
COMMENT

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

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INTRODUCTION

Snitch testimony is a leading cause of wrongful convictions in capital cases.¹ Typically, snitch testimony involves a codefendant or an accomplice to the murder in question giving testimony in exchange for a lighter sentence or immunity.² Courts nationwide have exonerated fifty-one death row inmates who received death sentences based on the testimony of witnesses with incentives to lie.³ Currently there is no judicially recognized method for determining whether a person is being truthful when answering questions.⁴ Studies of polygraph testing indicate that test results are eighty to ninety-eight percent accurate in deciphering when a person is being truthful.⁵ Despite such evidence, courts continue to consider polygraph test results too unreliable to serve as evidence under most circumstances.⁶

¹ See CTR. ON WRONGFUL CONVICTIONS, NW. UNIV., *THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH* ROW 3 (2004), available at http://www.law.northwestern.edu/wrongfulconvictions/issues/causes_andremedies/snitches/snitchsystembooklet.pdf; Innocence Project, *Facts on Post-Conviction DNA Exonerations*, <http://www.innocenceproject.org/Content/351.php> (last visited Oct. 29, 2009) (noting that snitch testimony accounted for 15 percent of wrongful convictions later overturned by DNA testing); Midwestern Innocence Project, *Snitch Testimony*, <http://www.innocenceprojectmidwest.org/index.php/snitch-testimony> (last visited Oct. 29, 2009) (noting that in more than 15 percent of cases where DNA evidence ultimately led to exoneration, “an informant or jailhouse snitch testified against defendant”).

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).

⁴ See DAVID LYKKEN, *A TREMOR IN THE BLOOD: USES AND ABUSES OF THE LIE DETECTOR 60* (1998) (noting that scientists must identify specific lie response before they create lie detectors); NAT'L RESEARCH COUNCIL, *THE POLYGRAPH AND LIE DETECTION 201* (2003) (noting courts' skepticism in regard to admitting polygraph evidence into court); KERRY SEGRAVE, *LIE DETECTORS: A SOCIAL HISTORY 168-82* (2004) (discussing current state of polygraph technology in legal system).

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.⁷

Generally, defendants are only eligible for a death sentence for crimes of first-degree murder with aggravating circumstances and certain military crimes.⁸ The U.S. Supreme Court has recognized a fundamental difference between crimes that carry potential death sentences and noncapital crimes.⁹ The difference between the two is that there are no corrective or modifying mechanisms for a completed capital sentence.¹⁰ 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.¹¹ 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.¹²

reliability of polygraph evidence polarizes scientific community); *United States v. Fulks*, 454 F.3d 410, 434 (4th Cir. 2006) (noting that polygraph evidence is too unreliable to serve as evidence); *Bessent*, *supra* note 5, at 977 (noting that due to reliability concerns, U.S. Supreme Court ruled polygraph evidence inadmissible); Nicholas R. Barnes, Comment, *The Polygraph and Juveniles: Rehabilitation or Overreaction? A Case Against the Current Use of Polygraph Examinations on Juvenile Offenders*, 39 U. TOL. L. REV. 669, 679 (2008) (noting that although some studies find low rate of error in polygraph testing, "too many confounding factors exist"). *But see* ABRAMS, *supra* note 5, at 105 tbl.6-1 (indicating results varied from 63 to 100 percent accurate); NAT'L RESEARCH COUNCIL, *supra* note 4, at xiii (citing APA research study finding that since 1980 reporting average accuracy rate was from 80 to 98 percent).

⁷ *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).

⁸ 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).

⁹ *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").

¹⁰ *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.

¹¹ *Eddings*, 455 U.S. at 110; *Lockett*, 438 U.S. at 604; *State v. Bartholomew*, 683 P.2d 1079, 1088 (Wash. 1984) (citing *Lockett*, 438 U.S. at 604).

¹² *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.¹³ 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.¹⁴ Part II outlines the circuit split between the Fourth and Ninth Circuit Courts of Appeals on the admissibility of polygraph evidence in capital sentencing.¹⁵ Part III argues that courts should admit polygraph evidence during the penalty phase of a capital trial.¹⁶ First, U.S. Supreme Court precedent establishes that expansive standards of evidence govern the penalty phase of a capital trial.¹⁷ Thus, lower courts should permit the admission of polygraph evidence.¹⁸ 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.¹⁹ (In *Scheffer*, the Supreme Court held that due to reliability concerns, polygraph evidence was inadmissible in a noncapital case.)²⁰ Finally, a per se ban on the admission of polygraph test results in all criminal proceedings is prejudicial to the defendant.²¹ 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.²²

I. BACKGROUND

Polygraph tests, better known as lie detector tests, are a controversial topic for courts.²³ Historically, courts have been

detectors"); *State v. Cosey*, 779 So. 2d 675, 688 (La. 2001) (noting that polygraph evidence is inadmissible in capital case because of questionable quality).

¹³ See *infra* Part III.

¹⁴ See *infra* Part I.

¹⁵ See *infra* Part II.

¹⁶ See *infra* Part III.A.

¹⁷ See *infra* Part III.A.

¹⁸ See *infra* Part III.A.

¹⁹ See *infra* Part III.B.

²⁰ See *United States v. Scheffer*, 523 U.S. 303, 310-11, 317 (1998) (upholding military rule of evidence prohibiting all polygraph evidence in military courts).

²¹ See *infra* Part III.C.

²² See *infra* Parts III.A-C.

²³ See NAT'L RESEARCH COUNCIL, *supra* note 4, at 201 (noting that "polygraph testing has long been the subject of judicial attention"); SEGRAVE, *supra* note 4, at 168 (recognizing that court use of polygraph detectors remained controversial after passage of Employee Polygraph Protection Act); see also Charles W. Daniels, *Using Polygraph Evidence After Scheffer: The Law of Polygraph Admissibility in American Jurisdictions and Suggestions for Dealing with the Recurring Legal Obstacles*, CHAMPION,

reluctant to admit polygraph test results as evidence because of reliability concerns.²⁴ In 1998, the U.S. Supreme Court upheld a military rule of evidence making polygraph evidence categorically inadmissible in all military court proceedings.²⁵ This ruling instilled renewed vigor into the discussion over the use of polygraph test results as evidence.²⁶ In particular, courts have split over whether polygraph test results can serve as mitigating evidence during the penalty phase of a capital trial.²⁷

A. *The Polygraph*

Invented in the twentieth century, a polygraph machine measures multiple physiological processes and changes in those processes.²⁸ 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.²⁹ 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*, 454 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.³⁰ The government, however, routinely uses polygraph technology for many practical purposes.³¹ For example, police departments and national security organizations perform numerous polygraph tests each year on job applicants and current employees.³² Despite these practical purposes, Congress limited polygraph testing to governmental use.³³ In 1988, Congress passed the Employment Polygraph Protection Act (“EPPA”), which restricted the use of polygraph testing in the private sector.³⁴ The EPPA prohibits employers in the private sector from even suggesting that employees submit to polygraph testing.³⁵

Courts have followed congressional example and have refused to embrace polygraph technology.³⁶ 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 253-54 (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”).

³¹ See NAT’L RESEARCH COUNCIL, *supra* note 4, at 5-7 (discussing government’s use of polygraph technology for security screening); Jerome H. Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694, 722 (1961) (noting police utilization of polygraph technology); Dan Eggen & Shankar Vedantam, *Feds Using Lie Detectors More for Job Seekers, Hunt Criminals*, PITTSBURGH POST-GAZETTE, May 1, 2006, at A7, available at 2006 WLNR 7416787 (noting federal government’s use of polygraph technology).

³² See sources cited *supra* note 31.

³³ See 29 U.S.C. §§ 2001-08 (Supp. V 2000) (restricting use of polygraphs in employment settings); NAT’L RESEARCH COUNCIL, *supra* note 4, at 12 (noting that federal government uses polygraph technology to screen current government employees, “especially in security-sensitive occupations”); SEGRAVE, *supra* note 4, at 170 (stating that “[d]uring 1996, Department of Defense conducted 12,548 [lie detector] exams”).

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.”³⁷ Despite courts’ skepticism regarding polygraph evidence, scientists continue to study and improve polygraph technology.³⁸ Currently, a large number of experts believe that polygraph test results are extremely accurate.³⁹ The avid support of some experts intensifies the debate over the admissibility of polygraph test results as mitigating evidence in capital trials.⁴⁰

B. Mitigating Evidence

Mitigating evidence comprises facts or situations that may reduce a defendant’s degree of culpability, thereby reducing his sentence.⁴¹ In the context of a capital trial, mitigating evidence serves to reduce a defendant’s sentence from death to life in prison or less.⁴² 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.⁴³

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 “[a]lthough polygraph technology has advanced significantly since its inception,” courts remain skeptical); Reyhan Harmanci, *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.

⁴¹ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (defining mitigating evidence to include any aspect of defendant’s character, record, or circumstances of offense); BLACK’S LAW DICTIONARY 277 (9th ed. 2009); Alyssa Connell Lareau & Grant Henrichsen Willis, *Capital Punishment*, 90 GEO. L.J. 1838, 1852-56 (2002).

⁴² *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett*, 438 U.S. at 604; *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976).

⁴³ See *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990); *Mills v. Maryland*, 486 U.S. 367, 374-75 (1988); *Lockett*, 438 U.S. at 604.

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.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.⁴⁵ Such factors ultimately play into the sentencer's decision to impose the death sentence or not.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.⁴⁷ This emphasis led the Supreme Court to hold that expansive rules of evidence govern the penalty phase of a capital trial.⁴⁸

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.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.⁵⁰ A series of Supreme Court cases, however, established that such mandatory impositions of the death

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.

⁴⁵ See GOLDMAN, *supra* note 8, at 47 (discussing Supreme Court's consideration of mitigating factors in capital context); Lareau & Willis, *supra* note 41, at 1853-57 (discussing role of courts in considering all relevant mitigating evidence). See generally Michael R. Levine, 108 Easy Mitigating Factors, http://www.fd.org/pdf_lib/108Mitigating_Factors.pdf (last visited Oct. 29, 2009) (listing mitigating factors).

⁴⁶ *Eddings*, 455 U.S. at 115; *Lockett*, 438 U.S. at 601-02; *Woodson*, 428 U.S. at 297-300.

⁴⁷ See *Mills*, 486 U.S. at 374-75; *Eddings*, 455 U.S. at 110; *Lockett*, 438 U.S. at 604.

⁴⁸ See *McKoy*, 494 U.S. at 441; *Mills*, 486 U.S. at 374-75; *Lockett*, 438 U.S. at 604.

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).

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).

penalty, without consideration of all mitigating evidence, are contrary to the Constitution.⁵¹

In *Woodson v. North Carolina*, the Supreme Court first deemed mandatory death sentences unconstitutional.⁵² At the trial level, the jury convicted two men of murder.⁵³ At the time, North Carolina's death penalty statute required a death sentence for any person convicted of first-degree murder.⁵⁴ On appeal, the Supreme Court held that the North Carolina statute violated the Eighth and Fourteenth Amendments.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.⁵⁶ Specifically, the Court noted that such statutes were inconsistent with "the fundamental respect for humanity underlying the Eighth Amendment."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.⁵⁸ The statute also failed to permit consideration of the circumstances of the defendant's particular offense.⁵⁹ The Supreme Court, however, failed to define which "relevant facets" it would require courts to consider.⁶⁰ After *Woodson*, many states became confused over how to construct death penalty statutes that allowed consideration of all relevant facets and guaranteed Eighth Amendment protections.⁶¹

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

⁵¹ See cases cited *supra* note 46.

⁵² *Woodson*, 428 U.S. at 305.

⁵³ *Id.* at 282.

⁵⁴ *Id.* at 285-86.

⁵⁵ *Id.* at 305.

⁵⁶ *Id.* at 304.

⁵⁷ *Id.*

⁵⁸ *Id.* at 305.

⁵⁹ *Id.* at 304.

⁶⁰ See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (noting that after *Woodson*, Supreme Court "did not attempt to indicate . . . which facets of an offender or his offense it deemed 'relevant'").

⁶¹ See *id.* at 602 (noting that over previous decade, signals on how to revise state death penalty statutes were not "easy to decipher").

⁶² *Id.* at 602-05.

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.⁷⁵ Thus, the Supreme Court declared Ohio's statute unconstitutional.⁷⁶

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

Lockett and *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.⁸⁵ Over the next eight years, two other Supreme Court cases echoed the principle established in *Lockett* and *Eddings*.⁸⁶ *Mills v. Maryland* and *McKoy v. North Carolina* both involved defendants charged and convicted of capital murder.⁸⁷ The Supreme Court overturned the defendants' convictions in both cases.⁸⁸ The Court again held that the state statutes at issue violated the Constitution by preventing the sentencer from

⁷⁵ *Id.* at 608.

⁷⁶ *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).

⁷⁷ *Eddings v. Oklahoma*, 455 U.S. 104, 105 (1982).

⁷⁸ *Id.*

⁷⁹ *Id.* at 105, 109.

⁸⁰ *Id.* at 117.

⁸¹ *Id.* at 115.

⁸² *See id.* at 110 (noting that rule in *Lockett* established that sentencer must consider all relevant mitigating factors during penalty phase of capital trial).

⁸³ *Id.* at 113-14.

⁸⁴ *Id.*

⁸⁵ *See id.* at 110; *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978).

⁸⁶ *See McKoy v. North Carolina*, 494 U.S. 433, 438 (1990) (noting that Supreme Court's decision in *Lockett* established that juror must weigh all mitigating evidence); *Mills v. Maryland*, 486 U.S. 367, 374 (1988) (noting that "it is beyond dispute" that in capital case principle established in *Lockett* applies).

⁸⁷ *McKoy*, 494 U.S. at 435; *Mills*, 486 U.S. at 371.

⁸⁸ *McKoy*, 494 U.S. at 444; *Mills*, 486 U.S. at 384.

considering all mitigating evidence.⁸⁹ Both statutes precluded jurors from considering evidence as mitigating unless the jury unanimously agreed that such evidence was mitigating.⁹⁰ 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.⁹¹ 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.⁹²

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.⁹³ 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.⁹⁴ The defendant agreed to take a polygraph test to answer questions regarding his possible use of methamphetamines.⁹⁵ 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.⁹⁶ Scheffer sought to introduce the results of the polygraph test to support his testimony that he did not knowingly use drugs.⁹⁷ 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.⁹⁸ The U.S. Court of Appeals for the Armed Forces reversed the military court's decision.⁹⁹ 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).

⁹³ *United States v. Scheffer*, 523 U.S. 303, 317 (1998).

⁹⁴ *Id.* at 306-07.

⁹⁵ *Id.* at 306.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 306-07.

⁹⁹ *Id.* at 307.

defense.¹⁰⁰ The Supreme Court granted certiorari and reversed the decision of the Court of Appeals.¹⁰¹

In reversing, the majority emphasized that a defendant does not have an unlimited right to present all relevant evidence.¹⁰² Instead, relevant evidence is “subject to reasonable restrictions” and must accommodate “other legitimate interests in the criminal trial process.”¹⁰³ The majority found that the per se ban in question served several legitimate interests in the criminal trial process.¹⁰⁴ First, the Court noted that the rule ensured that defendants would only introduce reliable evidence at trial.¹⁰⁵ Second, the rule preserved the role of members of the court-martial panel in determining credibility.¹⁰⁶ Finally, the Court noted that the rule “avoid[ed] litigation that is collateral to the primary purpose of the trial.”¹⁰⁷ The statute passed constitutional muster because it served legitimate interests and was neither arbitrary nor disproportionate.¹⁰⁸ The decision in *Scheffer* impacted the admissibility of polygraph evidence in both noncapital cases and capital cases.¹⁰⁹ Ultimately, the federal circuit courts split over the admissibility of polygraph evidence in the penalty phase of a capital trial.¹¹⁰

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.¹¹¹ 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.¹¹² However, the Fourth Circuit has ruled that polygraph evidence is inadmissible as a mitigating factor during the penalty phase of a capital trial.¹¹³ 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.¹¹⁴

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.¹¹⁵ The trial court convicted Rupe of capital murder and robbery and sentenced him to death.¹¹⁶ After exhausting state appellate procedures, Rupe brought federal habeas proceedings to the United States District Court for the Western District of Washington.¹¹⁷ The district court ruled in Rupe's favor and the case was eventually appealed to the Ninth Circuit.¹¹⁸ The Ninth Circuit affirmed and found that the state court violated Rupe's due process rights.¹¹⁹ 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 *Id.* at 410; *Rupe*, 93 F.3d at 1434.

¹¹⁵ 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).

¹¹⁶ *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.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1436.

¹¹⁹ 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.¹²⁰ Rupe claimed that the state's key witness killed the victim.¹²¹ Further evidence established that the witness "disposed of the murder weapon . . . and spent some of the robbery proceeds."¹²² The witness's polygraph results showed he was not truthful when answering questions about his involvement in the crime.¹²³ The court ruled that such evidence was a mitigating factor because it was relevant to the issue of culpability.¹²⁴ 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.¹²⁵ The court determined that the Washington statute unconstitutionally precluded the defendant from introducing polygraph results into evidence in the penalty phase.¹²⁶

The court distinguished between evidence standards in capital cases and those in noncapital cases by citing the principle established in *Lockett and Eddings*.¹²⁷ Under this principle, lax standards of evidence govern the penalty phase in capital cases and defendants must be able to present all mitigating evidence.¹²⁸ Thus, the court held that the key witness's polygraph results were admissible as mitigating evidence in the penalty phase.¹²⁹ In *Paxton v. Ward*, another capital case, the Tenth Circuit adopted the Ninth Circuit's holding.¹³⁰

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 *Scheffer* did not overrule Ninth Circuit's ruling in *Rupe*).

B. United States v. Fulks

The Fourth Circuit Court of Appeals came to a different conclusion.¹³¹ 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.¹³² The trial court convicted the defendant of carjacking and kidnapping that resulted in the death of the victim.¹³³ The court sentenced Fulks to death, and he appealed his sentence.¹³⁴ On appeal, Fulks asserted that the court had unconstitutionally precluded him from introducing testimony concerning three polygraph examinations administered to him by the FBI.¹³⁵ The polygraph test results showed that Fulks was truthful when he told the FBI that he neither knew of nor participated in the murders.¹³⁶ However, the Fourth Circuit found that the Supreme Court's decision in *Scheffer* foreclosed Fulks's claim.¹³⁷ The Fourth Circuit concluded that *Scheffer* suggested that exclusion of polygraph evidence would pass constitutional muster in the capital context.¹³⁸ In making its ruling, the court based its decision on *Scheffer*'s emphasis on the unreliable nature of polygraph tests.¹³⁹ By doing so, the Fourth Circuit broke with the Ninth Circuit and created a circuit split.¹⁴⁰

¹³¹ *United States v. Fulks*, 454 F.3d 410, 434 (4th Cir. 2006).

¹³² *Id.*

¹³³ *Id.* at 413.

¹³⁴ *Id.*

¹³⁵ *See id.* at 434 (noting that results of “[polygraph] examinations indicated that Fulks’s 2003 statements [were] truthful and that he neither knew of nor participated in the murders”).

¹³⁶ *Id.*

¹³⁷ *See id.* (noting that Supreme Court determined that polygraph evidence is too unreliable to serve as evidence in any court proceeding).

¹³⁸ *Id.* In reaching its decision, the Fourth Circuit emphasized the unreliable nature of polygraph evidence. *Id.* Given this exclusionary interest, the Fourth Circuit suggested that exclusion of polygraph results in noncapital cases would pass constitutional muster in capital context because of the Court's concern regarding unreliable evidence. *Id.* *But see* *Paxton v. Ward*, 199 F.3d 1197, 1215 (10th Cir. 1999) (noting that *Scheffer* is distinguishable because “it did not involve a capital defendant’s constitutional right to present mitigating evidence”).

¹³⁹ *Fulks*, 454 F.3d. at 434.

¹⁴⁰ *Compare id.* (holding that it is in interest of court to exclude polygraph evidence because of reliability concerns), *with* *Rupe v. Wood*, 93 F.3d 1434, 1440 (9th Cir. 1996) (holding that excluding relevant evidence because of doubts about reliability interfered with jury’s ability to weigh mitigating factors).

III. ANALYSIS

Courts should admit polygraph evidence in the penalty phase of a capital trial.¹⁴¹ First, U.S. Supreme Court precedent establishes that expansive lax rules of evidence govern the penalty phase of a capital trial.¹⁴² In addition, lower courts incorrectly apply the analysis in *Scheffer* to the penalty phase of a capital trial.¹⁴³ Finally, allowing all relevant mitigating evidence during the penalty phase will better serve justice.¹⁴⁴ Allowing this evidence leads to a capital system which affords defendants with an increased opportunity to advocate for a penalty less than death.¹⁴⁵ Such an opportunity is beneficial to defendants who do not deserve a death sentence.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.¹⁴⁷ In noncapital sentencing, the defendant does not have a constitutional right to present all mitigating evidence.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.¹⁴⁹ To secure a capital defendant's Eighth Amendment rights, state statutes must allow all

¹⁴¹ *Paxton*, 199 F.3d at 1215-16; *Rupe*, 93 F.3d at 1441.

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).

¹⁴³ See *infra* Part III.B (arguing that lower courts are incorrect in applying holding from noncapital Supreme Court case to capital cases).

¹⁴⁴ See *infra* Part III.C (noting that defendants do not currently benefit from polygraph evidence).

¹⁴⁵ See *infra* Part III.C (arguing that allowing defendants to benefit from polygraph evidence will balance unequal aspect of criminal justice system).

¹⁴⁶ See *infra* Part III.C (arguing that admitting defendants' polygraph evidence benefits defendants who do not deserve death sentence).

¹⁴⁷ *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); see also *Mills v. Maryland*, 486 U.S. 367, 383 (1988) (noting that decision to use power of state to execute defendant is distinguishable from any other decisions citizens and public officials make); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (noting that "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two"); *State v. Bartholomew*, 683 P.2d 1079, 1089 (Wash. 1984) (noting that defendant can submit any evidence of his character, record, or circumstances of offense when jury deliberates death judgment).

¹⁴⁸ See cases cited *supra* note 147.

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.¹⁵⁰ The Supreme Court made clear that mitigating evidence may encompass anything related to the circumstances of the crime in question.¹⁵¹ Polygraph evidence of a defendant or an important witness to the crime relates to the circumstances of the crime.¹⁵² This is particularly true in regard to the polygraph test results of a codefendant offering snitch testimony in exchange for a lesser sentence.¹⁵³ 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.¹⁵⁴ Prohibiting a defendant from proffering such evidence would violate his or her constitutional rights.¹⁵⁵

However, one could argue that the Supreme Court has already deemed polygraph evidence too unreliable to serve as evidence in court proceedings.¹⁵⁶ Courts are aware of the dramatic impact that scientific and forensic evidence have on juries.¹⁵⁷ A major fear among courts is that jurors will replace their personal credibility determinations with the results of the polygraph examinations.¹⁵⁸

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) (citing principle established in *Lockett*); *Bartholomew*, 683 P.2d at 1089 (holding defendant may submit any evidence of his character, record, or circumstances of offense in penalty phase of capital trial).

¹⁵¹ See *Woodson*, 428 U.S. at 304; *McGautha v. California*, 402 U.S. 183, 200-01 (1971).

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).

¹⁵⁶ See *United States v. Scheffer*, 523 U.S. 303, 310-11 (1998) (discussing general lack of consensus on reliability of polygraph test results).

¹⁵⁷ See *Scheffer*, 523 U.S. at 313-14; *State v. Cosey*, 779 So. 2d 675, 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 jurors 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

trial system is that 'the jury is the lie detector' " (quoting *United States v. Bernard*, 490 F.2d 907, 912 (9th Cir. 1973)); *United States v. Fulks*, 454 F.3d 410, 434 (4th Cir. 2006) (echoing Supreme Court's concern in *Scheffer*); *Cosey*, 770 So. 2d at 686 (discussing concern that polygraph evidence may replace juror's determination regarding credibility of witness).

¹⁵⁹ See *supra* note 157.

¹⁶⁰ See *Scheffer*, 523 U.S. at 310 (noting that some studies find polygraph evidence accurate less than half of time); *People v. Richardson*, 183 P.3d 1146, 1195 (Cal. 2008) (noting that court reached conclusion that polygraph evidence is too unreliable to serve as evidence); *State v. Hartman*, 42 S.W.3d 44, 60 (Tenn. 2001) (noting "longstanding precedent" in Tennessee courts in which "polygraph test results are inherently unreliable").

¹⁶¹ See *Barnes*, *supra* note 6, at 669 (discussing current court programs, which use polygraph examinations on juvenile offenders). See generally *Fulks*, 454 F.3d 410 (noting that due to reliability concerns, polygraph evidence is inadmissible in penalty phase of capital trial); *Richardson*, 183 P.3d 1146 (holding that polygraph evidence is inadmissible in penalty phase of capital trial due to reliability concerns); Joseph Sanders, *The Merits of the Paternalistic Justification for Restrictions on the Admission of Expert Evidence*, 33 SETON HALL L. REV. 881, 885-91 (2003) (chronicling current debate and rules concerning admissibility of scientific evidence).

¹⁶² See *Rupe v. Wood*, 93 F.3d 1434, 1440 (9th Cir. 1996) (noting that "exclusion of relevant evidence because of doubts about reliability violated principle of *Lockett* and *Eddings* by interfering with the jury's ability to weigh mitigating factors"); *State v. Height*, 604 S.E.2d 796, 798 (Ga. 2004) (noting that admission of mitigating evidence in penalty phase depends on evidence's relevancy, not reliability).

¹⁶³ See *supra* note 151.

¹⁶⁴ See *Paxton v. Ward*, 199 F.3d 1197, 1214 (10th Cir. 1999) (noting that state statute's exclusion of proffered relevant mitigating evidence violates Fourteenth Amendment); *Rupe*, 93 F.3d at 1439-40 (noting that defendant's polygraph evidence was not so unreliable as to have no probative value, thus its exclusion violated Eighth and Fourteenth Amendments); *Height*, 604 S.E.2d at 798 (noting that state violated Supreme Court's long standing position that states cannot use evidentiary rules intended to insure reliability to exclude relevant mitigating evidence).

interfered with the jury's ability to weigh mitigating factors.¹⁶⁵ True, *Lockett* and *Eddings* further established that the Supreme Court wanted death penalty decisions to be reliable.¹⁶⁶ However, the Court did not focus on the reliability of the mitigating evidence.¹⁶⁷ Instead, the Court focused on reliability of the *ultimate decision* in terms of allowing the jury to hear all relevant mitigating evidence.¹⁶⁸ Thus, polygraph test results should be admissible in the penalty phase of a capital trial despite courts' reliability concerns.¹⁶⁹

In addition, lower courts mistakenly cite noncapital cases when making rulings involving polygraph evidence in capital cases.¹⁷⁰ The Supreme Court has expressly upheld per se bans on polygraph evidence in noncapital criminal cases.¹⁷¹ The Supreme Court, however, has never expressly done so in the penalty phase of a capital trial.¹⁷² 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.¹⁷³

¹⁶⁵ See *McKoy v. North Carolina*, 494 U.S. 433, 438 (1990); *Mills v. Maryland*, 486 U.S. 367, 374-76 (1988); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

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).

¹⁷¹ See generally *Holmes v. South Carolina*, 547 U.S. 319 (2006) (citing *United States v. Scheffer*, 523 U.S. 303 (1998)) (noting that U.S. Supreme Court's upholding rule of evidence prohibiting polygraph evidence did not violate defendant's right to present defense); *Scheffer*, 523 U.S. 303 (1998) (upholding military evidence rule setting forth per se ban on all polygraph evidence in noncapital case).

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.¹⁷⁴ The Court upheld the military's per se ban on polygraph evidence because it served three legitimate interests in the criminal trial process.¹⁷⁵ The three legitimate interests were ensuring admission of only reliable evidence, preserving the role of court members, and avoiding collateral litigation.¹⁷⁶ 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.¹⁷⁷

Writing about the first interest in *Scheffer*, the Court noted that the scientific community remains polarized about polygraph reliability.¹⁷⁸ To support their contention, the Court cited numerous cases holding that polygraph evidence should be inadmissible because of reliability concerns.¹⁷⁹ However, none of the cases cited by the Court involved defendants charged with capital offenses.¹⁸⁰ Lower courts fail to recognize this distinction when holding that polygraph evidence is too unreliable to serve as evidence in the penalty phase.¹⁸¹ Such a failure was particularly evident in the Fourth Circuit's analysis in *Fulks*.¹⁸² Although the *Fulks* court noted that *Scheffer* was a noncapital case, it failed to mention the different interests involved in noncapital and capital cases.¹⁸³ 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.¹⁸⁴

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.

¹⁸⁰ *See, e.g., United States v. Messina*, 131 F.3d 36, 42 (2d Cir. 1997) (extortion); *United States v. Posado*, 57 F.3d 428, 436 (5th Cir. 1995) (possessing cocaine with intent to distribute); *State v. Porter*, 698 A.2d 739 (Conn. 1997) (arson); *People v. Gard*, 632 N.E.2d 1026 (Ill. 1994) (arson); *Perkins v. State*, 902 S.W.2d 88 (Tex. 1995) (sexual assault of child).

¹⁸¹ *See cases cited supra* note 171.

¹⁸² *United States v. Fulks*, 454 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.¹⁸⁵ The Court noted that in the criminal trial system the jury is the lie detector.¹⁸⁶ By its nature, polygraph evidence may diminish a juror's role in determining the credibility of the defendant and the witnesses.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹

The final interest is that the per se ban avoids collateral litigation.¹⁹⁰ The Supreme Court did not want separate collateral mini-trials on issues other than innocence or guilt.¹⁹¹ The Court determined that such collateral litigation extends criminal trials and distracts the jury from determining guilt or innocence.¹⁹² Again, this concern is not applicable in the penalty phase of a capital trial.¹⁹³ The jury determines a defendant's guilt before the penalty phase begins.¹⁹⁴ Thus, any concern over the jury's function of determining guilt or innocence is not present.¹⁹⁵

of polygraph evidence would pass constitutional muster in both capital and noncapital contexts).

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. Cosey*, 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.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.¹⁹⁷ In addition, expert testimony will increase the court's costs and unnecessarily prolong the jury's service.¹⁹⁸ Given the nature of the crimes involved in capital cases, extended jury service can be a heavy burden.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.²⁰⁰ The unique circumstances of the penalty phase make it important for our justice system to allow defendants every opportunity to present mitigating evidence.²⁰¹ It is

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).

¹⁹⁷ Richard D. Pompelio, Op-Ed., *For Survivor's Sake, Abolish the Death Penalty*, N.J. STAR LEDGER, June 12, 2006, at 15, available at 2006 WLNR 10045925 (noting death penalty's impact on victim's family); Meryl Dillman, *Victim's Families Face Long Delays in Death Penalty Cases*, INDEP. MAIL, Aug. 13, 2006, <http://www.independentmail.com/news/2006/aug/13/victims-families-face-long-delays-in-death-cases/> (noting emotional toll on murder victim's families during appeal process); Staff, *Victim's Families Are the Reason for Death Penalty Reform*, <http://durstonforcongress.blogspot.com/2006/09/from-hill-letters-on-death-penalty.html> (last visited Mar. 10, 2010) (noting victim's families' role in death penalty process).

¹⁹⁸ See sources cited *supra* note 196.

¹⁹⁹ See TIM MCGRATH & SIOBHAN RYAN, CRIMINOLOGY RESEARCH COUNCIL SUB-GROUP ON JUROR STRESS AND DEBRIEFING, PAPER 1 FOR CONFERENCE 2 (2004), available at <http://www.criminologyresearchcouncil.gov.au/reports/2004-06-29-JurorsConf1.pdf> (noting that jurors experience anxiety and stress from serving on jury); Donna Pedergast, *Jury Duty: Drama and Trauma*, WOMEN CRIME INK, Dec. 30, 2008, <http://womenincrimeink.blogspot.com/2008/12/jury-duty-drama-and-trauma.html> (noting that graphic images often leave jurors emotionally depleted); Cindy Adams, *The Importance of the American Jury: Serving on a Jury Can Be a Challenging Experience*, http://law.suite101.com/article.cfm/the_importance_of_the_american_jury (last visited Oct. 29, 2009) (noting heavy emotional impact of serving on jury in cases dealing with serious crime).

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).

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.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.²⁰³ Decades of Supreme Court decisions mandate that defendants have every opportunity to argue for a sentence of less than death.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.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.²⁰⁶

defendants have every opportunity to present mitigating evidence); *Paxton v. Ward*, 199 F.3d 1197, 1218 (10th Cir. 1999) (noting that capital defendant has constitutional right to present all mitigating evidence that might form basis for sentence of less than death); *Rupe v. Wood*, 93 F.3d 1434, 1441 (9th Cir. 1996) (noting that constitutional principles allow defendant to present all relevant mitigating evidence in penalty phase of capital trial).

²⁰² See sources cited *supra* note 196.

²⁰³ See *United States v. Scheffer*, 523 U.S. 303, 337-38 (1998) (Stevens, J., dissenting) (noting that “the potential burden of collateral proceedings to determine the examiner’s qualifications is a manifestly insufficient justification for a categorical exclusion of expert testimony”).

²⁰⁴ See *McKoy v. North Carolina*, 494 U.S. 433, 443 (1990); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Dutton v. Brown*, 812 F.2d 593, 600 (10th Cir. 1987).

²⁰⁵ See *Eddings*, 455 U.S. at 110 (affirming *Lockett* rule, i.e., Eighth and Fourteenth Amendments require sentencer to consider any aspect of defendant’s character or record as mitigating factor); *Lockett*, 438 U.S. at 602-05 (establishing that Eighth and Fourteenth Amendments require sentencer to consider as mitigating factor any aspect of defendant’s character or circumstances of offense).

²⁰⁶ See *McKoy*, 494 U.S. at 440-44 (remanding defendant’s death sentence because sentencer failed to consider all mitigating evidence at penalty phase); *Mills v. Maryland*, 486 U.S. 367, 375-77 (1988) (vacating petitioner’s death sentence because state statute did not consider all relevant mitigating evidence in penalty phase of capital trial); *Eddings*, 455 U.S. at 110 (noting that in regard to Eighth and Fourteenth Amendments, defendant has right to present all mitigating evidence to trier of fact); *Lockett*, 438 U.S. at 604 (same); *Paxton*, 199 F.3d at 1214-16 (holding defendant’s death sentence contrary to federal law because trial court failed to admit defendant’s polygraph evidence at penalty phase); *Rupe*, 93 F.3d at 1441 (noting that Constitution requires courts to admit polygraph evidence during penalty phase of capital trial); *Dutton*, 812 F.2d at 600 (noting Constitution mandates that capital defendant have every opportunity to present potentially mitigating evidence that might form basis for

However, under *Fulks*, defendants cannot use such evidence during the penalty phase.²⁰⁷ This prohibition fails to allow defendants every opportunity to introduce relevant evidence that may reduce their culpability.²⁰⁸ Also, such a prohibition makes the criminal justice system less efficient by reducing the reliability of the death sentence handed down by the jury.²⁰⁹ Despite such concerns, courts sometimes allow prosecutors to introduce polygraph evidence when test results benefit only the state's case.²¹⁰ 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.²¹¹ 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.²¹² The results of polygraph tests aid law enforcement officers in deciding on which area of the investigation they should direct their focus.²¹³ Frequently, when faced with the prospect of taking a polygraph examination, suspects voluntarily confess to crimes.²¹⁴ Thus, the polygraph test is a tool of intimidation as well as fact-finding.²¹⁵

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

question).

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).

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).

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).

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).

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).

²¹⁷ See sources cited *supra* note 1.

testimony comprise 45.9 percent of all exonerations.²¹⁸ This makes snitch testimony a leading cause of wrongful conviction in the United States.²¹⁹ Frequently, a prosecutor will make snitch testimony the center of his case against a defendant.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.²²¹ Snitches often take polygraph exams prior to cutting deals with the prosecution.²²² In some cases, the polygraph test results show that a codefendant or snitch is answering questions about the crime deceptively.²²³ Although such evidence is extremely relevant, most courts will rule that the test results are inadmissible.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.²²⁵ Allowing criminal defendants to benefit from polygraph test results seems equitable given that police and prosecutors already benefit from such technology.²²⁶

A legal system that allows the prosecution and police to benefit from polygraph technology while prohibiting defendants from similarly benefiting is unjust.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.²²⁸ At no other time do

²¹⁸ See sources cited *supra* note 1.

²¹⁹ See sources cited *supra* note 1.

²²⁰ See sources cited *supra* note 213.

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.

²²² See *supra* note 220.

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).

²²⁴ See cases cited *supra* note 223.

²²⁵ See sources cited *supra* note 206.

²²⁶ See *supra* note 215.

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).

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.

defendants need such a benefit more than in the penalty phase of a capital trial.²²⁹

CONCLUSION

There is injustice in a system that fails to allow criminal defendants every opportunity to proffer evidence that may save their lives.²³⁰ Polygraph evidence should be admissible during the penalty phase of a capital trial.²³¹ While some courts allow polygraph evidence to serve as mitigating evidence in the penalty phase, others do not.²³² 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.²³³ These courts also incorrectly apply the analysis in *Scheffer*, a noncapital case, to the penalty phase of a capital trial.²³⁴ Finally, these courts are prejudicial to defendants when they prohibit polygraph evidence during the penalty phase.²³⁵ If this issue comes before the United States Supreme Court, the Court should follow the Ninth

²²⁹ See *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (recognizing difference between death penalty and other sentences and concluding that sentencer must consider all mitigating evidence in penalty phase of capital trial); *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (noting that death penalty is qualitatively different from all other penalties); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (noting that Constitution requires consideration of all mitigating evidence related to character, record, and circumstances of offense at penalty phase of capital trial).

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).