal trial process” (quoting Rock v. Arkansas, 483 U.S. 44, 55 (1987))).
103 Id.
104 See id. at 309 (noting that military courts’ polygraph evidence ban kept out unreliable evidence, secured jurors’ role as factfinder, and lessened burden of hearing expert testimony).
105 Id.
106 Id.
107 Id.
108 Id.
109 See United States v. Fulks, 454 F.3d 410, 434 (4th Cir. 2006) (citing Scheffer to prohibit admission of polygraph evidence in penalty phase of capital trial); People v. Richardson, 183 P.3d 1146, 1195 (Cal. 2008) (citing Scheffer as support for decision that trial court properly excluded defendant’s polygraph in penalty phase of trial); see also Thornburg v. Mullin, 422 F.3d 1113, 1125 (10th Cir. 2005) (mentioning Scheffer’s effect on states that institute per se polygraph bans).
110 Compare Fulks, 454 F.3d at 434 (holding polygraph inadmissible during penalty phase of capital trial), with Paxton v. Ward, 199 F.3d 1197, 1215-16 (10th Cir. 1999) (holding polygraph evidence admissible during penalty phase of capital trial), and Rupe v. Wood, 93 F.3d 1434, 1441 (9th Cir. 1996) (same).
II. THE CIRCUIT SPLIT

Admission of polygraph evidence as a mitigating factor in the penalty phase of a capital trial has been controversial. Currently, the Ninth Circuit Court of Appeals holds that polygraph evidence is admissible as a mitigating factor during the penalty phase of a capital trial. However, the Fourth Circuit has ruled that polygraph evidence is inadmissible as a mitigating factor during the penalty phase of a capital trial. The two cases that best exemplify this split are Rupe v. Wood from the Ninth Circuit and United States v. Fulks from the Fourth Circuit.

A. Rupe v. Wood

In 1996, the Ninth Circuit in Rupe v. Wood set aside a death sentence because a Washington statute prohibited the admission of polygraph evidence at the penalty phase. The trial court convicted Rupe of capital murder and robbery and sentenced him to death. After exhausting state appellate procedures, Rupe brought federal habeas proceedings to the United States District Court for the Western District of Washington. The district court ruled in Rupe's favor and found that the state court violated Rupe's due process rights. Rupe sought to introduce polygraph test results from

---

111 See Richardson, 183 P.3d at 1194-95; Barnes, supra note 6, at 675-82.
112 See Paxton, 199 F.3d at 1215-16 (affirming trial court's decision that failure to admit polygraph evidence was contrary to clearly established federal law as determined by Supreme Court); Rupe, 93 F.3d at 1441 (affirming that court's refusal to admit polygraph evidence during second penalty phase hearing violated defendant's due process rights).
113 See Fulks, 454 F.3d at 434 (noting that "Constitution does not mandate admission of polygraph results in capital sentencing proceedings" (quoting Goins v. Angelone, 226 F.3d 312, 326 n.7 (4th Cir. 2000))).
114 See Rupe, 93 F.3d at 1439-42 (noting that state's star witness and accomplice's polygraph test results are admissible as mitigating evidence in penalty phase of capital trial).
115 Id. at 1437. The jury convicted the defendant of murder and sentenced him to death for the killing of two bank tellers during a bank robbery. Id. The defendant maintained that an accomplice to the bank robbery had committed the murders. Id.
116 Id.
117 Id. at 1436.
118 See id. at 1439 (finding that trial court's refusal to admit defendant's proffered polygraph evidence during his first penalty phase of trial violated constitutional principles).
the state's key witness. Rupe claimed that the state's key witness killed the victim. Further evidence established that the witness “disposed of the murder weapon . . . and spent some of the robbery proceeds.” The witness's polygraph results showed he was not truthful when answering questions about his involvement in the crime. The court ruled that such evidence was a mitigating factor because it was relevant to the issue of culpability. In addition, such evidence refuted the state's assertion that no evidence other than Rupe's statements supported his claim that the state's witness committed the murders. The court determined that the Washington statute unconstitutionally precluded the defendant from introducing polygraph results into evidence in the penalty phase.

The court distinguished between evidence standards in capital cases and those in noncapital cases by citing the principle established in Lockett and Eddings. Under this principle, lax standards of evidence govern the penalty phase in capital cases and defendants must be able to present all mitigating evidence. Thus, the court held that the key witness's polygraph results were admissible as mitigating evidence in the penalty phase. In Paxton v. Ward, another capital case, the Tenth Circuit adopted the Ninth Circuit's holding.

120 Id. The state's key witness was an accessory to the burglary and murder in question. Id. When arrested, the police administered the key witness a polygraph test. Id. The results of the key witness's polygraph test showed deception. Id.
121 Id. at 1441.
122 See id. (noting that state's key witness indisputably played role in offenses).
123 Id. at 1438.
124 Id. at 1441.
125 Id.
126 Id.
127 Id. at 1439-40. See generally Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (concluding that sentencer must consider, as mitigating factor, any aspect of defendant's character, record, and any circumstances of offense); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (establishing that sentencer in capital trial must consider all aspects proffered by defendant of character, record, or circumstances of crime in penalty phase).
128 Eddings, 455 U.S. at 110; Lockett, 438 U.S. at 604.
129 Rupe, 93 F.3d at 1441.
130 Paxton v. Ward, 199 F.3d 1197, 1214-16 (10th Cir. 1999) (noting that Supreme Court's decision in Schaffer did not overrule Ninth Circuit's ruling in Rupe).
The Fourth Circuit Court of Appeals came to a different conclusion. In 2006, the Fourth Circuit in United States v. Fulks held that the Constitution does not require the admission of polygraph results during the penalty phase of a capital trial. The trial court convicted the defendant of carjacking and kidnapping that resulted in the death of the victim. On appeal, Fulks asserted that the court had unconstitutionally precluded him from introducing testimony concerning three polygraph examinations administered to him by the FBI. The polygraph test results showed that Fulks was truthful when he told the FBI that he neither knew of nor participated in the murders. However, the Fourth Circuit found that the Supreme Court’s decision in Scheffer foreclosed Fulks’s claim. The Fourth Circuit concluded that Scheffer suggested that exclusion of polygraph evidence would pass constitutional muster in the capital context. In making its ruling, the court based its decision on Scheffer’s emphasis on the unreliable nature of polygraph tests. By doing so, the Fourth Circuit broke with the Ninth Circuit and created a circuit split.
III. ANALYSIS

Courts should admit polygraph evidence in the penalty phase of a capital trial.\textsuperscript{141} First, U.S. Supreme Court precedent establishes that expansive lax rules of evidence govern the penalty phase of a capital trial.\textsuperscript{142} In addition, lower courts incorrectly apply the analysis in Scheffer to the penalty phase of a capital trial.\textsuperscript{143} Finally, allowing all relevant mitigating evidence during the penalty phase will better serve justice.\textsuperscript{144} Allowing this evidence leads to a capital system which affords defendants with an increased opportunity to advocate for a penalty less than death.\textsuperscript{145} Such an opportunity is beneficial to defendants who do not deserve a death sentence.\textsuperscript{146}

A. Expansive Rules of Evidence Govern the Penalty Phase

Fundamental differences between capital and noncapital sentencing must be taken into account when determining the admissibility of mitigating evidence.\textsuperscript{147} In noncapital sentencing, the defendant does not have a constitutional right to present all mitigating evidence.\textsuperscript{148} However, in capital sentencing, the fundamental respect for humanity underlying the Eighth Amendment requires the court to hear all mitigating evidence proffered by the defendant.\textsuperscript{149} To secure a capital defendant’s Eighth Amendment rights, state statutes must allow all

\textsuperscript{141} Paxton, 199 F.3d at 1215-16; Rupe, 93 F.3d at 1441.
\textsuperscript{142} See infra Part III.A (arguing that there is significant Supreme Court case law establishing expansive standard of evidence governing penalty phase of capital trial).
\textsuperscript{143} See infra Part III.B (arguing that lower courts are incorrect in applying holding from noncapital Supreme Court case to capital cases).
\textsuperscript{144} See infra Part III.C (noting that defendants do not currently benefit from polygraph evidence).
\textsuperscript{145} See infra Part III.C (arguing that allowing defendants to benefit from polygraph evidence will balance unequal aspect of criminal justice system).
\textsuperscript{146} See infra Part III.C (arguing that admitting defendants’ polygraph evidence benefits defendants who do not deserve death sentence).
\textsuperscript{148} See cases cited supra note 147.
\textsuperscript{149} See U.S. CONST. amend. VIII; Lockett, 438 U.S. at 604; Woodson, 428 U.S. at 304.
mitigating evidence in the penalty phase. The Supreme Court made clear that mitigating evidence may encompass anything related to the circumstances of the crime in question. Polygraph evidence of a defendant or an important witness to the crime relates to the circumstances of the crime. This is particularly true in regard to the polygraph test results of a codefendant offering snitch testimony in exchange for a lesser sentence. If the prosecution utilizes a codefendant’s snitch testimony against a defendant, the admission of relevant polygraph evidence should be admissible under the relaxed standard of evidence. Prohibiting a defendant from proffering such evidence would violate his or her constitutional rights.

However, one could argue that the Supreme Court has already deemed polygraph evidence too unreliable to serve as evidence in court proceedings. Courts are aware of the dramatic impact that scientific and forensic evidence have on juries. A major fear among courts is that jurors will replace their personal credibility determinations with the results of the polygraph examinations.

150 See Mills, 486 U.S. at 374 (noting that “it is beyond dispute” that statute cannot preclude sentencer from considering as mitigating evidence defendant’s character, record, or circumstances of crime); Rupe v. Wood, 93 F.3d 1434, 1439-40 (9th Cir. 1996) (holding defendant may submit any evidence of his character, record, or circumstances of offense in penalty phase of capital trial).


152 See Rupe, 93 F.3d at 1441 (holding that polygraph evidence which potentially adds to defendant’s argument regarding culpability is admissible in penalty phase); State v. Height, 604 S.E.2d 796, 798 (Ga. 2004) (noting that polygraph evidence was relevant and sufficiently reliable under liberal admissibility rules governing capital sentencing proceedings).

153 See Rupe, 93 F.3d at 1441 (noting that court of appeals ruled codefendant’s polygraph test admissible in penalty phase of capital trial); Height, 604 S.E.2d at 798 (noting that polygraph test results related to defendant or circumstances of crime are admissible in penalty phase of capital trial).

154 See cases cited supra note 151.

155 Rupe, 93 F.3d at 1439-40 (noting that exclusion of relevant evidence violates principle established in Lockett and Eddings); Height, 604 S.E.2d at 798 (noting violation of defendant’s constitutional rights when state statute precludes sentencer from hearing mitigating evidence related to circumstances of offense).


157 See Scheffer, 523 U.S. at 313-14; State v. Cosey, 779 So. 2d 673, 686 (La. 2000) (noting that jury may infer that if witness passed polygraph examination he is testifying truthfully); Bessent, supra note 5, at 975 (noting that courts worry that juries focus too much on polygraph evidence and become confused).

158 See Scheffer, 523 U.S. at 313 (noting that “fundamental premise of our criminal
Courts believe that this substitution is detrimental to the justice system because they generally view jurors' credibility determinations as more reliable than polygraph technology.\(^{159}\) Also, courts often bar polygraph evidence in order to advance their legitimate interest in admitting only reliable evidence.\(^{160}\) Courts' concerns over admitting unreliable evidence dominate judicial discussions about whether to admit polygraph evidence at trial.\(^{161}\)

However, the rules of evidence during the penalty phase of a capital trial deal with relevancy and not reliability.\(^{162}\) Thus, while polygraph evidence may not be absolutely reliable, it is relevant to the circumstances of the crime.\(^{163}\) The exclusion of relevant evidence over reliability concerns violates the principles set forth in *Lockett* and *Eddings*.\(^{164}\) *Lockett* and *Eddings* established that such exclusions
Mitigating Evidence?

interfered with the jury's ability to weigh mitigating factors. True, Lockett and Eddings further established that the Supreme Court wanted death penalty decisions to be reliable. However, the Court did not focus on the reliability of the mitigating evidence. Instead, the Court focused on reliability of the ultimate decision in terms of allowing the jury to hear all relevant mitigating evidence. Thus, polygraph test results should be admissible in the penalty phase of a capital trial despite courts' reliability concerns.

In addition, lower courts mistakenly cite noncapital cases when making rulings involving polygraph evidence in capital cases. The Supreme Court has expressly upheld per se bans on polygraph evidence in noncapital criminal cases. The Supreme Court, however, has never expressly done so in the penalty phase of a capital trial. The lack of a direct Supreme Court decision with regard to the admissibility of polygraph evidence in the penalty phase of capital sentencing has led lower courts to mistakenly cite Scheffer in their rulings banning polygraph evidence.

---


166 See Eddings, 455 U.S. at 112; Lockett, 438 U.S. at 604.

167 See, e.g., Eddings, 455 U.S. at 112-13 (noting that death sentence is more consistent and reliable when jury hears all mitigating evidence); Lockett, 438 U.S. at 604 (noting that allowing consideration of all mitigating evidence in penalty phase makes death sentence more reliable).

168 See cases cited supra note 166.

169 Paxton, 199 F.3d at 1216; Rupe, 93 F.3d at 1441; Height, 604 S.E.2d at 798; State v. Bartholomew, 683 P.2d 1079, 1089 (Wash. 1984).

170 See generally United States v. Fulks, 454 F.3d 410 (4th Cir. 2006) (citing noncapital case Scheffer in support of prohibiting polygraph evidence in penalty phase); United States v. Catalan-Roman, 368 F. Supp. 2d 119, 121-23 (D.P.R. 2001) (relying solely on Scheffer in holding that defendant's polygraph evidence was rightfully excluding in penalty phase); People v. Richardson, 183 P.3d 1146, 1195 (Cal. 2008) (citing People v. Wilkinson, 94 P.3d 551, 569 (Cal. 2004), involving polygraph evidence in connection with DUI charge, in support of holding that polygraph evidence is not admissible in penalty phase of capital trial).


172 See Paxton, 199 F.3d at 1215-16 (noting that Supreme Court's holding in Scheffer does not control penalty phase of capital trial where different rules of evidence govern).

173 See sources cited supra note 171.
B. Lower Courts Incorrectly Apply the Scheffer Analysis

In Scheffer, the Supreme Court upheld a military evidence rule that banned polygraph evidence in all military court proceedings. The Court upheld the military’s per se ban on polygraph evidence because it served three legitimate interests in the criminal trial process. The three legitimate interests were ensuring admission of only reliable evidence, preserving the role of court members, and avoiding collateral litigation. Although a per se ban on polygraph evidence may serve these three interests in noncapital criminal trials, they fail to do so in the penalty phase of a capital trial.

Writing about the first interest in Scheffer, the Court noted that the scientific community remains polarized about polygraph reliability. To support their contention, the Court cited numerous cases holding that polygraph evidence should be inadmissible because of reliability concerns. However, none of the cases cited by the Court involved defendants charged with capital offenses. Lower courts fail to recognize this distinction when holding that polygraph evidence is too unreliable to serve as evidence in the penalty phase. Such a failure was particularly evident in the Fourth Circuit’s analysis in Fulks. Although the Fulks court noted that Scheffer was a noncapital case, it failed to mention the different interests involved in noncapital and capital cases. Thus, lower courts such as Fulks have upheld state statutes dealing with the penalty phase without distinguishing between the interests of capital and noncapital cases.

---

174 Scheffer, 523 U.S. at 317.
175 See id. at 309-15.
176 Id.
177 See Paxton, 199 F.3d at 1215 (noting that Supreme Court’s holding in Scheffer does not apply in cases involving capital defendant’s constitutional right to present mitigating evidence); State v. Height, 604 S.E.2d 796, 798 (Ga. 2004) (noting that states may not use evidentiary rules intended to assure reliability in sentencing process to exclude relevant mitigating evidence).
178 Scheffer, 523 U.S. at 309-10.
179 Id. at 310-11.
181 See cases cited supra note 171.
182 United States v. Fulks, 434 F.3d 410, 434 (4th Cir. 2006).
183 Id.
184 See id. (noting that Supreme Court’s analysis in Scheffer suggests that exclusion
The second interest the Supreme Court listed in *Scheffer* is that the per se ban preserves the court members’ core function of making credibility determinations in criminal trials. The Court noted that in the criminal trial system the jury is the lie detector. By its nature, polygraph evidence may diminish a juror’s role in determining the credibility of the defendant and the witnesses. However, when the penalty phase of a capital trial begins, the jury has already determined that the defendant is guilty based on the evidence presented. Thus, the Court’s concern that allowing polygraph evidence into trial can lead jurors to abandon their duty to assess credibility and guilt is not present.

The final interest is that the per se ban avoids collateral litigation. The Supreme Court did not want separate collateral mini-trials on issues other than innocence or guilt. The Court determined that such collateral litigation extends criminal trials and distracts the jury from determining guilt or innocence. Again, this concern is not applicable in the penalty phase of a capital trial. The jury determines a defendant’s guilt before the penalty phase begins. Thus, any concern over the jury’s function of determining guilt or innocence is not present.

---

185 See United States v. Scheffer, 523 U.S. 303, 312-14 (1998) (stating that polygraph evidence diminishes jury’s role in making credibility determinations and can lead jurors to abandon their duty to assess credibility and guilt).

186 Id. at 313.

187 Id.; *Fulks*, 454 F.3d at 434; State v. Casey, 779 So. 2d 675, 686, 688 (La. 2001).

188 See *McGautha* v. California, 402 U.S. 183, 186 (1971) (noting that capital trial is divided into two stages, with jury first considering issue of guilt before issue of punishment); State v. Height, 604 S.E.2d 796, 798 (Ga. 2004) (noting purpose of bifurcated trial in capital context); Goldman, supra note 8, at 44 (discussing bifurcated trial process in death penalty cases).

189 See supra note 187.

190 *Scheffer*, 523 U.S. at 314.

191 Id.

192 Id.

193 See *McGautha*, 403 U.S. at 186 (noting that jury makes guilt determination before penalty phase); Jennifer L. Culbert, *Dead Certainty: The Death Penalty and the Problem of Judgment* 32 (2008) (noting that factfinder determines guilt before penalty phase of capital trial); Goldman, supra note 8, at 44 (discussing bifurcated trial process in death penalty cases).

194 *McGautha*, 403 U.S. at 186; Culbert, supra note 193, at 32; Goldman, supra note 8, at 44.

195 See supra note 193.
One might argue that despite a prior guilt determination, the parties will still need to provide time-consuming expert testimony to explain polygraph results.\textsuperscript{196} According to this argument, lengthy expert testimony will not only consume more of the court's time, but will also prolong the pain that victims' families have to go through.\textsuperscript{197} In addition, expert testimony will increase the court's costs and unnecessarily prolong the jury's service.\textsuperscript{198} Given the nature of the crimes involved in capital cases, extended jury service can be a heavy burden.\textsuperscript{199}

However, given the possibility that an undeserving defendant may be sentenced to death, it is important that courts admit polygraph test results during the penalty phase.\textsuperscript{200} The unique circumstances of the penalty phase make it important for our justice system to allow defendants every opportunity to present mitigating evidence.\textsuperscript{201} It is

\textsuperscript{196} See Scheffer, 523 U.S. at 314-15 (noting that admitting polygraph evidence will substantially burden courts with unnecessary litigation); United States v. Fulks, 454 F.3d 410, 434 (4th Cir. 2006) (recognizing that court has interest in eliminating collateral litigation); Fisher, supra note 30, at 179 (noting that forensic science experts often make legal system less efficient by confusing and creating doubts among jurors).


\textsuperscript{198} See sources cited supra note 196.


\textsuperscript{200} See State v. Porter, 698 A.2d 739, 779 (Conn. 1997) (noting that per se exclusionary rule may lead to imposition of death penalty on innocent defendant); State v. Height, 604 S.E.2d 796, 798 (Ga. 2004) (noting that when deciding whether to impose sentence of death, it is desirable for jury to have as much information relating to crime as possible).

\textsuperscript{201} See Baze v. Parker, 371 F.3d 310, 334-35 (6th Cir. 2004) (Cole, J., dissenting) (noting that Supreme Court is exceedingly cautious in ensuring that capital
true that the presentation of mitigating evidence, such as polygraph results, will increase the financial and emotional burden on the jury and the court.\textsuperscript{202} However, given that a capital defendant is advocating for the sparing of his life, it is inappropriate to weigh his life against administrative concerns of the court.\textsuperscript{203} Decades of Supreme Court decisions mandate that defendants have every opportunity to argue for a sentence of less than death.\textsuperscript{204} Thus, although the Court's ban on polygraph evidence served three legitimate purposes for noncapital cases, these purposes do not apply when a defendant is advocating for his life.\textsuperscript{205}

C. Barring Polygraph Evidence During the Penalty Phase Is Prejudicial to the Defendant

It is not in the interest of justice to prohibit defendants from admitting polygraph evidence in the penalty phase of a capital trial.\textsuperscript{206}
However, under Fulks, defendants cannot use such evidence during the penalty phase. This prohibition fails to allow defendants every opportunity to introduce relevant evidence that may reduce their culpability. Also, such a prohibition makes the criminal justice system less efficient by reducing the reliability of the death sentence handed down by the jury. Despite such concerns, courts sometimes allow prosecutors to introduce polygraph evidence when test results benefit only the state’s case. Therefore, it would be unjust to allow only prosecutors, but not criminal defendants, to benefit from polygraph evidence.

Prosecutors indirectly benefit from police use of polygraph technology during investigations. During initial murder sentence less than death); State v. Height, 604 S.E.2d 796, 798 (Ga. 2004) (noting that defendant's need to introduce mitigating evidence trumps evidentiary rules); State v. Bartholomew, 683 P.2d 1079, 1085 (Wash. 1984) (noting that Supreme Court requires sentencer to hear all mitigating evidence proffered by defendant at sentencing hearing).

207 See United States v. Fulks, 454 F.3d 410, 434 (4th Cir. 2006) (noting that Supreme Court’s decision that Constitution does not mandate admission of polygraph results in capital sentencing binds Fourth Circuit Court of Appeals); see also Scheffer, 523 U.S. at 308.

208 See Mills, 486 U.S. at 374 (noting that sentencer must consider all mitigating evidence defendant proffers as basis for sentence less than death); Lockett, 438 U.S. at 604 (recognizing that defendants have constitutional rights to present all mitigating evidence to jury at penalty phase of capital trial); Paxton, 199 F.3d at 1213 (noting that sentencer must consider any aspect of defendant’s character, record, or circumstance of crime he offers as basis for sentence less than death).

209 See McKoy, 494 U.S. at 438 (noting that state sentencing scheme that leads reasonable jurors to believe they could not consider any mitigating evidence unless all jurors agreed on existence of particular circumstance increased risk of arbitrary death sentence); Eddings, 455 U.S. at 116 (noting trial court’s failure to consider mitigating evidence, such as defendant’s age, increased risk of arbitrary death judgment); Lockett, 438 U.S. at 605 (noting that if jury does not consider all mitigating evidence, there is increased risk of sentencing undeserving defendant to death).

210 See Thornburg v. Mullin, 422 F.3d 1113, 1124-25 (10th Cir. 2005) (holding that prosecutor’s mention of defendant’s polygraph test results was so insignificant as to not be violation of defendant’s constitutional rights); Davis v. Singletary, 853 F. Supp. 1492, 1567-69 (M.D. Fla. 1994) (finding no constitutional violation where state referenced defendant’s polygraph test results during trial); Jennifer Feehan, Court Reverses Conviction in 1991 Slaying: Appeals Judges Find Recording Prejudicial, BLADE, Jan. 18, 2009, available at 2009 WLNR 1008894 (referencing Sixth Circuit Court of Appeals case in which court found prosecutor’s reference to defendant’s polygraph test during trial prejudicial).

211 See, e.g., Rupe, 93 F.3d at 1439 (noting that codefendant and accomplice to crime was state’s key witness in defendant’s trial); State v. Cosey, 779 So. 2d 675, 685 (La. 2001) (noting that state’s main witness was police suspect); Bartholomew, 683 P.2d at 1088-89 (noting that state’s principal witness was accomplice to crime in
investigations, police regularly ask suspects to take polygraph tests.\textsuperscript{212} The results of polygraph tests aid law enforcement officers in deciding on which area of the investigation they should direct their focus.\textsuperscript{213} Frequently, when faced with the prospect of taking a polygraph examination, suspects voluntarily confess to crimes.\textsuperscript{214} Thus, the polygraph test is a tool of intimidation as well as fact-finding.\textsuperscript{215}

Although prosecutors and police benefit from defendants taking polygraph examinations, capital murder defendants currently do not.\textsuperscript{216} Since capital punishment resumed in the 1970s, states have exonerated 111 death row inmates.\textsuperscript{217} Cases involving snitch

\begin{itemize}
\item \textsuperscript{212} See Segrave, supra note 4, at 20 (noting police usage of polygraph technology on criminal suspects); Mary Flood, Judge Bars Kent from Using Polygraph Results in His Trial, HOUSTON CHRON., Dec. 18., 2008, available at 2008 WLNR 23785955 (noting that polygraph results are often used in police investigations); Nora Lockwood Tooher, Truth About Polygraphs: They’re Still Around, MASS. LAW. WEEKLY, June 23, 2008, available at 2008 WLNR 25584839 (noting law enforcement’s use of polygraph tests to garner confessions).
\item \textsuperscript{213} See, e.g., Rupe, 93 F.3d at 1439 (noting that codefendant and accomplice to crime was state’s key witness in defendant’s trial); State v. Cosey, 779 So. 2d 675, 685 (La. 2001) (noting that state’s main witness was police suspect); State v. Bartholomew, 683 P.2d 1079, 1088-89 (Wash. 1984) (noting that state’s principal witness was accomplice to crime in question).
\item \textsuperscript{214} See Segrave, supra note 4, at 20 (noting police usage of polygraph technology on criminal suspects); Charles Keeshan, Judge: Sitter Wasn’t Duped into Confessing, DAILY HERALD, Sept. 30, 2008, at 3, available at 2008 WLNR 25979985 (describing how suspect broke down and confessed when asked by authorities to take polygraph test); Tooher, supra note 212, at 220 (noting that police still use polygraph tests to garner confessions from criminals).
\item \textsuperscript{215} See Paul Purpura, Years After Stabbing, Trial Set to Start: Suspect Rejects Plea in Harvey Murder, NEW ORLEANS TIMES-PICAYUNE, Jan. 28, 2008, at 1, available at 2009 WLNR 1605626 (describing police department’s statements to defendant regarding his failure of a polygraph to garner confession to murder); Validity of Polygraph Results Debatable, DAILY SOUTHTOWN, May 14, 2008, at A11, available at 2008 WLNR 10292457 (noting that polygraph is often source of intimidation). But see Wyoming: Polygraph Test Is Not Witness Intimidation, CRIME CONTROL DIGEST, Feb. 24, 2006, at 5, available at 2006 WLNR 4815142 (noting that Wyoming Supreme Court held administering of polygraph test to witness was not intimidation).
\item \textsuperscript{216} See Rupe, 93 F.3d at 1441 (noting that trial court incorrectly ruled as inadmissible results of codefendant’s polygraph test showing he was truthful when answering questions regarding murders); Davis v. Singletary, 853 F. Supp. 1492, 1469 (M.D. Fla. 1994) (ruling that it was proper for state to mention defendant’s polygraph test results to his detriment); State v. Hartman, 42 S.W.3d 44, 60 (Tenn. 2001) (noting that trial court charged defendant with murder even though he passed polygraph test).
\item \textsuperscript{217} See sources cited supra note 1.
\end{itemize}
testimony comprise 45.9 percent of all exonerations.\textsuperscript{218} This makes snitch testimony a leading cause of wrongful conviction in the United States.\textsuperscript{219} Frequently, a prosecutor will make snitch testimony the center of his case against a defendant.\textsuperscript{220} Typically, snitch testimony involves a codefendant or an accomplice to the murder in question giving testimony in exchange for a lighter sentence or immunity.\textsuperscript{221} Snitches often take polygraph exams prior to cutting deals with the prosecution.\textsuperscript{222} In some cases, the polygraph test results show that a codefendant or snitch is answering questions about the crime deceptively.\textsuperscript{223} Although such evidence is extremely relevant, most courts will rule that the test results are inadmissible.\textsuperscript{224} By contrast, if courts allowed polygraph test results into evidence, a capital defendant could use a codefendant’s failed polygraph test to impeach the codefendant’s credibility.\textsuperscript{225} Allowing criminal defendants to benefit from polygraph test results seems equitable given that police and prosecutors already benefit from such technology.\textsuperscript{226}

A legal system that allows the prosecution and police to benefit from polygraph technology while prohibiting defendants from similarly benefiting is unjust.\textsuperscript{227} If the prosecution benefits from polygraph technology at the initial stages of the criminal process, defendants should have the same opportunity at the end.\textsuperscript{228} At no other time do

\textsuperscript{218} See sources cited supra note 1.
\textsuperscript{219} See sources cited supra note 1.
\textsuperscript{220} See sources cited supra note 213.
\textsuperscript{221} See Thornburg v. Mullin, 422 F.3d 1113, 1120 (10th Cir. 2005); Rupe, 93 F.3d at 1439; Bartholomew, 683 P.2d at 1088.
\textsuperscript{222} See supra note 220.
\textsuperscript{223} See Rupe, 93 F.3d at 1438 (noting that polygraph examiner determined that state’s star witness’s polygraph test results showed deception); Cosey, 779 So. 2d at 685-86 (noting that suspect had answered deceptively when administered polygraph test); Bartholomew, 683 P.2d at 1088 (noting that polygraphist concluded that polygraph test results of prosecution’s principal witness showed deception regarding relevant questions concerning murders).
\textsuperscript{224} See cases cited supra note 223.
\textsuperscript{225} See sources cited supra note 206.
\textsuperscript{226} See supra note 215.
\textsuperscript{227} Compare United States v. Scheffer, 523 U.S. 303, 309-10 (1998) (upholding rule of evidence which prohibited defendant’s use of polygraph evidence), and United States v. Fulks, 454 F.3d 410, 434-35 (4th Cir. 2006) (ruling defendant’s polygraph results inadmissible in penalty phase of capital trial), with Rupe, 93 F.3d at 1441 (allowing defendant’s polygraph evidence to serve as mitigating evidence in penalty phase), and State v. Height, 604 S.E.2d 796, 798 (Ga. 2004) (finding error in trial court’s exclusion of defendant’s polygraph evidence in penalty phase of capital trial).
\textsuperscript{228} E.g., Paxton v. Ward, 199 F.3d 1197, 1215-16 (10th Cir. 1999); Rupe, 93 F.3d at 1441; Height, 604 S.E.2d at 798.
CONCLUSION

There is injustice in a system that fails to allow criminal defendants every opportunity to proffer evidence that may save their lives. Polygraph evidence should be admissible during the penalty phase of a capital trial. While some courts allow polygraph evidence to serve as mitigating evidence in the penalty phase, others do not. Courts that do not allow polygraph evidence fail to take into account that expansive rules of evidence govern the penalty phase of a capital trial. These courts also incorrectly apply the analysis in Scheffer, a noncapital case, to the penalty phase of a capital trial. Finally, these courts are prejudicial to defendants when they prohibit polygraph evidence during the penalty phase. If this issue comes before the United States Supreme Court, the Court should follow the Ninth


230 See supra Part III (noting that Constitution guarantees defendants right to present all mitigating evidence that may result in punishment of less than death in penalty phase of capital trial).

231 See Lockett, 438 U.S. at 604 (establishing expansive rules of evidence in penalty phase of capital trial); Eddings, 455 U.S. at 110 (affirming Supreme Court's holding in Lockett that Constitution mandates expansive rules of evidence in the penalty phase of capital trial); Rupe, 93 F.3d at 1441 (holding that Constitution requires courts to admit polygraph results as mitigating evidence during penalty phase of capital trial); State v. Bartholomew, 683 P.2d 1079, 1088-89 (Wash. 1984) (recognizing that under controlling U.S. Supreme Court authority expansive standards govern admission of mitigating evidence during penalty phase of death penalty trial).

232 See Scheffer, 523 U.S. at 317 (holding that per se ban on polygraph evidence did not violate defendant's constitutional rights); Fulks, 454 F.3d at 434-35 (citing Scheffer and previous Fourth Circuit case to establish that Constitution does not mandate admission of polygraph results in capital sentencing proceedings).

233 See supra Part III.A (arguing that expansive rules of evidence govern penalty phase of capital trial).

234 See supra Part III.B (arguing that lower courts incorrectly apply Supreme Court's decision in Scheffer when ruling on capital cases).

235 See supra Part III.C (arguing that barring polygraph evidence during penalty phase of capital trial is prejudicial to defendant).
Circuit’s holding in *Rupe* and allow polygraph evidence. 236 Until the Supreme Court makes this ruling, polygraph technology will continue in its role as a powerful tool for federal and state governments’ exclusive use. 237

---

236 *See supra* Part III (arguing that courts should admit polygraph evidence in penalty phase of capital trial).

237 *See supra* Part III.C (noting that criminal defendants do not currently benefit from polygraph technology).